In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014 No: 205

IN THE MATTER OF THE ESTATE OF PQR, DECEASED

RULING

(in Chambers)

Date of hearing: November 19, 2014
Date of Ruling: December 8, 2014

Ms. Fozeia Rana-Fahy, MJM Limited, for the Applicant
Mr. David Kessaram and Ms. Cheri Minors, Cox Hallett Wilkinson Limited, for the Respondent
Mr. Ben Adamson, Conyers Dill and Pearman Limited, for the Executor

Introductory

1. The Applicant ("D") is the daughter of the deceased and the Respondent ("W") is the widow of the deceased. The parties, the two principal beneficiaries, disagree as to the effect of a forfeiture clause contained in clause 10 of the Will. The Applicant seeks to have the clause declared to be null and void. The Respondent seeks to uphold the clause, but concedes that it must be given a somewhat nuanced effect to avoid depriving the Applicant altogether of her right of access to the Court to enforce her undisputed rights under the Will.

2. The Executor adopted a neutral position, being primarily interested in clarifying the terms upon which the estate ought properly to be administered.

3. The point of construction is one that has seemingly never been determined as a matter of Bermuda law. Both the Applicant and the Respondent presented cogent arguments in support of their respective positions, relying on cases which revealed an apparent

divergence between Commonwealth case law (more hostile to the validity of forfeiture clauses) and English case law (less hostile to the notion of seeking to give reasonable effect to forfeiture clauses). The present application requires the Court to some extent to choose between two competing strands of legal policy, one favouring giving primacy to the testator's intentions and the other permitting public policy considerations to prevail.

4. It was nevertheless ultimately common ground that the forfeiture clause had to be given a purposive construction so as to permit D to enforce her rights under the Will and should not be construed literally and/or strictly according to its terms. As a result, it was not in controversy that D was entitled to seek declaratory relief about the effect of the forfeiture clause itself without triggering its operation, assuming it was found to be valid.

5. Finally it is necessary to mention at the outset that the Will is seemingly (and somewhat surprisingly) not a professionally drawn instrument (in formal terms at least), but a "homemade" instrument. How, if at all, this fact impacts on the issues in controversy will be addressed below.

The relevant provisions of the Will and the relief sought by D

6. The only actual gift for D is provided for in Clause 10 of the Will, which provides as follows:

> "*I give to my said daughter* [D] *50 per cent of all my cash and investments. Thus an equal percentage goes to my wife and daughter.*
>
> *If my daughter or her affiliates initiate any litigation of any type relating to this will or to my wife's ownership of the* [AB] *property, or to my wife in general, then she shall forfeit this cash legacy and investment legacy, and shall receive no benefit from this will.*"

7. W was given not just the other 50% of the Testator's cash and investments, but also all of the Testator's interest in (a) a New York property, (b) a Vermont property (or, if the property is held by a company, shares in the company), and (c) any Bermuda real estate. In addition W was given all residual real and personal property. The estate overall is believed to be worth some $40 million, some 60% of which unarguably represents cash and/or investments.

8. The Skeleton Argument of D described the following disputes in relation to the Will:

(a) whether the Testator's interests in the Mortgages constitute interests in Bermuda real estate gifted to W or investments in which D has a 50% interest;

(b) whether the Executor is obliged to recover the Loans;

(c) whether a sale and purchase agreement in relation to certain Bermuda real property ("the SPA") is enforceable;

(d) whether certain shares in a US company ("USC") are held on constructive trust for D.

9. Against this background, Ms. Rana-Fahy summarised the relief sought by D in her own Originating Summons as being declarations:

(1) that she will not be disentitled from benefitting under the Will:

(a) by participating in any proceedings in which she is joined as a defendant concerning the true meaning and effect of the Will,

(b) by making a claim in respect of the USC matter,

(c) by making a claim in the context of determining whether assets such as the Loans and the SPA form part of the Testator's estate; and

(2) that clause 10 (i.e. the proviso to the gift) is invalid or of no effect.

10. These concerns are very real ones because the Executor has been advised to seek directions from this Court as to the true meaning and effect of the Will.

Legal findings

The Issues

11. D's counsel submitted that the following issues were relevant to the question of whether the forfeiture clause in the Will was valid:

(1) whether the clause imposed a condition precedent or a condition subsequent;

(2) whether the condition is imposed merely *in terrorem*;

(3) whether the condition is imposed with sufficient certainty;

(4) whether the condition is void for repugnancy on, inter alia, public policy grounds;

(5) whether the condition is void for some wider public policy reasons.

Condition precedent or condition subsequent?

12. Ms. Rana-Fahy submitted that forfeiture "*clauses in wills and trusts have almost invariably been treated as imposing conditions subsequent. The natural and ordinary meaning of the words used in clause 10 of the Will (in particular 'If my daughter or her affiliates initiate any litigation…then she shall forfeit…') points to a condition subsequent rather than a condition precedent*" (Skeleton Argument, paragraph 13). Accordingly, if the forfeiture provisions were ineffective, the gift itself was still valid. The converse applied in the case of a condition precedent.

13. Mr. Kessaram sensibly conceded this irresistible argument.

Void as merely in terrorem?

14. Ms. Rana-Fahy submitted that the condition was clearly *in terrorem* and void because the clause contained no specific gift over. Mr Kessaram responded that the law does not in fact rigidly require an explicit gift over to displace the rule of construction D relied upon. The intention of the Testator was the key consideration. Because there were only two beneficiaries and one was given the residue, it was clear by necessary implication that W was intended to acquire D's interest if it was forfeited. Moreover, in construing the forfeiture condition, the Court was entitled to take into account the fact that the Will was a "homemade" one.

15. In oral argument, D's counsel firstly referred the Court to the following passage from Privy Council judgment (delivered by Lord Radcliffe) in *Leong-v-Lim Beng Chye* [1955] A.C. 648 at 660:

> "*For whereas a condition subsequent in partial restraint of marriage was effective to determine the estate in the case of a devise of realty…it was early determined and consistently maintained that a condition subsequent in partial restraint of marriage, when annexed to a bequest of personalty, was ineffective to destroy the gift unless the will in question contained an explicit gift over of the legacy to another legatee. And for this purpose a mere residuary bequest was not treated as a gift over.*
>
> *One thing is certain about this rule. It exists…*"

16. Firstly, I reject the submission advanced on behalf of W that the quoted *dicta* are merely *obiter*, and not binding because the reasoning does not form part of the decision. The Judicial Committee expressly found (at page 663) that because there was no express gift over, the condition subsequent in restraint of marriage failed:

> "*The condition or proviso must be treated as 'merely in terrorem,' that is, as intended merely in a monitory sense, and the appellants are entitled to take the share equally between them, notwithstanding the remarriage of Sally Leong.*"

17. More difficult to immediately assess was the merit of Mr. Kessaram's suggestion that the principle contended for applies solely to covenants in restraint of marriage, and that it was illogical to seek to apply the express gift over requirement in other factual contexts. Lord Radcliffe himself observed (at page 662) that "*it is not possible, at this stage of its history, to give an account of the origin of the rule that is wholly logical*". The illogicality arises because the rule was originally borrowed by the Ecclesiastical Courts from a Roman law public policy rule. The English courts subsequently re-characterised the rule, somewhat artificially, as a rule of construction based on the testator's presumed intentions. Nevertheless, there is nothing in the modern rule, as a rule of construction, which would limit its application to any particular species of forfeiture clause, as regards personalty. Lord Radcliffe concluded his analysis of the evolution of the rule by stating (at page 662-663) in terms which potentially apply to any forfeiture condition in a will:

> "*No doubt it is quite satisfactory to say that, if the will contains an express gift over, that gift shows beyond doubt that the testator did not intend that the condition should merely be in terrorem. But it is equally satisfactory, and perhaps less complicated an approach, to follow Lord Hardwicke in saying that it is the presence in the will of the express gift over that determines the matter in favour of forfeiture. So, it has been suggested, would an express revocation of a bequest that is bound by a similar condition. In any event, in so far as the rule is rested on intention, their Lordships do not feel any doubt that the intention relied upon must be found within the four corners of the will itself and extracted from the contents of the will.*"

18. However, D's counsel also referred to other authorities which suggest that this rule of construction applies to forfeiture clauses purporting to prohibit challenges to a will as well. '*Williams on Wills*' paragraph 34.13 states:

> "*Certain conditions, if attached to a legacy of specific personal property or a legacy charged on personal estate only, may be void against the donee as made in terrorem, that is to say, as a mere idle threat to induce the donee to comply with the conditions, but not to affect the bequest, unless the testator shows that his intention was not merely to threaten or enjoin the donee by the*

condition, but to make a different disposition of the property in the event of non-compliance with the condition. The conditions to which this doctrine is ordinarily applied are conditions in restraint of marriage, or forbidding the donees to dispute the will."[1]

19. The learned authors in footnote 4 under paragraph 34.13 of '*Williams on Wills*' explicitly state, citing authority, that: "*Where there is no gift over, the condition is ineffective*". D's counsel also placed reliance upon similar statements found in '*Lewin on Trusts*', 18th edition, where, at paragraph 5-15, in crucial reliance on *Leong-v-Lim Beng Chye* [1955] A.C. 648, the learned authors unambiguously state:

> "*There is a well established rule that a provision in a will revoking a bequest of pure personalty on the legatee either contesting the will or marrying without consent will be disregarded, leaving the bequest to take effect, if the condition is imposed in terrorem……The gift over on the new trust shows that the provision is not a mere idle threat, but an integral part of the machinery of the trusts. <u>Such a gift over is essential to the validity of the trust</u>…*" [emphasis added]

20. Ms. Rana-Fahy also relied on a *dictum* found in the judgment of Smellie CJ, a leading offshore trust judge, in a case cited in '*Lewin on Trusts*' (at paragraph 5-06) on the collateral public policy issue considered below. In *A.N.-v-Barclays Private Bank and Trust (Cayman) Limited* [2006] CILR 67, 9 ITELR 630, Smellie CJ opined as follows:

> "*30. It is settled from the leading cases of Cooke v. Turner…and Evanturel v. Evanturel…that there is no general rule of law that precludes testators from including in their wills provisions which would prevent or discourage beneficiaries from going to court to contest a will and to provide for the forfeiture of interests where such contests are unsuccessfully mounted. Further, such a provision cannot be imposed merely in terrorem as an idle threat but, instead, has to be one that effects the termination of the forfeited interest by making a gift over of that interest to someone else: Leong v. Chye (LimBeng)*…"

21. Accordingly, there is an abundance of clear and highly persuasive authority which supports the binding Privy Council decision in *Leong-v-Lim Beng Chye* [1955] A.C. 648 to the following effect. A forfeiture clause linked to a gift of personal property is void unless there is an express gift over linked to the relevant condition subsequent. There was none in clause 10 nor was there any such gift over in any other part of the

[1] In footnote 4 the learned authors suggest that it is now settled that the *in terrorem* rule applies only to these two types of condition: *Re Hanlon, Heads-v-Hanlon* [1933] Ch 254. D's counsel distinguished the actual finding reached in the latter case.

Will. The residue clause in favour of W was a standard residue clause containing no reference to the forfeiture clause.

22. I am fortified in this conclusion by reference to a Canadian authority which was cited with approval in '*Williams on Wills*' (paragraph 34.13, n.4), and relied upon by Ms. Rana-Fahy's in her oral and written arguments. In *Re Kent (Kent-v-McKay)* (1982) 136 DLR (3d) 318, a decision of the British Columbia Supreme Court, clause 9 of the will provided as follows:

> "*I HEREBY WILL AND DECLARE that if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection with any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have been entitled shall thereupon cease and I HEREBY REVOKE all said benefits and I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate to be distributed as directed in this my Will; PROVIDED that if such person whose benefits are so revoked would otherwise share in the residue of my Estate his or her benefits so revoked shall be divided equally among the remaining shares into which the residue of my Estate may be divided or as if such person had predeceased me and had left no issue surviving me.*"

23. Lander LJSC, after summarising the scope of the *in terrorem* rule, held as follows:

> "*[14] In this instance is such a "threat" idle? Ordinarily if a provision which contains such a condition is followed by a gift over in the event of a breach of that condition, the condition is held to be valid: Jarman on Wills, p. 1255. While certain authorities question whether a gift over is always necessary, I have concluded in this instance that para. 9 of the testator's will creates a gift over. The words, "I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate" are sufficient to constitute a gift over for the purpose of meeting the in terrorem doctrine…*"

24. It only remains to set out my reasons for rejecting the somewhat straw-clutching argument that the Court should have regard to the fact that this was a "homemade" will. As a matter of general principle, it seems entirely consistent with the policy underlying the *in terrorem* rule to hold that if a testator wishes impose legally binding conditions on gifts, he should either (a) seek legal advice as to how this best can be achieved, or (b) assume the risk that should his wishes be expressed in a way that conflicts with the law on interpreting wills, they may not be fully carried out. In the present case, the wording of the Will is far from simple or crude and on the whole its clauses appear to be based on professionally-drafted precedents. No case involving a no contest condition in a will was cited which suggested that allowance should be made for the fact that a will was a "homemade" one. It is impossible to believe, in light of the attention that such clauses have received from the courts for over 300 years (*Comes Sterling-v-Levingston* (1672-73) 21 ER 620 was the earliest case cited)

that if a rule for liberally construing homemade forfeiture clauses existed, counsel would have failed to find explicit support for it.

25. The following passage in *Charles-v-Varzey*[2002]UKPC 48, [2003] 1 WLR 437 in my judgment suggests that a liberal construction of homemade wills is only justified in exceptional cases, such as where an entire gift is conceptually uncertain in legal terms:

> "*17. Their Lordships do not think it profitable to express any view on whether Da Costa's case*[2] *was rightly decided. It was a decision on a homemade will containing unusual dispositions. It may be that with more ingenuity the testator's intentions could have been accommodated within the concepts of the law of property. But their Lordships respectfully disagree with the Court of Appeal's opinion that it governs the present case. There is absolutely no difficulty about accommodating Iris Charles's intentions within ordinary property concepts…*"

26. I therefore find that the forfeiture provision found in clause 10 of the Will in the present case is of no legal effect. In case I am wrong in this primary finding, the alternative findings I would have reached are set out below.

Void for uncertainty?

27. Ms. Rana-Fahy submitted that the forfeiture condition was, in the alternative, void for uncertainty. She relied upon the following general principles which were not in controversy, save as to their pertinence to the present facts:

    (a) conditions subsequent must meet a higher bar in terms of certainty because of the need to avoid disturbing vested gifts ('*Williams on Wills*', paragraph 34.9);

    (b) the present condition was a case of "*conceptual uncertainty*" (*Re Tuck's Settlement Trusts, Public Trustee-v-Tuck* [1978] 1 All ER 1047 at 1052, per Lord Denning;

    (c) for a condition subsequent to meet the requisite certainty standards, "*that condition must be such that the Court can see from the beginning, precisely and distinctly upon the happening of what event it was that the preceding vested interest was to determine*" (*Clavering-v-Ellison* (1859) 7 HL Cas 707 at 725, per Lord Cranworth).

28. Counsel for D then submitted that if one divided the condition into three limbs, namely "*If my daughter or her affiliates*" (1) "*initiate any litigation of any type*

[2] *Da Costa v Warburton* (1971) 17 WIR 334.

relating to this will", (2) "*relating to my wife's ownership of the* [Vermont] *property*", and (3) "*to my wife in general*", limbs (1) and (3) were conceptually uncertain and open to various possible interpretations.

29. Mr. Kessaram submitted that difficulty in ascertaining the meaning of the relevant clause was not fatal; to be void, "*the will must be incapable of any clear meaning*" ('*Williams on Wills*', paragraph 53.1). In broad terms, the respective positions of the parties on uncertainty mirrored their stance as regards whether the forfeiture clause in the Will should be void for repugnancy. D contended for a strict reading whilst W contended for a more purposive approach. At first blush, the complaint about the variety of meanings which might be attributed to the phrase "*any litigation of any type relating to this will*" appeared to me to carry less merit than the complaint about such litigation "*in relation to my wife in general*". What is the distinction between invalidating uncertainty and difficulties in interpretation which are capable of resolution?

30. An illuminating example of where the demarcation line ought to be drawn is provided by the judgment of Smellie CJ in *A.N.-v-Barclays Private Bank and Trust (Cayman) Limited* [2006] CILR 67. In that case, the uncertainty challenge was made to what was described as limb 3 of a "no contest" clause in a trust deed. The passage reproduced below strongly points to rejecting the challenge to limb 1 of the forfeiture clause in the present case and, somewhat less clearly, undermines the attack on limb 3 as well. A distinction is made between a broad but 'certain' prohibition on challenges to a will and an 'uncertain' prohibition on challenging the validity of decisions made by the trustees or committee of protectors. Smellie CJ stated:

> "*[50] Indeed, as Mr. Martin observed, it is fundamental to the existence of a trust that there will be beneficiaries to enforce it. As such, it would be repugnant to the very nature of a trust to prevent a beneficiary from doing so. The principle was concisely expressed by Millett LJ in Armitage v Nurse [1998] Ch 241 at 253:*
>
> > *'I accept the submissions made on behalf of Paula [(the plaintiff beneficiary)] that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.'*"

31. Implicit in the analysis, it seems to me, is the finding that a prohibition on all challenges to the validity of the trust/will is conceptually certain, while all challenges to the validity of decisions made by the trustees is conceptually uncertain because of the wide range of decisions the trustees would potentially be required to make. Smellie CJ resolved the uncertainty by construing the prohibition as restricting only challenges to invalid decisions, but he did so by reference to a general clause in the deed mandating a construction so far as possible in accordance with Caymanian law:

> "[96] As to what the word "contests" itself should mean either for the purposes of Limb 1, Limb 2 or Limb 3, I hardly see any basis for doubt.
>
> [97] A similar question arose in Evanturel v Evanturel [1874] L.R.6 PC 1 where a testatrix had sought to prohibit challenges by her legatee daughters to the will by use of the words "takes any steps whatever (whether directly or indirectly) to contest my present will".
>
> [98] The Privy Council made short work of the arguments that those words were void for uncertainty, in terms sufficiently wide to be of application here (L. R. 6 P.C. at 22, per Sir James Colvile):
>
> > 'The terms, though general, seem to their Lordships to point to a contestation of the testament in a court of law, and to be made so general in order to embrace every form of legal proceeding wherein or whereby such contestation might take place. There is therefore no uncertainty in the Clause as might prevent its application.' "

32. The approach taken in relation to uncertainty mirrored the approach adopted in relation to repugnancy, and attempts were made to construe the instrument in a way which validated its terms rather than invalidated them. Part of the justification for an interpretation giving effect to what Smellie CJ described as "*the established principles*" was somewhat more than just a Caymanian governing law clause. The clause was a severability clause as well, expressly preserving those clauses which complied with the governing law even if conflicting clauses were 'lost'. In the present case, clause 10 read literally prohibits D from suing W in respect of valid claims wholly unrelated to the Will. It is a somewhat similar type of conceptual uncertainty

to that which confronted the Caymanian Grand Court in the *Barclays Private Bank and Trust* case. Clause 3 of the Will provides in salient part as follows:

> "*… I direct that my Will be governed by and shall be construed in accordance with the laws of Bermuda and that the courts of Bermuda shall be the forum for the administration thereof.*"

33. This clause in my judgment, though somewhat differently drafted to the Caymanian clause in *Barclays Private Bank and Trust*, nevertheless signifies that the administration of the Will as a whole is subject to the supervision of this Court. The Testator clearly intended that the Will should be, as far as possible, valid and capable of being legally enforced.

34. For reasons that are explained in relation to repugnancy below, I adopt the broad purposive construction approach contended for by Mr Kessaram applying the analytical approach deployed by Smellie CJ in *A.N.-v-Barclays Private Bank and Trust (Cayman) Limited* [2006] CILR 67; 9 ITELR 630. I would construe limb 3 of clause 10 as only prohibiting unjustified claims brought by D against W be they related or unrelated to the Will. A claim would be "unjustified" if it was either not advanced in good faith or if there was no god reason for it being pursued, as is explained further below. This approach appears to me to reflect the predominant modern English approach of only invalidating a clause in a trust deed or will on grounds of uncertainty as a last resort.

35. By way of both contrast and further illustration of this analytical approach, John Martin QC (sitting as a Deputy Judge[3]) in *Nathan-v-Leonard* [2003]1WLR 827 at 835, "*with great reluctance*" found the following clause (which was virtually unintelligible) "*too uncertain to be enforced*":

> "*This clause cannot be superseded, and will only come into being if at anytime during the life of the Trust or up to 80 years has elapsed.*"

36. W's counsel relied appropriately, both as regards certainty and repugnancy, on the following passage from the judgment of Lord Hoffman on behalf of the Privy Council in *Charles-v-Varzey*[2002]UKPC 48, [2003] 1 WLR 437:

> "*12. ... In principle, the application of these rules of public policy comes after the question of construction. One first ascertains the intention of the testator and then decides whether it can be given effect. But nowadays the existence of the rules of public policy may influence the question of construction. If the testator's words can be construed in two different ways, one of which is valid and the other void, then unless the testator obviously did not intend to make the kind of gift which would be valid, the court will usually be inclined to construe his will in that sense. The theory of the old rule against perpetuities was that construction was "remorseless": one*

[3] The Deputy Judge appeared as counsel for the successful plaintiff in *A.N.*-v- *Barclays Private Bank and Trust (Cayman) Limited* and is now a Caymanian Justice of Appeal.

> *construed the will as if there was no rule against perpetuities and then, if the gift offended, held it void. See Gray, The Rules Against Perpetuities (4th ed 1962 para 629). <u>But that kind of construction is now out of date</u>.*" [emphasis added]

37. Accordingly, had I not found that the forfeiture provisions of the Will were invalid by virtue of the *in terrorem* doctrine, I would have rejected D's uncertainty complaints on the above grounds.

Void for repugnancy on public policy grounds?

<u>Ouster of the jurisdiction of the Court /of no effect in relation to valid claims</u>

38. The first limb of D's void for repugnancy argument was the public policy objection to clauses ousting the jurisdiction of the courts. This overlapped with the alternative argument that the clause should only be construed as being effective in relation to valid or justifiable claims. The same considerations also apply to the technically distinguishable argument for repugnancy on the grounds of excluding specific statutory rights (the provisions under Part III of The Succession Act 1974 permitting challenges of unreasonable provisions made by wills). Mr. Kessaram astutely conceded that the clause could not be given effect according to its terms, and the Skeleton Argument of Mr. Kessaram and Ms. Minors concluded with the following submission which I ultimately accept in substantive terms. He argued that D would forfeit her rights under the Will:

> "*…by unsuccessfully making a direct or indirect challenge (either by bringing proceedings herself or by asserting a construction of the Will in the Executor's application) which is adverse to any of the gifts made to* [W] *under the Will; at least if the challenge is not made bona fide or with…good cause.*"

39. Ms. Rana-Fahy concluded her oral submissions on this topic by briefly making an important point. As a matter of Bermuda law, the public policy rule against ouster is more than a mere common law rule; it also has constitutional significance. Section 6(8) of the Bermuda Constitution (in terms substantially similar to article 6 of the European Convention on Human Rights) guarantees the right of access to the courts.

40. From the standpoint of merely construing a private law instrument, however, there is probably little practical distinction between a constitutionally entrenched prohibition against ousting the jurisdiction of the courts and the corresponding common law policy rule. In both cases, one construes the relevant clause (be it in a contract, trust deed or will) presuming that the relevant draftsman did not intend to create a provision which might be invalidated by the courts for infringing a fundamental legal policy principle. One seeks to construe a clause which, literally read, would oust the jurisdiction of the courts (and accordingly be void), in a way which:

    (a) does not offend the relevant public policy rule; and

(b) subject to (a), gives effect so far as is possible to the intentions of the maker of the instrument in question.

41. However, it must be admitted that, as a general rule, it is only in cases of ambiguity that public policy considerations are deployed to determine how the relevant provision should be interpreted. Clear words generally trump all. Can public policy considerations be used to decide the primary meaning of a no contest condition, or must regard to such considerations only be deployed after first determining the meaning of the plain words?

42. Ms. Rana-Fahy correctly submitted that a different approach has been taken in Australia and Canada (by certain courts at least) as regards the various heads of repugnancy. With respect to the first limb, ouster *simpliciter*, she invited the Court to follow the approach adopted in one Australian case. In *Leerac Pty Ltd-v-Garrick E. Fay* [2008] NSWSC 1082, Brereton J held:

> "*25 Reference was made to the judgment of Madden CJ in the Supreme Court of Victoria in Wallace v Wallace (1898) 24 VLR 859, in which his Honour held that a provision in a Will – to the effect that any person entitled to any benefit under the Will who took any proceedings against the executors or instituted any suit for the administration of the estate should absolutely forfeit all benefit under the Will – was void to the extent that it had no force or effect upon a bona fide and reasonable claim, although it might have been effective against a frivolous or vexatious action. (In New South Wales, Permanent Trustee Company v Dougall would tell against its validity in respect of administration suits). Somewhat similarly, in AN v Barclays Private Bank & Trust (Cayman) Ltd, Smellie CJ held that a non-contest clause was not to be construed as to operate contrary to established principles and must be read by implication as permitting not only contests which were successful but also contests which were justifiable, so that it should be read 'whosoever unjustifiably contests the validity of this deed ...'. I regret to say that, to my mind, the approach adopted by Madden CJ and Smellie CJ appears to put the question of validity before the question of construction. Construction is a process intended to ascertain the intent of the settlor or testator, and it is only once that intent is ascertained that one can decide whether the clause is valid or not. This principle is often recognised in the field of covenants in restraint of trade, where it is plainly established that one construes the covenant first and then determines whether as so construed it offends public policy. To my mind, nothing is clearer than that the testator in Wallace v Wallace and the settlor in AN v Barclays Private Bank & Trust (Cayman) Ltd intended to deter all suits, justifiable or unjustifiable, and such clauses, it seems to me, cannot be*

saved by reading them down, contrary to the settlor's intention, to bring them within the scope of public policy."

43. Brereton J objects to applying public policy considerations as part of the process of determining the meaning of the offending clause. I respectfully reject the analysis of Brereton J and adopt the approach of Smellie CJ in *A.N.-v-Barclays Private Bank and Trust (Cayman) Limited* [2006] CILR 67; 9 ITELR 630, for the principled reasons which I will now explain. The latter approach, which seems to me to better reflect the predominant approach of English judges over the ages, is consistent with a distinctive approach to construing no contest and similar forfeiture clauses in wills and trusts (if not contracts). When confronted with a conflict between even clear words and an opposing public policy consideration, the presumption that the testator/trustee intended to make a valid gift is engaged to ensure validity and avoid invalidity. Notwithstanding the views expressed by Lord Hoffman in *Charles-v-Varzey* [2003] 1 WLR 437 at paragraph 12 and reproduced above as to the modern approach to construing such instruments, the roots of the current approach (if not the legal reasoning) seem generally to be very deep. For example:

    (a) in *Comes Sterling-v-Levingston* (1672-73) 21 ER 620, 2 Chan. Rep. 75, the plaintiff sued to enforce his rights under a settlement in circumstances where his entitlement was unclear, despite a forfeiture clause: "*His Lordship declared, it was most fit that a Trial at Law be had touching the Plaintiff's Right and Title, and that such Action to be brought shall not be taken or construed a Breach of the Proviso aforesaid, or Forfeiture of the Plaintiff's Right and Title to the Premisses*";

    (b) in *Powell-v- Morgan* (1688) 2 Vern 90, the headnote records: "*Legacy given on condition the legatee shall not dispute the will. Legatee commences a suit whereby he contests the validity of the will, yet no forfeiture of the legacy, if there was probabilis causa litigandi*";

    (c) in *Cooke-v-Cholmondeley* (1849) 12 E.R 8, where an heiress participated in proceedings brought by trustees for construction of the will, the Lord Chancellor (at page 12) insisted on the decree making it clear that her participation in the proceedings did not trigger the forfeiture clause;

    (d) in *Massy-v-Rogers* (1883) 11 LR (Ireland) 409, the executors were given the power to determine all disputes relating to the will and when they

themselves applied to court for directions. This was an atypical case where the clause in question was truly an "ouster" clause as opposed to a "no contest" clause. Still, there was not in substance any departure from the 'mainstream' English approach because the beneficiary was not viewed as contesting the will at all. In a very clear statement of legal principle (at 417), the Vice-Chancellor opined:

> "*Every subject of the realm is entitled to free access to these tribunals, to ascertain, establish and enforce the rights which the law gives him, whether arising upon contract, or upon testamentary disposition. In my opinion, any attempt to exclude this right is unlawful and inoperative*";

(e) in *Re Williams* [1910] 1 Ch 399 at 403-404, Swifen-Eady J held that the relevant no contest clause "*does not apply where there is probabilis causa ltigandi…the clause if applicable to such an action would be void for repugnancy*…"

44. The position has not been entirely uniform, however. Clauses have been struck down altogether in England. In *Rhodes-v- The Muswell Hill Land Company* (1861) 29 BEAV 560, all disputes relating to the will, including matters of construction, were referred to arbitration on terms that any beneficiary commencing court proceedings in relation to the will would have their interest forfeited. This was a full-blown ouster clause. When a beneficiary sought specific performance of a contract for the sale of devised land and clarification of his disputed title, Sir John Romilly (MR) robustly held as follows:

> " *I have no doubt that the clause of forfeiture has no more effect than if it had been altogether omitted from the will…this provision is absurd, inconsistent and repugnant*…"

45. The substance of this decision may be viewed as striking down that aspect of the clause which purported to prohibit a beneficiary from enforcing their rights under the will. The overall principle which emerges from the old English cases is not so much a public policy objection to 'no contest' clauses altogether, but a more narrowly defined objection to clauses which purport to oust the supervisory jurisdiction of the court in respect of the due administration of the estate. The consistent judicial approach,

perhaps typifying common law judges at a time when law more of a trade than a field for academic study, was a disposition towards ensuring that litigants who deserved the assistance of the courts were permitted to obtain relief. The judgments reflect a results-oriented theory-light decision-making style. It is against this background that the modern approach of construing such clauses in a way which invalidates ouster clauses to the extent that they purport to oust the jurisdiction of the court altogether, by excluding justifiable applications, emerges. How the courts should deal with no contest clauses which are, literally read, repugnant because they oust the jurisdiction of the courts in practical terms is accordingly clearer than the theoretical underpinning for the relevant approach. This analytical fuzziness is described in *'Lewin on Trusts'* at paragraph 5-09 in the following way:

> "…*there is English authority which supports the view, endorsed by Cayman authority, that a no contest clause will not operate to determine an interest when a challenge which would otherwise suffice to determine an interest is made for probable cause, though ultimately unsuccessful. These limitations on the operation of a no contest clause apply even without express provision limiting their operation. Though in English law it is unclear whether the limitations apply simply as a matter of law irrespective of the terms of the relevant clause, or, as has been held in the Cayman Islands, as a matter of construction implying limiting words into the relevant provision and thereby saving the provision from invalidity*…"

46. The Caymanian authority referred to by *Lewin* is of course the *Barclays Private Bank and Trust* case. In that case, the judicial analysis on repugnancy began vey logically with the following recitation of the umbrella principles governing repugnant clauses in wills:

> "59. *.As to repugnancy, Williams on Wills 8th ed., para. 34.5, at 347 (2002) states the principle thus: '[A] repugnant condition is one which attempts to make the enjoyment of a vested gift contrary to the principles of law affecting the gift'*[4] *citing Saunders v Vautier*[5] *...*"

47. This articulation of the fundamental legal basis of repugnancy is essentially a fundamental rule of construction if one considers that the phrase "*principles of law affecting the gift*" embrace rules of public policy as well as rules of (private) property

[4] '*Williams on Wills*' (Lexis ed.) paragraph 34.5.
[5] [1841] Cr & Ph 240.

law. Another important rule of construction, referred to by Ms. Rana-Fahy and dealt with by '*Williams on Wills*' (at paragraph 53.2) under the rubric of uncertainty, is the following well known rule. This is a rule which in my judgment applies with equal force to construing an ouster-type clause which is potentially void on public policy or similar grounds, and justifies a construction which seeks to give effect to the testamentary intent so far as legal policy permits:

> "*The other maxim is: Ut res magis valeat quam pereat. Where words are capable of two constructions, even in the case of a deed, and much more in the case of a will, it is just and reasonable that such construction should be adopted as tends to make the document effective and the rule is to construe a will according to this maxim, giving effect as far as possible to every word, and giving effect to the gift if it is possible to do so rather than to declare it void…and so defeat the testator's intention.*"

48. The approach of Smellie CJ in *A.N.-v-Barclays Private Bank and Trust (Cayman) Limited* [2006] CILR 67; 9 ITELR 630, disapproved in *Leerac Pty Ltd-v-Garrick E Fay* [2008] NSWSC 1082, is entirely consistent with (a) a long line of persuasive authority, (b) the binding decision of the Judicial Committee of the Privy Council in *Charles-v-Varzey*, and (c) generally applicable principles of law as well. For essentially the same reasons, I decline to follow those Commonwealth authorities which appear to hold that no contest clauses are altogether void for repugnancy with statutory rights to challenge the adequacy of provisions made under wills. Such cases include *Kent-v- McKay* (1982) 136 DLR (3d) 318, which I follow on the *in terrorem* point. It is important to note that in this case the possibility of saving parts of the clause does not appear to have been considered, let alone consciously rejected. As far as the Will in the present case is concerned, the fact that the Testator expressly chose Bermuda law and the courts of Bermuda to govern the administration of his estate further justifies a construction which would, subject to applicable rules of law and public policy, preserve the wishes expressed in the no contest clause.

49. Smellie CJ reached the following conclusions as to the construction of the instrument in light of the authorities:

> "*96. What then is to be made of cl. 23, which contains no such qualifying words as "success", "bona fide", or "justified"? The answer must be that the clause must be construed in accordance with all the terms of the deed in the light of the settled common law principles which have been identified. It is plain enough that cl. 23 was not intended to be construed as flying in the face*

of the established principles. Rather, cl. 19 of the Deed makes it plain that the contrary would have been the intention in as much as it provides that, if possible, any offending provision shall be construed in accordance with the laws of the Cayman Islands.

97. Further, I am reminded of the maxim; verba ita sunt itelligenda ut res magis valeat quam pereat: where two constructions of an instrument are equally plausible, upon one of which the instrument is valid, and upon the other of which it is invalid, the Court should lean towards that construction which validates the instrument. See Langston v Langston [1834] 2 Cl & Fin 194 cited in The Interpretation of Contracts, by Lewison, Sweet & Maxwell, 2004; pp231-232. I am satisfied that construed as intended to conform with the decided cases, Clause 23 can be validated so as to eliminate any concerns about uncertainty, repugnancy or ouster of the jurisdiction of the Courts.

Conclusion

[98] Clause 23, if construed literally according to its terms and taken by itself, would be void for uncertainty and repugnancy and for being contrary to public policy. However, in light of cl. 19 of the Deed, cl. 23 is not to be construed as intended to operate contrary to the established principles. Viewed in this way, and making the best I can of the import of the decided cases, cl. 23 must be read by implication as allowing not only such contests which are successful; but also contests which are "justifiable", in the sense of being taken bona fide, not frivolously or vexatiously and with probabilis causa litigandi. Thus construed, cl. 23 would read: *'Whosoever <u>unjustifiably</u> contests the validity of this deed and the Trust created under it, of the provisions of any conveyance of property by any person or persons to the trustee…'."*

50. Had I not been required to find that clause 10 was ineffective altogether through the application of the *in terrorem* rule, I would have adopted the above approach to construing the clause, which both counsel in substance commended to the Court. It was adopted by way of fall-back position by D's counsel. But Mr. Kessaram affirmatively submitted that D should be permitted (a) at a minimum to enforce her rights under the Will, and (b) at most to make only those adverse challenges which were asserted in good faith or for good cause. I would have construed clause 10 as merely restricting D's right to unjustifiably commence or participate in the prohibited classes of litigation. This would include applications for the due administration of the Will and any other good faith adverse challenges for which there was good cause.

51. Such an approach is also justified by broader considerations of legal policy. It is a notorious fact that an important limb of Bermuda's economy involves encouraging high net worth individuals to establish trusts and wills which are expressed to be governed by Bermudian law. Such instruments are almost invariably drafted by reference to English precedents and, in significant cases, with input from English solicitors and counsel. Local statutory departures and particular factual idiosyncrasies apart, this Court should generally lean towards rules of construction which are consistent with the corresponding English law approach. In many cases, as here, the best persuasive authority may be found in the jurisprudence of sister offshore jurisdictions whose legal policy aspirations in this area of the law are generally consonant with our own.

Summary

52. I find that the forfeiture clause is invalid and of no legal effect because it is not accompanied by an express gift over provision as required by the *in terrorem* rule. I accept the submissions of Ms. Rana-Fahy on this issue.

53. If I were not required to find the forfeiture clause to be invalid on the above grounds, I would have rejected D's complaint that the relevant provision is void for uncertainty. I would have construed the clause in such a way as saved it from invalidity, following the approach adopted by Smellie CJ in *A.N.-v-Barclays Private Bank and Trust (Cayman) Limited* [2006] CILR 67; 9 ITELR 630. I accept the submissions of Mr. Kessaram on this issue.

54. If I were not required to find the forfeiture clause to be invalid on the above grounds, I would also have rejected D's complaint that the relevant provision is void for repugnancy on public policy grounds. Again, I would follow the approach adopted by the Caymanian Grand Court in the 2006 *Barclays Private Bank and Trust (Cayman) Limited* decision, construing the clause as permitting justifiable litigation. I accept the primary submissions of Mr. Kessaram and the fall-back submissions of Ms. Rana-Fahy on this issue.

55. Unless any party applies by letter to the Registrar within 14 days to be heard as to the terms of the final Order or costs, the following Order is made on D's Originating Summons:

(1) a declaration that D will not be disentitled from benefitting under the Will:

(a) by participating in any proceedings in which she is joined as a defendant concerning the true meaning and effect of the Will,

(b) by making a claim in respect of the USC matter,

(c) by making a claim in the context of determining whether assets such as the Loans and the SPA form part of the Testator's estate; and

(2) a declaration that the proviso to clause 10 is invalid and of no effect;

(3) an order that the costs of all parties shall be payable out of the Estate.

Dated this 8th day of December, 2014 _____

IAN R.C. KAWALEY CJ