[2015] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 142/2009

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (Ag)

BETWEEN	**LOUISA REBECCA WATSON**	**APPELLANT**
AND	**ERNIE PARCHMENT**	**RESPONDENT**

Ravil Golding instructed by Lyn-Cook, Golding & Co for the appellant

Emile Leiba and Jonathan Morgan instructed by DunnCox for the respondent

13 March and 8 May 2015

DUKHARAN JA

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA (Ag) and agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

[2] I too have read the draft judgment of my sister Sinclair-Haynes JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA (Ag)

[3] Louisa Rebecca Watson is the adopted daughter of Martha Watson-Gayle, deceased, and the respondent Ernie Parchment is the deceased's niece (adopted) – see page 73 of Record of Appeal (para. 9). Both have purported to provide the last will and testament of the said Martha Watson-Gayle). Louisa Rebecca Watson, the appellant, obtained probate of the alleged last will and testament. Miss Ernie Parchment however, instituted proceedings in the Supreme Court challenging the *bona fides* of the deceased's alleged last will and testament. Consequently, on 9 September 2009, Pusey J made the orders stated hereunder against which the appellant appeals.

Pusey J's orders

> "1. The Probate of the alleged last will and testament dated 30th day of November 1987 of MARTHA WATSON-GAYLE, deceased, granted by the Resident Magistrate for the Parish of St. Elizabeth on the 21st day of March 2003 to LOUISA REBECCA WATSON of Pondside District, Parotee in the Parish of St. Elizabeth is hereby called in and revoked.
>
> 2. The alleged last will and testament dated the 30th day of November 1987 of the deceased MARTHA WATSON-GAYLE being the script referred to in the Affidavit of Louisa Rebecca Watson dated and filed March 15, 2006 and a copy of which is exhibited thereto is hereby declared to be null and void and its force and validity pronounced against.
>
> 3. The Court hereby pronounces for the force and validity of the last will and testament, dated December, One Thousand Nine Hundred and Eighty Five (1985) of the deceased MARTHA WATSON-GAYLE, being the script referred to in the Affidavit of Ernie Parchment dated July 7, 2005 and filed on July 29, 2005 and a copy of which is exhibited thereto, in

solemn form, and directs that probate be granted to the Claimant Ernie Parchment in Solemn Form.

4. The Court hereby directs an inquiry and account as to the rents and profits of the estate of the said deceased MARTHA WATSON-GAYLE that shall have come into the hands of the Defendant Louisa Rebecca Watson at any time since the death of the deceased.

5. The Defendant Louisa Rebecca Watson is hereby ordered to file an Affidavit in compliance with the Civil Procedure Rules in respect of the Order numbered 4 herein within 21 days of the date of this Order.

6. All rents and profits of the estate of the deceased, including any proceeds of sale of land or other property, as shall have come into the hands of the Defendant Louisa Rebecca Watson are to be paid to the Claimant forthwith.

7. Costs to the Claimant to be agreed or taxed…"

The factual background

[4] Although the court was not provided with the notes of evidence, Mr Emile Leiba's detailed and unchallenged submissions were helpful in that regard. On 29 July 2005, the respondent filed a fixed date claim form which was supported by particulars of claim and an affidavit of testamentary script. The appellant was ordered by Hibbert J on 15 March 2006 to specifically disclose all documents which bore the deceased's handwriting and the production of the deceased's original marriage certificate with her signature thereon. He also ordered the parties to agree to a handwriting expert which cost was to be equally borne by the parties. The appellant was granted an extension of time to file and serve her defence.

[5] The appellant's defence was filed on 16 March 2006 with an affidavit of testamentary script. In her defence she averred that the 1987 will which she probated was the true last will and testament of the deceased. She averred also that the said will was made at her home and in her presence and that of the two attesting witnesses. She asserted that the signature on the 1987 will was that of the deceased. She categorically denied that the said will was a forgery.

[6] On 26 September 2006, the parties were granted leave to file further affidavits by McDonald-Bishop J (as she then was). She ordered the parties to provide for submission to the handwriting expert, other relevant documents which bore the deceased's signature in compliance with Hibbert J's order. By order of 12 March 2007, the parties were to attend for cross-examination. The parties however did not file the relevant affidavits. On 15 July 2008, the respondent filed and served her affidavit with a letter to the appellant which informed her attorney that she had filed no affidavit in support of her defence but that they had no objection to her filing same as soon as possible. The appellant did not file the required affidavit.

[7] Mr Carl Major, a retired superintendent of police, was appointed as the handwriting expert. He filed his report on 1 December 2006 in which he concluded that the 1987 will propounded by the appellant was a forgery. He formed the opinion based on a comparison of the signature on the marriage certificate of the deceased which the Registrar General produced. Both the expert's report and the authenticity of the marriage certificate were not challenged.

[8] The trial of the matter commenced on 29 July 2008 before Pusey J and was adjourned as part-heard for continuation on 2 September 2008. At that hearing, the respondent's attorney objected to the appellant's attorney suggesting to the witnesses in cross-examination that the deceased could not write. The appellant was also prevented from tendering into evidence, a voter's identification card and another document on which the deceased had purportedly made her mark. The objection was taken on the grounds that: the appellant failed to comply with Hibbert J's order for disclosure; disclosure of the voter's identification card was not in compliance with the Civil Procedure Rules (CPR) and the appellant had produced the other document for the first time at the hearing. She was also prevented from giving *viva voce* evidence having failed to comply with the judges' orders to file her affidavit(s).

[9] Pusey J disallowed the appellant's attorney from cross-examining or leading evidence which was contrary to his defence. The appellant's attorney applied to amend the defence. The learned judge required the application to be made in writing and the matter was adjourned part-heard to 7 November 2008 for the appellant to comply with Pusey J's order and for other reasons. The appellant failed to comply. On 7 November 2008, the matter was further adjourned to 11 December 2008 and was also further adjourned to 30 January 2009, at the request of the appellant's attorney.

[10] At the close of the respondents' case on 30 January 2009, the appellant requested another adjournment to produce another document which she claimed she had in her possession. This document, it was asserted, would prove that the deceased

could neither read nor write. The respondent's attorney objected and applied to have the appellant's defence struck out.

[11] The written submissions which were filed on behalf of the appellant abandoned the crux of her defence. She then sought to assert that the deceased was illiterate and was unable to write her name. She further stated that she did not see the deceased sign the will. According to her, its inclusion in the defence must have been an error by the attorney who took the instructions. She stated that several documents were discovered during the proceeding which showed that the deceased was unable to write her name. Pusey J refused her application and made the orders abovementioned.

[12] On 4 November 2009, the appellant filed the following grounds of appeal.

> "1. That the Learned Trial Judge erred in Law when he made an order striking out the Appellant's defence on the ground that she failed to file an affidavit speaking to the matters contained in her defence in a case where there was no necessity for filing affidavits as the matter should have been commenced in open court since it consists of proving a Will in solemn form.
>
> 2. That in refusing the Defendant leave to amend her defence and file a Witness Statement was unduly harsh and did not accord with the overriding objective of the Civil Procedure Rules and represented a windfall to the Claimant/Respondent."

[13] The respondent, on 18 November 2009, filed counter notice of appeal which is hereunder stated:

"(a) That the learned Judge ought properly to have granted summary judgment to the Respondent/Claimant and/or struck out the Appellant's/Defendant's Defence on the basis of the joint expert report which in effect determined the material issues in the claim in favour of the Respondent/Claimant.

(b) That the learned Judge ought properly to have struck out the Defence of the Appellant/Defendant on the basis that the Appellant/Defendant was guilty of dilatory and oppressive conduct, in particular unnecessary and inexcusable delay which amounted to an abuse of the process of the Court.

(c) That the learned Judge ought properly to have struck out the Defence of the Appellant/Defendant on the basis that the Appellant/Defendant intentionally and/or recklessly failed to comply with an order of the Court for specific disclosure to the prejudice of the Respondent/Claimant.

(d) That the Respondent/Claimant was entitled to Judgment having presented cogent unchallenged evidence sufficient to establish the validity of the Will propounded by the Respondent/Claimant in Solemn Form."

[14] Neither the notes of evidence nor reasons for the learned judge's decision were available to the court. On 2 November 2012, the appellant, by way of notice of application for court orders, applied to dispense with the procedural requirement pursuant to rule 1.14 of the Court of Appeal Rules, 2002 (CAR), that the full record be filed.

[15] Mr Golding argued that the learned judge embarked on an incorrect mode of trial. He contended that contentious probate matters are to be heard in open court. He relied on the work of the learned authors of Tristram and Coote's Probate Practice 24th

ed for his proposition. According to Mr Golding, the only departure from that rule is pursuant to rule 68.68 of the CPR which allows for the hearing of such matters in chambers where the parties have agreed to a compromise.

[16] He said that the error was pointed out to the learned judge and it was also indicated to the learned judge that in the circumstances, the matter was not triable on affidavits but rather on witness statements. No affidavit was filed on behalf of the appellant because the matter ought to have proceeded on witness statements. The learned judge was further informed that the appellant had not filed any affidavits because the matter was not triable on affidavits.

[17] According to Mr Golding, Pusey J ignored the submissions and relied on affidavit evidence instead of witness statements. The appellant was also precluded from giving *viva voce* evidence. It is his submission that the fact that the appellant was not allowed to give evidence is tantamount to a striking out of her claim.

[18] Mr Golding further complained that the appellant was not permitted to amend her defence to enable her to prove that the said Martha Watson-Gayle, the testator, was unable to read or write. The amendment, he submitted, would have conclusively proven that both wills were forgeries. In the circumstances, the estate would devolve on intestacy.

[19] He submitted that had the learned judge not prevented the appellant from amending her defence, she would have been able to provide documentary evidence to

wit: the deceased's national identification card and the appellant's birth certificate, on which the deceased made an X. Those documents, he said, were obtained only days before the hearing. He argued that disclosure is an ongoing exercise and the documents which the appellant sought to tender contradicted the handwriting expert's opinion. Without the amendment he was unable to properly cross-examine the witnesses as his cross-examination would have been contrary to his pleadings.

Analysis

Ground 1

> That the main ground of appeal is that the learned trial judge fell into error when he made an order striking out the appellant's defence on the ground that she failed to file an affidavit speaking to the matters contained in her defence in a case where the trial should have been in open court and was not trial on affidavit as allegations of fraud were made by the respondent.

[20] Mr Leiba submitted that the rule, as stated in the passage in Tristram and Coote's Probate Practice, relied on by Mr Golding, is not the common law. He submitted that rule 53.11(1) of the CPR is the applicable rule. Further, he submitted, there is no exclusionary provision which prevents such matters being heard in chambers. He contended that Hibbert J exercised his case management powers by determining that the matter was to be heard in chambers and there was no appeal from that order. He submitted that the court has a general discretion to direct that evidence be given in writing, except where the rules state otherwise. He relied on rule 26.1(2)(q) of the CPR.

The applicable law and rules

[21] The following passages from the work of the learned authors of Tristram and Coote's Probate Practice to which Mr Golding directed us are, in my view, unsupportive of his position. At page 717, the learned authors stated:

> "A probate action may be tried in London, (i.e., at the Royal Courts of Justice), outside London, or, if the value of the estate is within the prescribed limits, at a County Court.
>
> The venue for the trial is within the discretion of the Court, and is fixed at the hearing of the summons for directions. The exercise of the Court's discretion in regard to the place or mode of trial is subject to review on appeal."

That particular passage refers to the exercise of an English judge's discretion.

[22] It is palpable from a reading of pages 120-121 of the said text, which deal with the mode of trial, that the learned authors recognized that the trial judge possessed the discretion to direct the proceedings. At pages 120 and 121, the learned authors expressed:

> "The mode of trial, i.e. whether the action is to be tried by a judge alone, or with a jury, is determined on the summons for directions (b).
>
> **Discretion of the court.**
>
> The court has in all cases a discretion to direct trial with or without a jury, which is, however, subject to review by the Court of Appeal if necessary (c). The considerations mentioned below are included merely as a guide to the manner in which the discretion of the Court has been exercised.

> Questions of fact may be ordered to be tried with or without a jury. Where the only issue is a question of law, the action will usually be directed to be tried by a judge alone: this also applies where the only issue is as to the due execution of a will. Direction for trial with a jury may more readily be given where the issues are testamentary capacity, undue influence or fraud, but application for a jury may be refused where the questions require more cogency of proof than questions of fact ordinarily submitted to juries (d), or where the main question to be decided is one of mixed law and fact, e.g., the presumptive revocation of a will (e)."

[23] Rule 26.1(2)(q) and (v) of the CPR similarly confers upon our judges, the discretion to direct the proceedings. The learned judges before whom the instant matter was heard on each occasion did just that. Rule 26. 1(2)(q) and (v) provides:

> "Except where these Rules provide otherwise, the court may-
>
> (q) direct that any evidence be given in written form;
>
> (v) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective."

[24] Counsel for the appellant's reliance on the passages in Tristan and Coote's Probate Practice is in my view misconceived. As rightly pointed out by Mr Leiba, rule 27.2(7) of the CPR authorises the court to exercise its case management powers at the first hearing of the fixed date claim form. Rule 27.2(7) states:

> "At the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference."

[25] The fixed date claim form was first heard on 15 March 2006 by Hibbert J, who duly made the several case management orders including the specific disclosure of certain documents which bore the signature of the deceased. Further case management orders were made by McDonald-Bishop J on 26 September 2006. In managing the matter, she ordered *inter alia*, the filing of further affidavits by the parties and the production of relevant documents which contained the deceased's signature. On 12 March 2007, McDonald J fixed the matter for hearing in chambers and ordered, *inter alia*, cross-examination of the parties. There was no appeal from any of those orders requiring the filing of affidavits or the matter being heard in chambers in spite of Mr Golding's contention that the judges' orders were erroneously made.

[26] His reliance on rule 68.68 of the CPR for the proposition that without a compromise the court may not hear a probate matter in chambers is equally unsustainable. Part 68, section 2 of the CPR deals with "Contentious Probate Proceedings". Rule 68.68(1)(a) reads:

> "Where, whether before or after the service of the defence in probate proceedings, the parties to the proceedings agree to compromise the court may-
>
> (a) order the trial of the proceedings on affidavit evidence (which will lead to a grant in solemn form);"

There is no expressed prohibition in rule 68.68(1)(a) against probate proceedings being tried in chambers on affidavits. In fact the CPR states the very contrary. Rule 68.55 which is captioned "How to commence probate proceedings" specifically states at sub-paragraphs (1) and 4(a) that:

"(1) Probate proceedings must be begun by issuing a fixed date claim form in form 2.

(4) The claimant must -

(a) file a particulars of claim with the claim form; …"

[27] Rule 68.57(2) and (3) of the CPR requires the filing of affidavits by parties unless otherwise directed by the court. Rule 68.57(2) states:

"(2) Unless the court otherwise directs, the claimant and every defendant who has entered an acknowledgement of service must swear an affidavit-

(a) describing any testamentary document of the deceased person, whose estate is the subject of the action, of which he or she has any knowledge or, if such be the case, stating that he or she knows of no such document, and

(b) if either party has knowledge of any such document which is not in his or her possession or under his or her control -

(i) giving the name and address of the person in whose possession or under whose control it is; or
(ii) that he or she does not know the name or address of that person.

(3) The affidavit must be sworn by the party or, in the case of a minor or patient, by that party's next friend unless the court otherwise orders."

Rules 68.57(4) and (6) states:

"(4) Unless the court otherwise directs -

(a) the claimant must lodge his or her affidavit and any testamentary

documents in his or her possession when the claim form is issued; and

(b) the defendant must lodge his or her affidavit and any testamentary documents in his or her possession when filing an acknowledgment of service.

(6) Except with the leave of the court, no party to probate proceedings may be allowed to inspect an affidavit filed, or any testamentary document lodged, by any other party to the proceedings under this rule, until an affidavit sworn by the first party containing the information referred to in paragraph (1) has been filed."

[28] The proceedings were appropriately instituted by way of fixed date claim form and supported by particulars of claim in accordance with rule 68.55(1)-(4). The respondent also complied with rule 68.57 by filing an affidavit of testamentary script. Mr Golding's complaint that the hearing of the matter should have proceeded by way of witness statements instead of affidavits is therefore wholly unmeritorious.

[29] Mr Golding also relied on rule 53.11(1) of the CPR in support of his contention that the appropriate forum was open court. Rule 53.11(1) reads:

"The general rule is that the application must be heard in open court."

[30] Part 53 of the CPR however concerns proceedings relating to the committal and confiscation of assets and is clearly inapplicable to the case at bar.

Ground 2

> That refusing the appellant leave to amend her defence and file a witness statement was unduly harsh and did not accord with the overriding objective of the Civil Procedure Rules and represented a windfall to the respondent.

[31] The amendment was sought to aver that the deceased was unable to write. The appellant also sought to adduce evidence to that effect. Was the learned judge's refusal to allow the amendment a correct exercise of his discretion?

[32] The appellant sought to amend her defence to plead that which was entirely contradictory to her defence. In her defence, at paragraphs 14, 25 and 30, the appellant averred:

> "That MARTHA'S true last will and testament was made at her home in Pondside District on November 30, 1987 in the presence of the Defendant, Sarodo Lindo and Egular Charles Watson and thereafter given to Sarodo Lindo for safekeeping…
>
> The "**1987 will**" contains **Martha's** known and legitimate signature and the Defendant denies that it is a forgery and would put the Claimant to proof thereof.
>
> The Defendant denies that the signature of SARODO LINDO, which appears on the 1987 will, is a forgery and would put the Claimant to strict proof thereof."

[33] The determining question is whether, in all the circumstances which were presented to the learned judge, it was "just and proportionate" to have exercised his discretion by refusing the amendment.

[34] Indeed the dictum of Waller LJ in **Worldwide Corporation Ltd v GPT Ltd** [1998] 1 All ER 667 is pertinent although the amendment sought in that matter was after trial. He said:

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.
>
> We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it."

In **Charlesworth v Relay Roads Ltd and others** [2000] 1 WLR 230 Neuberger J (as he then was) at page 235 made the following observation:

> "As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point, other than a hopeless one, will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly

> where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted."

[35] That view could be said to derive support from the observations of Millett LJ in **Gale v Superdrug Stores Plc** [1996] 1 WLR 1089, 1098-1099:

> "The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of the litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice."

[36] In **Clarapede & Co v Commercial Union Association** (1883) 32 WR 262, 263, Brett MR said:

> "However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs…
>
> I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognize the exigencies of the modern civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity. On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain on

> litigation, legitimate expectation, the efficient conduct of the case in question and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds."

[37] The paramount consideration which indubitably is to be deduced from a reading of the cases is that the amendment will be allowed if it is necessary in the interests of justice. In seeking to arrive at the answer, a balancing act is necessary. In so doing, the overriding objective of the court is preeminent. A material consideration is the appellant's dilatory conduct of the matter which constitutes, in my view, disregard for the rules of the court.

[38] It is important to scrutinize the behavior of the appellant in her conduct of this matter. At the case management hearing before Hibbert J, on 15 March 2006, the appellant's defence was not filed. The defence was filed the following day. Both parties were ordered to attend for cross-examination on 20 March 2007 but neither attended. Nor was any affidavit filed as was required. The respondent remedied her breach by filing her substantive affidavit on 15 July 2008. Although the appellant's attorney-at law was informed of the oversight, the appellant still did not file any affidavit. There were a number of adjournments before the matter commenced on 29 July 2008. Not all were attributable to the appellant. She was however ordered to pay costs on one occasion.

[39] Mr Carl Major was appointed as handwriting expert. He was jointly instructed by the parties on 13 November 2006. They were permitted to submit questions to him in relation to his report in which he found the will propounded by the appellant to be a

forgery. The appellant chose not to. The expert's decision was based on a comparison of the signature on the impugned will, with the signature which appeared on her marriage certificate. It is noteworthy that the appellant had raised no objection to the marriage certificate being submitted. In fact, it was produced by her. The appellant's conduct, in my view, constitutes unreasonable delay. Nevertheless is there a meritorious case?

[40] Of significance, it was at the adjourned hearing that it was first suggested to the witnesses that the deceased was unable to write. The appellant tendered into evidence a voter's identification card which bore a picture of the deceased on which the deceased purportedly marked her X. Although the voter's identification card was shown to the respondent before the hearing, it was not disclosed in accordance with the rules.

[41] The appellant attempted to tender into evidence another document purporting to be her birth certificate on which there was an X allegedly made by the deceased. The respondent's attorney-at-law objected to the documents being accepted as evidence for the reasons stated hereunder:

(1) The appellant's failure to comply with Hibbert J's orders for disclosure. At the case management conference which was held before him, the appellant was ordered to specifically disclose all documents which bore the deceased's handwriting.

(2) Disclosure of the voter's identification was not in compliance with the CPR. By virtue of rule 28.14(1), documents which were not disclosed must be excluded from the proceedings. The voter's identification card was not disclosed in accordance with the rule.

(3) The second document was neither disclosed nor was it shown to the respondent before the hearing.

[42] The objections were overruled. The appellant was, however, forbidden from cross-examining or adducing evidence which countered her defence. It was at that juncture that the appellant's attorney applied to amend her defence. The matter was adjourned for the application to be made in writing. The matter was adjourned to 7 November 2008.

[43] The matter was further adjourned without a hearing on 7 November and 11 December 2008 at the instance of the appellant. Upon the close of the respondent's case, on 30 January 2009, the appellant requested yet another adjournment on the ground that she was possessed of a document which proved that the deceased was unable to read or write. The respondent's attorney applied to strike out the appellant's defence.

[44] Is the instant case an appropriate one for the exercise of the court's discretion to allow the amendment? Our attention was drawn to the case of the English Court of Appeal **Justio Binks v Securicor Omega Express Ltd** [2003] EWCA Civ 993, by Mr

Leiba. In that case, the claimant was allowed to amend his claim to include an alternate claim which had arisen on the defendant's case.

[45] The claimant, Mr Binks, was an employee of the defendant. His job included the unloading of parcels from a van unto a loading deck to which a conveyor belt was attached. Upon the completion of the task, it was the supervisor's duty to instruct the driver when it was safe to move the vehicle. Unfortunately, the supervisor signaled the driver to move and Mr Binks fell injuring his hand, shoulder and back.

[46] His evidence at trial was that having completed unloading, he was in the process of removing the conveyor belt from the van when the van suddenly moved and propelled him towards the door. In an effort to avoid the door, he fell onto the ground with his legs remaining on the van. Mr Binks' case was that he was not on the conveyor belt.

[47] The defendant's case however, was that he had mounted the conveyor belt in order to exit the van although it was prohibited. The van moved. He thought the door would descend and he panicked and fell off the belt.

[48] One of the defendant's witnesses, a Mr Tovey, the section manager, testified that he obtained from Mr Binks an account of the accident shortly after which he wrote up in the accident book in which he had stated that he was on the conveyor belt when the vehicle moved. It startled him and he fell from the conveyor belt and sustained the

injuries. Mr Binks' case, however, was that the report was not a true account of what he had given.

[49] The judge indicated strongly that he preferred the evidence of the witness for the defendant. That finding would have been fatal to the case as was pleaded. At the conclusion of the evidence, his attorney submitted that he ought to be allowed to advance an alternative claim that Mr Binks was actually seated on the conveyor belt when the supervisor, without ensuring it was safe to do so, signaled the driver to move the van.

[50] There was sufficient evidence from Mr Tovey, the report which he attributed to Mr Binks and a video recording, which provided the evidential basis to support the alternative case. In refusing the application the judge considered that there was no application to amend the pleadings which placed him standing at the rear of the van when it moved suddenly causing him to fall. The judge also noted the fact that pleadings bear statement of truth. He opined that the claimant could not sign a statement of case which would "advance wholly conflicting versions of his complaint against the Defendant".

[51] The statement of truth argument did not sit well with the Court of Appeal. Maurice Kay J pointed out that rule 22.1(2) of the English CPR permitted the courts to "dispense with verification by a statement of truth when a statement of case is amended". He noted that the rule did not specify the circumstances in which the court should dispense with verification as aforesaid, but held that an amendment "to plead in

the alternative a case derived from an opponent's documents, pleadings or evidence is capable of being such a case". At paragraph 8, he said:

> "In my judgment, it does not in all cases prevent a party from submitting or amending a pleading which includes an allegation which he is not putting forward as the truth, provided that there is an evidential basis for it. If it is in the form of an amendment, then, as I have said, it may be appropriate for the court to permit it without requiring a statement of truth."

[52] Maurice Kay J, however, further opined that in advancing an alternative case based on material which the opponent put forward, a "suitably drafted" statement of truth could be appended to make it plain that his primary case is:

> "… not an assertion of the truth of his opponent's account, if the court find that to be the truth, he will seek to rely upon it as an alternative basis for liability."

He continued at paragraphs 9 and 10:

> "Although I accept that the purpose of Part 22 is to deter or discourage claimants from advancing a case which is inherently untrue or wholly speculative (a purpose which will never be wholly achieved), I do not accept that its purpose extends to the possibility of relieving of liability a defendant whose own evidence may establish a cause of action against him. That would not be consistent with the overriding objective of dealing with a case justly (CPR 1.1(1)).
>
> All this leads me to the conclusion that the judge in the present case misdirected himself on the statement of truth point. He deserves …"

[53] Carnwath LJ, in agreeing with Maurice Kay J at paragraph 18, opined thus:

> "I agree that one purpose of CPR Part 22 is to deter or discourage claimants from advancing a case which is inherently untrue or wholly speculative. However, I see nothing in that Part, or in Lord Woolf's report, to indicate an intention to exclude altogether the possibility of pleading factual alternatives, particularly where as here the alternative is raised by the defendant's own case. So long as the pleading makes clear that the alternative is disputed on the facts, there is nothing untruthful or dishonest in the claimant advancing the contention, that, if it is upheld, the defendant is nonetheless liable."

[54] The facts of **Binks'** case are distinguishable from the instant case. In **Binks'** case, Mr Binks was not seeking to amend to advance as true that he was in the conveyor belt at the time of the accident. He sought to rely on the defendant's case that he was, and which was supported by evidence. In the instant case, however, the appellant sought to amend her pleadings to advance a case entirely repugnant to her pleaded case.

[55] Further, unlike the English Civil Procedure Rules which give the judge the discretion to dispense with the requirement of verification by certificate of truth, rule 20.5(2) of the CPR mandates the filing of a certificate of truth in cases of amendments. Rule 20.5(2) reads:

> "(2) An amended statement of case must include a certificate of truth in accordance with rule 3.12."

[56] Although the appellant asserted that it was her attorney who erred in advancing the pleaded defence, she affixed her signature certifying its truth. The phrase 'certificate of truth' needs no explanation. The appellant's proposed defence lacks

probity having certified the veracity of the contents of her defence that she was present and witnessed the deceased sign the will. To allow her to amend her defence and file a statement of truth swearing the opposite would be to allow her to advance a case which would render her pleaded claim a lie. To do so would certainly be the antithesis of the overriding objective of the court which is to deal justly with matters. Dealing justly includes ensuring that matters are dealt with fairly.

Ought the judge to have allowed the appellant to file witness statements?

[57] The appellant's failure to file her affidavit is contumacious. Mr Leiba's assertion (in his written submission) that his reminder to the appellant's attorney that no substantive affidavit was filed was ignored has not been challenged. It was Mr Golding's submission that he pointed out to the judge that the trial ought not to have proceeded on affidavits. As already noted, there was no appeal from any of the judge's orders requiring the filing of affidavits.

[58] The appellant has flagrantly disregarded the orders. This she did at her own peril. Furthermore, in light of the appellant's aforementioned dilatory conduct of the matter, to allow her to amend her defence and file witness statements certainly would be repugnant to the overriding objective of the court which requires the court to allocate an appropriate share of the court's resources to each case. Additionally, it seems to me that the appellant would be confronted by a well nigh insurmountable task of convincing a judge that her documents which she intends to belatedly tender in

order to challenge the respondent's will are not forgeries in light of her impugned veracity.

[59] As Panton JA (as he then was) observed in **Paulette Bailey and another v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** SCCA No 103/2004 delivered 25 May 2005:

> "… For many years, litigants with no chance of success frustrated the system, preventing the timely disposition of matters by employing every possible delaying tactic. In the process, the Courts gained the reputation in some quarters of being supportive of dilatoriness. The 2002 Rules are aimed at changing that perspective, and providing litigants with speedy justice. The Courts cannot now, without very good reasons, countenance disobedience of these Rules, and say simply that the panacea is "cost". Those days are gone."

At page 17 he expressed:

> "There is a further consideration which is of supreme importance in today's world. It has to do with the length of time that Courts take to bring issues to finality. In order that the Court may maintain its place as the rightful decider of issues, it needs to do so in a timely fashion, giving due consideration to difficulties that parties may encounter along the way in the preparation and presentation of their cases, but not countenancing shifts in positions and strategies that have the apparent intention of prolonging proceedings, and frustrating those who wish to have their legitimate rights recognized and enforced."

How should the court dispose of this matter?

[60] Axiomatically this matter should be dismissed, but how? The respondent, in her counter claim, asserted that the judge ought to have:

(a) granted summary judgment on the basis of the expert's report;

(b) struck out the defence because of the appellant's dilatory conduct which constituted an abuse of the process of the court;

(c) struck out the defence on the basis of the appellant's intentional and or reckless failure to comply with the order of the court; or

(d) the respondent was entitled to judgment on the evidence.

[61] It is evident that the matter could have been disposed of on any of the grounds propounded by the respondent. It seems to me that the learned judge disposed of the matter on ground (d) of the respondent's counter notice. There was ample evidence before the learned judge to accept the validity of the 1985 will propounded by the respondent and I will add, to reject as a forgery the 1987 will propouned by the appellant. Mr Leiba relied on Lord Woolf CJ's dictum in the English Court of Appeal case of **Peet v Mid-Kent Healthcare NHS Trust** [2001] EWCA Civ 1703. At paragraph 28 he said:

> "…If there is no reason which justifies more evidence than that from a single expert on any particular topic, then again in the normal way the report prepared by the single expert should be the evidence in the case on the issues covered by that expert's report. In the normal way, therefore, there should be no need for that report to be amplified or tested by cross-examination. If it needs amplification, or if it should be subject to cross-examination, the court has a discretion to allow that to happen. The court may permit that to happen either prior to the hearing or at the hearing. But the assumption should be that the single joint expert's report is the evidence. Any amplification or any cross-examination should be restricted as far as possible. Equally, where parties agree that there should be a single joint expert, and

> a single joint expert produces a report, it is possible for the court still to permit a party to instruct his or her own expert and for that expert to be called at the hearing. However, there must be good reason for that course to be adopted. Normally, where the issue is of the sort that is covered by non-medical evidence, as in this case, the court should be slow to allow a second expert to be instructed."

[62] In the instant case the parties agreed on the expert. The appellant did not put any question to the expert. Even to the untrained eye, the 1987 will was a forgery. The entire document was written in the same handwriting. The attesting witnesses' signatures and that of the testator were identical. The signature on the 1985 will resembled that on the marriage certificate which she submitted. The learned judge as the arbiter of fact was entitled to examine the wills and arrive at his findings.

[63] Mr Leiba submitted that the appeal is misconceived. Pusey J did not strike out the appellant's defence as alleged by her. The matter was not only argued before him, he considered their written submissions and ruled in favour of the respondent. The judge exercised the inherent power of the court to give judgment having arrived at a decision on the preliminary issue. It was his submission that there was ample evidence before the learned judge which entitled him to make his decision. The issue which the learned judge was required to determine was whether the appellant had substantiated her pleadings and disclosed a reasonable ground for defending the claim.

[64] The parties were instructed by the learned judge to file additional affidavits but declined to do so. The appellant also failed to comply with the learned judge's order for specific disclosure (which failure was prejudicial to the respondent) and failed to make

her application to amend her defence in writing. Mr Leiba submitted that the learned judge was, in the circumstances, also empowered by rule 26.3 of the CPR to strike out the appellant's defence.

[65] I am somewhat flummoxed by the respondent's criticism of the learned judge's order in light of his attorney's submissions which sanctioned the judge's orders. From the material before the court, the judge was justified to rule as he did. Of course, it would have been better if we had the benefit of his reasons in writing. Be that as it may, I find that there is absolutely no merit in this appeal. Accordingly, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

DUKHARAN JA

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.