

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2009/0020

BETWEEN

CALVIN TODMAN
(as Executor of the Estate of Edward Todman, deceased)

Claimant

-and-

MARGUERITE HODGE

Defendant

Appearances:

Mr. Robert Nader of Forbes Hare for the Claimant

Ms. Akilah Anderson of Farara Kerins for the Defendant

2011: July 06, 14

2011: December 29

JUDGMENT

Wills Act – section 7 - Revocation of will – Will not properly witnessed – No case submission – Whether claim made out on the balance of probabilities – Witness did not testify at trial –Hearsay evidence - No reason for absence – CPR 33 – Whether deposition of witness examination before the Registrar admissible without 21 days notice – Whether claimant a credible witness

Section 7 of the Wills Act, Cap 81 of the Laws of the Virgin Islands provides that: "No will shall be valid unless ...it shall be signed... by the testator ... in the presence of two, or more, witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator"

The claimant brought an action seeking to have his uncle's will declared invalid for failure to comply with section 7. His case was that he had a conversation with one of the witnesses to the will. This witness told him that she was not in the room with the testator when she signed the will. The witness was subpoenaed twice before she appeared before the Registrar for an oral examination. In the oral examination, the witness said that the testator was only known to her in passing and he was not in the house at the time she signed the will. A transcript of the oral examination formed

part of the trial bundle. The witness did not provide a witness statement at the trial. Nor did she come to testify. No reason was given for her absence.

At the eleventh hour, the defendant raised a preliminary point, that the claimant had no standing to bring the claim. At the close of the claimant's case, the defendant elected to call no witnesses and made a submission that there was no case to answer.

Held:

1. The claimant has standing to bring the claim. The effect of section 5(3) of the Intestates Estates Act is that the children of any brother or sister of the intestate who predeceased him would take their parent's share: **Galloway v Galloway** [1949] NZLR 24 followed. The preliminary issue is misconceived and ought to be dismissed with costs.
2. In a civil trial, where the defendant has elected not to call any evidence upon making an application of no case to answer, the test by which the no case application falls to be considered is whether or not the claimant has established his or her case by the evidence called on the balance of probabilities: **Miller (t/a Waterloo Plant) v Cawley** [2002] All ER (D) 452, [2002] EWCA Civ 1100 followed.
3. This Court will not give much weight to the deposition because: (i) there was no attempt to give the deposition the status of sworn evidence in this trial. No notice of its inclusion pursuant to CPR 33.14 was given, nor was any attempt made to read it into evidence during the trial pursuant to section 162 of the Evidence Act.. The claimant was not cross-examined on its contents. In effect, it is nothing more than hearsay; (ii) The principal witness for the claimant was an unwilling witness and had to be subpoenaed twice for examination before the Registrar; (iii) Her evidence was not merely corroborative or important; it was fundamental – indeed, the basis of the claim; (iv) the claimant's failure to give notice of his intention to rely on this deposition deprived this Court of the opportunity to summon the principal witness so that the Court could assess her demeanour under cross-examination in order to form its own determination as to whether or not she was a credible witness; and (v) no explanation was proffered for her absence on the day of trial.
4. The claimant's evidence as to the contents of the conversation between the principal witness and himself are inadmissible hearsay since she did not testify at this trial.
5. The claimant has no sufficient evidence and fails to establish his claim on the balance of probabilities. Accordingly the claim is dismissed.

JUDGMENT

Introduction

- [1] By Re-amended Claim Form dated 2 November 2009, the claimant, Calvin Todman ("Mr. Todman") brought this action in which he sought to have the Last Will and Testament of

his uncle, Wellington Todman (“the deceased”) declared invalid, the Grant of Probate dated 22 July 2005 revoked, a declaration that the deceased died intestate and that the deceased’s estate be distributed in accordance with sections 4(1)(e) and 5 of the Intestates Estates Act (“the Act”).¹

- [2] The factual basis of this claim is derived from a conversation that Mr. Todman had in 2008 with Norma John, one of the attesting witnesses to the deceased’s will. During that conversation Ms. John revealed that the said Will was not properly witnessed to in accordance with the provisions of the Wills Act.²

Background Facts

- [3] This claim is the latest in a protracted line of litigation concerning the deceased’s estate. Mr. Todman and his sister, Joyce Delemos are co-executors of the estate of their father, Edward Todman, also deceased. Edward Todman, who was the full brother of the deceased, predeceased him.
- [4] The deceased died on 20 May 2005 at the ripe old age of ninety leaving no children. The defendant, Marguerite Hodge (“Ms. Hodge”) is the niece of the deceased. In his Will purportedly executed on 5 March 2000, the deceased named Ms. Hodge the executrix and residuary beneficiary of his estate. The Will was attested to by two witnesses, Beulah Rawlings and Ms. John.
- [5] An application for the Grant of Probate of the Will was made on 3 June 2005. It was supported by an affidavit of Ms. Rawlings. The Order of Grant of Probate was sealed by the Registrar of the High Court on 22 July 2005 / 4 August 2005.
- [6] Mr. Todman commenced these proceedings on 19 January 2009. In his Claim Form which he prepared without the benefit of counsel, he alleged that Ms. Hodge fictitiously obtained the Grant of Probate and that the Will was falsely executed. His principal factual contentions are as follows:³

¹ Cap. 34 of the Laws of the Virgin Islands.

² Cap. 81 of the Laws of the Virgin Islands.

³ Trial Bundle at Tab 4: Statement of Claim filed 13 March 2009 at para. 5 – 8.

1. Ms. Rawlings, in the affidavit of attesting witness made in support of the application for the Grant of Probate, stated that she and Ms. John witnessed the signing of the Will by the deceased and that they were there when it was being signed.
2. Ms. John did not produce an affidavit of attesting witness in support of the application for the Grant of Probate.
3. In or around the middle of 2008, he [Mr. Todman], spoke to Ms. John who told him that (i) she did not witness the signing of the Will and she was not there when the deceased purportedly signed it; (ii) instead, she had been summoned to the home of Ms. Hodge's mother, Christine Hodge, and Ms. Hodge asked her to sign the Will and (iii) she understood that the Will had been prepared by Ms. Hodge's aunt, Magdalene Rhymer and not by the deceased.
4. He is not aware of the existence of any other Will of the deceased.

[7] Mr. Todman's principal legal contentions are:⁴

1. The Will was not properly witnessed and accordingly, it is invalid under section 7 of the Wills Act;
2. The Grant of Probate was made pursuant to an invalid Will and an Affidavit of Attesting Witness that contained false statements. Accordingly, the Grant of Probate is invalid;
3. In the absence of any other purported Will, the estate of the deceased is to be treated as an intestate estate and should be distributed in accordance with the terms of the Act. This would entail the distribution of property to the heirs of the deceased, Edward Todman.

⁴ Trial Bundle at Tab 4: Statement of Claim filed 13 March 2009 at para. 8.

[8] Ms. Hodge, initially filed a Defence and Witness Statements of her own, however, consideration of these fell away on the day of trial when Ms. Anderson, appearing as Counsel for Ms. Hodge, rested the Defence on two limbs. Her first submission was that Mr. Todman had no standing to bring the claim. Secondly, at the conclusion of Mr. Todman's case, she made a "no case to answer" submission alleging that Mr. Todman had failed to make out a case on the balance of probabilities.

Preliminary Issue – Locus standi of claimant

[9] Mr. Todman purports to bring this claim in his capacities as (a) an executor of the estate of his deceased father, Edward Todman and (b) as a prospective beneficiary of the estate of the deceased. He pleads that he is a prospective beneficiary of the intestate estate of the deceased because he is his nephew. In her Amended Defence, Ms. Hodge pleads that Mr. Todman's interest is shut out because the deceased has a wife who is still living and known to all parties (and is herself the beneficiary of gifts under the Will). Mr. Todman, in his Reply to Amended Defence, states that he is a prospective beneficiary and to the extent that any widow of the deceased has an interest in the deceased's estate, that interest is a life interest only.

[10] As a result of these pleadings, Ms. Anderson challenged Mr. Todman's standing to bring this claim. She submitted that by virtue of section 4(1) (e) of the Act, any right Mr. Todman has to bring this claim is derived from a right that would have accrued to his father, Edward Todman, as a full blood brother of the deceased. However, since Edward Todman predeceased the deceased, he was not "*living at the death of the intestate*" and was therefore not entitled to any part of his brother's estate.

[11] Furthermore, said Ms. Anderson, Mr. Todman had failed to establish in his pleadings several prerequisite points that are relevant to his right to bring this claim such as that the deceased (a) died without issue; (b) without leaving a living wife; and both his parents were dead at the time of his [the deceased] death.⁵

⁵ *Read v Brown* [1888] QB 128 per Lord Esher MR at 131, "What is the real meaning of the phrase "a cause of action..."...every fact which it would be necessary for the plaintiff to prove, if traversed, in order

[12] Learned Counsel for Mr. Todman, Mr. Nader submitted that Ms. Anderson's arguments are misconceived. He said that taking Ms. Hodge's case at its highest (assuming that the deceased has a wife still living which Mr. Todman does not admit), and assuming intestacy, the position in the succession scheme to real and personal estate, is as follows:

1. The deceased's wife will take his personal chattels absolutely and the residuary estate will be charged with the payment of 10% of the net value of the estate free of costs and death duties with interest from the date of death at 5% per annum: see s. 4(1)(a) of the Act. The remainder of the estate will be held on trust for the deceased's wife during her lifetime: see s.4(1)(a)(ii);
2. Subject to the life interest of the deceased's wife, the residuary estate will be held on the statutory trusts for the "*brothers and sisters of the whole blood of the intestate*": see s. 4(1)(e).

[13] In my opinion, this is a correct extrapolation of the law.

[14] Section 4(1) (e) is significant. It provides as follows:

"The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely – (e) if the intestate leaves no issue or parent, then, subject to the interest of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely –

first, on *the statutory trusts for the brothers and sisters* of the whole blood of the intestate...."

[15] If I understood Ms. Anderson correctly, her primary point on this issue was that though Edward Todman was the deceased's brother, he predeceased him so Mr. Todman, as Edward Todman's son, cannot step into his father's shoes because of section 4(1)(e). The section makes it plain that "the residuary estate is to be held on the "statutory trusts" for the brothers and sisters. The statutory trusts are defined in section 5(1)(a) of the Act as:

"Where under this Act the residuary estate of an intestate, or any part thereof is directed to be held on *the statutory trusts* for the issue of the intestate, the same shall be held on the following trusts, namely – in trust, in equal shares if more

to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

than one, for all or any of the children or child of the intestate, living at the death of the intestate ...**and for all or any of the issue living at the death of the intestate ... of any child of the intestate who predeceases the intestate...**"

[16] So it is clear that the children of any child of the intestate who predeceased the intestate would take their parent's share.

[17] Section 5(3) provides that:

"Where under this Act the residuary estate of an intestate, or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than the issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate ...**as if such trusts ... were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.**"

[18] The references in the succession scheme in section 4 are references to classes of persons -brothers and sisters- is one such class. The combined effect of these sections is that if any brother or sister of the intestate predeceased the intestate, the child(ren) of that brother or sister would take their parent's share. To my mind, this was exactly what the Supreme Court of New Zealand in **Galloway v Galloway**⁶ reasoned to be the effect of similar provisions in the New Zealand Administration Amendment Act 1944.

[19] Ms. Anderson made a heroic attempt to distinguish **Galloway**. She argued that: (i) the judgment does not emanate from a superior court and, consequently, is not binding on this court; (ii) it should not be used as persuasive authority because of its vintage; and (iii) a careful reading of the text of the New Zealand Act shows a number of differences to our Act which may make wholesale adoption of its interpretation unsafe. For example, (a) the NZ Act refers to the entire estate whereas our Act refers to the residuary estate only; and (b) the NZ Act does not differentiate between the rights of the whole and half-blood whereas our Act creates a hierarchy between these two.

[20] According to Ms. Anderson, whatever view the Court may take of the meaning or extent of these changes, there is no way to know what the New Zealand Parliament intended by

⁶ [1949] NZLR 24.

them. She also submitted that the two Acts do not mirror one another, and as such, their interpretation cannot be the same solely on the basis of a judgment by a court of similar standing.

[21] Unfortunately, none of these criticisms are material to the issue before the court. The wording of our Act by itself is plain enough to achieve the intended result.

[22] I therefore find that the preliminary point on standing is misconceived and ought to be dismissed with costs to Mr. Todman.

No Case to Answer

[23] At the close of Mr. Todman's case, the Defence elected not to adduce any evidence and made a submission of "no case to answer." Miss Anderson submitted that the status of the evidence before the Court is such that Mr. Todman has failed to make out his claim on the balance of probabilities.

[24] In a civil trial, where the defendant has elected not to call any evidence upon making an application of no case to answer, the test by which the no case application falls to be considered is whether or not the claimant has established his claim on the balance of probabilities: **Miller (t/a Waterloo Plant) v Cawley**.⁷

[25] Mr. Nader correctly pointed out that the proper approach to a "no case to answer" submission was explained by Brown LJ in **Benham Limited v Kythira Investments Ltd & another**⁸. Brown LJ said (at para. 30):

"...the only issue then is whether the claimant has established his claim on a balance of probabilities. But it must be recognized that he may do so by establishing no more than a weak *prima facie* case which has then been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can in other words tip the probability in the claimant's favour."

⁷ [2002] All ER (D) 452, [2002] EWCA Civ 1100 (at para. 18).

⁸ [2003] EWCA 1764, para. 30 – 33.

[26] Brown LJ continued [at para. 32]:

"Let me state my central conclusion as emphatically as I can. Rarely, if ever, should a judge trying a civil action without a jury entertain a submission of no case to answer. That clearly was this court's conclusion in *Alexander v Rayson* [1936] 1 KB 169, 178 and I see no reason to take a different view today, the CPR notwithstanding. Almost without exception the dangers and difficulties involved will outweigh any supposed advantages. Just conceivably, as Mance LJ suggested at the end of para 12 of his judgment in *Miller*, "some flaw of fact or law may...have emerged for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail, and it may save significant costs if a determination is made at that stage". Plainly, however, that was not the case here and hardly ever will it be so. Any temptation to entertain a submission should almost invariably be resisted."

[27] Mr. Nader further correctly submitted that the approach to drawing adverse inferences from a party's election not to call evidence was discussed by our Court of Appeal in **Elena Collongues v Andrew Lynch & Others**.⁹ In that case, Edwards JA said:

"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in action.

(2) if a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible evidence to be given, even if it is not wholly satisfactory, the potentially detrimental effect of his / her absence or silence may be reduced or nullified."

[28] Mr. Nader then argued that Mr. Todman's central contention in the pleadings and evidence is that the Will was not properly witnessed. He submitted that Ms. Hodge does not deny

⁹ BVIHCVAP 2007/001, Judgment dated 14 July 2008, para. 82. See also **Wisniewski v Central Manchester Healthy Authority** [1987] PIQR P324.

this in her pleadings and she has declined to offer any evidence on the point and indeed was tellingly evasive in the Witness Statement that was filed. He next submitted that Ms. John had given a deposition and had been cross-examined in proceedings by Ms. Hodge's legal practitioners. Ms. John's evidence was that: (a) she was not in the deceased's presence when she signed the Will as a "witness" and (b) there was no attempt to contradict that evidence. Accordingly, submitted Mr. Nader, the Court should draw a strong adverse inference from Ms. Hodge's refusal to give evidence and answer a direct question on the points identified above. Mr. Nader forcefully argued that there is sufficient evidence, even arising out of Ms. Hodge's pleadings, but particularly, arising out of the evidence given by Ms. John, to justify the submission of "no case to answer" to fail.

[29] Mr. Nader also submitted that the deposition transcript of Ms. John is one of the agreed documents for use at trial. This is not in dispute. The general rule is that any document that forms part of an agreed hearing bundle is admissible as to its contents. This is the case unless: (1) the court orders otherwise; or (2) a party gives written notice of objection to the admissibility of that document.¹⁰ As Ms. Hodge has not raised any objection to the admissibility of the deposition transcript, the transcript will be admissible in evidence. Having been admitted into evidence, the court will decide what weight if any, will be attached to it given the fact that Ms. John has not testified at this trial.

Court analysis

Calvin Todman

[30] Mr. Todman was the only witness to testify at this trial. He said that during or around the middle of 2008, he spoke to Ms. John about the Will which the deceased purportedly executed. Ms. John told him that she did not witness the signing of the Will and she was not in the presence of the deceased when he purportedly signed it. He further stated that Ms. John told him that she was first approached to sign the Will whilst she was in hospital but she declined. She was subsequently summoned to the home of Ms. Hodge's mother and Ms. Hodge asked her to sign the Will. He said that Ms. John told him that the deceased was not present when she signed the Will.

¹⁰ See UK CPR32.2.4 and 32PD 27 – both of which operate in the BVI pursuant to section 11 of the West Indies Associated States Supreme Court Act.

- [31] It appears that the thrust for bringing this action to challenge the validity of the Will emanated from the conversation that Mr. Todman purportedly had with Ms. John. However, the fact of the conversation, regardless of its contents, is not a fact upon which the Court could invalidate a will simply because the contents of the conversation are hearsay evidence. Ms. John has not come to this Court to testify and no reason was proffered for her absence. In fact, she had to be subpoenaed twice for examination before the Registrar. If the Court is to accept what Mr. Todman said, it seems to me that anyone could come to the Court and testify that someone told them something and obtain a remedy. This cannot be the law.
- [32] Back to Mr. Todman's evidence. This is a civil case wherein the standard of proof is based upon the balance of probabilities. Having had the opportunity of seeing and hearing Mr. Todman, I found him to be an unconvincing witness. Under intense cross-examination, he said that he brought this claim on behalf of himself and his brothers and sisters and [extended family] but then contradicted himself by saying that "no one" in the family agreed to him bringing the claim.
- [33] Next, in the face of the Amended Defence dated 19 April 2010 and the affidavit of Joyce Delemos and Amin Abdullah (both his siblings) filed on 2 April 2009 attaching three letters from his siblings dated 6 April 2006, 16 December 2007 and 18 February 2008, and addressed to Mr. Todman at a Post Office Box which he admitted was his, regarding his treatment of the matters between them, he alleged that (i) he did not know that the question of the living status of the deceased's wife, Lois Todman was an issue in these proceedings; (ii) he was clueless as to whether Lois Todman is alive or dead or where she could be found; and (iii) maintained that denial in the face of his eventual acceptance that he had seen the affidavit. Finally, Mr. Todman admitted having seen the affidavit but denied having seen the three letters annexed to that affidavit.
- [34] Furthermore, Mr. Todman claimed to have known the deceased "very well" and for a period of in excess of twenty years but he could not tell this Court anything about the existence of Lois Todman, the wife of the deceased and a beneficiary in the deceased's Will.

- [35] Next, Mr. Todman alleged that he had a conversation with Ms. John at the office and in the presence of Mrs. Samuel Lawrence although Mrs. Lawrence is not mentioned in his pleading, his examination-in-chief or by anyone at all in these proceedings prior to Mr. Todman being cross-examined. He has not called or summoned Mrs. Lawrence to testify on his behalf and I agree with Ms. Anderson that her inclusion was a recent fabrication.
- [36] Mr. Todman's case is based purely on an alleged conversation with Ms. John. This formed the basis of his claim to invalidate the Will and to revoke the Grant of Probate. Fundamentally, he relied on bald hearsay statements only, as he was not a witness to the events he claimed that Ms. John recounted to him. Furthermore, he accepted that Ms. Hodge was not present when the purported conversation took place between him and Ms. John. I agree with Ms. Anderson that this, without more, cannot form the basis of any claim particularly since Mr. Todman struck me as being an evasive witness who I cannot believe.

Norma John - examination before the Registrar

- [37] By Notice of Application dated 16 July 2010, Mr. Todman applied to the Court (i) for permission to issue a Witness Summons compelling Ms. John to attend Court to give evidence on a date prior to the date fixed for the trial of the matter; or (2) for further directions enabling Mr. Todman to issue a Witness Summons compelling Ms. John to attend the trial of this matter after the fixing of the trial date notwithstanding the terms of a previous Order.
- [38] The grounds of the application are many; one of them being that "*Mr. Todman has approached Ms. John to give evidence at the trial and she was not prepared to do so. Mr. Todman believed that Ms. John is reluctant to give evidence because she lives in an apartment owned by the defendant's mother.*"
- [39] On 28 July 2010, Olivetti J ordered that Ms. John appear for examination before the Registrar on a date to be fixed after 15 September 2010. This Order was made pursuant to CPR 33.7.

[40] After being subpoenaed twice, Ms. John finally appeared before the Registrar on 4 February 2011.¹¹ The record showed that Mr. Nader examined Ms. John and she was cross-examined by Ms. Anderson. The core of her examination was that: (i) when she signed the Will as a witness, the deceased was not present; (ii) she did not recall the circumstances by which she came to sign the Will; (iii) she was at Ms. Hodge's home when she signed it; and (iv) she and Ms. Hodge were the only persons present when she signed the Will. Upon cross examination, Ms. John said that (i) she knows Ms. Rawlings but could not recall if she [Ms. Rawlings] was there when she signed the Will; (ii) she could not recall whether the deceased's signature was already there when she signed the Will and (iii) she was dismissed from Ms. Hodge's employment for dishonesty. The record further revealed that the Registrar did not ask any questions. As I see it, the Registrar was merely performing the role of a note-taker; not an adjudicator. .

[41] The only factual evidence which is capable of invalidating this Will is what Ms. John said in examination before the Registrar: when she signed the Will as a witness, the deceased was not present. The Registrar who examined Ms. John asked no questions of Ms. John and made no findings, factual or otherwise. As I see it, the Registrar was merely a note-taker; not an adjudicator.

[42] The only persons who can give evidence of the primary facts alleged in this case are the persons who were present at the time of the execution of the Will. Only three persons signed the Will and are presumed to have been present; namely, the deceased and his two witnesses, Ms. Rawlings and Ms. John. The deceased has gone to the Great Beyond. That leaves the evidence of Ms. Rawlings and Ms. John, neither of whom were brought before this Court to testify. Nothing at all has been said about Ms. Rawlings. This Court does not know whether she is dead or alive. It is evident that Ms. John was an unwilling witness hence the application by Mr. Todman. What propelled the Court to make an order for examination before the Registrar and not before a judge who will hear the case is another matter particularly when the case turned on the credibility of this witness.

¹¹ See Tab. 10 - Transcript of Examination Proceedings dated 4 February 2011.

[43] Now, I have already found that Ms. John's examination before the Registrar is admissible. The next and more pertinent question is what weight, if any, is to be attached to her evidence. If I understood Mr. Nader correctly, he opined that Ms. John's examination is not only admissible but should be given substantial weight. In other words, the Court should accept it as credible evidence. I have great difficulty with this. Undoubtedly, the Court ought to give credence to such evidence but such an examination before another examiner cannot automatically assume the status of credible evidence. Indeed, section 55 of the Evidence Act, 2006¹² is useful. It provides as follows:

"(1) Subject to subsection (2), in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if

(a) the maker of the statement either

- (i) had personal knowledge of the matters dealt with by the statement; or
- (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be presumed to have had, personal knowledge of those matters; and

(b) the maker of the statement is called as a witness in the proceedings."

[44] Essentially, the section provides that documentary evidence in respect of a fact in issue is admissible as evidence of that fact only if the maker of the statement is called as a witness in the proceedings unless the court is satisfied that it is not possible¹³ or otherwise not necessary¹⁴ for the witness to be called. CPR 33.14(2) is also apposite. It provides that "a party intending to put in evidence a deposition at a hearing must serve notice of such intention on every other party at least 21 days before the day fixed for hearing."

¹² Act No. 15 of 2006 of the Laws of the Virgin Islands.

¹³ Section 55 (2) of the Evidence Act.

¹⁴ Ibid. Section 55 (3)

[45] Mr. Nader made no attempt to have the examination before the Registrar admitted into evidence; not even at the pre-trial review which was held on 1 March 2011 before Olivetti J. Ms. Hodge's failure to make an application to exclude the deposition transcript from the trial bundle is neither here nor there. Mr. Nader gave no notice of intending to put the deposition in evidence to trigger such an application. Also, the Court was deprived of the opportunity of deciding whether to require the deponent to attend as provided by CPR 33.14(3). Ms. John is a compellable witness within this jurisdiction. If she had come to this Court to testify, there would have been no real point in an application to exclude the deposition but Ms. Hodge is entitled to take the claim as she finds it. At the close of Mr. Todman's case, Ms. John had not testified and the examination before the Registrar was not read into evidence. It is merely a document in the trial bundle without a maker to authenticate it and no reference was made by the only witness who did give evidence at the trial.

[46] That said, I return to the real question: what weight, if any, should the Court attach to the examination conducted by the Registrar. Mr. Nader submitted that "given its nature and content, that document ought to be afforded substantial weight".¹⁵ On the basis of that evidence, Mr. Nader suggested that Mr. Todman has established no more than a weak 'prima facie case' sufficient to establish his claim and the Court should draw adverse inferences from Ms. Hodge's silence as to the location of the parties during the signing of the Will. To my mind, the submission is untenable for a number of reasons.

[47] Firstly, Ms. John did not appear before me. I am therefore handicapped in assessing the veracity of her statements. Further, I am unable to form any judgment as to whether she is a credible witness or not.

[48] Second, Ms. John was an unwilling witness. She had to be subpoenaed twice for examination before the Registrar. She did not give a witness statement in this trial. No reason was proffered at this trial as to her availability or non-availability. Such a crucial witness ought to have been present at this trial.

¹⁵ Claimant's Supplemental Closing Submissions, at para. 9.

- [49] In my opinion and given the reluctance of Ms. John to testify, I cannot attach much weight to her examination before the Registrar. In any event, her examination appeared shaky and unreliable. For example, Ms. John could not recall if Ms. Rawlings was present in the room when she signed the Will neither could she recall if the deceased's signature was already on the Will when she signed it.
- [50] I simply cannot revoke a Will on the basis of hearsay evidence, the evidence of an unwilling witness whose absence has not otherwise been explained and questionable evidence.
- [51] Nothing more need be said, but for completeness, I refer to the case of **Sebastian Borges v The Fitness to Practice Committee of the Medical Council and the Medical Council**.¹⁶ The Supreme Court of Ireland upheld the High Court's decision to quash the proceedings of the Fitness to Practice Committee of the Irish Medical Council. The Committee was conducting an inquiry into whether the applicant's name should be removed from the register as a medical practitioner in Ireland, following his removal as a registered medical practitioner in the UK.
- [52] The only complainants were the two women whose evidence had been the basis for the UK Medical Council's decision. It was initially expected that the complainants in the UK proceedings would have been called in the Irish proceedings. However, upon enquiry, Counsel for the Irish Medical Council was informed that the witnesses were not prepared to attend the hearings in Ireland. The Council had no power to compel their attendance. Counsel then sought to put into evidence the transcript of the UK hearing together with the decision of the UK Medical Council and the Privy Council judgment dismissing the applicant's appeal against that decision.
- [53] The Irish Medical Council argued that this evidence should be admissible within an exception to the hearsay rule on the basis that the statements made met the tests of "necessity" and "reliability" having been made in proceedings which provided an opportunity for cross-examination and **the findings based on those proceedings**

¹⁶ [2004] 2 ILRM 81, [2004] 1 IR 103, [2004] IESC 9

[emphasis added] were upheld by none other than the Privy Council itself. In addition, they referred to statutory provisions¹⁷ which recognized that justice sometimes required exceptions to the hearsay rule and relied on a litany of Canadian decisions where such out of court statements were admitted although the maker was unavailable.

[54] Both the High Court and Supreme Court of Ireland held that the interest of justice did not justify an exception in this case. The only evidence of misconduct was based on the evidence of these two women. The court agreed it would amount to a breach of the applicant's constitutional right to fundamental fairness of procedure to deny "the safeguard of material evidence being given orally and tested by cross-examination" in circumstances where the only reason the hearing was being conducted in that form was because the witnesses were unwilling to travel to Ireland, or give their evidence by way of video link or attend a hearing of the Committee in the UK.

[55] Keane CJ noted at page 21 of the Judgment:

"In considering whether the approach which found favour with the House of Lords and the Court of Appeal in those cases should be adopted in this jurisdiction, one must bear in mind the reasons which have led courts in this jurisdiction to hold that, in some cases at least, the right of a person to have the evidence against him given orally and tested by cross-examination before the tribunal in question may be of such importance in a particular case that to deprive the person concerned of that right would amount to a breach of the basic fairness of procedure to which he is entitled by virtue of Article 40.1 of the Constitution. It is not simply because the tribunal is in greater danger of arriving at an unfair conclusion, absent the safeguard of material evidence being given orally and tested by cross-examination. Such a departure from the normal rules of evidence might well be justifiable, as I have already noted, in the case of a tribunal of this nature. It is because, depending on the nature of the evidence, its admission in that form may offend against fundamental concepts of fairness, which are not simply rooted in the law of evidence, either in its statutory or common law vesture. As Henchy J. put it in Kiely -v- Minister for Social Welfare,

"Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice."

¹⁷ Similar provisions exist in BVI: see for example CPR 33.14 and Evidence Act 2006, s. 55(2), and s. 162

[56] Keane CJ concluded at page 28 of the Judgment:

“It would seem that, in all the Canadian cases, the witnesses concerned could not be called to give evidence, because they were either dead or incompetent to give evidence. In the present case, in contrast, the Council seek to adduce the hearsay evidence because the complainants are unwilling to give evidence at the inquiry and cannot be compelled so to do. It is, accordingly, unnecessary to reach any conclusion in this case as to whether the approach adopted in the Canadian authorities should be followed in this jurisdiction. It is sufficient to say that **the applicant cannot be deprived of his right to fair procedures, which necessitate the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person** [emphasis added].

The desire of the Council to proceed with an inquiry based on the records of the proceedings in the United Kingdom is perfectly understandable, having regard to the important statutory function entrusted to them of investigating any allegations of professional misconduct against doctors registered in this jurisdiction which come to their attention. However, that consideration cannot relieve the High Court or this court of the obligation of ensuring that the right of the doctor concerned to a fair hearing is, so far as practicable, upheld.”

[57] Likewise, the only relevant evidence in this matter is the evidence of Ms. John. This Court cannot grant Mr. Todman relief on the basis of hearsay evidence by a witness who is merely unwilling to testify in person and whose examination before the Registrar is questionable.

[58] In the circumstances, the submission of “no case to answer” is upheld since Mr. Todman has failed to establish his claim on the balance of probabilities.

Estoppel

[59] Ms. Hodge in her pleadings raised an issue of estoppel.¹⁸ I agree with Mr. Nader’s that in light of Ms. Hodge’s election not to testify, she has failed to demonstrate the existence of any estoppel.

Conclusion

[60] In the premises, I will dismiss the claim with prescribed costs discounting the costs that Ms. Hodge will have to pay to Mr. Todman on the preliminary issue point. If costs are not

¹⁸ See para. 5 of the Amended Defence filed 20.04.2010 at Tab 7 of the Trial Bundle.

agreed, then the parties are to file and exchange written submissions no later than 15 January 2012. I will further order that the Registrar fix this matter before the Master as soon as is reasonably practicable after consultation with both Counsel.

[61] Lastly, I am immeasurably grateful to both Mr. Nader and Ms. Anderson for their well-presented and passionate submissions, oral as well as written.

Indra Hariprashad-Charles
High Court Judge