EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

HCVAP 2012/002

BETWEEN:

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

Appellant

and

MARGUERITE HODGE

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise E. Blenman — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Robert Nader of Forbes Hare for the Appellant
Ms. Tamara Cameron of Farara Kerins for the Respondent

2012: October 2, 4.

Civil appeal – Probate – Contested will – No case submission test in a civil case – Claimant to establish his claim on a balance of probabilities – Prima facie case – Whether trial judge ought to have drawn adverse inferences from the respondent's election to remain silent

Mr. Wellington Todman, the deceased, is the uncle of both the appellant, Mr. Calvin Todman ("Mr. Todman"), and the respondent, Ms. Marguerite Hodge ("Ms. Hodge"). He died leaving behind no issue. He purportedly made a Will ("the Will") naming his niece, Ms. Hodge, as the Executrix and the residuary beneficiary of his estate. The Will was attested by two witnesses, Ms. Norma John ("Ms. John"), a former employee of Ms. Hodge's mother and Ms. Beulah Rawlings ("Ms. Rawlings"). Upon his death and after an application by Ms. Hodge for probate of the Will which application was supported by an affidavit of due execution sworn by Ms. Rawlings, the Registrar of the High Court duly issued and sealed an Order of a Grant of Probate.

Mr. Todman brought a claim for an order that this Grant of Probate be revoked and the estate of the deceased be treated as an intestate estate. He founded his claim on a conversation he had with Ms. John. He alleged that Ms. John told him that she had not been present when the deceased executed the Will; neither had Mr. Wellington Todman been present when she witnessed the Will. She was summoned to the home of Ms. Hodge's mother where she was asked by Ms. Hodge to sign the Will. She understood that the Will was prepared by Ms. Hodge's aunt and not by the deceased.

Ms. John was an unwilling witness who had to be subpoenaed twice before she appeared before the Registrar for an oral examination. Ms. John essentially repeated her allegations before the Registrar. A transcript of this oral examination formed a part of the trial bundle by agreement. At the trial, Ms. John was absent and no reason was proffered for her absence. At the close of Mr. Todman's case Ms Hodge made a no case submission. The trial judge upheld the no case submission holding that Mr. Todman had failed to establish his claim on a balance of probabilities. Mr. Todman appealed that decision.

Held: allowing the appeal and ordering that (1) the Grant of Probate of the deceased's Will to the respondent is revoked; (2) the Will of the deceased is declared invalid; (3) the deceased is found to have died intestate; (4) the deceased's estate is to be distributed in accordance with sections 4(1)(e) and 5 of the Intestates Estate Act; (5) the appellant to be awarded prescribed costs in the court below and two-thirds of those costs on the appeal in accordance with rule 65.13 of the Civil Procedure Rules 2000, that:

1. The test by which a no case submission falls to be considered is whether or not the claimant has established his claim on the balance of probabilities. 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 tip the probability in the claimant's favour.

   Miller (t/a Waterloo Plant) v Cawley 2002] All ER (D) 452 applied; Benham Limited v Kythira Investments Ltd & Another 2003] EWCA Civ 1764 applied.

2. 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. 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. There must have been some evidence, however weak, adduced by the claimant, before the court is entitled to draw the desired inference. Ms. Hodge, when put to her election, chose not to call any witnesses and remained silent. The evidence given by Ms. John was that Ms. Hodge was present when she witnessed the Will. This piece of evidence was never challenged, neither by counsel for Ms. Hodge during Ms. John's cross-examination nor in Ms. Hodge's witness statement. Ms. Hodge was a witness who might be expected to have material

evidence to give on the issue in action. Therefore, her failure to give any evidence and to rely instead on a no-case submission deserved the drawing by the judge of an adverse inference. This adverse inference strengthened the case of Mr. Todman to the status of a very strong *prima facie* case.

Elena Collongues v Andrew Lynch et al Territory of the Virgin Islands High Court Civil Appeal No. 1 of 2007 (delivered 14th July 2008, unreported) followed.

ORAL JUDGMENT

[1] MITCHELL JA [AG.]: This is a judgment of the Court. Mr. Calvin Todman ("Mr. Todman") brought a claim in the High Court for an order that a Grant of Probate in respect of the purported Will of his uncle, Mr. Wellington Todman, deceased, ("the Will") would be revoked. He also sought a decree pronouncing against the validity of the Will, and consequential declaratory relief to the effect that Mr. Wellington Todman had died intestate, and that his estate was to be treated as an intestate estate to be distributed in accordance with the Intestates Estates Act.[1] Mr. Todman is one of the Executors of the Will of his late father, Edward Todman, who pre-deceased his brother, the late Mr. Wellington Todman. Mr. Wellington Todman died leaving no issue. In his Will he named his niece, Marguerite Hodge ("Ms. Hodge"), the Executrix of his Will and his residuary beneficiary. His Will was attested by two witnesses, Ms. Beulah Rawlings ("Ms. Rawlings") and Ms. Norma John ("Ms. John"). After his death, Ms. Hodge applied for probate of his Will supported by an affidavit of due execution sworn by Ms. Rawlings. The Order of Grant of Probate was duly issued and sealed by the Registrar of the High Court.

[2] The background to the dispute, as revealed in the facts found by the learned trial judge in her judgment, is as follows. Mr. Todman contended that one of the two witnesses to the Will, Ms. John, had not been present when the Will was executed by Mr. Wellington Todman. He learned this from a conversation with Ms. John, who told him that when she signed the Will, Mr. Wellington Todman was not in the

[1] Cap. 34, Revised Laws of the Virgin Islands, sections 4(1)(e) and 5.

room. Instead, she had been summoned to the home of Ms. Hodge's mother, Ms. Christine Hodge, where Ms. Hodge had asked her to sign the Will. She also told him that she understood that the Will had been prepared by Ms. Hodge's aunt, Magdalene Rhymer, and not by the deceased.

[3] As a result of this conversation, Mr. Todman brought the suit. The basis of Mr. Todman's claim was that the Will was invalid for the purposes of section 7 of the Wills Act[2] because it had not been properly witnessed. There was no other known will, and he sought an order that the estate should be treated as an intestate estate. By the Intestates Estates Act the residuary estate is to be held by the administrator on various statutory trusts.

[4] Ms. John turned out to be a reluctant witness. Mr. Todman, therefore, obtained an order from the court that Ms. John be subpoenaed to appear before the Registrar for an oral examination.[3] She had to be subpoenaed twice before she appeared. In her oral examination, Ms. John said that the late Mr. Wellington Todman was only known to her in passing, and he was not in the house at the time she signed the Will. She did not recall the circumstances by which she came to sign the Will. She and Ms. Hodge were the only persons present when she signed the Will. Under cross-examination by counsel for Ms. Hodge, Ms. John claimed that she knew Ms. Rawlings, the other witness to the Will, but could not recall if she was present when she signed the Will. Also, she could not recall whether the deceased's signature was already there when she signed. She also admitted that she had previously been dismissed from Ms. Hodge's employment for dishonesty.

[5] A transcript of this oral examination formed a part of the trial bundle by agreement. There was no objection to it being admitted in evidence. When the actual trial commenced, Ms. John did not appear to testify, nor was any reason given for her absence. Mr. Todman was the only witness to testify at the trial. His statement of

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[2] Cap. 81, Revised Laws of the Virgin Islands.

[3] Pursuant to rule 33.7 in the Civil Procedure Rules 2000.

what Ms. John had told him was clearly hearsay, and the judge was right to find that it was not evidence of the truth of its contents. The judge found him to be an unconvincing witness, principally on the basis of certain contradictory statements he made in his evidence. For example, she found that he contradicted himself as to whether or not he had the consent of his brothers and sisters in bringing the claim. He also contradicted himself over the existence of the living status of the late Mr. Wellington Todman's wife, Lois Todman, who was mentioned as a beneficiary in the Will. She found him an evasive witness whom she could not believe.

[6] At the close of the case for Mr. Todman, the defendant Ms. Hodge elected to produce no evidence and her counsel made a "no case to answer" submission. The judge dismissed Mr. Todman's claim on the basis that he had failed to establish his claim on a balance of probabilities. That determination is the subject of this appeal.

[7] In upholding the no case submission of Ms. Hodge's counsel, the learned trial judge relied on dicta from **Miller (t/a Waterloo Plant) v Cawley**,[4] and **Benham Limited v Kythira Investments Ltd & Another**.[5] These explain that in a civil trial when a defendant has elected not to adduce any evidence, and makes a no case submission, the test by which the no case submission falls to be considered is whether or not the claimant has established his claim on the balance of probabilities. It must be recognised 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 tip the probability in the claimant's favour.

[8] The correct approach to drawing adverse inferences from a party's election not to call evidence was discussed by our Court of Appeal in the case of **Elena**

[4] [2002] All ER (D) 452, [2002] EWCA Civ 1100.
[5] [2003] EWCA Civ 1764.

Collongues v Andrew Lynch et al.[6] There, the Court explained that 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. 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. 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. If the reason for the witness' 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.

[9] The rule is that an assessment of the weight to be afforded to evidence ought to be made in the light of the general principles of "common sense", as Lord Blackburn put it in the case of Lord Advocate v Balantyre.[7] So, the weight of the aggregate of many pieces of evidence taken together is often much greater than the sum of the weight of each such piece of evidence taken separately. The rule in Watt or Thomas v Thomas[8] also is that an appellant who seeks to challenge the trial judge's findings of fact has an uphill task. The trial judge will have had the opportunity to see and hear the witnesses and therefore the Court of Appeal will be slow to interfere with the findings of fact. The assessment of evidence and the acceptance or rejection of any part of the evidence are normally matters for the trial judge. The trial judge has usually been in a position to assess the evidence, and unless there is a mistake of law or a misrepresentation of the facts, the Court

[6] Territory of the Virgin Islands High Court Civil Appeal No. 1 of 2007 (delivered 14th July 2008, unreported) per Edwards JA.
[7] The Lord Advocate et al v Lord Blantyre and Another (1879) 4 App Cas 770 at 792.
[8] [1947] AC 484.

of Appeal will normally not disturb her findings. This Court has frequently ruled that it will not substitute its conclusion for that of the trial judge simply because it would have formed a different view of the evidence.[9] The situation is somewhat altered when we are dealing with a ruling on a no case submission when all the evidence is not yet in and when a question of the proper inferences to be drawn arises. Where the Court of Appeal is satisfied that the trial judge has misdirected herself and drawn erroneous inferences from facts, then the appellate court is in as good a position to evaluate the evidence and determine what inferences should be drawn from the proved facts. The burden on the appellant remains a very heavy one, and the Court of Appeal will only interfere if it finds that the trial judge was clearly wrong.

[10] As Brown LJ explained in the Benham Limited case, and which explanation we happily accept, rarely if ever should a judge trying a civil action without a jury entertain a submission of no case to answer. Almost without exception the dangers and difficulties involved will outweigh any supposed advantages. It may be that some flaw of law or fact may have emerged in the case for the claimant for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail. It may then save significant costs if a determination is made at that stage. Plainly, that will hardly ever be the case. Any temptation to entertain a submission should almost invariably be resisted.

[11] The learned trial judge explained at paragraph 43 of her judgment that she had great difficulty with counsel's submission that Ms. John's examination should be accepted as credible evidence. One of her difficulties with accepting that the evidence could be treated as credible was that it had been taken before an

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[9] Elena Collongues v Andrew Lynch et al Territory of the Virgin Islands High Court Civil Appeal No. 1 of 2007 (delivered 14th July 2008, unreported); Grenada Electricity Services Limited v Isaac Peters Grenada High Court Civil Appeal No. 10 of 2002 (delivered 28th January 2003, unreported); Golfview Development Limited v St. Kitts Development Corporation et al St. Christopher and Nevis High Court Civil Appeal No. 24 of 2003 (delivered 31st March 2005, unreported); Chiverton Construction Limited et al v Scrub Island Development Group Limited Territory of the Virgin Islands High Court Civil Appeal No. 28 of 2009 (delivered 19th September 2011, unreported).

examiner other than the judge trying the case. She thought that section 55 of the Evidence Act,[10] which she cited in full, was useful guidance. We note, however, that section 55 applies not to a deposition taken pursuant to the Civil Procedure Rules 2000 ("CPR"), but to a statement of a person made in a document, i.e., to a typical hearsay statement contained in a document. Such a document is rendered admissible by the section only if the maker has personal knowledge of the matters dealt with in the statement, where the document forms part of a record made in the performance of a duty to record the information in question, and where the maker of the statement is called as a witness in the proceedings. This section has no application to the circumstances of this case.

[12] The learned trial judge was also concerned, apparently as a result of a last-minute submission made by counsel for Ms. Hodge, about the requirements of CPR 33.14(2).[11] CPR 33.14 deals with the use of depositions at a court hearing. She concluded that counsel for Mr. Todman had erred in making no attempt to have the examination before the Registrar admitted in evidence. She found that counsel for Mr. Todman had failed to give notice of his intention to put the deposition in evidence, which would have triggered an application by Ms. Hodge to exclude it.

[13] However, it is difficult to see how the learned trial judge came to such a conclusion. Ms. Hodge was aware of the taking of the deposition and had notice in good time that it was intended to be used at the trial. There is no special form of notice prescribed by the Rules, nor is such a notice required to be filed in court in the proceedings. Once a party knows that a deposition is being taken, whether

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[10] No. 15 of 2006, Laws of the Virgin Islands.

[11] CPR 33.14 – Use of deposition at hearing

33.14(1) A deposition ordered under rule 33.7 or 33.9 may be given in evidence at the trial unless the court orders otherwise.

(2) 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 the hearing.

(3) The court may require a deponent to attend the hearing and give oral evidence.

from an unwilling witness or any other person, with the leave of the court, for use at the trial, it is open to that party if she wishes, to apply for the witness to be summoned to attend at court and to give oral evidence. There is nothing more the other party who called for the witness' examination is required to do to trigger an application. In any event, to the extent that Ms. Hodge contended that she had insufficient notice, that matter ought to have been raised other than in supplemental submissions lodged after both parties had closed their cases. The appropriate way to have done it was by an application supported by evidence given on affidavit and heard either at case management or as a preliminary issue.

[14] Further, having made a no case to answer submission and closed her case, it was not open to Ms. Hodge to seek to later take procedural points to exclude the transcript. This was particularly so when the parties had agreed that the transcript was to be included in the trial bundle.[12] Nor was it right for the learned judge to conclude that the court had been deprived of the ability to make an order of its own motion to compel the attendance of Ms. John.[13] The rule says otherwise. In any event, normally this was a matter to be raised by one of the parties who would apply for the witness to be summoned to attend. The trial judge does not normally decide which persons should attend as witnesses.

[15] The learned trial judge was concerned that, at the close of Mr. Todman's case, neither had Ms. John testified nor had her examination before the Registrar been read into evidence. It was, she concluded, merely a document in the trial bundle without a maker to authenticate it and no reference was made to it by the only witness who did give evidence at the trial. It is difficult to see the relevance of these concerns. The transcript is not required by any rule to be read into evidence. At this stage of the trial, the judge is merely determining whether there is some evidence that *prima facie* establishes the claimant's case, so that the

[12] Hertsmere Primary Care Trust v The Estate of Balasubramanium Rabindra-Anandh [2005] EWHC 320 (Ch).
[13] See CPR 33.14(3) above.

defendant should be called upon to make her defence. At the end of the trial it will be for the judge to weigh all the evidence and to decide what weight the transcript bears against the other testimony to and for the case for the claimant.

[16] The learned trial judge determined that Ms. John's examination before the Registrar could not be given any weight. She did not accept that the court should draw adverse inferences from Ms. Hodge's silence as to the location of the parties during the signing of the Will. Her reasons are set out at paragraphs 47 to 49 of her judgment.

[17] The learned trial judge found as a fact[14] that the only persons who could give evidence of the primary facts alleged in this case were the persons who were present at the time of the execution of the Will. She found that these were the deceased and the two witnesses to his Will, Ms. John and Ms. Rawlings. She forgot that Ms. John, in her sworn deposition to the Registrar, testified that the defendant, Ms. Hodge, was present, indeed the only person present, when she signed the Will. This testimony was as yet uncontradicted. Ms. Hodge had relevant evidence on this issue to give. It would have been simple for Ms. Hodge to take the stand and either deny having been present when Ms. John signed the Will or deny her contention that Mr. Wellington Todman was not present at the time. Ms. Hodge's failure to do so, and to rely instead on a no case submission, in our view deserved the drawing by the judge of an adverse inference. The learned trial judge having failed to do so we do so, now and find that this strengthened the case of Mr. Todman to the status of a very strong *prima facie* case.

[18] The learned trial judge found that the failure of Ms. John to appear before her left her handicapped in assessing the veracity of her statements. She had been unable to form any judgment as to whether she was a credible witness or not. We have difficulty in understanding why the learned judge had difficulty with the credibility of the witness on this basis. The witness statement on the crucial

[14] At para. 42 of her judgment.

element in the case, whether the deceased had been present when she signed the Will at Ms. Hodge's mother's home, had not up to this point been denied by Ms. Hodge or by any other person. During Ms. John's cross-examination before the Registrar, Ms. Hodge's counsel had not suggested to her that she had either been lying or had been mistaken. Ms. Hodge's witness statement contained no suggestion that Ms. John was not telling the truth. There was, therefore, no reason for any doubt to arise, at least at this stage of the trial, as to Ms. John's credibility.

[19] Her second reason for not being able to draw any adverse inference or to afford the document any weight was that Ms. John had been an unwilling witness at the examination before the Registrar, and she had not given a witness statement or made herself available at the trial. Further, during her examination she had appeared shaky and unreliable in, for example, being unable to recall if the other witness, Ms. Rawlings, had been present in the room when she signed the Will or whether the deceased's signature was already on the Will when she signed it. In our view it is difficult to see why the learned trial judge failed even to consider whether she could draw an adverse inference from Ms. Hodge's failure to give evidence. The evidence was that Ms. John was an existing tenant of Ms. Hodge's mother. She was a former employee of Ms. Hodge. As a general principle, witnesses to wills are likely to be persons who know the beneficiaries of the will. They can be expected to be reluctant to give evidence that militates against the validity of those wills. Yet, her evidence that Mr. Wellington Todman was not present when she witnessed the Will was clear and uncontradicted by anyone. In our view she ought to have considered the matter, and drawn an adverse inference.

[20] The learned trial judge spent the last several pages of her judgment discussing the Irish case of Sebastian Borges v The Fitness to Practice Committee of the

Medical Council et al.[15] This case concerned the inadmissibility in Irish Medical Council proceedings of a transcript of the testimony of two witnesses taken at a hearing in England before the UK Medical Council, when the witnesses were not prepared to travel to Ireland. The Irish Medical Council sought to have the transcript admitted in its own proceedings on the basis of "necessity" and "reliability". But, both the Irish High Court and the Irish Supreme Court held that the interests of justice did not justify an exception to the hearsay rule. They agreed that 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 to give their evidence by way of video link, or to attend a hearing of the Committee in the UK. By comparison, in the instant case Ms. John had given her deposition in the same proceedings that are the subject of this appeal; she had given it for the purpose of its use in the trial; both parties had been present at the giving of the deposition, and, Ms. John had been cross-examined by counsel for Ms. Hodge. There was nothing hearsay about this transcript. In any event, the learned trial judge had already specifically pronounced on the admissibility of the transcript, so the issue of hearsay did not arise afresh.

[21] It seems to us quite wrong, therefore, for the learned trial judge to have concluded as she did at paragraph 57 of her judgment that she could not grant Mr. Todman relief on the basis of hearsay evidence by a witness who was merely unwilling to testify in person and whose examination before the Registrar was questionable. She erred in upholding the no case to answer submission on the basis that Mr. Todman had failed to establish his claim on the balance of probabilities. We are satisfied that the transcript of the uncontested sworn testimony of Ms. John given in the circumstances that have previously been described was more than the weak

[15] [2004] 2 ILRM 81; [2004] 1 IR 103; [2004] IESC 9.

prima-facie case that was required. The learned judge was wrong not to have drawn the appropriate adverse inference from Ms. Hodge's refusal to give evidence and found that that refusal strengthened the case brought by Mr. Todman and required Ms. Hodge to give her defence.

[22] It is therefore ordered as follows and for the reasons set out above that:

(a) The Grant of Probate dated 22nd July 2005 of the Will to Marguerite Dian Hodge is revoked;

(b) The Will of the late Mr. Wellington Todman dated 5th March 2000 is declared invalid;

(c) The late Mr. Wellington Todman is found to have died intestate;

(d) The estate of the late Mr. Wellington Todman is to be distributed in accordance with sections 4(1)(e) and 5 of the Intestates Estates Act;

(e) Mr. Calvin Todman is entitled to his costs in the court below on the prescribed costs basis established by the learned trial judge and to two-thirds of those costs on the appeal in accordance with CPR 65.13.