THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2009/0370

BETWEEN:

THEODORA JEAN

Claimant

and

VALENTINE MONTOUTE

Defendant

Consolidated with SLUHCV2009/0605

BETWEEN:

VALENTINE MONTOUTE
VICTORIA SION AKA VICTOIRE SIMON
GEORGINA ANTHONY
STEPHANIE MONTOUTE-CALDERON
VIRGINIA MELIUS AKA VIRGINIA MICHAUD
JOSEPH MONTOUTE
FRANCES POLIUS
ANNE HUSBANDS
IDA PAUL

Claimants

and

THEODORA JEAN

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence
High Court Judge

On written submissions:

Mr. Dexter Theodore, QC of Counsel for the Claimants/Defendant, Valentine Montoute and others

Mrs. Andra Gokool-Foster of Counsel for the Defendant/Claimant, Theodora Jean

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2017: May 18.

DECISION ON APPLICATION

Background

[1] In 2009, two claims were filed, one by Valentine Montoute and eight of his siblings against Theodora Jean, their sister, seeking a declaration to set aside a will (undue influence claim) and the other by Theodora Jean against Valentine Montoute (caveat claim). These two claims were consolidated by Order dated 23rd June 2010. Pleadings in the undue influence claim closed on 5th March 2010.

[2] An application was filed by Theodora Jean on 25th September 2009 to strike out the claim. The file does not record what happened to this application. Subsequently, on 21st September 2010, case management directions were given for the trial of the matter in the consolidated claims.

[3] Trial was set for 11th and 12th May 2011. The trial dates of 11th and 12th May 2011 were vacated and new trial dates of 28th and 29th March 2012 were set on 10th May 2011. It would appear that this trial date was also vacated and on 26th April 2012, the court vacated the trial date of 26th April 2012 and re-scheduled the trial for 27th March 2013. I am uncertain as to what happened in the interim but on 6th February 2015, Theodora Jean filed an application to strike out and dismiss the claim and for judgment without trial. This application is what gave rise to the decision which is now the subject of the instant application.

[4] On 12th February 2014, the trial date of 12th February 2014 was vacated and new trial dates of 11th and 12th May 2015 were set. On 11th February 2015, the trial dates of 11th and 12th February 2015 were vacated and directions were given with respect to the application to strike out. New trial dates were set for 6th and 7th April 2016.

[5] On 12th January 2016, the court gave directions for the filing of submissions in relation to the application to strike filed by Theodora Jean on 6th February 2015 which had not yet been heard and the hearing was scheduled for 12th July 2016. On 12th July 2016, the hearing of the application to strike was then scheduled for 28th February 2017 by Belle J.

[6] This matter first came before me on 24th January 2017 and having reviewed the file and recognizing that this matter was now before the court for eight (8) years and in an effort to sort out the documents which had been filed and what was outstanding, I ordered that each party file a chronological list of all documents filed in the matter so that case management could be undertaken if necessary, after the application to strike had been disposed of. I also confirmed what was pending on the file.

[7] On 10th March 2017, having considered the application of 6th February 2015 and the submissions filed by both parties, I gave an oral ruling in the matter and refused the application to strike out the claim and directed that the claim proceed to case management on 30th March 2017.

[8] On 10th March 2017, Mr. Deale Lee holding papers for Mrs. Andra Gokool-Foster and Mr. Dexter Theodore, QC were present. The hearing on 30th March 2017 was re-scheduled to 13th April 2017.

[9] On 4th April 2017, the applicant, Theodora Jean filed an application for the following orders:

1. That I recuse myself from further hearing and determining these proceedings
2. That the issue of whether a single judge can overturn a decision of the Court of Appeal which has not been overruled by the Privy Council; and
3. That the issue of whether articles 1142 of the **Civil Code** and 174 of the **Code of Civil Procedure** are the only sources of jurisdiction for the granting of an Order setting aside a Notarial will, be hereby forthwith sent to the Court of Appeal by way of Case Stated.

[10] At the hearing on 13th April 2017, I made mention that the application of 4th April 2017 had come to my attention and gave directions for the respondent to file a response and the applicant to file a reply to same if necessary, and adjourned the hearing to 11th May 2017. At that hearing as well, counsel Mrs. Foster for the applicant, Theodora Jean indicated that she had been told by Mr. Lee that the Court had indicated that it would provide a written decision. I indicated that I had not and confirmed with counsel, Mr. Theodore, QC that no such indication had been given. I also indicated to counsel that I had received no written request for a written decision to which she responded that she had asked the Court clerk. I am not aware of any such request being made and as indicated to counsel, the Court stood ready to provide same if requested. Counsel indicated that she did not mind having a copy and this was made available to the Court clerk for distribution to both counsel on the afternoon after the court session ended.

Application for recusal

[11] This decision solely deals with the application for an order that I recuse myself from further hearing and determination of the matter. I do not think that it is prudent to comment on or discuss any of the other grounds raised which essentially challenge the decision which I gave, as it would be tantamount to me sitting in review of my decision.

[12] The grounds for this part of the application as set out in the application are as follows:

> That by refusing the application to strike out, "the Court had first to determine the fundamental issue of whether the claim is an abuse of process in that it seeks to obtain relief which is permissible only under Article 1142 of the **Civil Code** and 174 of the **Code of Civil Procedure**."[1]

The applicant states in the application that:

> "the decision to strike out involved a detailed scrutiny and analysis of the allegations and pleadings on the charges of undue influence. The Court first had to evaluate the potency and reliability of the assertions and allegations of Undue Influence as made against the Applicant, THE[O]DORA JEAN. The Court also had to measure whether the Notaries could have contributed in any way or would have tacitly acquiesced in and condoned the undue influence. Additionally, the Court had to make a positive finding that the Notaries were not in any way involved and are in no way culpable in the allegations of undue influence. As such, where the Court of Appeal has ruled on the manner in which these actions are to be commenced and the parties to it, this decision cannot but convey to the fair minded and well informed observer having considered the facts, that the issue of force and strength of the allegations of undue influence has already weighed heavily on the mind of the Honourable Judge."[2]

[13] The applicant went on at paragraph 9 to state:

> "That consequently, the fair minded and informed observer, having regard to the facts and circumstances of the ruling in this matter would inevitably conclude that there is a real possibility that, in light of the Order to strike out and the contents of the claim form and statement of claim inclusive of the pleadings and particularization of undue influence, the Court can no longer deliberate and consider the issues with an objective and disabused mind. There is therefore a real danger that the Court is already disposed to the conclusion that a notarial will can be set aside purely on the basis of undue influence."

[14] At paragraph 7 the applicant states:

> "That the substantive issue of authenticity which is inextricably bound up to the joinder of the Notaries has therefore already been decided by the decision to strike out the notice of application. It means that there is ample evidence that the fair minded observer sitting on the Gros Islet bus,

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[1] Paragraph 2 of the grounds as stated in the application filed on 4th April 2017.

[2] Paragraph 8 of the grounds of the application.

> dispassionate and objective would come to the conclusion that there is a real danger that the Court has made up its mind on the substantive issue."

[15] The application before me was an application to strike out a claim as an abuse of process on the ground that it ought to have been brought by way of improbation proceedings and not by claim form. In fact, one of applicant's grounds was that the claim was brought by ordinary claim form and not by fixed date claim form. The analysis which I undertook did not and could not have included a detailed assessment of the evidence in the matter as this is not what is required on an application to strike out for abuse of process. This is clearly borne out by paragraph 8 of the decision where I state as follows:

> "Having reviewed the authorities cited, I am of the view that improbation cannot be the appropriate action in this case as the claimants' case is not that the will is false or has been forged but that although validly executed was done under undue influence and so does not reflect the true intentions of their father. In essence, he was coerced or forced by Theodora to execute the will leaving everything to her. **Of course, these are matters which the court will have to determine at trial."** (My emphasis.)

[16] This is a clear indication that I considered that the claimants still had to prove the case which they had brought and that this could only have been done at the trial. In fact, the case of **Citco Global Custody NV v Y2K Finance Inc.**[3] discusses what is the correct approach on a strike out application and it is clear that there is to be no weighing of evidence as the court merely assumes that everything as presented in the statement of claim is true.

[17] The applicant has alleged bias not on the basis of anything that I have done in the conduct of the hearing of this application or in dealing with the matter generally, but based on the fact that the decision that I gave is incorrect. There are no allegations of what findings of fact I made which suggest that I have pre-judged the claim. Mr. Dexter Theodore, QC states in his skeleton argument in reply filed

[3] BVIHCVAP2008/0022.

on 25th April 2017 that there is also no allegation or evidence of any partiality or prejudice or interest in the outcome of the case on my part and I must agree.

The appropriate test for bias

[18] The locus classicus for the test to be applied in cases of allegations of bias is that enunciated in **Porter v Magill**[4]. In that case, Lord Hope said the test was

> "whether the fair-minded and informed observer, having considered the facts, would consider that there is a real possibility that the tribunal was biased."

This general principle is in no doubt and in **Porter v Magill**, the House of Lords endorsed the approach taken by Lord Phillips MR in **In Re Medicaments and Related Classes of Goods (No. 2)**:[5]

> "[85] … The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

The informed and fair-minded observer

[19] In the case of **Kimyani v Sandhu**[6], the master had to deal with a litigant alleging judicial bias. The case emphasized that the test is one of the fair minded and informed observer and not that of the litigant in question.

[20] In **Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz**,[7] the Court of Appeal said:

> "[69] … We would however, emphasize two important points. First, the opinion of the notional informed and fair-minded observer is not to be confused with the opinion of the litigant. The "real possibility" test is an objective test. It ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias … [T]he litigant is not the fair-minded observer. He lacks objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a

[4] [2002] 2 AC 357.
[5] [2001] ICR 564.
[6] [2017] EWHC 151 (Ch).
[7] [7] [2016] EWCA Civ 556..

> stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded.
> […]
> [72] Secondly, the informed and fair-minded observer is to be treated as knowing all the relevant circumstances, and it is not for the court to make an assessment of these … It was held in Virdi v Law Society [2010] EWCA Civ 100 that the hypothetical fair-minded observer is to be treated as if in possession of all the relevant facts and not only those that are publicly available …"

[21] In **Dobbs v Triodos Bank NV**,[8] Chadwick LJ said:

> "But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had not been criticised – whether that criticism was justified or not."

[22] In the case of **Locabail (UK) Ltd. v Bayfield Properties Ltd.**[9] the Court of Appeal referred to the case of **Clenae Ply. Ltd. & Others v Australia and New Zealand Banking Group Ltd** in which Callaway JA observed that:

> "As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application."

Application

Actual bias

[23] It is quite unreal for a judge to have to decide whether he or she is actually biased. I place on record that I do not consider that I am in any way biased towards the defendant or to any party in this claim for that matter.

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[8] [2005] EWCA 468 at paragraph 7.
[9] [2000] QB 451 at paragraph 24.

Apparent bias

[24] The defendant's application is premised on the ground of apparent bias so the question is whether the fair-minded and informed observer who is not the litigant would consider that by striking out the claim and making the determination that the claim could properly be brought in the manner that it has means that I would not be impartial in the hearing of the substantive claim. The applicant states that the fair-mined observer would inevitably conclude that there is a real possibility in light of the order to strike out and the contents of the claim form and statement of claim … the Court would no longer deliberate and consider the issues with an objective and disabused mind. She says that there is a real danger that the Court is already disposed to the conclusion that the Notarial Will can be set aside purely on the basis of undue influence.

[25] I cannot agree that a fair-minded and informed observer would think that I would not objectively assess this claim when it finally makes it way to a trial date. The applicant's submissions of apparent bias are based on counsel's assessment that I have erred in the decision which I made regarding the application to strike out. The applicant has not detailed what in my order on the strike out application suggests that I would no longer be able to deliberate and consider the issues objectively and with a disabused mind.

[26] I cannot see that an informed and fair-minded observer would think (even if it were to turn out that I erred in my assessment of the law in the area of the way in which a notarial will can be set aside) that my absence of knowledge or error means that there is real possibility of bias on my part. If that were the case, then a judge who was overruled on an interlocutory application by the Court of Appeal could never adjudicate in the trial of the substantive claim. That would be an incredulous proposition. Indeed, this is not supported by case law in our own jurisdiction where there have been many an appeal allowed on interlocutory applications where the matters were then remitted to the High Court to be dealt with by the same judge.

[27] This application has attempted to review my decision without taking the relevant steps to appeal the decision and as indicated above, I will refrain from embarking on any discussion of those grounds which in my mind are more appropriate in an appeal.

[28] In reply submissions filed on 8th May 2017, counsel for the applicant states as follows:

> "That the fair minded and informed observer will be aware that this Notice of Application was made before Justice Bell[e] and was adjourned sine die on the representations of Mr. Dexter Theodore Counsel for the Respondent. Mr. Dexter Theodore informed the Court that the identical issue which formed the core of the application was before the Privy Council in the appeal of DESIR."

This information was not made known to the Court even at the point when I had asked what was outstanding on the file. Also, it is clear from the record and the orders on the file that the application was not adjourned sine die but had on 12th July 2016, been adjourned to 28th February 2017 for hearing. I am being apprised of this for the first time in the reply submissions and so I am not sure that the fair minded and informed observer would be privy to this information.

[29] Counsel introduced at paragraphs 1.11-1.12 of the reply submissions the following:

> "1.11-That the fair minded and informed observer will also be aware of the damning and criminal nature of the highly prejudicial allegations made against the applicant using firearms and ammunition to coerce others into obedience to her whims and fancies. That the fair minded and informed observer will undoubtedly conclude that having regards to the rejection of the Notice of Application the High Court will not be able to be free and act without prejudice.
> 1.12 That the fair minded and informed observer would conclude that there is a real possibility that in light of the decision making process which invariably involved a study and evaluation of the pleadings as in particular the adverse and detrimental allegations which are made against the applicant, that the High Court "would not approach the trial with an open mind or, put another way, that he would not conduct an impartial inquiry, at any rate so far as the conduct of the appellant is concerned."

[30] I cannot see how a fair minded and informed observer would ever think that because a judge rules against a party it means that he or she cannot be objective. If this were the case then many a case would have to be heard by another judge because in every application there will be a losing party who may very well claim that a judge cannot be objective since they ruled against them. It is also the case that even though counsel is correct that the entire record must be looked at, in this case there were no findings of fact made. The adverse matters to which Mrs. Foster refers are matters on the pleadings and in evidence of witnesses which must be proved at trial. The fact that a statement is made in the claimants' statement of claim about such matters is not a 'fait a compli'. The allegations must still be proven.

[31] Paragraph 1.13 of the reply submissions appears to contain grounds which are akin to appeal grounds and so I will not comment save to say that I have explained the sequence of events which led to the issuance of the written decision. The Court delivers oral judgments every day and it is well-known that if counsel wishes to have written reasons that they make a formal request and same will be considered. There is always the option of applying for the transcript of the oral delivery but that comes at a cost. I make no further comment in this regard. The Court does not give written decisions following every oral decision as that would not be practical.

[32] In all the circumstances of this case, I must conclude that there is no substance in the applicant's contentions that I would be biased and would not be able to objectively decide this claim moving forward. Apart from the criticisms of the decision and the statement of the grounds for same, there is nothing which suggests that I have done anything which would cause a fair minded and informed observer to think that I would not be impartial or deal with the case objectively. If the applicant is of the opinion that I am wrong in my assessment of the strike out application, then it was certainly open to the applicant to appeal the decision.

Conclusion

[33] For the foregoing reasons, the application that I recuse myself from further hearing and determining these proceedings is refused.

Kimberly Cenac-Phulgence
High Court Judge

By The Court

Registrar