EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2003/0004

BETWEEN:

YASMIN BROWNE
(by Mother and Next Friend, Maureen Browne)

1st Claimant/Respondent

TISHIMA BROWNE
(by Mother and Next Friend, Maureen Browne)

2nd Claimant/Respondent

AND

EMILY AGATHA GOVIA

1st Defendant/Applicant

MICHAEL GOVIA

2nd Defendant/Applicant

Appearances:-

Ms. Kimloy Walker for the Applicants/defendants.
Mr. John Cato for the Respondents/claimants.

2017: November 6th

JUDGMENT

[1] **WARD, J**.: This is an application to strike out the claimants' Statement of Claim for want of prosecution. The matter has a long history which requires the salient factual background and procedural chronology to be set out.

[2] On 20th October, 1998, Keith Govia died intestate. The deceased was the son and full blood brother of the applicants/defendants.

[3] The applicants/defendants applied for a Grant of Letters of Administration for the use and benefit of the respondents who were then acknowledged to be the children of the deceased and who at the time were minors.

[4] On 3rd March, 1999 a Grant of Letters of Administration was issued to the applicants/defendants as co-administrators of the deceased's estate limited until one of the respondents/claimants attained the age of eighteen years.

[5] On 6th July, 1999 the respondents'/claimants' Next Friend issued a Praecipe for Citation calling for the said Grant to be called in, revoked and declared null and void.

[6] On 21st September, 1999 the Registrar issued the Citation which commanded the applicants/defendants to deposit the said Letters of Administration in the Registry "*in order that the said MAUREEN BROWNE, the mother of the two minor children and the intended guardian may proceed in due course of law for the revocation of the same*."

[7] In January 2003, Maureen Browne, applied to the court to be appointed Next Friend of the respondents/claimants for the purpose of issuing a claim in probate proceedings for the revocation of the said grant and for her appointment as Administratrix of the estate.

[8] On 28th February, 2003 the respondents/claimants commenced proceedings by Fixed Date Claim Form. In the accompanying Statement of Claim the respondents/claimants averred that the Grant to the applicants/defendants had been obtained by administrative error or fraud upon the court. It claimed that without the knowledge and consent of the respondents/claimants or their mother, who was their guardian, the 1st applicant/1st defendant swore that she was their grandmother and falsely swore that she was their Guardian when all along they were residing at Stapleton Village with their mother, Maureen Browne. It further stated that despite swearing to administer the estate for the benefit of the

claimants, upon obtaining the said Grant, the 1st applicant/1st defendant declared that the deceased was not the father of the claimants and had made an *ex parte* application to the Director of Public Prosecutions for him to issue an order for the exhumation of the body of the deceased in order to obtain tissue samples for DNA testing to determine paternity of the children.

[9] On 14th April, 2003 the respondents/claimants sought further orders from the court to preserve and secure the assets of the estate, including a freezing order on monies held at the St. Kitts-Nevis-Anguilla National Bank, and to provide an account.

[10] It appears that by this time the 1stapplicant/1st defendant was no longer resident in the Federation. Accordingly, leave was granted by Justice Ian Donaldson QC for Notice of Proceedings to be served on her by publication in a local weekly newspaper.

[11] On 9th May, 2003 the 2nd applicant/2nd defendant applied to strike out the aforementioned Statement of Claim for failure to comply with Rules of Court. Justice Davidson K. Baptiste granted leave to the respondents/claimants to amend the Statement of Claim and the amended claim was filed on 26th May, 2003.

[12] A defence was filed on 25th June, 2003. The applicants/defendants averred that they had obtained the consent of the Next Friend of the respondents/claimants in order to apply for the Grant because of her periodic assertions that the deceased was the father of the children. They were therefore surprised when in December 1999 the claimants made an application to the High Court for a declaration that the deceased was the father of the children. This prompted them to conduct enquiries which included a search of Church records. This led to the subsequent discovery that the deceased's name did not appear on any of the children's baptismal certificates. Indeed the name Steadroy Tichera was listed as "parent" on the baptismal certificate of the 2nd respondent/claimant. Consequently, the applicants/defendants instructed their solicitor to apply to the DPP to exhume the body in order to determine the issue of paternity.

[13] The records are incomplete but it appears that between June 2003 and 2016 very little progress was made. However, notably, on 7th December, 2006, Belle, J. ordered that the proceedings be stayed until DNA testing was conducted to determine the paternity of the respondents/claimants. The respondents/claimants dispute this and say no such order exists. The court file contains an endorsement of a hearing on 7th December, 2006 before Belle, J. The note reflects that the claimants appeared in person while Mr. Joseph Quinlan held for Mr. Hesketh Benjamin for the defendants. The order as recorded is in the following terms:

> "Proceedings are stayed until a DNA test is done to determine paternity of Tishima Browne. Matter is taken off the Court list."

[14] There matters lay until May 2014 when the 1st applicant/1st defendant applied for a Grant of Letters of Administration.

[15] On 15th June, 2015, the 1st respondent/claimant applied to the Registrar for a Cessate Grant by reason of the fulfillment of the limitation contained in the previous Grant of Letters of Administration, namely, that the respondents had attained the age of eighteen.

[16] On 8th August 2016, the 1st applicant/1st defendant filed an application to strike out the Statement of Claim filed by the respondents/claimants for want of prosecution and for failure to comply with Civil Procedure Rules 2000 ("CPR") 23.11(4) or, alternatively, an order that the 1st applicant/1st defendant and the respondents/claimants be subjected to DNA testing at their own expense in order to settle the issue of paternity; for a declaration that the respondents/claimants are not entitled to apply for Letters of Administration; and for the 1st applicant/1st defendant to be granted leave to apply for Letters of Administration.

[17] On 11th November, 2016 the respondents/claimants filed an application to strike out the applicant's application to strike out as an abuse of process and sought an order for Directions to the Registrar to issue a Grant of Letters of Administration to Yasmin Browne as sole beneficiary, on the basis that Tishima Browne had filed a renunciation in the estate of the deceased and that Yasmin Browne having

attained the age of majority, Maureen Browne is no longer the Guardian and Next Friend.

Issues:

[18] The issues for resolution are:

(i) Whether the respondents/claimants' statement of claim should be struck out for want of prosecution and for failure to comply with CPR 23.11(4).

(ii) Whether the court should order that a paternity test be done to determine the paternity of the respondents/claimants;

(iii) Whether the 1st applicant/1st defendant is entitled to apply for a Grant of Letters of Administration;

(iv) Whether the 1st respondent/ 1st claimant is entitled to apply for a Cessate Grant.

[19] On the first issue, the applicant/defendants submit that the respondents/claimants are guilty of inordinate and inexcusable delay in proceeding with their claim which was instituted in 2003. They cite the fact that 14 years have passed since the respondents/claimants first instituted their claim and ascribe the inertia in legal proceedings to the deliberate intention of the respondents/defendants to frustrate the attempts of the applicants/defendants to their rightful entitlement to the estate of the deceased. The applicants/defendants assert that the delay is prejudicial to them because it has rendered them unable to completely administer and or wind up the affairs of the deceased's estate.

[20] The applicants/defendants further contend that the respondents/claimants have failed to provide any credible excuse for the delay and are wholly culpable for it through legal maneuverings designed to avoid a determination of the paternity issue. For example, it is averred that the respondents/claimants have prematurely discontinued several applications for a declaration of paternity in the Magistrates' and High Court and have failed to comply with a 2006 court order to submit to

DNA testing. The applicants/defendants invite the court to draw a negative inference from this failure to comply.

[21] The applicants/defendants submit in the alternative that the claim should be struck out because, in breach of CPR 23.11(4), the respondents/defendants have failed to adhere to the procedure to be followed where the appointment of a next friend ceases.

[22] In written submissions in reply, the respondents/claimants assert that since obtaining letters of administration the applicants/defendants have set about gathering in the estate of the deceased but have not distributed proceeds to the respondents/claimants or their next friend. This is what led the respondents/claimants to institute proceedings to displace the applicants/defendants and to call for an account. The respondents/claimants blame the applicants/defendants for the delay following the order of Justice Belle in 2006 for DNA testing. They say that it is the inaction on the part of the applicants/defendants since then that prompted them to renew their quest for justice in 2016.

[23] The respondents/claimants therefore beseech the court to put matters right by giving directions to "resolve the impasse" and to require the applicants/defendants to surrender the administration by paying into court all monies collected from the estate before they may be permitted to make any application or be heard by the court.

Discussion

Issue No.1: Whether the respondents/claimants' statement of claim should be struck out for want of prosecution and for failure to comply with CPR 23.11(4).

[1] The principles governing the court's power to strike out a claim are well settled. The power to strike out is one that must be used sparingly. The rationale for this cautious approach was explained by Mitchell, J.A. in ***Tawney Assets Limited v***

East Pine Management[1]:

> *"The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial."*

[24] I have set out the history of this matter in some detail in order that the full picture may be seen. On my analysis of the litigation journey, there are some key milestones.

[25] On 21st September 1999, the respondents/defendants prevailed when the Registrar issued the Citation which commanded the applicants/defendants to deposit the said Letters of Administration in the Registry *"in order that the said MAUREEN BROWNE, the mother of the two minor children and the intended guardian may proceed in due course of law for the revocation of the same*." With this order the applicants, faithfully complied. However, it was not until January 2003 that the respondents/defendants filed their action. No explanation has been proffered for this delay. Clearly, in light of the Citation, the applicants/defendants could take no further action in relation to the estate as the ball was then in the respondents'/defendants' court.

[26] Thereafter, matters moved along at a reasonable pace until June 2003 when a defence was filed. It appears further that matters progressed to the point where a trial date was set for 17th May 2006 but vacated by the court by Notice dated 20th April, 2006. The Notice indicated that the new trial date would likely be in July, 2006.

[27] The next event of significance, though some controversy occurred on 7th December, 2006 when Belle, J stayed the proceedings pending a DNA test to determine the paternity of the 2nd respondent/defendant. For accuracy, it should

[1] Civil Appeal No. 7 of 2012 (Unreported)

be stated that Belle J.'s order related only to the 2nd respondent/2nddefendant and not to both respondents as argued by the applicants.

[28] The 1st applicant/1st defendant has averred on affidavit that shortly after Belle J's order she attended Avalon Laboratory in Basseterre in order to comply with the order but states that the next friend did not produce the respondents for testing. The respondents/claimants have not addressed this matter in any affidavit filed in this matter.

[29] This was the prevailing state of affairs until the applicants/defendants filed their application to strike out the statement of claim in August 2016. It seems that it was this application that injected new life into the respondents/claimants who, three months later, then filed an application to strike out the applicants/defendants own application to strike.

[30] In looking at the issue of delay in the round, I have had regard to the length of the delay in this matter, which I reckon from 2006 when the order for DNA testing was made and the matter stayed; the failure of the respondents/claimants to offer any explanation for non-compliance with the court order to submit to DNA testing; the overall dilatory conduct of the respondents/claimants with regard to the litigation; and the prejudicial effect on the other litigants in this matter.

Failure to comply with court order

[31] The applicants/defendants also base their case on the respondents/claimants' failure to comply with the court's order for DNA testing. I accept the evidence of the applicants/defendants on this issue.

[32] The respondents/claimants have not addressed this issue relating to the failure to submit to DNA testing in any affidavit filed in this matter and there is no evidence that they have ever objected to submitting to DNA testing; yet they have not done so. The applicants/defendants invite the court to draw an adverse inference from this failure.

[33] In considering this invitation, I have in mind section 9 of the Status of Children Act CAP 12:14 which gives the court the discretion, at its own motion, to give directions requiring a paternity test to be carried out in any civil proceedings in which the paternity of a person falls to be determined. By section 11, where a court gives such a direction and any person fails to take any step required of him or her for the purpose of giving effect to the direction, the court may draw such inference, if any, from that fact as appears proper in the circumstances. I have also considered the authorities on this point cited by the applicants: **Re L**[2] and **Errol Daniel v Edith Gabriel**[3]**.**

[34] In the absence of objection to DNA testing and/or some satisfactory explanation from the respondents/defendants for failing to submit to DNA testing, and when coupled with the fact that no reason has been advanced to explain the presence of the name Steadroy Tichera on the baptismal certificate as father of the 2nd respondent/2nd claimant, the court feels adequately justified in drawing the inference that the failure to comply with the directions of the court to submit to DNA testing suggests that the respondents/claimants have no genuine conviction that they are the children of the deceased.

[35] In all the circumstances, the applicants'/defendants' application to dismiss the respondents'/claimants action for want of prosecution and for failure to comply with a court order is meritorious and dispositive of the matter.

[36] Accordingly, I make the following declarations and orders:

(i) Claim No. SKBHCV2003/0004 is struck out for want of prosecution and for failure to comply with a court order;

(ii) The 1st applicant/1st defendant is at liberty to apply for grant of Letters of Administration of the Estate of Keith Govia;

(iii) The respondents/claimants application to strike out the applicants/defendants application to strike out is dismissed;

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[2] [1968] All E.R. 2
[3] NEVHCV2014/0071

(iv) The respondents/claimants shall pay the applicants'/defendants' cost in this application in the sum of $1,500.00.

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar