

COMMONWEALTH OF THE BAHAMAS

2018

IN THE SUPREME COURT

PRO/cpr/00055

Common Law & Equity Division

IN THE MATTER OF THE GRANT OF PROBATE BY THE SUPREME COURT OF
THE COMMONWEALTH OF THE BAHAMAS IN THE ESTATE OF VIRGINIA
ETHYLYN FERGUSON A.K.A ETHYLYN VIRGINIA FERGUSON (DECEASED)
DATED THE 26TH DAY OF JUNE 2018

AND IN THE MATTER OF THE WILLS ACT, 2002

AND IN THE MATTER OF THE PROBATE AND ADMINISTRATION OF ESTATES
ACT, 2011

AND IN THE MATTER OF THE PROBATE AND ADMINISTRATION OF ESTATES
RULES 11

BETWEEN

SHERISE HAMILTON

First Plaintiff

AND

AMOS LUTHER FERGUSON

Second Plaintiff

AND

VISCOUNT FERGUSON

Third Plaintiff

AND

LANATHA D. WILLIAMS (a.k.a) DYNELL WILLIAMS

AND

KRISTA T SIMMONS (a.k.a) K. TENEILE SIMMONS

Defendants

(The purported Executrices and Trustees of the Estate of the late Virginia Ethylyn
Ferguson (a.k.a) Ethylyn Virginia Ferguson and in their personal capacity)

Before: The Honourable Madam Justice G. Diane Stewart

Appearances: Mr. Wellington Olander for the Plaintiff
Mrs. Lenise Flowers for the Defendant

Ruling Date: 14th September, 2022

RULING

1. By a writ of Summons filed on November 30th, 2018, the Plaintiff seeks
 - ix. An Order restraining the Defendants, their servants, agents or whosoever from disposing of the property of the late Virginia Ethylyn Ferguson a.k.a Ethylyn Virginia Ferguson who died on the 5th day of January, 2018
 - x. For an accounting of the assets of the Estate of the late Virginia Ethylyn Ferguson a.k.a Ethylyn Virginia Ferguson from this 5th day of January 2018 to present
 - xi. Order that the grant of probate issued by the Supreme Court be revoked
 - xii. For Declaration propounding the last Will and Testament dated 28th February, 2017 on the grounds that it was executed under suspicious circumstances and/or undue influence and/or is fraudulent
 - xiii. For further or other interim relief as this Honourable Court deems just
 - xiv. That the Defendants bear the costs of this application

2. By an ex-parte summons filed 24th October, 2018, (“**The Plaintiff’s Summons**”), the Plaintiff sought an injunction for the following:-
 - i. Restraining the Defendants, her servants, agents or whosoever from disposing of property of the late Virginia Ethylyn Ferguson a.k.a Ethylyn Virginia Ferguson who died on 5th January, 2018
 - ii. For an accounting of the assets of the Estate of the late Virginia Ethylyn Ferguson a.k.a Ethylyn Virginia Ferguson from this 5th day of January 2018 to present
 - iii. That the grant of probate issued by the Supreme Court be revoked
 - iv. For further or other interim relief as this Honourable Court deems just
 - v. That the Defendants bear the costs of this application

3. This summons was supported by the affidavit of Sherise Hamilton filed the 24th October, 2018.

4. The Court granted the Plaintiffs an Interim Ex- parte injunction against the Second Defendant on the 14th December, 2018 until the 19th December to enable the Plaintiffs to serve the First Defendant and pending the inter partes hearing of the application for the injunction.

5. This interim injunction was granted against the First Defendant on 19th December, 2018 until the determination of the inter partes hearing.

6. On 14th February, 2019, the parties agreed to vary the injunction to allow the Second Defendant to utilize the sum of \$50,863.48 to continue the business of Caribbean International Uniforms a business which had been started by the late Virginia Ethylyn Ferguson, the mother of the Plaintiff and the Defendant.
7. On 25th March, 2019 the Defendants filed a summons seeking that the Plaintiff's Writ be struck out on the following grounds:-
 - i. The application of the Plaintiffs for contentious probate relief is not in conformity with Rule 32 of the Probate and Administration of Estates Rules, 2011
 - ii. The rule is mandatory
 - iii. Any other ground as this Honourable Court sees fit and
 - iv. That costs be provided for, to be taxed if not agreed
8. The Court ruled that the application to strike out be dismissed and allowed the Plaintiffs to amend their Writ of Summons to comply with Rule 32 of the Probate and Administration of Estate Rules.
9. The Plaintiffs initial counsel withdrew from the record and the Summons was adjourned to allow the Plaintiffs to retain new counsel.
10. The Affidavits of both the First and Second Defendants were filed on 11th January, 2019. The Second Defendant filed a supplemental Affidavit on 8th February, 2019.
11. The Plaintiffs filed the Affidavits of Amos Ferguson, Emerson Rolle and Kensington Rolle on 12th March, 2019. The Second Affidavit of Sherise Hamilton and the Affidavit of Viscount Ferguson were filed on 14th March, 2019.
12. The Second Defendant filed a Second Supplemental Affidavit on 25th April, 2019 and in response to all of the affidavits filed on behalf of the Plaintiffs a Third Supplemental Affidavit on the 31st May, 2019.

Background Facts

13. The late Virginia Ethylyn Ferguson a.k.a Ethylyn Virginia Ferguson ("**The Deceased and/or Testatrix**"), was an entrepreneur who carried on the business of making uniforms for the public under the name of Caribbean International Uniforms ("CIU").
14. The Deceased died on 5th January, 2018. In early February, 2017 she was diagnosed with cancer, and soon thereafter, was instructed by the Second Defendant, Kriska Simmons to leave her home in Maple Street, Pinewood Gardens and move to the Second Defendant's home Westwinds Subdivision.

15. The Deceased travelled between The Bahamas and the United States for medical treatment.
16. Prior to her death, the Deceased had executed her Last Will and Testament in February, 2017. After her death the Will was submitted to the Supreme Court for a grant of probate in probate action number 273 of 2018. The grant was issued on 26th June, 2018 to the Defendants as executors of the Estate of the Deceased.
17. A Caveat was filed on 16th March, 2018 in the probate action.
18. All of the parties to this action are beneficiaries under the purported Will but with different gifts.
19. The Registrar of the Supreme Court has since recalled the grant of probate.
20. The Court granted the interim order on 15th January, 2019 and ordered that the Second Defendant her servants, agents be restrained from disposing of the property of the Testatrix. This Order was varied on 25th April, 2019 to allow the Second Defendant to utilize the funds held by Gibson & Associates for the continued operation of CIU provided that the Second Defendant gives a full accounting of the use of the said funds.

Evidence

Plaintiff's Evidence

Affidavit of Sherise Hamilton filed 24th October, 2018

21. The Deceased was diagnosed with stage 4 cancer in early February, 2017. She requested that she leave her home and move in with the Second Defendant at her home. She travelled regularly between The Bahamas and the United States seeing medical treatment.
22. The circumstances surrounding the preparation and execution of the Deceased's last Will are suspicious. It is her understanding that the Deceased did not personally give the Attorney who prepared the purported Will the instructions for the will, rather it was the Second Defendant who gave the instructions. The Plaintiffs allege that the Deceased did not have a copy of the purported Will in her possession despite making several requests to obtain a copy of the same.
23. The Plaintiff is convinced that the Deceased was adamant that the contents of the Will were not her true last wishes and did not approve the contents of the Will and made several requests for the Second Defendant to call the Attorney who prepared the Will to have the Will amended to reflect her last wishes.
24. The Deceased was under the physical control of the Second Defendant, which caused difficulties by the Plaintiff in obtaining access to the Deceased to ensure

that the Will was executed according to her wishes. There were several excuses by the Second Defendant why the Attorney was unable to make the amendments to the Will as requested by the Deceased.

25. On 4th January, 2018, the Deceased requested that all of her children be present at her bedside. She stated that the Will was not what she wanted as her last wishes and that she needed a lawyer to come right away to have the changes made to be fair to all of her children and to make everyone happy. The Second Defendant said that the Attorney was also at the home on the 4th January, 2018 and found that the Deceased did not have the mental capacity to amend her Will. The Plaintiff allege that the mother was mentally capable until the day of her demise. They were unable to have another Attorney take instructions from the Deceased prior to her demise because she was constantly under the care and control of the Second Defendant. The Second Defendant often prohibited the Deceased from taking any calls and/or visitors.
26. The purported Will was the fruit of fraud and duress.
27. In March, 2019, the Plaintiff instructed Davis & Co. to lodge a caveat against the estate of the late Virginia Ethylyn Ferguson a.k.a Ethylyn Virginia Ferguson and which was lodged on the 16th March, 2018.
28. The Defendants have taken no steps to remove the caveat and a subsequent caveat was filed on 18th September, 2018. Notwithstanding this the Defendants were able to obtain a Grant of Probate which is in contravention of the Probate and Administration of Estates Act and Rules.
29. The Will which was admitted to Probate was not the same Will read to the children of the Deceased at Gibson & Co. It is the Plaintiff's understanding that changes were made to the Will after her passing.

Second Affidavit of Sherise Hamilton filed 14th March, 2019

30. The Testatrix and the Second Plaintiff, Amos Luther Ferguson were married but separated when the children were young.
31. Mrs. Hamilton recalled that she and her mother were very close and that her children loved being around the Testatrix and affectionately called her mommy rather than grammy.
32. In 2007, the Testatrix had asked her to work part time in the business dealing with inventory and travelling to do fittings. In 2015 she left her job to work full time within the business and provided direct assistance to the Testatrix until March 2017 when she was diagnosed with cancer. The day that the Testatrix was diagnosed with cancer, the First Plaintiff says that she offered to carry her mother home and stay with her for the night, but the Second Defendant refused and

insisted that their mother go home with her. Mrs. Hamilton recalls that since then she did not have much opportunity to spend time with their mother as she used to.

33. Mrs. Hamilton was informed by friends that the Second Defendant's husband has been telling people that the Testatrix business will soon be his.
34. In April 2017, she went to see and spend time with her mother. During this time, the Testatrix said that the Second Defendant, was being a little rough on her mother. I was informed by other family members that it was always difficult to see or talk to the Testatrix. Most of the time they would not answer the phone and if their mother was the one to answer the call, the Second Defendant would always asked who is on the phone and to tell them you are resting. It seemed like she was being monitored. A number of family members agreed that it was difficult to see and hear from the Testatrix and that they did not know any updates regarding her health.
35. There had been tension between the First Plaintiff and Second Defendant for some time. The Second Defendant was upset because the First Plaintiff had confronted her regarding certain wrong and unethical information she had sent out concerning the company.
36. On 4th January, 2018 the Testatrix called all of her children to her. When the majority of them were there she said that your Will should only be between you and the person who prepared it, but that is not so. She also said that the Will is not what she wants it to be, it is not fair and she wants everyone to be happy.

Affidavit of Kensington Rolle filed 12th March, 2019

37. Mr. Kensington Rolle as the older brother of the Testatrix averred that the Testatrix told him that she was being increasingly frustrated with the Second Defendant because she was unable to change her Will and even expressed that she did not trust the Second Defendant or the attorney.
38. The Testatrix was hearing impaired which became increasingly worse over the two years prior to her death.

Defendants' Evidence

Affidavit of Kriska T. Simmons filed 11th January, 2019

39. Mrs. Kriska T. Simmons, the Second Defendant, in opposition to the application of the Plaintiffs, explained that in 1999, the Testatrix started Caribbean International Uniform ("CIU") which was a home based business until she opened a store on East Bay Street in 2001. The store was relocated to Rosetta Street in 2003 and continues to operate from this location. The Testatrix developed an alliance with a United States based company, International

Uniforms Incorporated (“IUI”) who supplied uniforms for her company here in The Bahamas.

40. Mrs. Simmons worked with her mother from 2001 until her death by assisting with administrative tasks, uniform fittings and working in the store when the mother travelled. In more recent years Mrs. Simmons was given responsibility for all back office duties including accounting and communication with IUI.
41. Mrs. Simmons and the Testatrix were very close as they worked and lived together and naturally developed a strong bond which was not experienced by any of the other siblings.
42. In July 2016, the Testatrix temporarily moved from her Maple Street property to her other property at Hudson Close off Bellot Road, but in October 2016, when the Maple Street home sustained excessive water and severe roof damage from hurricane Matthew she moved permanently to the Hudson Close property and used the Maple Street property for storage.
43. After the Testatrix was diagnosed with Cancer, she moved in with Mrs. Simmons and her family while undergoing treatment.
44. In or about, 22nd February, 2017 the Testatrix stated that she had begun writing a Will and was adamant that her Will be completed. Nicole Watkins, Attorney-at-Law, in the legal department at BTC was contacted and agreed to assist the Testatrix. Mrs. Watkins spoke with the Testatrix over the telephone and took her instructions.
45. On or about 25th February, 2017, the Testatrix spoke with Mrs. Watkins again over the telephone to discuss the draft Will she had received and questioned the legal terms used to ensure that they would give effect to her legal wishes. On 28th February, 2018, the testatrix went to the BTC head office to meet with Mrs. Watkins to sign the Will. Mrs. Simmons stated that she did not sit in on that meeting.
46. The Testatrix travelled to Miami, Florida on 2nd March, 2017 for treatment and remained there until 14th June, 2017 as she was admitted to the hospital. The Testatrix continuously travelled between The Bahamas and Miami from 20th June, 2017 to October 2017.
47. Mrs. Simmons explained that during the times when the Testatrix was in Nassau, she would drop her off in the mornings at her brother, Kensington Rolle’s home and would collect her in the afternoons. All of her children had access to her.
48. In or about October 2017 the Testatrix hired a live in caregiver and her family members rotated sleeping with her and caring for her. The Testatrix also had a

telephone and cell phone and was easily accessible with unhindered access to anyone who wished to visit her.

49. In late October 2017, the Testatrix expressed her desire to amend her Will to remove the clause relating to Plantol Street because of requests by her brother to not do foolishness with the property because it was family property. Mrs. Simmons stated that she informed the Testatrix that Mrs. Watkins was not in the country at the time but would speak with her when she returned to arrange a meeting. She gave her Mrs. Watkins telephone contact so that she could call her, however the Testatrix always told her she had not called as yet when asked.

50. On 4th January, 2018 Mrs. Simmons along with the First Plaintiff and the caregiver were at the Testatrix's home as she was then experiencing severe pain. The First Plaintiff suggested calling another sister, the First Defendant to the home. The Testatrix informed them that she wanted to make a few minor changes to her Will but when asked what the changes were, she refused to say. Later that same day Mrs. Watkins came to the home, and later informed her that she was unable to make any amendments to the Will because the Testatrix was not lucid and unable to give clear instructions to amend the Will. The next day, the Testatrix passed.

51. On 24th January, 2018, both Defendants attended Gibson & Associates to seek legal assistance with the administration of the Testatrix's estate. The original will which was held by the Testatrix was admitted to probate.

52. On 1st March, 2018 all the children of the Testatrix met at Gibson & Associates to have a formal reading of the Will. Mrs. Simmons acknowledged that she was unaware that a Caveat was lodged with the Probate registry by the First Plaintiff and that she had not been informed of such by the law firm. The Grant of Probate was inadvertently issued despite the caveat being issued. The Registrar requested that the Grant of Probate be returned by a letter dated 8th November, 2018.

53. Mrs. Simmons avers that at no time during her mother's ailment did she physically control her or prevent her from amending her Will.

Affidavit of Lanatha D. Williams filed 11th January, 2019

54. Mrs. Lanatha Williams, the First Defendant made this affidavit in opposition to the application of the Plaintiffs'. The facts of the Second Defendant's Affidavit are similar to that of the First Defendant.

55. Mrs. Williams reiterated that the Testatrix, had a telephone and cell phone and was easily accessible to anyone without any hindrance. She added that the Plaintiffs seldom visited their mother, during her illness.

56. On 20th December, 2017 the Testatrix had asked her to help her run some errands to 'put her affairs in order'. The Testatrix visited several banks, Bahamas Communications and Public Officers Union and to the Attorney to amend her Will. However, the Testatrix was not feeling well and was unable to complete her errands, namely amending her Will.

57. Mrs. Williams stated that the Testatrix as a very strong willed person who was not easily influenced or persuaded by others and that at no time during her illness was the Testatrix under any physical control which hindered access to her.

Supplemental Affidavit of Kriska Simmons filed 8th February, 2019

58. In the course of providing services to its customers, CIU is required to pay for shipping related costs and related costs payable for transportation of customers' orders from Florida to The Bahamas and the cost of distribution. CIU expenses also include recurring operational expenses for payroll, rent and utilities. CIU also receives deposits from its customers.

59. Since the recalling of the Grant of Probate made by the Registrar and the interim order granted by the Court, CIU has been unable to meet its financial obligations without access to the operating account.

Third Supplemental Affidavit of Kriska Simmons filed 31st May, 2019

60. This affidavit was sworn to refute the statements made in the Affidavit of Kensington Rolle that the Testatrix was hearing impaired.

61. This affidavit exhibited the medical report of Dr. Margo Munroe which stated that, "Mrs. Ferguson has consistently displayed a thorough understanding of her condition, she willingly asked questions and expressed concerns about her health. To my knowledge, Ms. Ferguson has never demonstrated or indicated a lack of understanding her diagnosis or treatment options suggested."

Affidavit of Nicole Watkins filed 11th January, 2019

62. This affidavit was sworn on behalf of the Defendants. She states that she and the First Defendant are co-workers. She took initial instructions from the Testatrix over the telephone, and after meeting and speaking with the Testatrix on several occasions finalized the Will, and sometime later, the Will was executed.

63. On 4th January, 2017 when Mrs. Watkins visited the Testatrix to make some amendments to the Will, she realized that she was not the same astute business woman whom she spoke with and met previously. She was "in and out of it", at times giving instructions and other time being rather quiet or speaking about not

owning Plantol Street and other musings that she could not understand. She said that the Testatrix appeared to be 'traveling' and was therefore uncomfortable filling in the gaps of her incomplete instructions.

Issues

64. The issues for determination in the action are:-

- i. Whether the purported Last Will and testament was executed under suspicious circumstances
- ii. Whether an interlocutory injunction should be granted pending the determination of the trial of this action
- iii. Whether the grant of probate issued the 26th June, 2018 should be revoked pending determination of the trial

65. This application relates to whether the interlocutory injunction should be continued/granted pending the determination of the trial.

Plaintiffs Submissions

66. The Plaintiffs submit that there is a serious issue to be tried as their affidavit evidence raises issues as to the circumstances surrounding the instructions, preparation and execution of the Will by the Testatrix. The Plaintiffs allege that the purported Will is suspicious and does not reflect the true intentions of the Testatrix.

67. They claim that at the time of the execution of the Will the Testatrix was gravely ill having been diagnosed with stage 4 liver cancer, and was hearing impaired and as such could not have given proper instructions or have her instructions understood.

68. The Testatrix was unhappy with the contents of her Will and was frustrated in her efforts to meet with the lawyer to change the same. They further allege that the Will was held by the Second Defendant who made it difficult for the Testatrix to meet with her lawyer to make the changes to the purported Will as she wanted.

69. The deceased did not have the proper mental capacity to execute the Will and that there were suspicious circumstances surrounding the preparation of the Will. There were elements of coercion and that the Testatrix lacked knowledge of the contents of the purported Will and did not approve the same.

70. The Affidavits of the Plaintiffs aver that the Testatrix did not have testamentary capacity, that she lacked the knowledge and approval of the contents of the Will, and that there was a degree of undue influence and elements of coercion.

71. At common law the propounder of the Will must prove that the Testatrix had the requisite testamentary capacity, knowledge and approval and the intention to make a Will. Lucky v Tewari (1965) 8 W.I.R 552 provides:-

“That when the Will has been read over to a capable testator on the occasion of its execution that is sufficient proof that he approved of, as well as knew the contents of the will.”

Further in Vout v Hay [1995] 2 S.C.R. 876 at page 889, Sopinka J discussed the burden of proof:-

“...Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.”

72. The onus they submit is on the executors of the Will to prove capacity. In Re Collicutt Estates (1994) 128 N.S.R.(2d) 81 (probate Ct.) at 92, and affd at (1994), 134 N.S.R.(2d) 137 (C.A.):-

“If there is no evidence of incapacity, the will must be probated for every person is presumed sane; but once the will is attacked, whether it has been admitted to probate in common form or not, the burden of proof of testamentary capacity is on the executor or other persons who propound the will for probate. The burden of proof is the same whether the application to prove the will in solemn form was made before or after it was admitted to probate. The onus is on the propounder to establish, on a balance of probabilities, testamentary capacity.”

73. In the case of Laszlo v Lawton 2013 BCSC 305, the Supreme Court of British Columbia examined Vout v Hay [1995] 2 S.C.R 876 and the principles surrounding suspicious circumstances and stated:-

“[202] In discharging its burden of proof, the propounder is aided by a rebuttable presumption. It is presumed that the testator possessed the requisite knowledge and approval and testamentary capacity where the will was duly executed in accordance with the statutory formalities after having been read by or to the testator, who appeared to understand it. Vout clarified that this presumption may be rebutted by evidence of well-grounded suspicions, known as “suspicious circumstances”, relating to one or more of the following circumstances: (1) surrounding the preparation of the will; (2) tending to call into question the capacity of the testator; or (3) tending to show that the free will of the testator was overborne by acts of coercion or fraud (para. 25).

[203] The presumption places an evidentiary burden on the party challenging the will to adduce or point to “some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity”: Vout at para. 27.

[204] Where suspicious circumstances arise, the presumption is said to have been spent, meaning it does not apply and has no further role to play, and the propounder reassumes the legal burden of establishing both approval and capacity. Proving testamentary capacity as well as knowledge and approval of the will provision necessarily entails dispelling the suspicious circumstances that have been raised: see generally, *Ostrander v. Black* (1996), 12 E.T.R. (2d) 219 at 235 (Gen. Div.).

[205] The usual civil standard of proof, namely proof on a balance of probabilities, applies. That said, as a practical matter the extent of the proof required will be proportionate to the gravity of the suspicion, which will vary with the circumstances peculiar to each case: *Vout* at para. 24.”

74. The Plaintiffs’ submit that all the suspicious circumstances apply to this case. Further there were elements of coercion and that the Testatrix lacked knowledge of the contents of the purported Will and did not approve the same. The Plaintiffs’, case will be based strictly on suspicious circumstances namely that the instructions for the will were given under suspicious circumstances, that there was a degree of undue influence, that the Testatrix lacked knowledge and approval of the contents of the purported Will and that she also lacked testamentary capacity and therefore the Will would be declared null and void.

75. In *Riach v Ferris* [1935] 1 DLR 118 Chief Justice Duff adopted the definition of suspicious circumstances in *Tyrell v Painton* [1894] P.151 at pps. 159-160 where it was stated:-

“The principle is that, whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.”

76. In *Tyrell v Painton et al* (1894) p. 151 at 156 Lindley, L.J. quotes Parker B. in *Barry v Butlin* 2 MOO P.C. 480 where he stated:-

“the rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.”

Lindley, J. stated further-

“The rule in *Barry v. Butlin, Fulton v. Andrew* and *Brown v. Fisher* is not in my opinion confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist and whatever the nature may be it is for those who prepared the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or ardent influence, or whatever else they rely on to displace the case made for proving the will.”

77. In reply to the Defendants submission that the Plaintiffs have dealt with the issues which are only relevant to the substantive hearing and not to the interlocutory hearing for an injunction the Plaintiffs must consider whether the injunction should continue or be discharged.
78. The interlocutory injunction ought to remain in place following the well-established principles of Lord Diplock in **American Cyanamid Co v Ethicon Ltd (1975) AC**, which provide:-
- (a) **Is there a serious issue to be tried?**
 - (b) **Adequacy of damages to the Plaintiff. That damages will not be adequate if**
 - i) **The Defendant is or is likely to be unable to pay**
 - ii) **The wrong is irreparable**
 - iii) **The damage is not pecuniary**
 - iv) **Damages would be difficult to assess**
 - (c) **Adequacy of the undertaking in damages as protection for the Defendants**
 - (d) **Narrow balance of convenience**
 - (e) **Merits of the case**
79. The Plaintiffs submit that there is a serious issue to be tried and that the allegations ought to be addressed, tested and determined. The Plaintiffs further submit that when the interest of the parties are weighed, the interest of the parties are not evenly balanced in the balance of convenience test, as the Plaintiffs have more to lose and their loss cannot adequately be remedied by damages. The Defendants will only suffer minor inconvenience and disruption to the affairs of the Estate. If an injunction is not granted, the Defendants will be at liberty to dispose of the assets of the estate prior to a determination of the issues raised. The damage that the Plaintiffs' will suffer would then be irreparable. Also, damages would not be a suitable remedy as the property outlined in the Will carries significant sentimental value to the Plaintiff's.
80. The Defendants cannot demonstrate that they could suffer any losses as a result of being restrained in any way from dealing with the property. The Plaintiff submits that an undertaking in damages by the Defendant would be insufficient

and inadequate in the circumstances particularly given the history between the parties and the nature of the dispute.

81. There is a good and meritorious claim before the Court for determination. According to Lord Diplock at p 407 in **American Cyanamid Co v Ethicon Ltd** (supra),

“the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the Plaintiff’s need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff’s undertaking in damages if the uncertainty were resolved in the Defendant’s favour at the trial. The court must weigh one need against another and determine whether ‘the balance of convenience’ lies.”

Defendants’ Submissions

82. **Section 21(1) of the Supreme Court Act, Ch.53** invests the Court with the jurisdiction to grant interlocutory injunctions when it is just and convenient to do so. Section 21(1) provides as follows:-

“The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.”

83. **Order 29, Rule 1 of The Rules of the Supreme Court** states that:-

“(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s writ, originating summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.”

84. The Defendants maintained that there was no serious issue to be tried as the Plaintiff have failed to set out any facts to prove fraud or duress. The evidence of the Defendants set out their sequence of events leading up to the execution of the Will by the Testatrix. They maintain that the Testatrix was given a draft of the Will before executing the same and that at all times she was mentally competent to execute the same.

85. The Defendants relied on **Windermere Island North Development Ltd. and Another v RBC Royal Bank (Bahamas) Ltd.** where Barnett CJ held:

“12. For the purposes of this application, I am prepared to find that the Plaintiffs have met the first threshold of a good arguable case. I do with some degree of hesitation, as the evidence in the Second Defendant’s affidavit to support the application of bad faith and undervalue is rather thin, although it is unclear to me why the Defendant and/or its broker/agent thought it necessary or prudent to say that it was a ‘bank foreclosure’ or even indicate that the property was being sold under a mortgagee’s power of sale. It is on the second limb of the American Cyanamid test that the Plaintiffs have not satisfied me.”

86. The Defendants submit that the Plaintiff is required to give an undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction if it should be held at trial that the Plaintiff had not been entitled to restrain the Defendant from doing what he was threatening to do.

Decision **Interim Injunction**

87. The Court granted an interim injunction pending the inter-partes hearing of the application for the interlocutory injunction. The substantive issue the Court must address in this ruling is whether the interim injunction should be lawfully granted pending the determination of the trial in this action. The Defendants maintain that the injunction ought to be discharged.

88. The Plaintiffs have sought the injunction to prevent the Defendants from disposing of the assets of the Estate before a determination of the issues raised in this action.

89. **Section 21 of the Supreme Court Act** empowers the Court to grant injunctive relief. Further **Order 29 rule 1 of the RSC** provides that:

“(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s writ, originating summons, counterclaim or third party notice, as the case may be.”

90. In determining whether or not the interim injunction should be granted or continued, the Court must exercise its discretion having regard to the principles established in **American Cyanamid Co.**

91. The Court on an interlocutory application is not to decide the issues raised by a mere review of the evidence and without testing the same. The Court is simply to determine whether or not based on the evidence submitted that there is a serious issue to be tried. I have reviewed the evidence and I am satisfied that there is a serious issue to be tried.

92. Even though there is a serious issue to be determined in this matter, it is inappropriate to undertake a mini trial, to assess the quality of the case as set out by the Plaintiffs or Defendants. The evidence is clear that there is a serious issue surrounding the Will of the Testatrix but that is for a trial Judge to assess and determine.

93. According to the learned authors of *Gee on Commercial Injunctions* at paragraph 2.015:

“What the case [of American Cyanamid] clearly establishes is that there is “normally” no need on applications for an interim injunction to embark upon a mini trial on witness statements or affidavits to assess the quality of the claimant's case or the defendant's defences, or to assess the rival merits on a disputed, complicated question of law. This would be wasteful of the parties resources and those of the Court. It would also be inconsistent with the objective of the Court not to pronounce an opinion on the substantive merits of the case until trial. This objective encourages judges not to decide important applications on assessment of the apparent merits based on evidence, which is incomplete, and without the benefit of cross-examination, full disclosure of documents and detailed argument. These features made it fair and sensible to avoid assessment of the merits in American Cyanamid. However, the principles are “guidelines”, and not a “straitjacket”, where the function of the Court is to hold the position as justly as possible pending final determination of the triable issue at trial”

94. In order to obtain the injunction the Plaintiffs were required to satisfy the Court where the balance of convenience lies. As a consideration of this, the Plaintiff must satisfy the Court that damages will not be an adequate remedy.

95. The Plaintiffs have maintained that damages would not be an adequate remedy because the assets of the Will have sentimental value, which value cannot be measured in damages or replaced by money. The Defendants on the other hand have submitted that damages would be an adequate remedy and relied on **Windermere Island North Development Ltd.**

96. In **Fellowes v Fisher [1976] Q.B. 122**, Sir John Pennycuik considered the balance of convenience in deciding whether to grant an injunction and stated:-

- (1) **Provided that the Court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case.**
- (2) **The Court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief.**
- (3) **“As to that” the Court should first consider whether, if the Plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial in which case no interlocutory injunction should normally be granted.**

- (4) If damages would not provide an adequate remedy the Court should then consider whether if the Plaintiff fails the Defendant would be adequately compensated under the Plaintiffs' undertaking in damages, in which case there would be no reason upon this ground to refuse an interlocutory injunction.
- (5) Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance, should this otherwise be even, being preservation of the status quo. By the expression "status quo" I understand to be meant the position prevailing when the Defendant embarked upon the activity sought to be restrained. Different considerations might apply if the Plaintiff delays unduly his application for relief.
- (6) Finally, and apparently only when the balance still appears even: "it may be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence."

97. Further Fisher provides that:-

"It is where there is doubt to the adequacy of the respective remedies in damages... that the question of balance of convenience arises.... The extent to which the disadvantage to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies."

98. Upon a review of the Will which the Plaintiffs seek to have declared void, the Plaintiffs are beneficiaries of certain assets under the same and on a review of those assets where they are not beneficiaries, I am satisfied that they are all assets which would normally be compensatable by damages as they are primarily financial investments, cash or property which all have a market value and can be replaced. However there is the element of the sentimental value of the real property, and there is also the issue of whether the Defendants are able to compensate the Plaintiffs in damages. Upon a review of the evidence, there is no evidence provided of their ability to pay damages. If the injunction remains, the investment and the properties will still be there, and the Defendants at worst will only be deprived of the properties until a determination of the validity of the Will. If the injunction is discharged, the estate will be administered and the properties and funds will be distributed and upon a determination of the validity of the Will they may no longer be in existence. I must therefore determine where the balance of convenience lies.

99. The balance of convenience in my opinion lies with the Plaintiffs. I am not satisfied that the Defendants will be at substantial risk if the injunction were to remain in place. It was revealed through an accounting of the Estate of the Testatrix provided by the Defendants that the total assets of the Estate were valued at \$505,962.91 as at May 20th, 2019, and liabilities totalled \$125,722.17.

Although the Defendants had informed the court that they initially had been using personal monies to carry on the business of the Testatrix, the court varied the initial ex parte Order to allow certain funds to be used toward the business. The only risk for the Defendants would be the return of the funds expended as the asset would still be available. On the contrary there is no evidence of the ability of the Defendants to pay to the Plaintiffs monies due to them if they are successful if the funds of the Estate have all been spent. The Plaintiffs on the other hand have given an undertaking to this court to pay any damages incurred should they be unsuccessful at trial.

100. The difficulty also facing the Defendants has been in proving that damages would be an adequate remedy for the party suffering injury. With the injunction currently in place, the Defendants have been operating the business of the Testatrix sufficiently well, therefore, they are not the party suffering any loss. However, damages may not be recoverable if the injunction were discharged, and the Defendants as Executrices deal with the Estate of the Testatrix and the assets are distributed or dissipated.

101. All of the assets have not been distributed equally between the children in the Will and therefore it cannot be submitted that the balance of convenience is equally distributed. The Plaintiffs have maintained that some of the assets have sentimental value which is also a factor which I must consider.

102. After considering the factors above, I am satisfied that the balance of convenience lies in maintaining the injunction and I so order.

103. In the circumstances I order that the existing injunction be continued until the determination of the action. The costs of this application will abide the outcome of the trial.

Dated this 14th day of September 2022


Hon. G. Diane Stewart