

COURT OF APPEAL SITTING

**ANGUILLA
14th – 15th May 2012**

JUDGMENTS

Case Name:

[1] Anne-Marie Mac Leish

[2] Lynette Rooker

v

Avison Albert “Bert” Marryshow

**[High Court Civil Appeal No. 12 of 2010]
(Grenada)**

Date:

Monday, 14th May 2012

Coram:

The Hon. Sir. Hugh A. Rawlins, Chief Justice

The Hon. Mde. Janice M. Pereira, Justice of Appeal

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

Appellants:

**Mr. Gerhard Wallbank holding papers for counsel for
the appellant**

Respondent:

**Ms. Yanique Stewart holding papers for counsel for
the respondent**

Issues:

**Civil appeal – Wills – Probate – Validity –
Testamentary capacity – Suspicious circumstances –
Whether the testatrix possessed a sound and
disposing mind and memory at the time of the making
of the 1995 Will**

**Result and
Reason:**

**Held: dismissing the appeal (Edwards J.A.
dissenting) and ordering that the appellants pay the
agreed prescribed costs of the respondent in
accordance with CPR 65.5(2)(b)(iii) which puts the
costs of the claim below at \$14,000.00 and the costs
in the appeal being two thirds of that sum pursuant to
CPR 65.13, that:**

1. The testatrix, at the time of making her 1995 Will, must in the language of the law, be possessed of sound and disposing mind and memory. Her memory may be very imperfect, greatly impaired by age or disease, yet her understanding may be sufficiently sound for many of the ordinary transactions of life. Once the court is able to answer whether the testatrix's mind was sufficiently sound to enable her to know and understand the business in which she was engaged at the time she executed her will, the testatrix is deemed possessed of adequate testamentary capacity. In the present case, there was sufficient evidence which showed that the deceased was aware of the extent of her property over which she had a power of disposition. There was also evidence as to why she would wish to bestow her bounty on her god-son as opposed to her nieces. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries and this can lead to disputes almost always arising. However, if judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs. In light of this, the Court is bound to agree with the finding by the learned trial judge on this issue. (per Pereira J.A. and Baptiste J.A.; Edwards J.A. dissenting).

Gill v Woodall and others [2010] EWCA Civ 1430 applied; Den v Joseph Vancleve (1819) 2 Southard 589 applied; Zorbas v Sidiropoulous (No 2) [2009] NSWCA 197 cited; Marsh v Tyrell and Harding (1828) 2 Hagg. Ecc. 84 applied distinguished.

A court ought not to pronounce in favour of a will that is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testatrix. A court should be

satisfied that at the material time of making a will the testatrix had a sound and disposing mind, memory and understanding. A disposing mind and memory is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions and the like. The testatrix, at the time of making her 1995 Will, must be possessed of this sound and disposing mind and memory and understood the nature of her act and its effects, the extent of the property of which she was disposing, and understood and appreciated the claims to which she ought to give effect. The testatrix must also comprehend the nature of the claims of others whom by her will she is excluding from all participation in that property. The testatrix, at the time of making the 1995 Will, made no mention of her 1982 Will to her solicitor. The beneficiary under the 1995 Will differed completely from the beneficiaries under the 1982 Will. The question for the Court is not whether the deceased knew, when she executed the 1995 Will that she was giving all her property to the respondent and excluding all her other relations from any share in it, but whether at that time she was capable of recollecting who those relations were; of understanding their respective claims upon her regard and bounty; and of deliberately forming an intelligent purpose of excluding them from any share of her property. Albeit the testatrix had the capacity to communicate her testamentary wishes she had limitations in comprehending that she had to consider the claims of her other relatives and in remembering the existing dispositions she made in the previous 1982 Will. Furthermore, to successfully revoke a former will by a new will it is necessary to prove that the testatrix recollected the general contents of the previous will. Consequently, the 1995 Will should be deemed invalid. (per Edwards J.A.)

Wintle v Nye [1959] 1 All.E.R. 552 applied; Leger v Poirier [1944] 3 D.L.R. 1 applied; Murphy v Lamphier (1914) 31 O.L.R. 287 applied; Marsh v Tyrrell and Harding (1828) 2 Hagg. Ecc. 84 applied;

Charles Harwood v Maria Baker (1840) 3 Moore's PCC 282 applied.

- 2. The revocation clause contained in the 1995 Will effectively revoked any former will, being the 1982 Will. Although the testatrix never made mention of the 1982 Will to her solicitor, it cannot be assumed in the absence of evidence probative of that conclusion that her answer was due to loss of memory. The learned trial judge had evidence before him, which he rightly accepted, and which showed the close relationship that existed between the testatrix and her god-son and also showed that, at the relevant time, the testatrix often spoke of her family and other matters and not the same matter twice. The testatrix also had the presence of mind to make specific mention of her assets in her 1995 Will; in contra distinction to her 1982 Will. Taking all these factors into consideration her failure to either acknowledge or remember the 1982 Will or its contents or benefactors without more, is not sufficient to excite the suspicion of the Court. (per Pereira J.A. and Baptiste J.A.; Edwards J.A. dissenting)**

The respondent as the propounder of the 1995 Will has the burden of proof to remove any suspicion of the Court. The absence of proof that the testatrix recollected the general contents of her 1982 Will was a matter that ought to have excited the suspicion of the court. Though there was ample evidence proving that the deceased had the capacity to communicate her testamentary wishes, this was not sufficient in law. There was no evidence advanced by the respondent before the learned trial judge that showed the reason why the testatrix did not mention her 1982 Will was not due to memory loss, which consequently meant that the testatrix was not possessed of a sound and disposing mind and memory. Thus, it cannot be said that the respondent has discharged his burden of proof in the absence of strong and clear evidence that the deceased's failure to mention her 1982 Will, and deliberately reject the appellants from participating in her estate, was not due to memory loss. (per Edwards J.A.)

Tyrrell v Painton and Another [1894] P. 151 applied.

- 3. The application of the Golden Rule assists in the avoidance of subsequent disputes as to capacity. However, where the Golden Rule was not followed, and the court has to resolve a dispute as to capacity, non-compliance with the Golden Rule does not demonstrate a lack of capacity. The issue must be decided by the court by applying the correct legal principles to the court's findings of fact. The issue in the present case was satisfactorily decided as the trial judge applied the relevant legal principles to the facts before him. (per Pereira J.A. and Baptiste J.A.; Edwards J.A. dissenting)**

Leigh Helen Cowderoy v Lionel Steve Cranfield [2011] EWHC 1616 (Ch). applied.

The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who is seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings. The attorney at law in the present case failed to do either. Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. However, at the very least the attorney ought to have kept his notes. In addition the testator's mental defects would have been more apparent to an experienced medical examiner to whom a proper description of the legal test for testamentary capacity had been provided. Owing to the failure to adduce such medical evidence, the respondent has failed to remove the suspicion existing in relation to the deceased's testamentary capacity to make the 1995 Will (per Edwards J.A.)

Kenward v Adams (1975) Times 29 November 1975 applied; In Re Simpson (1977) 121 SJ 224 applied.

4. A trial judge, in keeping with relevant statutory provisions, is entitled to arrive at his own conclusions. He has the advantage of seeing and assessing the demeanor and credibility of the witnesses. The evidence of persons present when the deceased gave instructions for her will or its execution, if they were not merely witnesses called into her presence for a few moments, is of considerable weight and this is so particularly where such persons are unprejudiced. In determining whether Mr. Bernardine and Ms. Frederick were unprejudiced and credible, the lack of motive to fabricate was a very relevant factor the judge was entitled to take into account. While the absence of motive by itself is not sufficient to establish credibility, it would be a relevant factor in determining whether Mr. Bernardine and Ms. Frederick were credible as to the circumstances surrounding the making and execution of the 1995 Will by the deceased testatrix Ena Payne. (per Edwards J.A.)

Case Name:

**Pacific China Holdings Limited
v
Grand Pacific Holdings Limited BVI**

**[High Court Civil Appeal No. 39 of 2010]
(Territory of the Virgin Islands)**

Date:

Monday, 14th May 2012

Coram:

**The Hon. Sir. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**

Appearances:

Appellant:

Mr. Gerhard Wallbank holding papers for counsel for the appellant

Respondent:

Mr. Clyde Williams holding papers for counsel for the respondent

Issues:

Civil appeal – Liability for liquidators’ remuneration – Order appointing liquidators set aside - Whether the liquidators’ remuneration are considered costs arising out of or in relation to the proceedings – Whether liquidator’s remuneration may be recoverable by the successful party against the unsuccessful party

Result and Reason:

Held: allowing the appeal and ordering that GPH bear the remuneration of the liquidators and the costs of the proceedings below and on this appeal, the costs of the appeal being fixed at two thirds of the costs as assessed by the court below, that:

1. A successful appeal against the making of a winding up order resulting in the setting aside of that order does not and cannot equate to a termination of the liquidation under section 233 of the Insolvency Act. Wholly different considerations are engaged on a section 233 termination, which specifically states that the court may order the termination of a liquidation if it is satisfied that it is just and equitable to do so. Such termination does not anticipate a termination order taking effect retroactively. In the case at bar, where the Winding up Order was set aside on appeal as being wrongly made, it sought to ‘unwind’ the winding up and accordingly did not require the Court to have specific regard to just and equitable considerations before setting it aside.

Section 233 of the Virgin Islands Insolvency Act, 2003 considered.

2. The Court by virtue of rule 64.3 of the Civil Procedure Rules 2000 has the power to award costs arising out of or related to any proceedings to a person who is not necessarily a party to the proceedings. The liquidators in this instance are considered persons who are not a party to the proceedings. The Court accordingly has a wide discretion in all matters relating to expenses,

including the power, when necessary, to direct which of the parties is to bear the cost of the remuneration and expenses of any professional man or other officer appointed by the court to act in the proceedings which have come to an end.

3. GPH knowingly made an application for a winding up order when there was a real dispute as to the debt. This was an abuse of process. Moreover, GPH resisted a stay of the Winding up Order and produced no cogent evidence showing that the liquidators conferred some benefit to PCH which it would be unconscionable for PCH to keep without paying for it. Accordingly, GPH should bear the ultimate liability for the liquidators' remuneration.

APPLICATIONS AND APPEALS

Case Name:

**Delano Smith
v
Regina**

[High Court Criminal Appeal No. 2 of 2011]

**Paul Petty
v
Regina**

[High Court Criminal Appeal No. 3 of 2011]

**Connell Richardson
v
Regina**

[High Court Criminal Appeal No. 4 of 2011]

**Marville King
v
Regina**

[High Court Criminal Appeal No. 5 of 2011]

Date: Monday, 14th May 2012

Coram: The Hon. Sir. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

Applicants: Ms. Keesha Carty instructed by KCW et al

Respondent: Ms. Erica Edwards and Mr. Ivor Greene of the Attorney General's Chambers

Issues: Applications for extension of time – Murder – Appellants sentenced to life imprisonment – Present appeals against sentence only – Appellants had already appealed against their convictions

Result / Order: [Oral delivery]
Applications for extension of time in which to appeal are dismissed.

Reason: Even if the appellants' applications for extensions of time were granted, they would not have been able to overcome the jurisdictional hurdle which they faced; they had already exercised their right to appeal (when they appealed against their convictions only) and so could not appeal to the Court a second time. See also the decision of this Court in the case of Jerry Martin v The Queen, Territory of the Virgin Islands High Court Criminal Appeal No. 3 of 2007 (delivered 6th June 2011, unreported).

Case Name:

Verne O'Flaherty

v

Regina

[High Court Criminal Appeal No. 6 of 2011]

Date:

Monday, 14th May 2012

Coram:

**The Hon. Mr. Paul Webster, QC, Justice of Appeal
[Ag.]**

Appearances:

Applicant:

Mr. Verne O'Flaherty in person

Respondent:

**Ms. Erica Edwards and Mr. Ivor Greene of the
Attorney General's Chambers**

Issues:

**Application for extension of time to appeal – Time on
remand not taken into account**

Result / Order:

[Oral delivery]

**Application for extension of time in which to appeal is
dismissed.**

Reason:

**The appellant was sentenced in February 2005 and so
the application for an extension of time was over six
years late. Furthermore, no good reason was
advanced for the delay. The issue of remand time in
sentencing is a matter for the sentencing judge and in
this case, the Court could find no basis for interfering
with the exercise of the judge's discretion.**

Case Name:

**Oliver MacDonna (Administrator of the Estate
of Jane Rebecca Richardson)**

v

**[1] Benjamin W. Richardson (Administrator of
the Estate of John Richards Richardson)**

[2] Global Investment (Anguilla) Ltd.
[3] Robert Considine & Anna Considine
[4] Benjamin Wilson Richardson & Leonard
Bennett (Administrator of the Estate of John
Athelton Richardson)
[5] Charles Cromwell Fleming (Administrator
of the Estates of the heirs of Arthur Fleming)
[6] Henry Hodge (Personal Representative of
the Estate of Agatha Hodge)
[7] Tenemos Realty LLC
[8] The Registrar of Lands
[9] The Attorney General of Anguilla

[High Court Civil Appeal No. 1 of 2012]

Date: Monday, 14th May 2012

Coram: The Hon. Sir Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal
[Ag.]

Appearances:

Applicant: Mr. Clyde Williams, instructed by Alex Richardson
and Associates

Respondents: Ms. Cora Richardson-Hodge holding papers for Ms.
Joyce Kentish-Egan, instructed by Joyce Kentish and
Associates (for respondents 1-6)
Mr. John Wigley, instructed by Chancery Lane
Chambers (for the 7th respondent)
Mr. Ivor Greene and Ms. Erica Edwards of the
Attorney General's Chambers for the 8th and 9th
respondents)

Issues: Application for discharge and/or revocation of order
by single judge – Application for extension of time to
apply for leave to appeal – Application for leave to
appeal

Result / Order: [Oral delivery]
1. The application by the applicants for an order for

extension of time to file an application for leave to appeal against the order of the single judge of this court of 7th February 2012 is granted.

2. In the circumstances of this case and in consideration of the overriding objective, this court further grants leave to appeal on the application which was filed on 9th January as amended on 10th January 2012.
3. By consent of the applicants and the 7th respondent the application for leave is treated as the appeal.
4. Further to paragraph 3 of this order the appeal is allowed and the decision of the trial judge is wholly set aside.
5. Further to paragraph 4 of this order the matter is remitted to the High Court for case management as a matter of urgency with a view to rehearing and determination of the evidence which is to be used for that rehearing.
6. The 7th respondent shall pay US \$3,000.00 agreed costs to the applicant in the application and in the appeal.

Reason:

The Court was of the view that the appeal before the High Court was by way of a full rehearing rather than merely a review of the proceedings before the Registrar of Lands. The High Court could have therefore admitted and considered evidence which may not have necessarily been before the Registrar.

Case Name:

**Sheldon Brooks
v
Regina**

[High Court Criminal Appeal No. 2 of 2008]

Date:

Monday, 14th May 2012

Coram:

**The Hon. Sir Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal**

[Ag.]

Appearances:

Appellant: Ms. Keesha Carty, instructed by KCW et al

Respondent: Ms. Erica Edwards and Mr. Ivor Greene of the Attorney General's Chambers

Issues: Murder – Appeal against conviction and sentence

**Result / Order
& Reason:**

[Oral delivery]

The appeal is adjourned pending the appointment of a legal aid attorney by this Court through the Registrar to assist the appellant in the prosecution of the appeal.

Case Name:

**A B C & D
v
E**

[High Court Civil Appeal No. 1 of 2011]

Date: Tuesday, 15th May 2012

Coram: The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal
[Ag.]

Appearances:

Appellants: Mr. Gerhard Wallbank of Webster Dyrud Mitchell

Respondent: Mr. Clyde Williams holding papers for counsel of Alex Richardson and Associates

Issues: Refusal of Norwich Pharmacal and Bankers Trust relief in court below – Whether the learned judge erred in applying the legal tests appropriate to establish whether it is proper to exercise the Norwich

Pharmacal jurisdiction, to the appellants' application for Bankers Trust relief

Result / Order:

[Oral delivery]

The application for an adjournment is granted. The date is to be fixed by the Registrar.

Reason:

Counsel of Alex Richardson and Associates who had conduct of the matter was ill and an adjournment was therefore requested. The appellants were not opposed to the adjournment being granted.

Case Name:

Paul S. Webster

v

Lois Dunbar

[High Court Civil Appeal No. 4 of 2011]

Date:

Tuesday, 15th May 2012

Coram:

**The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Ms. Jean Dyer and Ms. Dana Campbell, instructed by Keithley Lake and Associates

Respondent:

Ms. Cora Richardson-Hodge and Ms. Sherma Blaize, instructed by CR Hodge and Associates

Issues:

Appeal against decision of trial judge declaring a 25% beneficial interest in Registration Section West Central Block 28309B Parcel 98, a 40% beneficial interest in a Mercedes Benz and a 60% beneficial interest in Persian rugs in favour of respondent

Result / Order:

Judgment is reserved.