FIJI COURT OF APPEAL
CIVIL JURISDICTION

CIVIL APPEAL ABU0006/96S

BETWEEN VICTOR JANSON HO Appellant

and

KENNETH MICHAEL HO
and LEONG FAI LEING Respondents

G. Downes Q.C, M.S. Sahu Khan, G. Blake and P. Stormer for appellant
P. Graham Q.C, D. Jamnadas and J.B. Gray for respondents

Date and Place of Hearing: 10 & 11 February 1997, Suva

Date of Delivery of Judgment: 16 May 1997

JUDGMENT

INTRODUCTION

The appellant appeals against a judgment of Scott J delivered in the High Court at Suva on 8 January 1996. The learned Judge pronounced probate in solemn form in favour of a will dated 11 December 1986 made by Harry Janson Ho late of Suva, company director ("the testator"). He died on 5 May 1988.

In the Court below, the plaintiffs were the present respondents (one of two sons of the deceased and the widow of the deceased). The defendant in the Court below (the appellant in this Court) was the other son of

the deceased who had been disinherited in the will which was under scrutiny. Although proceedings were commenced in 1989, the case did not come to a hearing until July/August 1995.

The hearing in the High Court was concerned with various claims by the defendant (appellant): (a) the will had not been properly executed; (b) the testator did not know or approve of its contents; (c) the testator lacked testamentary capacity; and (d) the testator executed the will as a result of undue influence being brought to bear on him by the respondent.

FURTHER EVIDENCE, ON APPEAL

Before discussing the merits of the appeal, it is necessary to mention one preliminary matter. In December 1996, the appellant sought leave of this Court to adduce further evidence at the hearing of the appeal to supplement the record taken at trial by means of the Judge's notes. This application was accompanied by an affidavit from counsel who had appeared for the appellant in the Court below. The scope of the proposed supplementation of the record was comprehensive. The appellant sought not merely to remedy nominated alleged errors and omissions but to include a series of questions and answers in cross-examination of the first respondent which it was said the Judge did not record.

Counsel for the respondents did not agree that the Judge's record was inadequate, claiming that the alleged omissions in the record - particularly the questions and answers - had been reconstructed with the benefit of hindsight.

The appellant's application was referred by the President of this Court to the trial Judge for comment. Scott J rejected the claim that he had inadequately recorded the evidence. He noted that no application to tape-record the proceedings had been made. He acknowledged one minor omission from the printed record.

The Judge's response was referred by the President to counsel for comment. This course was quite appropriate because the case law envisages possible agreement between counsel on questions relating to the adequacy of the record and the Judge's view would be helpful to counsel in this area.

In Thompson v Andrews [1968] 2 All ER 419, the English Court of Appeal held that, in the absence of agreement between the parties, the Court of Appeal must abide by the Judge's note so far as it goes. It was there claimed by one party that the Official Referee's note was wholly inadequate; that party sought to substitute for the Official Referee's record a lengthy note made by a solicitor.

In **Vakauta v Kelly** (1988) 13 NSWLR 502, 524 McHugh JA said -

> "But in all events, when what is in issue is what a trial Judge in a Court of record has said an appellate Court should not permit evidence to supplement the transcript unless both parties agree to what was said."

Later McHugh JA said at 524-5 -

> "If a dispute exists between the parties or the Judge as to what was said, the version of the Judge must be conclusive. It is difficult to see how a contrary view could prevail without requiring or permitting the Judge to give evidence and be cross-examined in the appellate Court. Such a course is not merely unthinkable it is contrary to the function and status of a Judge in a Court of record."

Sadly, Fiji does not have the reporting services available in the New South Wales Court system. However, the principle must be the same in this country as in other common law jurisdictions. This Court must accept the Judge's record of evidence which can be supplemented only if counsel for all parties agree that it is deficient or erroneous. We express considerable sympathy for trial Judges in Fiji who must not only keep an accurate note of the evidence - albeit in narrative form - but must also be alert to observe the demeanour of witnesses. This latter task is particularly important in a case, such as the present, where the Judge's assessment of the credibility and reliability of the witnesses is all-important.

We note that the recommendations of the Beattie Commission on the Fiji Court system, concerning the recording of evidence in the High Court of Fiji, have not yet been brought into effect. We can only hope for the sake of litigants, counsel and Judges that some better method of recording evidence in major trials, both civil and criminal, can speedily be instituted.

At the commencement of the hearing of the appeal, senior counsel for the appellant indicated that the application to supplement the record would not be proceeding. It was accordingly dismissed. Counsel for the respondents sought costs on that application. We deal with costs at the conclusion of the judgment.

RELEVANT HISTORY

The testator was aged 78 at the date of his death. Born in China, he came to Fiji in 1922; he had been a successful businessman in Suva for many years. The will under attack: (a) appointed the respondents as trustees and executors; (b) made monetary bequests to the testator's four daughters and to the second respondent; (c) gave certain life interests to the second respondent (provided she remained the testator's widow and did not remarry or live with another man as man and wife); and (d) left the residue of the estate to the first respondent. The will set out the testator's reasons for

not making any provision for the appellant in these words -

> "... as he has not cared for my welfare and in fact has compelled me into litigation with him in spite of many efforts made by me to bring about a reconciliation. Furthermore, he has defrauded thousands of dollars and has not been accounting for the large amounts he has been collecting from the family company, Golden Dragon Limited. Furthermore, as a result of his actions, my family companies and I have suffered and are likely to suffer considerable losses financially."

In a series of earlier wills made by the testator since 1967, the appellant always benefited by receiving half the residue along with his brother, the first respondent. Further detail of the earlier wills, other than as indicated below, is not necessary to record. There was no competing counterclaim for probate of the 1984 will, the one before the will under contention, as is standard practice in probate actions.

All wills had been drawn by Mr Kantilal Parshotam, an experienced conveyancing solicitor now retired. He and his firm had acted for the testator since the early 1960's. Mr Parshotam considered the testator well understood spoken English. He was able to communicate with him. Mr Parshotam was quite satisfied that the testator could convey his instructions properly.

A will in 1967 had benefited the testator's first wife. By the time of a 1977 will, the first wife had died and the two sons received the bulk of the estate. By the

time of a 1981 will, the deceased had remarried; he there made provision for his new wife (the second respondent) and gave legacies for his daughters; the residual beneficiaries were still the two sons. This was still the case with the 1984 will, the one that we should have expected the appellant to make the subject of his counterclaim. The appellant was not a trustee under that will as he had been in earlier wills, although he was still one of the residuary beneficiaries. Instead, he counterclaimed for grant of probate of a much earlier will, one made on 16 October 1978.

EVIDENCE REGARDING EXECUTION OF WILL

We now summarise the evidence relating to the making of the will in question as found by the Judge. This evidence was open to the Judge to accept. It should always be borne in mind on an appeal from what is essentially a factual finding, that an appellate Court should interfere with a Judge's assessment of credibility only where the evidence accepted by the Judge is inconsistent with incontrovertible facts established by the evidence or is patently improbable. Hutton v Palmer [1990] 2 NZLR 260, Switzerland Insurance (Australia) Ltd v Gooch [1996] 3 NZLR 525, 531-2, Nocton v Ashburton [1914] AC 932, 945. The Judge here clearly accepted the evidence of the witnesses concerning the making of the will. It is difficult to see what other course he could have taken.

The testator saw Mr Parshotam by appointment in the latter's office on 4 December 1986. He came alone. Mr Parshotam had no difficulty in communicating with him in the English language although the testator's native language was Chinese. Over an hour-long interview, the testator gave Mr Parshotam instructions to prepare a will disinheriting the appellant. He told Mr Parshotam that the appellant had deeply upset him by commencing legal proceedings, that he had finally lost faith in him and that he wanted this unhappy circumstance to be mentioned in the will. Mr Parshotam's evidence, accepted by the Judge, was that although the testator was close to 80, he did not appear to be suffering from any mental or physical impairment either when giving the instructions, or when the will was executed on 11 December 1986.

Mr Parshotam was told by the deceased that the appellant had defrauded the family business. The testator had been sued by the appellant in proceedings issued in the then Supreme Court shortly before the testator gave the will instructions. Mr Parshotam, aware of this factor, knew the testator as a successful businessman and a director of family companies which ran a night-club and a music shop.

The testator had complained about the appellant to his accountant, Mr Kapadia, who also gave evidence. Believing that the testator's money was missing, Mr Kapadia accompanied the testator to the night-club to

open the safe but was prevented by the appellant from doing so.

Mr Parshotam told the testator that he should reflect before taking such a radical step as disinheriting the appellant. This was the reason, as stated by Mr Parshotam in evidence, why he did not prepare the new will immediately but waited until 11 December to allow the testator to "think it over" and discuss it further with his accountant. Mr Parshotam did not investigate the alleged defrauding himself but relied on what he was told by the testator. He stated that the testator's reason for reducing the bequests to his daughters was that he was not hearing from them, they were overseas and he had not been pleased with them.

When the testator came to sign the will on 11 December 1986, accompanied by his wife who did not speak English, Mr Parshotam explained its provisions to him carefully. He then arranged for Senator Mohammed Afzal Khan, another Suva solicitor, to be a witness and asked him to explain independently the provisions of the will to the testator. It took Mr Khan about two hours to go through the will, clause by clause, with the testator. Mr Khan considered that the testator fully understood the contents of the will. He specifically dwelt on the clause which gave reasons for disinheriting the appellant. The document was then executed in the presence of Mr Khan and Mr Chand, an experienced law clerk employed by Mr Parshotam,

as the attesting witnesses. Mr Chand was also present when the will was being discussed with the testator by Mr Khan. Both Messrs Khan and Chand confirmed in evidence that to the best of their observation, the testator understood the will. It was then signed in the presence of both of them who duly subscribed their names as attesting witnesses in accordance with the Wills Act.

The will was not explained to the testator in Cantonese as had been an affidavit made in the injunction proceedings which he had brought against the appellant. There was no medical evidence called - as is usual in testamentary capacity cases - to suggest that the testator may have been suffering from any illness, mental or physical, at the time of execution of the will.

From the above recital, it might have been thought fairly clear that the trial Judge who saw and heard the witnesses was entitled to find that the will had been duly executed and that there was just no evidentiary basis for any allegation that the testator lacked testamentary capacity.

The very lengthy submissions advanced on behalf of the appellant, when analysed, place little importance on the trial Judge's advantage in seeing and hearing the witnesses. We have already noted how unwilling an appellate Court should be to upset such findings.

GROUNDS OF APPEAL

The principal grounds of appeal can be summarised as follows -

"(a) that the trial judge was in error in finding that the respondents had discharged the burden of proof that Harry Janson Ho ("the testator") knew and approved the contents of his will dated 11 December 1986 ("the 1986 will");

(b) that the trial judge was in error in rejecting relevant and admissible evidence in relation to the question of whether the testator knew and approved the contents of the 1986 will;

(c) that the trial judge was in error in failing to consider relevant evidence in relation to the question of whether the testator knew and approved of the contents of the 1986 will;

(d) that the trial judge was in error in finding that the respondents had discharged the burden of proof that the testator had testamentary capacity in relation to the 1986 will;

(e) that the trial judge was in error in failing to apply the correct legal principles and consider relevant evidence in relation to the question of whether the execution of the 1986 will by the testator was procured by the undue influence of the firstnamed respondent;

(f) that the trial judge was in error in failing to consider the question of whether the costs of the appellant should be paid out of the estate of the testator."

LAW ON TESTAMENTARY CAPACITY

The law in this area is well settled. Out of the numerous formulations, we pick that of O'Leary CJ in the New Zealand Court of Appeal in Re White [1951] NZLR 393, 409 -

> "If a will rational on the face of it is shown to have been executed and attested in the normal manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But, if there are circumstances in evidence which counter-balance that presumption, the decree of the Court must be against its validity unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it: (per Cresswell, J in **Symes v Green** (1859) 1 Sw & Tr 401; 164 ER 785). In the end the tribunal must be able affirmatively, on a review of the whole evidence, to declare itself satisfied of the testator's competence at the time of the execution of the will: (**Smith v Tebitt** [1867] LR 1 P & D 398, 436 and **Sutton v Sadler** (1857) 3 CB (NS) 87, 97; 140 ER 671, 675)".

The question of onus was also referred to in a passage from the judgment of the High Court of Australia in **Worth v Clasohm** (1953), 86 CLR 439, 453 as follows -

> "A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the Court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt of proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the Court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the Court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution." (Emphasis added)

The approach adopted to the question of proof in all the cases is the same - i.e. that before a will can be admitted to probate, it must be shown that the testator was a person of sufficient mental capacity; that in the

absence of any evidence to the contrary it will be presumed that the document has been made by a person of competent understanding; that once a doubt is raised as to the existence of testamentary capacity, an onus rests on the person propounding the will to satisfy the Court that the testator retained his mental powers to the requisite extent; that in the end, the tribunal must be able to declare that it is satisfied of the testator's competence at the relevant time, but that a will will not be defeated merely because a residual doubt remains as to that matter. The matter has been put in different ways with varying degrees of emphasis according to the circumstances of each case but we do not detect any difference of judicial opinion, significant for the purposes of the present state, in the passages cited. (See also Peters v Morris (New Zealand Court of Appeal, 19 May 1987, unreported CA99/83).

First and Fourth Grounds of Appeal

The first and fourth grounds coalesce and can be summarised as follows: (i) the onus of proof was on the party propounding the will (in this case the respondents); (ii) the normal presumption arising from proof of due execution that the testator must have known and approved of the contents of the will at the time of execution was displaced because suspicious circumstances arose; and (iii) the proponents then had the burden of

proving affirmatively the testator's approval of the contents and failed to discharge it. **Wintle v Nye** (1959) 1 WLR 284, 291.

In this case the suspicious circumstances alleged were that the will excluded the appellant after a series of wills in which he had benefited or that "fraud" had been practised on the testator in obtaining the will's execution. In probate actions, the term "fraud" may extend to statements which were wilfully false or to the suppression of material facts for the purpose of gaining benefits under the will. See **Ridges v Watson** (unreported, Supreme Court of New South Wales, 1 May 1992, per Powell J at 6).

It was alleged that the first respondent had practised "fraud" on the testator but we are at a loss to see what evidence there was that could have raised the necessary suspicion. The allegation is that the first respondent must have poisoned the testator's mind against the appellant with "fraudulent calumny". Even relying on the evidence in support of the undue influence claim, this allegation is no more than wishful thinking.

No medical evidence was called by either party as is usually called in probate actions. Looking at the evidence, we can see no basis for saying that the testator suffered from mental impairment. This is not the archetypal case where the prudent solicitor should

have been alerted to obtaining medical opinion on the testator's capacity. For example, a commonly encountered situation - a will is executed by a very infirm testator in hospital shortly before death or a will is made for an elderly person by a solicitor unknown to the testator. To the contrary, this will was made by an experienced solicitor who had acted for the testator. In our view, he went to commendable lengths to ensure that the will represented the testator's wishes. The Judge clearly accepted the evidence of the experienced solicitors - one who prepared the will and one who witnessed it - and of the experienced legal executive who was the other witness. The Judge was fully entitled to come to that view.

The appellant further submitted that the testator entertained insane delusions concerning him. A plethora of authority, most of it covering propositions not really in issue, was advanced. Of the numerous cases cited, we have found the most helpful in this area to be the unreported decision of the Court of Appeal of New South Wales in The Estate of E.G. Griffith (judgment, 7 June 1995). We accept with gratitude the clear and concise statement of the relevant law found in the judgment of Gleeson CJ.

In Griffith, as here, there was an attack on the "inofficiousness" of the will; i.e. an inofficious will is one in which natural affection and the claims of near

relationship have been disregarded. See **Banks v Goodfellow** (1870) LR 5 QB 549, 570. In **Griffiths** there was opinion evidence from psychiatrists as to the deceased's mental state when she excluded her only child when she made her will. Where a testator exhibits an animus against a relative who may be thought deserving of the testator's bounty, the choice is, as Gleeson CJ put it, between""a harsh, unreasonable judgment of character" which is not on that account alone inconsistent with the sound disposing mind and a "morbid aberration" which so affects the testatrix's judgment of a person with a natural claim on her bounty so as to warrant the conclusion that she lacked the capacity to make a valid will". See Boughton v Knight (1873) LR 3 P & D 64, 69.

After stating the general rule about onus of proof, Gleeson CJ said at 10 -

> "If following a vigilant examination of the whole of the evidence, the doubt is felt to be substantial enough to preclude a belief that the testatrix was of sound mind, memory and understanding at the time of execution of the will, probate will not be granted" (Worth v Clasohm (1952) 86 CLR 439)

Later the learned Chief Justice said -

> "Nevertheless, difficult though its application may be in individual cases, the law treats as critical the distinction between mere antipathy, albeit unreasonable, towards one who has a claim, and a judgment which is affected by a disorder of the mind."

Insane delusions as such do not have to be proved; they may be inferred from the facts which are proved. Gleeson CJ said at 12 -

> "Where an alleged delusion concerns a fact, or state of affairs, being upon a judgment as to the moral claim one person has upon another's bounty, and the question of its falsity is capable of objective determination, the task of the court is relatively straightforward. However, there may be cases in which one person's estimation of another's claims may seem harsh and unwarranted, and perhaps even unnatural, but it is impossible to assign a reason for that, or to point to any false belief. Testamentary capacity is not reserved for people who are wise, or fair, or reasonable, or whose values conform to generally accepted community standards. A person may disinherit a child for reasons that would shock the conscience of most ordinary members of the community, but that does not make the will invalid."

The Chief Justice later emphasised the need for great care before concluding that a harsh or unreasonable judgment amounts to a delusion.

In Griffiths, the Court, by a majority, upheld the trial Judge's view that there was a plausible case, not rebutted, that the testatrix was unable to consider and give effect to the claims upon her bounty of her only child. The Court of Appeal rejected any challenge to the assessment of the evidence and the findings of fact of the trial Judge. It does not seem that an insane delusion argument was put to Scott J. It is rather late to put it now.

In the present case, Scott J's findings in the "fraud" and other related areas were expressed as follows -

> "I tried to explain why I ruled against the admission of such evidence but I was conscious that my explanation was not clearly understood. I will try again. In my view whether the defendant's allegations that the first plaintiff was dishonest and poisoned the testator's mind are true or not they do not affect the central question before me namely: did the first plaintiff coerce the testator into disinheriting the defendant? This is because the truth of a testator's belief which lead him to make the dispositions which he in fact makes do not affect their validity. Were that not so then upon it being shown in any case that a testator acted on wrong information it would be open to have the will set aside, a proposition so absurd that it only has to be stated to be appreciated.
>
> If, for the sake of argument, I were to accept the whole of the defendant's case would that amount to proof that coercion actually took place? In my view it would not and therefore no useful purpose whatever would have been served by enquiring into the matters which the defendant wanted the Court to explore."

The above quotation also covers Scott J's findings on the alternative claim of undue influence. Effectively, Scott J was saying that there was enmity between the appellant and the testator. He did not find it necessary to enter into an excursion as to which of them was right. He had before him no evidence to show a "morbid aberration". At best for the appellant, the evidence showed a harsh, unreasonable judgment of character on the part of the testator.

There may have been an unreasonable antipathy but it cannot be elevated into a disorder of the mind. At best for the appellant, on the admissible evidence presented,

there can only be what the cases call "a residual doubt" about testamentary capacity. The testator's estimation of the appellant may have been harsh and unwarranted but that is not enough to show an "insane delusion" depriving him of testamentary capacity.

Second and Third Grounds - Rejection of Evidence

The claims about rejection of evidence stemmed from an attempt by counsel for the appellant before Scott J to cross-examine the first respondent as to details of his personal finances and transactions. It was the part of the cross-examination where the record was sought to be supplemented. Then counsel for the appellant submitted to the Judge that the line of questioning was relevant in demonstrating the alleged undue influence. The Judge allowed general questioning on the results of financial dealings which disclosed such relevant matters as disagreements with the testator and with the appellant but not a detailed investigation of the first respondent's personal finances. He also disallowed cross-examination on the matters raised in the testator's affidavit in the injunction proceedings. He called that "a fruitless and time-wasting investigation".

The allegation, on appeal but not before the Judge, was that the first respondent had unduly influenced the testator or that the testator was so wrong in his view of the appellant when he excluded him from the will that it

could fairly be said that he was suffering under an insane delusion. The onus of proving that he was not would have rested on the proponent of the will.

Looking at the record as a whole, it is apparent that Scott J permitted considerable evidence of the "bad blood" which existed between the parties as the above extract from his judgment shows. However, it is difficult to see what relevance the personal finances of the first respondent had to those enquiries. In the absence of more specific pleadings, we consider that he was quite correct to reject this line of cross-examination of the respondents. Their evidence was to the effect that the appellant refused to make peace with the testator despite various attempts by the testator and others. It is clear from the record that the Judge, having seen and heard the witnesses, did not consider that any efforts by the respondents in this area were sufficient to give rise to undue influence.

Fifth Ground - Undue Influence

The onus is on the person who alleges undue influence. The Judge considered that the appellant had not discharged this onus. He clearly preferred the evidence of the respondents over that of the appellant and his witness, Mr Bayameyame. Clearly there was bad blood between the appellant and the testator, evidenced by the

initiation of proceedings by the appellant against the deceased.

The Judge summarised his view partly in the passage cited earlier and in the following -

> "I have in fact no doubt at all that there was a deep and long standing enmity between the first plaintiff and the defendant. I do not doubt that each belittled and made all manner of accusations against the other to their father. I do not suppose that either was always entirely ethical in his every business dealing. I also accept that the first plaintiff may well have indulged in a little bullying of his old father; such a thing is a very common occurrence. But at the end, I am satisfied that nothing I was told amounts to evidence of coercion. Indeed quite the contrary is the case. The defendant admitted that he was not present when the will was signed and so could not give direct evidence of what had occurred on that day. But the second plaintiff, who had nothing to gain by the defendant's disinheritance, was present as were Mr Parshotam, Mr Khan and Mr Chand. The evidence of all of them amounted to an assertion that the testator freely, in full possession of his faculties and being fully aware of what he was doing deliberately disinherited the defendant on 11 December 1986. Whether he did so because the defendant had issued a writ against him the previous October I do not know. It is not necessary for the Court to determine why the will was signed. It is not for the Court to decide whether it ought to have been signed. In order to establish the defence of undue influence it was however necessary for the defendant to prove that it was signed as a result of coercion either by the first plaintiff or by someone acting on his behalf. Having considered all the evidence led I am satisfied the defendant has failed to discharge the burden of proof resting upon him and accordingly there will be judgment for the plaintiffs."

We consider the Judge was quite able to take the above view of the evidence. He took full advantage of seeing and hearing the witnesses. On the evidence accepted by

the Judge there is no possibility of undue influence having been proved.

Sixth Ground - Costs

On the question of costs, the Judge made no order as to costs and did not appear to have given consideration to the question of costs, although submissions were made. Counsel submitted that even if the appellant were to failed in this Court, costs should be paid out of the estate on the basis that it was the "fault" of the testator which had brought about this enquiry. In Boughton v Knight (supra) it was ordered that the costs of the unsuccessful plaintiff and the defendant should be paid out of the estate even though the will of which grant of probate in solemn form had been sought was held to be invalid. That order was made because the plaintiff had not known the facts which led the Court to refuse the grant; the testator was substantially the cause of the litigation. The situation in the present case is entirely different. The will was valid and probate granted; the appellant was aware of the relevant facts but nevertheless chose to oppose the grant. We interpret the order of Scott J as making no order as to costs. In so doing he was being kind to the appellant.

In this Court, however, the respondent is entitled to costs including costs in respect of the appellant's application to supplement the record of the High Court,

and disbursements to be fixed, if agreement cannot be reached, by the Registrar.

Decision: Appeal dismissed.

Appellant to pay the respondents' costs of the appeal

Mr Justice Sir Ian Barker
Justice of Appeal

Mr Justice I.R. Thompson
Justice of Appeal

Mr Justice J.D. Dillon
Justice of Appeal