Hilary Term
[2019] UKPC 10
Privy Council Appeal No 0020 of 2011

JUDGMENT

Philomen Dean (Appellant) *v* Chanka Bhim (Respondent) (Trinidad and Tobago)

From the Court of Appeal (Trinidad and Tobago)

before

Lord Kerr
Lord Wilson
Lord Lloyd-Jones
Lord Briggs
Lady Arden

JUDGMENT GIVEN ON

11 March 2019

Heard on 7 February 2019

Appellant	*Respondent*
Anand Beharrylal QC Hyacinth Griffith Josh Hitchens (Instructed by Alvin Shiva Pariagsingh)	Rowan Pennington Benton (Instructed by Simons Muirhead & Burton)

LORD BRIGGS:

1. This is an appeal from the Court of Appeal of Trinidad & Tobago in contested probate proceedings, about the last will of Higgins Cardenas who died on 15 May 1999. The applicant for probate, Chanka Bhim, who was the deceased's accountant, could only produce a photocopy of the alleged will, dated 22nd February 1999, in which he was named as sole executor. Mr Bhim is the respondent to this appeal. The deceased's daughter Philomen Dean, who is the appellant, entered a caveat and was therefore joined as defendant to Mr Bhim's claim for probate. By her defence she denied that the alleged will was signed and executed by the deceased. By amendment made at the trial, she pleaded in the alternative that, if the will was duly signed and executed by the deceased, Mr Bhim's inability to produce the original entitled her to rely upon a presumption that the deceased had, before his death, destroyed the will with the intention of revoking it.

2. In the event, the case turned upon two questions of fact, namely:

   i) Did the deceased sign and duly execute the will?

   ii) Did the deceased destroy the will before he died?

3. The trial judge Hosein J held, in a written reserved judgment completed shortly after the trial in 2007, first, that the will had indeed been signed and duly executed by the deceased and secondly, that he had not destroyed the will before he died. He made both those findings after hearing evidence from witnesses, namely Mr Bhim himself and a Mr Boodoo (who was one of the attesting witnesses, the other having died), that they had both seen the deceased signing the will and had seen the original will at the deceased's home very shortly after his death. Despite some discrepancies in those witnesses' oral and written accounts of the execution of the will, and evidence from other witnesses giving a different account of what had happened after the deceased's death, the judge decided to give credit to the evidence of Mr Bhim and Mr Boodoo, not least because neither of them had anything to gain, or to lose, by the admission of the will to probate.

4. Ms Dean's appeal was heard by the Court of Appeal (Kangaloo, Jamadar and Soo-Hon JJA) in July 2009. In a careful reserved judgment (with which his colleagues agreed) Kangaloo JA dismissed the appeal, affirming both of the findings of primary fact made by the judge, namely that the deceased had both signed the will, and had not destroyed it prior to his death. Kangaloo JA observed in passing that the judge might perhaps have expressed the second of those findings with greater clarity than he did.

5. Subject only to one point, to which the Board will return, this is therefore a case in which there have been two findings of primary fact by the trial judge, both confirmed by the Court of Appeal, which, if not capable of being disturbed on this further appeal, are decisive as to the outcome of this dispute.

6. It is the settled practice of the Board not to interfere with concurrent findings of primary fact by the courts below. This is the practice regardless whether an appeal lies to the Board as of right, as in this case, or only with leave: see *Juman v Attorney General of Trinidad and Tobago* [2017] UKPC3, per Lord Toulson at paras14-15, following *Devi v Roy* [1946] AC 508 at 521 and *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 at paras 4-8. In *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15 the advice of the Board included this passage, at para 44:

> "The Board's settled practice is not just to treat the scales as loaded against an appellant in the circumstances described above, but altogether to decline to interfere with concurrent findings of pure fact. This means, …, that an appellant seeking to mount such an appeal must first persuade the Board that the case comes within that very limited special category which justifies a departure from that practice."

7. This appeal has been mounted upon four grounds. Although thinly veiled as errors of law or principle, the first three grounds were, in substance, straight-forward attacks upon the fact-finding process undertaken by the judge, and upon the analysis of them by the Court of Appeal. The first two of them related to the judge's finding that the will had been signed and duly executed by the deceased, and relied upon supposed inconsistencies in the detail of the judge's analysis, and upon a supposed failure by the applicant to deal with discrepancies in the written and oral accounts of the signing and execution of the will. The third ground related to the question whether the deceased had destroyed the will, asserting that a decision by the judge "on a parenthetical basis" is unsatisfactory in relation to a critical issue. This is a reference to the fact, taken fully into account by the Court of Appeal, that the only place in the judge's written judgment where he dealt expressly with his finding that the original will had been seen after the deceased's death was a passage in which that finding was expressed within brackets.

8. None of those three grounds of appeal came anywhere near placing this appeal within that very limited special category which justifies a departure from the Board's practice of declining to interfere with concurrent findings of pure fact. It is in those circumstances unnecessary for the Board to enter into any analysis of the detail, fluently though it was argued, in writing and orally, by Mr Beharrylal QC for the appellant. Since those grounds do not put this appeal into that special category, the proper response of the Board is simply to say that no basis for its interference with those two concurrent findings of primary fact has been disclosed.

9. The fourth ground falls into a slightly different class. The appellant obtained, shortly after filing her defence, the report of a document examiner, a Mr Glenn Parmassar in which, after examining a photocopy of the will and four other documents bearing specimen signatures of the deceased, he concluded:

> "From the available material, it has been concluded that it is probable that the questioned signature on exhibit on Q1 (*the will*) may not have been executed by the … specimen writer (*the deceased*), The evidence found, however, is by no means conclusive. The availability of additional contemporaneous specimen signatures, as well as the original of exhibit Q1 if possible, may allow for a more effective scientific examination."

10. In her appeal to the Court of Appeal Ms Dean complained that the judge had wrongly refused to admit Mr Parmassar's report as expert evidence, when application was made on her behalf to do so at the trial. The response on behalf of Mr Bhim was that no such application had been made to the judge.

11. As is recorded in the judgment of Kangaloo JA, the Court of Appeal dealt with that complaint in the following way. The court had before it affidavits from attorneys and advocates for the parties, who had been present at the trial, asserting (for Ms Dean) that such an application had been made and rejected and (for Mr Bhim) that no such application had been made. The Court of Appeal also had available the judge's notes of the trial, but no transcript. The court accepted the invitation of leading counsel for Ms Dean to decide that factual question on the basis on those written materials, without recourse to cross-examination. Faced with conflicting written evidence from the parties' lawyers, the court relied upon the absence of any note by the judge about the making, still less refusal, of such an application in deciding that, in fact, no such application had been made. This complaint therefore failed because of a finding of primary fact by the Court of Appeal.

12. On appeal to the Board, ground four asserts first, that the Court of Appeal should have insisted on obtaining a transcript of the proceedings before the judge. Secondly the Court of Appeal should have declined the invitation from leading counsel for Ms Dean to decide the question on the affidavit evidence, and should have insisted that her lawyers be invited to give their evidence orally, before it was rejected.

13. On enquiry by the Board at the hearing of this appeal, it was accepted by Mr Beharrylal QC (who did not appear below) for Ms Dean that no transcript of the proceedings before the judge has ever been located.

14. This fourth ground of appeal is therefore a straight-forward challenge to a finding of primary fact by the Court of Appeal. To succeed in such a challenge it would be necessary to show that the Court of Appeal had either erred in law or in principle, or made a finding for which there was no evidence at all, or one which was plainly unreasonable.

15. This ground of appeal manifestly fails to satisfy those conditions. It appears that there is no basis to conclude that, even if a transcript had been asked for by the Court of Appeal, it would have been available. Furthermore, the procedure for dealing with the factual question without reference to a transcript and doing so upon written rather than oral evidence, was one which counsel for Ms Dean had invited the Court of Appeal to employ. In the circumstances, this ground of appeal, as presented to the Board, amounts to no more than an attempt to have a second bite at the cherry, the appellant's preferred procedure having, when first deployed, failed to produce the desired result.

16. This appeal is therefore dismissed.