Case No: HC07C02318

NEUTRAL CITATION NUMBER: [2009] EWHC 3341 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 14 October 2009

BEFORE:

HIS HONOUR JUDGE PURLE QC
(sitting as a High Court Judge)

BETWEEN:

KATHERINE LIM

Claimant

- and -

ALISTAIR THOMPSON

Defendant

MR R WILSON (instructed by Messrs Kidd Rapinet) appeared on behalf of the Defendant

MS LIM represented herself on 12th and 13th October 2009 (though absenting herself for part of the time) but did not appear on 14th October 2009 and was not represented on that day

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Approved Judgment

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101 Finsbury Pavement London EC2A 1ER
Tel No: 020 7422 6131 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

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1. JUDGE PURLE: This is the trial of the claim of Ms Katherine Lim to revoke the grant of letters of administration dated 24 May 2007 in favour of the defendant, that is to say Alistair Thompson, he being the sole surviving defendant, in the estate of Peter John Ellis Rendes, the deceased, who died on 4 February 2007.

2. The matter was called on on Monday of this week, 12 October. On that occasion, Ms Lim sought an adjournment which I declined. There are the following issues which arise to be considered: firstly, that the will which Ms Lim now says is a valid will of the deceased, executed allegedly on 14 December 2006, is said by the defendant not to have been duly executed in accordance with section 9 of the Wills Act 1837. I mention also that there is an earlier version of that will or, to be more accurate, an earlier version of an attestation clause by the witnesses to that will, dated 25 October 2006. I mention also that there is an earlier purported will dated 22 October 2006 which, however, only has one witness. I think it behoves me, in light of the peculiar history of this case, to consider the validity of each of those three wills. The second point that arises is whether or not the deceased had testamentary capacity at the relevant time or times. The third point that arises is whether or not the deceased knew and approved of the contents of the will which it is sought to propound, whatever will that may ultimately prove to be.

3. Although I refused the adjournment on Monday of this week, it did seem to me, having regard to the late production of medical evidence, for which no criticism is intended, that it would not have been appropriate at that stage to deal with the issue of testamentary capacity or knowledge and approval until such time as Ms Lim had had the opportunity more fully to digest the lately produced evidence and consider whether any further evidence on her side was necessary in connection with the issues of capacity and knowledge and approval. However, it did not seem to me that the medical evidence impacted at all on the question of due execution; that issue is a relatively narrow one. I therefore directed that the question of due execution should be tried before other issues in the case. That is the trial that has now taken place. Initially, the direction I gave related only to the last of the 3 purported Wills. Subsequently, I extended the direction to encompass all 3 purported Wills.

4. Ms Lim, I should say, was not deterred from renewing her application for an adjournment thereafter at repeated intervals, which I continued to decline. However, there were some advantages in hearing those repeated applications because, in the course of so doing, she directed my attention towards aspects of the case which I took her to be relying upon. I should mention also that Ms Lim sought an adjournment, as my judgment of Monday highlighted, upon the grounds also that she is facing proceedings in the Southwark Crown Court tomorrow, 15 October 2009, for which she required time to prepare. It became evident yesterday, however, that this hearing in the Southwark Crown Court is a plea and case management hearing at which she will be required merely to plead guilty or not guilty. I regret that Ms Lim repeatedly misled me during the course of her oral submissions as to the extent that she would need to prepare for that purpose and am driven to infer that she was concerned to sabotage the hearing of this trial by whatever means.

5. I turn to consider the issue of due execution. Section 9 of the Wills Act 1837 provides as follows:

> No will shall be valid unless:
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
> (b) it appears that the testator intended by his signature to give effect to the will; and
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
> (d) Each witness either--
> (i) attests and signs the will; or
> (ii) acknowledges his signature,
> in the presence of the testator (but not necessarily in the presence of any other witness), but no other form of attestation shall be necessary.

6. The legal burden of proving due execution is on Ms Lim as she asserts the validity of the December 2006 will. To the extent that anyone may wish to prove due execution of any earlier will, the legal burden is on that person.

7. So far as the handwritten document of 22 October 2006 is concerned there is only one witness and it is self-evident, therefore, that there has been no due execution of that document for the purpose of the defined issue that I am trying. I so rule. So far as the document of 25 October 2006 is concerned, there is only a copy which has been produced; the original has not been produced. There is no explanation as to the non-production of the original, though I understood from Ms Lim that the original was in turn copied before attestation, as different attesting witnesses were originally intended. That is a curiosity, at least in itself, and in the light of the history of the matter becomes more of a curiosity and a matter of suspicion. No claim to propound any sort of will was made until after the death of the deceased following steps taken by the defendant to obtain possession against Ms Lim of the deceased's property.

8. In the claim form, as originally issued, reliance was placed solely on the 22 December handwritten will. On 25 October 2007 Master Moncaster ordered Ms Lim to search for wills and what she came up with was the will of 25 October 2006. I interpose to say that when I refer to "a will", I am referring in each case to a purported will and I am not going to repeat that word on every occasion; it must be taken as understood. She did not, as I have said, come up with the original of that but only a copy.

9. In the absence of any explanation as to why the original was not produced, the circumstance of the late production of the will when hitherto no reliance had been placed upon it is itself a circumstance of suspicion, the more so as it is evident from what I have been told by Ms Lim during such parts of the hearing as she has chosen to attend, and as appears from her own written statement, that she was (she claims) aware of this will. There must be a suspicion, as Master Moncaster recognised in a judgment notable for its clarity given on 24 April 2008, that what Ms Lim has been doing. by the production both of this will of the later version, is manufacturing a case according to her requirements.

10. Mr Wilson, for the defendant, adopted that approach and sought to persuade me that on the totality of the evidence, the likelihood was that both versions of the 25 October

2006 will were created by Ms Lim after the event. (By both versions, I mean, wherever I use that or any like expression, the one dated 25 October and the same version purportedly attested later on 14 December.) The language and layout of the will has the hallmarks of an idiosyncratic style, familiar to that of Ms Lim and very different from the deceased's style. This has been demonstrated by reference to another draft will, typed by the deceased himself some time before the October 2006 will, the style of which is very different.

11. Mr Wilson properly drew my attention to the authorities on the presumption of due execution. There is an attestation clause in the October 2006 will and the presumption of due execution, when it arises, is, as Mr Wilson rightly conceded, a strong one, see Sherrington v Sherrington [2005] WTLR 587. Mr Wilson also referred me to Re Papillon (deceased) [2006] EWHC 3419 (Ch), a decision of Mr Guy Newey QC, sitting as a Deputy Judge of this court. The version I refer to is reported at [2006] All ER (D) 297. Mr Newey QC put the matter thus in paragraph 22:

> "The burden of proving due execution, whether by presumption or by positive evidence, rests on the person setting up the will … In certain circumstances, however, the maxim *omnia praesumuntur rite esse acta* will apply and due execution will be presumed."

12. I pause to note my admiration for the deputy judge's courage to retain the Latin maxim in its original form. The passage continues:

> "The presumption applies, however, with less force where the document in issue does not include a full attestation clause ... Phillimore J explained as follows in Re Bercovitz Estate, Canning v Enever [1961] 1 WLR 892 (at 896):
>
> 'The force of the presumption or maxim varies with all the circumstances. Where a document is entirely regular in form it may be very strong; but where, as here, it is irregular and unusual in form, the maxim cannot apply with the same force.'
>
> In Bercovitz, Phillimore J took the question he had to decide to be 'whether, in all the circumstances of this particular case, it is more probable that what was done was done as it ought to have been done to render the will valid.' (see [1961] 1 WLR 892 at 895)."

13. The first version of the 25 October 2006 will was (according to the copy in evidence) attested by Paulina Hogan and Henryk Edmund Szewczyk. The attestation clause was itself dated 25 October 2006. The will itself was drawn up in the style which is more typical of Ms Lim's style than the deceased's and Ms Lim accepted that she typed it up although she said she did so on instructions.

14. Following the production of this version of the 25 October will, the defendant's solicitors obtained a statement from Paulina Hogan, which is formally in evidence, having been properly made the subject matter of a Civil Evidence Act notice. Paulina

Hogan says that she did not sign this document during the deceased's lifetime but did so in November 2007 (i.e., after the death of the deceased) and then subsequently was asked to do so again She declined to do so on the second occasion though for some reason which is not satisfactorily explained she was willing to do so on the first occasion. Paulina Hogan has not been subject to cross-examination but her evidence was properly admitted under a Civil Evidence Act notice.

15. As Ms Lim has throughout been a litigant in person and cannot be taken to have necessarily understood the significance of the Civil Evidence Act notice, I would, had she remained here to ask for it, as I endeavoured to make plain to her more than once, have issued a witness summons requiring the attendance of Paulina Hogan for cross-examination. I would alternatively have allowed her to put in a counter-notice out of time thus requiring the defendant to produce the witness. Mr Wilson fairly told me that the witness did not wish to attend and I can understand why, because on any footing the witness has, according to her own evidence, signed a document which she should not have signed, purporting to witness a document that she did not witness. Nonetheless, this was an opportunity of which Ms Lim did not avail herself.

16. The second purported attesting witness, Mr Szewczyk, was ordered at one stage, apparently by Master Moncaster, to attend. That order, as an order made only between the parties, must I think be construed as an order that whoever wished to rely upon Mr Szewczyk's evidence, which must be Ms Lim in the circumstances of this case, should ensure his attendance. Ms Lim did nothing to do so but again I was prepared to countenance the issue of a witness summons against Mr Szewczyk to secure his attendance as a witness. Ms Lim seemed very reluctant that I should do that, though that may have been influenced by her own view that this was a very impolite thing to do to a witness. I asked her yesterday, prior to her return to court today, to enquire of Mr Szewczyk, with whom she has clearly been in contact, as to when he might be prepared to attend court. She originally told me that he was scheduled to appear on 19 October. As however, this case was set down as a five day trial from 12 October, albeit in a window that stretched from 12 to 19 October so that it might, at one stage, have come on later, it was not acceptable on the face of it to defer him until 19 October. Moreover, I was not told that he would in fact be available on 19 October; that was merely one of the dates that Ms Lim wished to enquire about. I encouraged her overnight to enquire as to whether he might be available either today, which seemed unlikely, or on Friday of this week.

17. Ms Lim has not so far returned this morning. It is now 11.20am and as she was not herself feeling up to start giving her evidence yesterday evening, the half an hour that we lost then I decided to make up today by starting at 10.00am; a point which I alerted her to when rising yesterday. I also told her that if she was not here on time we would carry on without her. She had been late on the previous two days, though on the first day she may have had some excuse because there was a late change of courtroom to accommodate my own requirements for getting in and out of court, as I am a wheelchair user. She has not turned up this morning whether at 10.00am or at 10.30am or at 11.00am or not now until 11.20am, though her McKenzie friend who has been assisting her has been in court since 10.30am. The position, therefore, is that Mr Szewczyk has not attended to confirm his attestation of either version of the 25 October will. He was a witness to each of them.

18. During the course of addressing me, Ms Lim did, however, draw my attention to a statement of Mr Szewczyk, dated 3 December 2007, the relevant part of which I read out for the purpose of the record yesterday as there were no copies immediately available and the statement was part of a very much larger bundle bound together by one of those plastic binders that it is not easy to extract documents from. Mr Wilson, I should say, had no objection to my adopting that course. Ms Lim was apparently anxious that I should see this document and therefore I received it in that relatively informal way in evidence. She insisted that the document had been filed with the court back in December and she was under the impression that she had served it on the defendant's solicitors. Accordingly, I received it in evidence although a copy could not be found on the court file and the defendant's solicitors had not, in fact, so I was told, received a copy. It did not seem to me to be fair to exclude the statement on that ground alone in the case of a litigant in person.

19. Perusal of the statement was significant. In summary, Mr Szewczyk gave what purported to be confirmatory evidence as to the handwritten document of 22 October 2006. The statement was, however, entirely silent as to either version of the 25 October 2006 will. Ms Lim told me that she wished to obtain from Mr Szewczyk a further updated statement which I inferred would, she hoped at any rate, deal with the later will. However, she did not accede to my suggestion that I should issue a witness summons in respect of Mr Szewczyk, and the time for service of witness statements had long since passed, as she well knew. Notwithstanding that, I would have received his evidence orally had Ms Lim bothered to turn up to continue with the trial and asked me to deal with the matter in that way.

20. As it happens, all I have from Mr Szewczyk is the statement which is silent as to the two 25 October versions of the will. This only adds to the suspicions to which Master Moncaster alluded on 24 April 2008. The second version of the will of 25 October is plainly a photocopy of the earlier version. I hesitate to call it a photocopy of the original because I have not seen the original. Blown-up versions of the signature clearly indicate, even in the absence of expert evidence, that the second version of the will is merely a photocopy of the first. What is more, Ms Lim confirmed that in her address before me. Though that statement was not formally in evidence, the confirmation is admissible against her to the extent that it is a statement against interest. No intelligible explanation has been given as to why the second version was needed. What prompted it was the filing and service of Paulina Hogan's written statement which disclaimed the first version and also asserted that in December 2007 she, Paulina Hogan, was asked to do it again, this time in the presence of Mr Szewczyk.

21. It is evident from Paulina Hogan's version of what happened previously that there can (if her evidence is accepted) have been no due execution of the first version of the will, because it all happened after the death and, even if she got the dates wrong, the other attesting signatory was nowhere to be seen. Whilst, under the Wills Act, the signatures of the witnesses do not have to be appended in the presence of each other the testator is required to sign (or acknowledge his signature) in the presence of them both . There is no evidence at all that that occurred in the case of the first will, indeed there is evidence the other way from Paulina Hogan.

22. The fact, if Paulina Hogan's evidence is accepted, that Mr Szewczyk and she were asked to do it again is strongly supportive of the recognition by whoever asked them to do that, that there was something wrong with the first version of the 25 October will. Moreover, there is, as I have said, this second version, purported to have been attested on 14 December by Mr Szewczyk and a Dr Mutlack. Dr Mutlack is a different witness from Paulina Hogan and even if one proceeds on the basis that this document was, indeed, attested on 14 December 2006, the fact that that happened, assuming even that it happened with the deceased's knowledge, is, again, a recognition that there was something wrong with the first purported execution.

23. As regards the second version, the most that can be said is that what the witnesses attested was a copy of a copy of a will. As I have not seen the original version of the October will, I cannot assume that the December version is a copy of the original as opposed to a copy of the copy, in which, prior to the copying, the details of the previous attestations have, in some way, been excised.

24. The circumstances are, as Master Moncaster observed, suspicious. Moreover, the original of the December version is in evidence and that confirms, from an inspection, that it is a photocopy of the earlier version. As Mr Wilson pointed out, if one runs one's forefinger along the rear of the back page, there are indentations where the witnesses have signed but no indentation for Peter Rendes' signature.. The same is true of the front page, there being indentations on that page as well where the attesting witnesses have signed. Each of the substantive pages of the wills is, in fact, signed by the testator purportedly with the photocopied signature to which I have referred, that photocopy being attested by the 2 witnesses.

25. The first question I need to consider is whether or not a photocopied signature is a valid signature, even assuming the photocopy was made by or at the direction of the testator (or the photocopied signature was acknowledged by him) in the presence of the attesting witnesses. I refer again to the terms of section 9. What that section requires is that the will should both be in writing and "signed by the testator". That signature has to be made in the presence of two or more witnesses or acknowledged in the presence of those witnesses. In my judgment, a photocopy a previous version of the will with a photocopied signature of the testator is not a document which is signed by the testator at all. It is important to remember that one of the raisons d'être of the Wills Act, if not the primary raison d'être, is the prevention of fraud. When people die, there is no one around who can directly contradict, as other witnesses can do, the signature as being that person's signature. If someone forges a document in my name, I can give evidence about it and say, "I did not sign that document". A deceased person cannot do that. Therefore, it is very important that what must survive is an original signature, whether of the deceased or someone else signing at his direction in his presence. It does not matter whether that signature is attached in the presence of the witnesses or merely acknowledged in their presence but it does have to be an original signature so that the court can examine it and properly evaluate the evidence as to due execution.

26. It follows for this reason alone that the second version of the October will is invalid. However, I will go further. The circumstances in this case are of such suspicion that no presumption of due execution arises and I am not prepared to infer that everything was regular in this highly irregular chain of events, which I have already recited at greater length than possibly I need have done. One is left with the very clear impression that

Ms Lim has concocted these documents to serve her own purposes. It is not strictly necessary for me to go that far because the burden is upon her to prove due execution and she has manifestly failed to do so.

27. I should, perhaps, mention the evidence of Dr Mutlack. Master Moncaster, at an earlier stage, dispensed with the need for him to attend. He is in Jordan and, therefore, his presence could not be compelled in any event. There is, however, an unsatisfactory statement that has been put in purporting to bear his signature, which does not identify the will which he attested, though he does claim to have attested some such document. Curiously, the statement is dated 13 December 2007 and happens to tie in with the date when Paulina Hogan says she was asked to sign another will. The style of the document is very much in the style of Ms Lim and I am not persuaded by the mere existence of this purported witness statement that it is genuine or that it overcomes the circumstances of suspicion to which I have referred.

28. I shall finally add that I was also taken to a written statement which was formally adopted in evidence by a Mr Ward. The relevant part related to the circumstances in which he witnessed Ms Lim procuring the signature of the deceased upon a document shortly before his death. He apparently heard Ms Lim tell the deceased that the form he was being asked to sign was for the purpose of enabling him to change his GP. The inference I am asked to draw is that this may have been the deceased signing the will. Mr Ward said the document could have been anything. Ms Lim has not turned up today to be cross-examined on that. The conclusions I reach are, however, independent of the evidence of Mr Ward. As he said, the document that the deceased signed could have been anything. I am not prepared to assume that it was the will. It could, in fact, have been an authority to change his GP, which is what Mr Ward remembered Ms Lim saying.

29. There are (quite apart from Mr Ward's evidence) enough circumstances of suspicion for the presumption of regularity to have no application. I accordingly decide the preliminary issue in relation to each of the three wills in the same way. Not one of them was duly executed. It follows from this that the claim must also be dismissed as questions of capacity, or knowledge and approval, which I have assumed in favour of Ms Lim, do not, in the circumstances, any longer arise.