The importance of contemporary documents as a means of getting at the truth: *Mundil-Williams v Williams* [2021] EWHC 586 (Ch)

Date of Decision: 16 March 2021

Court: High Court, Business & Property Courts in Wales

Link: https://www.bailii.org/ew/cases/EWHC/Ch/2021/586.pdf

Summary

The decision of *Mundil-Williams v Williams* [2021 EWHC 586 Ch, which concerned whether a testator knew and approved the contents of a will, is one which turned on its own sensitive facts. Nevertheless, the decision does have something meaningful to

say to all practitioners on the importance of contemporary documents as a means of getting at the truth.

Claimant's case

By way of (brief) outline, the testator signed a purported will in 2014 (the "**2014 Will**"). The Claimant, being a son of the deceased, asked the court to pronounce against the validity of the 2014 Will on the ground that his father lacked knowledge and approval of its contents, and in favour of an earlier will dated 5 October 1990 (the "**1990 Will**"). The primary point taken by the Claimant was that his father never intended for the First Defendant, being the deceased's eldest son, to be given the family farm outright (the "**Farm"**). The Claimant maintained that the Farm was to form part of the residuary estate to be shared between the deceased's four sons. The Farm was by far the most significant asset in the testator's estate: the gross valuation of the assets in the estate for tax purposes was £983,000 of which £700,000 was the value of the Farm.

It was accepted by all parties that the deceased had testamentary capacity and gave detailed instructions to his solicitors. The will and an accompanying explanatory letter of wishes were both drafted by the testator's solicitors and were clear and unambiguous. On being provided with copies prior to execution, the testator read the will carefully, even indicating a correction in respect of the address of the Farm. He also read the letter of wishes, at least in draft form. Moreover, the firm of solicitors received confirmation both by telephone and in a face-to-face meeting that the testator understood its provisions and was content with them.

Decision

Despite the above factors weighing powerfully in favour of a conclusion that the 2014 Will did represent the testator's intentions, the Judge determined at **[¶51]** that: "*the testator did not have knowledge and approval of the contents of the 2014 Will and that he*

seriously misunderstood its provisions, in that he did not appreciate that the Farm was not part of the residuary." In reaching his conclusion, the Judge candidly stated that he was not impressed with the oral evidence presented by the Claimant, First or Second Defendant.

As regards the state of mind of the deceased, the Judge placed "*great importance*" on the contemporaneous documentation which included the evidence relating to the instructions given by the testator for the 2014 Will and the circumstances of its preparation and execution. The Judge observed that something had gone awry between the giving of instructions by the deceased to one member of staff at the solicitors' firm on 19 May, and the interpretation of those instructions by a paralegal who was responsible for the preparation of the 2014 Will on 18 June. There was nothing to suggest within the handwritten notes produced on 19 May 2014 or within the typed file note produced afterwards that the Deceased intended the Farm to form part of the residuary estate. The Judge rejected the Defendants' case that the deceased had changed his instructions on 18 June when speaking on the telephone to the paralegal. Of the paralegal's evidence, the Judge said at **[¶55]**: "*[She] showed obvious, though understandable, signs of remembering things in a manner that accorded with what she knows she ought to have done and what, as a qualified solicitor, she now would do*." It would seem that the unfortunate paralegal simply drafted the 2014 Will based upon her incorrect interpretation of the testator's previous instructions.

Discussion

Even in disputes which are highly fact-centric, it is a rare case where victory follows immediately from a rigorous cross examination of a witness leaving him/her '*swayed and…crumpled at the side of the witness box*.'[1] Judges are alive to the fact that the adversarial process of trial can often leave the truth mysteriously, and sometimes, conveniently hidden, covered over by the evasions, and half-truths embedded in the

[1] John Mortimer, Rumpole a la Carte (1990), p. 508

conflicting contentions of opposing witnesses.[2] In most cases, the successful narrative will be the one assessed as being the more favourable account against the contemporaneous documents. See the now familiar warnings in respect of the fallibility of the human memory when it comes to recalling past beliefs in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15] and [17].

In *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 at [48] and [49], Males LJ cited *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p.57 and gave the following additional guidance in respect of the importance of contemporary documentation:

> *"[48] In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in The Ocean Frost [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:*
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> > *"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."*

[2] David Pannick, 'Advocates' (1992), p. 233

> *[49] It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations. It is, however, striking that the judgment in this case contains virtually no analysis of the contemporary documents many of which appear to shed considerable light on the nature and purpose of the critical confirmations and the way in which they were understood."*

Whilst the above decisions were not referenced by HHJ Keyser QC (sitting as Judge in the High Court), he had no difficulty adopting the same approach. He placed little to no weight on the conversations prior to 2014 which were largely undocumented and took place over a long period of time. He emphasised the unreliability of the witness evidence at [**¶49**]:

> *"The written and oral evidence of witnesses may be important, and I think that some of the evidence given at trial was indeed important, but as I have already observed it has to be approached with caution. The passage of time adversely affects the reliability of recollections of past events, even if evidence is honestly and confidently given. And the court must be alive to the risk that recollections have been subconsciously moulded to a witness's perceived best advantage or, more regrettably, that a witness is giving evidence that is merely self-serving."*

Notwithstanding the above, it is not difficult to see (*even with the benefit of hindsight*) why the Defendants would have felt comfortable in defending this ambitious claim at trial given the apparent weight of evidence falling in their favour. However, as this case reminds us, there are 'facts' and then there are 'contemporaneous facts.' A protagonist in a factually sensitive cases would do well to sift the evidence at an early stage, then seek to drive a negotiated settlement (*where possible*) by emphasising the strength of the contemporaneous facts in his/her favour.

My thanks go to Luke Warm for producing the light-hearted illustration for this article.

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