

**OTTO RAYMOND DOUGHTY v BENJAMIN ELIJAH STOWERS  
(HBC286 of 2005L)**

5 HIGH COURT — CIVIL JURISDICTION

CONNORS J

8 September 2006

10 **Succession — probate — revocation — testamentary capacity — whether 1987 will was last will and testament of deceased — whether photocopy of 1987 will proved in common form until such time as original of will was found.**

15 The Plaintiff was the nephew of the testator, Jack Michael Doughty (deceased), and the Defendant was the executor and one of the beneficiaries to whom probate no 38407 (probate) was granted on 15 January 2001 with respect to a will of the deceased dated 14 February 1979 (1979 will). The other beneficiary in the will was the Defendant's half-brother, Peter Edward Olsen. The Plaintiff alleged that the deceased executed a further subsequent will in 1987 (1987 will) wherein he was appointed executor, and the beneficiaries were the Defendant and the Plaintiff as to the real estate owned by the  
20 deceased. The Plaintiff by writ of summons and statement of claim sought to revoke the probate and presented the following issues, whether: (1) the deceased executed his 1987 will as his last will and testament and he did not destroy or revoke the will after its due execution; and (2) the photocopy of the 1987 will was proved in common form until such time as the original of the will was found.

25 **Held** — (1) The deceased executed his 1987 will as his last will and testament in November 1987 in the presence of Judy Betty Beddoes (Beddoes), Colin King and District Officer Isikeli and he did not destroy or revoke the will after its due execution.

The evidence of the Plaintiff and of Singh was to the effect that the will was retained by Singh and Fatiaki solicitors. The evidence of the Plaintiff was that he took the will to that firm of solicitors and paid a fee. This was supported by the receipt for \$100. It was  
30 also supported by the evidence of Singh that it was the practice of the firm to charge an additional fee over and above the \$75 for the preparation of the will if the will was required to be stored. The will was in fact stored by the solicitors and not by the deceased. The presumption that the will was destroyed by the deceased was rebutted.

(2) There was evidence of the terms of the will in the photocopy of the unexecuted  
35 document. The document was identified by Singh as being the document prepared by the office of Singh and Fatiaki in 1987. It was also identified by Beddoes as being the document she saw the testator execute and which she executed as a witness. The evidence of execution of the 1987 will came not only from Beddoes but also from the Plaintiff and Josateki. He gave evidence of having travelled to Tavewa with the district officer who was going for the purpose of executing the 1987 will of the deceased.

40 Application granted.

**Cases referred to**

45 *Allan v Morrison* [1900] AC 604; *Birmingham v Renfrew* (1937) 57 CLR 666; *Blakney v J J Savage and Sons Pty Ltd* [1973] VR 385; *Gair v Bowers* (1909) 9 CLR 510; *Maks v Maks* (1986) 6 NSWLR 34; *Pukallus v Cameron* (1982) 180 CLR 447; 43 ALR 243; 56 ALJR 907; *Re Molloy* [1969] 1 NSW 400; *Estate of Ralston* (unreported, NSWSC, 12 September 1996); *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146, cited.

*Cahill v Rhodes* [2002] NSWSC 561; *Curley v Duff* (1985) 2 NSWLR 716, considered.

50 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; 67 ALJR 170, distinguished.

*A. Patel* for the Plaintiff

*F. Khan* for the Defendant

5 [1] **Connors J.** The Plaintiff by writ of summons and statement of claim dated 31 August 2001 and as amended in the course of the hearing seeks a revocation of Probate No 38407 and asks the court to pronounce against the validity of the alleged will dated 14 February 1979 as being the last will and testament of the deceased. The Plaintiff also seeks that the photocopy will dated 1987 be proved in common form until such time as the original will is found.

10 [2] The Plaintiff is the nephew of the testator, Jack Michael Doughty, and the Defendant is the executor and one of the beneficiaries to whom Probate No 38407 was granted on 15 January 2001 with respect to a will of the deceased dated 14 February 1979. The other beneficiary in the will is the Defendant's half-brother, Peter Edward Olsen.

15 [3] The Plaintiff alleges that the deceased testator executed a further subsequent will in 1987 (Ex No P-3) wherein he, the Plaintiff, was appointed executor and the beneficiaries were the Defendant and the Plaintiff as to the real estate owned by the deceased.

## 20 **The evidence**

[4] The Plaintiff gives evidence that in 1987 he had attended the office of Singh & Fatiaki, solicitors and barristers of Lautoka and has collected a will for execution. He says he did this following receipt of a letter dated 26 August 1997 (Ex No P-1) and that he subsequently returned the will to the office of Singh & Fatiaki and paid the sum \$100, the payment of which he says is evidenced by receipt dated 5 November 1987 (Ex No P-5). The will he says he collected for execution by his uncle was the photocopy will (Ex No P-3) and he further says that Judy Beddoes and Colin King attended upon his uncle at Tavewa Island to execute the will in the presence of the District Officer.

30 [5] While he was not present when the will was signed, he was present immediately prior thereto and says he was told not to be present so he walked down the beach while the signing took place. He says that during his uncle's lifetime he told him the land would be left equally to he and "Benny", Benny being the Defendant, Benjamin Elijah Stowers.

35 [6] While the deceased Jack Michael Doughty died on 28 September 1993, it wasn't until Peter Olsen, a cousin of the Plaintiff and half-brother of the Defendant, came onto the land in 2001 and started talking about the land that he owned that the Plaintiff went to see a solicitor with respect to the matter.

40 [7] When shown Ex No P-4, a will dated 29 August 1973 of the deceased, Jack Michael Doughty, the Plaintiff says that the purported signature on the back of the will beneath the words, "Cancelled 14 Feb 1979" is not the deceased's signature but it is his name printed. It is apparent that the signature is very different from that on the face of the will. One of the apparent witnesses to the 45 purported cancellation is "B Stowers".

[8] The Plaintiff says that after a visit by Mr Peter Olsen, he visited lawyers looking for the will of the deceased. He says he went to Singh & Fatiaki and they could not find it. He visited Iqbal Khan & Associates, ultimate successors to Singh & Fatiaki and they could not find a will. He says that a photocopy letter 50 addressed to Singh & Fatiaki dated July 18 (Ex No P-6) was found by him among his father's papers. The Plaintiff says that the will of 14 February 1979 upon

which probate has been granted does not bear the signature of the deceased, Jack Michael Doughty but has his name printed. That will has the appearance of being the will prepared by persons other than a solicitor and it is prepared on a pro forma printed form.

5 [9] The Plaintiff acknowledges that in the 1980s he was working in the Solomon Islands on 2-year contracts and that he would come home for 3–4 months at the end of those contracts. He says that in 1987 he was residing on Tavewa when the will was signed.

10 [10] He confirms that as at 1987 there was no means of communication from Tavewa to Lautoka and that writing was the only method other than communicating via Colin King or Judy Beddoes and the Blue Lagoon Cruises.

[11] Evidence was given in support of the Plaintiff's claim by Judy Betty Beddoes. She refers to the deceased testator as "Uncle Jack" and says 15 that the Plaintiff is her cousin through their maternal grandmothers. She gives evidence of having made purchases from time to time of necessary medication or other items required by the deceased testator and says that Colin King who was then employed as a cruise director with Blue Lagoon Cruises would see the deceased on his visits to the island and would then radio from the ship to her as 20 to any items that were required to be purchased which were then delivered on the next trip.

[12] She recalls quite clearly the events of November 1987 when she and Colin King attended Tavewa to witness the will of the deceased, Jack Michael Doughty. She says that arrangements had to be made for them to 25 attend at the same time as the Commissioner Western or District Officer was in the Yasawas. She says that the only people present when the will was executed were the testator, the Commissioner Western or the District Officer, Colin King and herself. That the will was read over by the Commissioner Western or District Officer to the testator and that they all then signed in the presence of each other.

30 [13] She also confirms that Colin King is now a resident of the United States of America. She says she did not take the will to Tavewa as it was already there when she arrived.

[14] I find that the evidence of Ms Beddoes is most compelling and I accept the 35 will was executed in her presence and the presence of Mr King, the testator and the District Officer in or about November 1987. She identifies Ex No P-3 as being the will that they all executed on that day.

[15] Anand Kumar Singh, a former partner of Singh & Fatiaki gave evidence that the will (Ex No P-3) was prepared in his office. He identified the will as 40 being a product of his office as it was printed on a "Dot Matrix Printer" which produced a very distinct type face and he says that his office was the first legal office to be computerised in 1987. He also identifies the receipt (Ex No P-5) and the letter (Ex No P-1) as being documents created at his office and identifies the signature, DV Fatiaki, appearing on Ex No P-1 as the signature of his former 45 partner. He says that at the time they charged a fee for retaining a will on behalf of a testator. He also says that at the time the accounting system was based on file numbers and that the File No J711 shown on the receipt and on the letter (Ex No P-1) confirms that they relate to the same transaction and the same client.

50 [16] He also chronicled the events as to the disposal of his practice in 1991 when he migrated and the practice was taken over by Bulewa & Co with the Lautoka office being run by Mr Vuataki. He then returned in late 1993 and

recommenced practice in Lautoka but did not retake the records from Bulewa & Co. He says that the firm ultimately became Iqbal Khan & Associates.

[17] Evidence was also given by Josateki, a cruise director with Blue Lagoon Cruises. He says that in November 1987 he was living in the village and that he recalls that the District Officer, Isikeli coming to the Yasawas and that he had met him before and knew his wife as they were related. He says that the District Officer has now passed away and when he died he was the District Officer in Navua. He says he travelled with the District Officer and others to Tavewa, a trip of about 5–10 minutes by boat and that at the time the District Officer said that he was going to Tavewa to do the will of Jack Doughty. He says they all went to Otto and Fannies place and then to Jack Doughty's and that he then went to his own village.

[18] On behalf of the Defendant, evidence was given by Varani Nadraiva, a villager from Yasawa. I found his evidence to be most unsatisfactory and found him to be a most unreliable witness. His recollections of almost 20 years ago were indeed very hazy and conflicting. I am unable to place any relevant weight on the evidence that he gave.

[19] Evidence was given by Peter Edward Olsen on behalf of the brother of the Defendant and one of the beneficiaries under the will that has been probated. He says that he came back from Australia and went to Sevuti for 5 or 6 years and then came to Lautoka in or about 1972 or 1973 and after commencing to reside in Lautoka he only visited Sevuti irregularly and about once per year. He holds a power of attorney from his half-brother, the Defendant and that it was he who obtained the grant of probate on behalf of the Defendant. He says that the Defendant had the will with him in Australia and brought it to Fiji to enable probate to be granted. He is unable to identify the handwriting of the deceased as he said they never wrote to each other but he does acknowledge that signatures of the testator on various documents are indeed different. He says that the Defendant migrated to Australia in the mid-1980s and has resided there ever since.

### The law

[20] In *Curley v Duff* (1985) 2 NSWLR 716 at 718 (*Curley*), Young J (now CJ in Equity) summarised the conditions which must be satisfied before probate of a lost will can be granted as follows:

As I understand it, five matters must be established when it is sought to have probate of a lost Will. First, it must be established that there actually was a Will (see *Re Molloy* [1969] 1 NSW 400), secondly, it must be shown that that Will revoked all previous Wills, thirdly, that the presumption that when a Will is not produced it has been destroyed must be overcome (see *Allan v Morrison* [1900] AC 604), fourthly, there must be evidence of its terms, and fifthly, evidence of due execution (see *Gair v Bowers* (1909) 9 CLR 510).

[21] In *Cahill v Rhodes* [2002] NSWSC 561 Campbell J set forth at [56] the standard of proof applicable in such cases as dealt with by Hodgson J in *Estate of Ralston* (unreported, NSWSC, 12 September 1996) as follows:

... there should be clear and convincing proof similar to that appropriate to other classes of case where the Court is asked to give effect to parol arrangements in circumstances where the law requires, or the parties have chosen, that a particular matter be recorded in some formal way (see, for example, *Pukallus v Cameron* (1982) 180 CLR 447; 43 ALR 243; 56 ALJR 907 at 911; *Blakney v J J Savage and Sons Pty Ltd* [1973] VR 385 at 389; *Maks v Maks* (1986) 6 NSWLR 34 at 36; *Whittet v State Bank of New South*

*Wales* (1991) 24 NSWLR 146 at 151–4), or where the Court is asked to make a finding concerning a legal transaction by a deceased person (see, for example, *Birmingham v Renfrew* (1937) 57 CLR 666 at 674 and 681–2).

5 However, this does not mean that what is required is other than proof on the balance of probabilities: cf *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; 67 ALJR 170 at 170–1. In a case such as this, I believe that what is required is that the party bearing the onus of proof must be sufficiently diligent in calling available evidence, because the Court Will not be prepared to act on material which it considers inadequate.

10 [22] The will that it is sought to prove is in writing and contains in clause 1 a revocation of all former wills and testamentary dispositions and there is evidence before the court from one of the witnesses to the will that the will was indeed executed by the testator in her presence and the presence of another witness and the District Officer. There is also evidence of the preparation of the will from the  
15 Plaintiff and from Mr Anand Singh.

[23] As to the presumption that when the will is not produced that it has been destroyed it is necessary to look at the evidence as to where the will was retained. The evidence of the Plaintiff and of Mr Singh is to the effect that the will was retained by Singh & Fatiaki solicitors. The evidence of the Plaintiff is that he took  
20 the will to that firm of solicitors and paid a fee. This is supported by the receipt for \$100 (Ex No P-5). It is also supported by the evidence of Mr Singh that it was the practice of the firm to charge an additional fee over and above the \$75 for the preparation of the will if the will was required to be stored. I am satisfied on the balance of probability that the will was in fact stored by the solicitors and not by  
25 the testator. The presumption that the will has been destroyed by the testator is therefore rebutted.

[24] There is evidence of the terms of the will in the photocopy of the unexecuted document, Ex No P-3. This document is identified by Mr Singh as being the document prepared by the office of Singh & Fatiaki in 1987. It is also  
30 identified by Ms Beddoes as being the document she saw the testator execute and which she executed as a witness. It follows from what I have said that there is in fact evidence of the execution of the will. The evidence of execution comes not only from Ms Beddoes but also from the Plaintiff and Josateki. He gave evidence of having travelled to Tavewa with the District Officer who was going for the  
35 purposes of executing a will of Jack Michael Doughty.

[25] Nothing has been placed before the court on behalf of the Defendant to suggest that the law as expressed in *Curley* is not the law applicable in this country.

### 40 Conclusion

[26] Applying the evidence that has been placed before the court to the tests as expressed above, I am satisfied on the balance of probability that the deceased, Jack Michael Doughty did execute his last will and testament in November 1987 in the presence of Judy Betty Beddoes and Colin King and also in the presence  
45 of the District Officer, Isikeli.

[27] Also on the evidence that is before the court, I am satisfied that the deceased did not destroy or otherwise revoke the will after its due execution.

### Orders of the court

(1) Probate No 38407 is revoked.

50 (2) The alleged will dated 14 February 1979 is declared not to be the last will and testament of the deceased, Jack Michael Doughty.

- (3) The photocopy will, Ex No P-3 is proved in common form until such time as the original of that will is found.

*Application granted.*

5

10

15

20

25

30

35

40

45

50