ROYAL COURT
(Probate Division) 1128.
14th June, 1996
Before: The Judicial Greffier

First Action.

Between	Petronella Chernin née Venhovens	First Plaintiff
And	Michael David Breeze	Second Plaintiff
And	Stephen John Foster	Defendant

AND

Second Action.

Between	Stephen John Foster	Plaintiff
And	Petronella Chernin née Venhovens	First Defendant
And	Michael David Breeze	Second Defendant

Application by the Plaintiffs in the first action and the Defendants in the second action to strike out the pleadings of Stephen John Foster in both actions.

Advocate M. St.J. O'Connell for Mrs. Chernin and Mr. Breeze;
Advocate J.P. Speck for Mr. Foster.

JUDGMENT

THE JUDICIAL GREFFIER: The two above-mentioned actions relate to the Estate of the late David Chernin. Mrs. Chernin and Mr. Breeze were granted Probate in England as the Executors of the personal Estate of Mr. Chernin on 13th September, 1994 by virtue of the Will of Mr. Chernin dated 24th January, 1992 and I shall hereinafter refer to them as "the Executors". They have lodged a *caveat* preventing Mr. Foster from seeking a Grant of Probate in respect of certain documents which are hereinafter referred to as "the allegedly testamentary documents". Mr. Foster has lodged a *caveat* preventing the Executors from obtaining a Grant of Probate in Jersey in relation to the assets of Mr. Chernin in Jersey. The two actions have been brought, one by each side, seeking to lift

the respective *caveats* and the pleadings therefore represent a mirror image of one another.

The Summonses which were brought before me by the Executors and which were first heard on 22nd May, 1996 and were subsequently dealt with on 14th June, 1996 were for the striking out of the pleadings of Mr. Foster in both actions.

The striking out was brought both under the terms of Rule 6/13(1) of the Royal Court Rules, 1992, as amended and under the inherent jurisdiction of the Court.

There is common ground between the parties that the late Mr. Chernin died domiciled in England and Wales. I had before me at the hearing on 14th June, 1996, affidavit evidence which confirmed that the late Mr. Chernin was throughout his life a British National and that at all relevant times he was resident in England and Wales. As Mr. Chernin died domiciled in England and Wales, under Jersey law I have to look to the law of England and Wales in order to determine whether the allegedly testamentary documents are valid testamentary documents. I had before me, at the hearing of the Summonses to strike out, the affidavit of Paul Richard Teverson, an English barrister, as to the requirements under the law of England and Wales for the witnessing of a Will or other testamentary documents. Under the terms of Section 9 of the Wills Act 1837 (as substituted by Section 17 of the Administration of Justice Act 1982) there is a requirement for witnessing by two witnesses who are present at the same time and, without such witnessing such testamentary documents cannot be valid under the law of England and Wales as a Will. However, under the terms of Section 1 of the Wills Act, 1963, there are various other circumstances in which a Will can be treated as being validly executed and these are if its execution conforms to the internal law in force:-

(a) in the territory where it was executed; or
(b) in the territory where the testator was domiciled, either at the time of its execution or at the time of his death; or
(c) in the territory where the testator had his habitual residence either at the time of its execution or at the time of his death; or
(d) in the state of which, either at the time of its execution of at the time of his death, the testator was a national.

As the domicile, habitual residence and nationality of the testator were, at all relevant times, England and Wales or Great Britain with England and Wales as the relevant jurisdiction flowing therefrom the only remaining possible issue was that the allegedly testamentary documents were executed in a territory which allowed testamentary documents to come into existence without any witnesses.

I have not described the allegedly testamentary documents because, although these are extremely strange and may not be testamentary documents under the law of England and Wales, in any event, the line of argument which was put before me by the Executors related entirely to the matter of witnessing.

Advocate Speck, on behalf of Mr. Foster, put forward the possibility that the allegedly testamentary documents were executed in a territory under the internal law of which they would be valid without any witnessing. However, he conceded that Mr. Foster did not know where the documents had been executed and that his client's allegations in this respect were purely speculative. I am bound to say that it is most unlikely that the allegedly testamentary documents were executed in Jersey because of their nature. One of them was a cheque drawn on an English based bank with the account number altered to reflect the account of a Jersey based subsidiary of that bank. If the documents had been executed in Jersey then the late Mr. Chernin would surely have gone to the Jersey based subsidiary of the bank and obtained a much more suitable form of document to sign.

There now exists, in Jersey, a line of cases in relation to the inherent jurisdiction of the Court in Jersey on a striking out application and in relation to the test as to whether a case is frivolous, vexatious or an abuse of process of the Court and should therefore be struck out. Unfortunately, all these cases were heard before me and the principles have not yet, to my knowledge, been tested before the Royal Court. In the case of John Arthur Burnett Bower v. Planning & Environment Committee of the States of Jersey, (28th March, 1996,) Jersey Unreported I set out a number of these cases at pages 6 to 9 thereof. The second and more accurate of those cases was Mauger v. Batty (9th October, 1995) Jersey Unreported. In that case, I quoted the relevant principles from the 1995 White Book as follows:-

> ***"Accordingly, I am proposing to apply those principles and I am now quoting various relevant sections from the 1995 White Book beginning with part of section 18/19/36 but omitting most case references, as follows:-***
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> ***"(1) 18/19/36 Inherent Jurisdiction - Apart from all rules and Orders, and notwithstanding the addition of para. (1)(d), the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process. In such cases, it will strike out part of an indorsement of a writ; or set aside service of it or will stay, or dismiss before the hearing, actions which it holds to be frivolous or vexatious; and removes from its files any matter improperly placed***

thereon. And this jurisdiction is in no way affected or diminished by this rule.

(2) 18/19/37 Exercise of jurisdiction -

(1) Discretion - The power to stay or dismiss an action under the inherent jurisdiction of the Court on the ground that it is obviously frivolous or vexatious is discretionary, just as it is under O.18, r.19. The jurisdiction is not limited to cases in which the facts are not in dispute. A judicial discretion must be used as to what proceedings are vexatious; for the court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principle. The jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed.

(2) Evidence - When application is made to the inherent jurisdiction of the Court, all the facts can be gone into; and affidavits as to the facts are admissible; Remmington v. Scoles [1897] 2 Ch.1, where it was only by extraneous evidence that Romer J. was convinced that it was a sham defence that ought to be struck out as an abuse of the process of the Court. In a proper case the Court will exercise the power, even though the application be out of time. In a case where an alleged infringement of patent was based on what the plaintiffs reasoned (without any evidence) that the defendants must have done, it was held that on the question of inherent jurisdiction, the Court is entitled to look at evidence, and after looking at evidence that the plaintiff's case was speculation, and accordingly the action was struck out (Upjohn Co. v. T. Kerfoot and Co. Ltd. [1988] F.S.R. 1).

(9) Spurious claim - Any action which the plaintiff clearly cannot prove and which is without any solid basis, may be stayed under this inherent jurisdiction as frivolous and vexatious. Thus, the House of Lords dismissed an action which appeared to it to have been brought to try a hypothetical case, but with no costs to either side. And when either party to an action has made repeated frivolous applications to the Judge or Master, the Court has power to make an order prohibiting any further application by him without leave. But if the action be clearly

vexatious or oppressive, the proper course is to dismiss it."

The test which I have had to apply in this case and which I applied in the Bower case and the Mauger v. Batty case has been the same. I have had to ask myself the question as to whether Mr. Foster's case in both actions is so based on speculation and a case which he clearly cannot prove and which is without any solid basis so as to permit it to be struck out under the inherent jurisdiction and as being frivolous, vexatious or an abuse of the process of the Court. Mr. Foster's case is absolutely hopeless in relation to the witnessing requirements under Section 9 of the Wills Act 1837. It is also absolutely hopeless under all the parts of Section 1 of the Rules Act, 1963, apart from the question of validity under the internal law in force in the territory where the allegedly testamentary documents were executed. Mr. Foster's case is entirely based on speculation and he clearly has absolutely no evidence that these documents were executed anywhere other than in England and Wales and, therefore, he clearly cannot prove that they were validly executed and, in particular, validly witnessed. It therefore appears to me that his pleadings ought to be struck out in both actions both under the inherent jurisdiction of the Court and as being frivolous, vexatious and an abuse of the process of the Court and I therefore ordered both the Order of Justice in the action in which he was a Plaintiff and the Answer in the action in which he was the Defendant to be struck out.

However, Advocate Speck then went on to present, on behalf of Mr. Foster, an application in relation to the action in which he was a Defendant, for leave to file an amended Answer. To date no appeal has been made against my refusal to allow the amended Answer to be filed and, accordingly, I am not going to set out in this Judgment the reasons for that refusal but will merely indicate that I was satisfied that the additional allegations which Mr. Foster was seeking to raise as alternatives, which were either that the allegedly testamentary documents constituted a *donatio mortis causa* or that they constituted the formation of a trust in relation to certain assets of the late Mr. Chernin which were situated in Jersey, were also absolutely hopeless. If an appeal is subsequently lodged against those decisions then I will provide a statement of my reasons for them.

Authorities

Wills Act 1837.

Wills Act 1963.

Rules Act 1963.

Administration of Justice Act 1982.

Bower -v- Planning & Environment Committee (28th March, 1996) Jersey Unreported.

Mauger -v- Batty (9th October, 1995) Jersey Unreported.

Clore -v- Stype Trustee (Jersey) Limited and others (1980) JJ 149.

Lindgren, trading as Naval Production -v- Jetcat Limited (1985-1986) JLR 66.

D.B. Installations Limited -v- Vaut Mieux Limited (1987-1988) JLR N.5.

Burke -v- Sogex International Limited (1987-1988) JLR 633 CofA.

Rothmer, King, K.S. Joseph and D. Joseph -v- Hill Samuel (C.I.) Trust Company Limited & 5 others (1991) JLR N.3.

R.S.C. (1995 Ed'n): r.18/19.