IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS CIVIL DIVISION

CICA (Civil) Appeal 0010 of 2023
(Formerly Cause No. GC 0088 of 2022)

BETWEEN

HILARY SHENIKA FREDERICK

FIRST APPELLANT

-AND-

MONICA VERONICA SMITH

SECOND APPELLANT

-AND-

CHRISTOBEL PATHRA SMITH

RESPONDENT

Before:	**The Rt. Hon. Sir John Goldring, President** **The Hon. Sir Michael Birt, Justice of Appeal** **The Rt. Hon. Sir Jack Beatson, Justice of Appeal**
Appearances:	**Mr Clayton Phuran for the Appellants / Plaintiffs** **Mr Philip Ebanks for the Respondent / Defendant**
Heard:	**On the papers**
Draft circulated:	**22 October 2024**
Judgment delivered:	**14 November 2024**

*CICA (Civil) Appeal No. 10 of 2023 Hilary Shenika Frederick and Monica Veronica Smith v Christobel Pathra Smith – Judgment (*with errata 13-Jan-26)*

JUDGMENT

Birt, JA

1. This judgment is supplemental to a judgment dated *29 August 2024 ("the Main Judgment") whereby this court dismissed the Appellants' appeal against the judgment of Walters J (Acting) dated 27 March 2023 in the Grand Court. Words and expressions defined in the Main Judgment have the same meaning where used in this judgment.

2. The Respondent now applies for an order that the costs of the appeal should be paid by the Appellants (to whom I shall refer as 'the Plaintiffs' for consistency with the Main Judgment).

Background

3. Reference should be made to the Main Judgment for the full background. In summary, the Deceased was the mother of the Second Plaintiff and the Grandmother of the First Plaintiff. The Respondent is the sister of the Second Plaintiff and executor of the Deceased's estate.

4. On 18 June 2012, the Deceased executed the Transfer purporting to transfer the Property into the names of herself and the First Plaintiff. The Transfer did not state, as required by the Registered Land Act, whether the Deceased and the First Plaintiff as transferees were to hold the Property as proprietors in common or as joint proprietors. Furthermore, the First Plaintiff did not register the Transfer in the Land Register, as required in order to transfer title under the Act, before the Deceased died in December 2015.

5. After the death of the Deceased, the Plaintiffs instituted proceedings seeking a declaration that the Transfer was valid to transfer title to the Property and that the Land Register should be rectified accordingly.

6. Their claim was dismissed by the Grand Court on the ground that the Deceased had not done all that she could do in order to transfer the Property because of three additional matters which needed to be addressed before the Transfer could be registered in the Land Register. One of these was that the Transfer needed to be completed so as to show whether the transferees were taking the Property as proprietors in common or as joint proprietors. Walters J held that the court could accordingly not perfect the gift and that the Property formed part of the Deceased's estate.

7. The Plaintiffs appealed to this court. In the Main Judgment, this court dismissed that appeal. Although it questioned whether the judge below had been right to rely on the two other matters which were said not to have been dealt with, the court held that the judge was correct to find that the Deceased had not done all that she needed to do to enable the Transfer to be registered, because the Transfer had not specified whether the transferees were to be proprietors in common or joint proprietors. The court also dismissed certain additional arguments which the Plaintiffs had sought to raise on appeal.

The contentions on appeal

8. The Respondent submits that, as the appeal was dismissed, costs should follow the event and should accordingly be awarded against the Plaintiffs. Mr Ebanks referred in this connection to Grand Court Rules, Order 62, Rule 5(5) which states:

> ***"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event,***

except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

9. The Plaintiffs accept that the general rule is that costs should follow the event, but submit that there are two well-established exceptions to that general rule in probate cases and that one or other of such exceptions should be applied in this case.

10. The two exceptions were conveniently summarised by Sir Gorell Barnes P in *Spiers v English* [1907] P 122 at 123 in the following terms:

"In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive are the two great principles upon which the court acts, costs would now, according to the rules, follow the event as a matter of course. Those principles allow good cause to be shewn why costs should not follow the event. Therefore, in each case where an application is made, the court has to consider whether the facts warrant either of those principles being brought into operation."

11. The reasoning behind the existence of these two exceptions was articulated by Sir James Wilde in *Mitchell v Gard* (1863) 3 Sw. & Tr. 275 at 277-8 in the following terms:

"The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question 'who shall bear the costs?' will

be answered with this other question, 'whose fault was it that they were incurred?'. If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.

But if the testator is not in fault, and those benefitted by the will not to blame, to whom is the litigation to be attributed? In the litigation entertained by others Court, this question is in general easily solved by the presumption that the losing party must needs be in the wrong, and, if in the wrong, the cause of a needless contest. But other considerations arise in this Court. It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial enquiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this enquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt.

From these considerations, the court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question whether the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent."

12. Mr Phuran's primary submission was that the first of these principles applied in the present case, namely that the costs should be paid out of the estate; alternatively, he submitted that the facts fell within the second principle and there should be no order as to costs. The first principle was applicable on the basis that the Deceased had left the validity of the gift of the Property in a state of confusion because she had not completed the Transfer properly. Alternatively, the second principle was applicable because there were reasonable grounds for investigating the validity of the Transfer said to give rise to the gift.

13. Mr Phuran further relied upon the impecuniosity of the Plaintiffs and the fact that they had made a settlement offer which was without prejudice save as to costs. He submitted in effect that cost should either come out of the estate or that there should be no order as to costs.

Decision

14. We were not referred to any authority which has extended the two exceptions referred to above to issues concerning an inter vivos gift rather an estate. However, for present purposes and without deciding the matter, I am prepared to assume that they could be applicable to disputes concerning gifts which have to be investigated after a donor has died such that the issue is whether or not the asset in question forms part of the estate.

15. Nevertheless, even on this assumption, I do not consider that either of the exceptions assist Mr Phuran on the facts of this case. That is for two reasons.

16. The first and decisive reason is that this is an appeal. Even if the exceptions could apply to proceedings necessary to resolve issues at first instance, the position is different on

appeal. Any proceedings which were rendered necessary because of uncertainty have been resolved by the decision of the first instance court. If a party chooses thereafter to appeal in the hope of reversing the decision, the costs of the appeal have not been necessitated by reason of the uncertainty, but because the appealing party does not like the first instance decision and has chosen to appeal. The costs of the appeal have been incurred solely because of the appealing party's decision. In those circumstances, it seems to me that costs should normally follow the event and that if the appeal is lost, the costs incurred by reason of the decision to appeal should be paid by the appealing party.

17. Secondly, the fault, if there is any, does not lie only with the Deceased; it lies equally with the First Plaintiff. Not only did she fail to seek to register the Transfer for several years before the Deceased's death (in which event the problem would have been identified and could have been resolved during the Deceased's lifetime) but, as one of the transferees, she was equally responsible for failing to complete the Transfer properly in order to specify whether the transferees were taking as proprietors in common or as joint proprietors.

18. In those circumstances, it would be wrong in my opinion to apply either of the exceptions referred to above. Having chosen to appeal, the Plaintiffs must take the normal consequences of losing an appeal, namely that the costs should follow the event.

19. As mentioned above, Mr Phuran also relied upon the impecuniosity of the Plaintiffs but I do not see that this can be a valid reason to deprive the Respondent of an order for costs in circumstances where she would normally be entitled to it.

20. Mr Phuran also referred to an offer dated 11 August 2023 whereby the Plaintiffs had offered to purchase the Respondent's half interest (in her personal capacity rather than as executrix) in the Property for CI$30,000 in circumstances where the value of the Property as a whole was said to be CI$100,000. I do not see that this assists the Plaintiffs. On the

court's finding, the Respondent, in her personal capacity, has an interest in half the Property and accordingly the offer was for less than her entitlement as upheld by the court.

21. Finally, Mr Phuran referred to the fact that the First Plaintiff had spent money towards the maintenance of the Property and indeed had taken out a bank loan to assist in this respect. However, I do not see that this is a matter which can be taken into account in assessing costs. If – as to which I express no view - the First Appellant has any claim in respect of monies which she has spent, this has to be resolved as a separate matter.

22. For these reasons, I would order that the Plaintiffs jointly and severally pay the Respondent's costs of the appeal on the standard basis. The costs incurred in connection with the issue of costs are also to be paid by the Plaintiffs jointly and severally on the standard basis.

Beatson JA

23. I agree.

Goldring P

24. I also agree.