IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No 23 of 2019
(Formerly FSD 27 of 2014 (RMJ))

BETWEEN:

MILLICENT E. COBAN

Appellant

-AND-

KURT JOSEPHS

Respondent

BEFORE:	**The Rt. Hon Sir John Goldring, President** **The Hon. C Dennis Morrison, Justice of Appeal** **The Hon. Sir Michael Birt, Justice of Appeal**
Appearances:	**Mr. Hector Robinson QC and Ms. Jessica Vickers of Mourant Ozannes for the Appellant.** **Respondent in person.**
Heard:	**Thursday 3rd September 2020**
Judgment delivered:	**Monday 28th September 2020**

JUDGMENT

The Hon. C Dennis Morrison, JA

Introduction

1. This appeal raises a question of costs. It arises out of the discontinuance of contested probate proceedings in the estate of the late Delroy Josephs ('the deceased'), who died on 23 November 2013.

2. The deceased, it appears, was a very wealthy man. By the time of his death at age 68 he had accumulated numerous properties and other assets, both in these islands and in Florida in the United States of America, where he had once lived.

3. Predeceased by his wife, the deceased died leaving two adult and two minor children.

4. The appellant ('Mrs Coban') is the sister of the deceased. Mrs Coban was named as the executor of the deceased's estate in a will made by him on 1 June 2012 ('the 2012 will').

5. The respondent ('Mr Josephs') is the eldest son of the deceased. Mr Josephs was named as the executor of the deceased's estate in a will purportedly made by the deceased on 1 November 2013, three weeks before he died ('the disputed will').

6. The attesting witnesses to the disputed will were Messrs Noel Christian and Luke McKoy.

7. On 23 December 2013, Mr Josephs filed an action in the Grand Court seeking a decree of probate of the disputed will ('the main action'). Mrs Coban was named as defendant, as the person who might otherwise have been entitled to a grant of probate of the 2012 will.

8. Mrs Coban defended the main action on a number of bases[1]. Among them were that the deceased's signature as it appeared on the disputed will was a forgery; the document itself was fabricated as part of a conspiracy between Messrs Josephs, Christian and McKoy to defraud the deceased's estate; alternatively, that the deceased's signature to the disputed will was procured by a trick or undue influence; and, in the further alternative, that the deceased lacked testamentary capacity when the disputed will was executed.

9. Mrs Coban also counterclaimed against Mr Josephs, Mr Christian and Mr McKoy. In the counterclaim, she sought, among other things, orders that Messrs Josephs and Christian deliver up the assets of the trust or estate; damages for trespass and conversion; damages for false imprisonment; aggravated and exemplary damages for conspiracy; and indemnity costs.

10. In their Reply and Defence to the Counterclaim, Mr Josephs, Mr Christian and Mr McKoy denied the allegations against them.

11. The question of the validity of the disputed will finally came on for trial before McMillan J ('the judge') on 19 February 2018. But on 22 February 2018, Mr Josephs withdrew the main action against Mrs Coban in its entirety. In consequence of this, the judge made an order pronouncing against the validity of the disputed will.

[1] See Amended Defence and Counterclaim dated 31 January 2014, amended and reissued on 11 March 2014.

12. By a further order made on 26 March 2019, the judge (i) gave leave to Mrs Coban to withdraw the counterclaim with no order as to costs; and (ii) ordered that there should be no order as to the costs of the main action.

13. This is Mrs Coban's appeal against the second of these two orders. The issue on appeal is whether, given the well-established principle that costs in contested litigation should ordinarily follow the event, the judge was right to make no order as to the costs of the main action. In the Memorandum of Grounds of Appeal filed on her behalf[2], Mrs Coban seeks an order that Mr Josephs should pay the costs of the main action and the appeal, such costs to be taxed on the standard basis if not agreed.

The route to trial

14. The progress of the matter to trial was not straightforward. During the interlocutory phase in the Cayman Islands, virtually parallel proceedings were on foot in Florida. In those proceedings, Mrs Coban sought to prove the 2012 will, against opposition from Mr Josephs.

15. Then, in an application dated 26 August 2014, Mrs Coban sought leave to discontinue her counterclaim in the Cayman proceedings. She also sought an order granting her letters of administration (with the disputed will attached) of the deceased's estate in the Cayman Islands.

16. This application came on for hearing before Smellie CJ on 4 September 2014. The Chief Justice considered that, as a matter of case management, the question of the validity of the disputed will should be determined before the issues raised by the application could properly be addressed. On this basis, the Chief Justice adjourned the application and made an order accordingly.

17. By a subsequent order made on 24 October 2014, the Chief Justice also appointed a Guardian ad Litem to see to the deceased's minor children's interests in the litigation[3].

18. And, in a letter dated 16 November 2017, Mrs Coban's attorneys-at-law advised Mr Joseph's attorneys-at-law that the allegation that Messrs Josephs, Christian and McKoy had forged the deceased's signature to the disputed will was no longer being pursued.

[2] Dated and filed on 1 September 2019
[3] See judgment of Smellie CJ in **KJ v MC**, FSD 0027 of 2014 ASCJ

19. It is against this background that, in accordance with the Chief Justice's order, the question of the validity of the disputed will finally came on for hearing before the judge on 19 February 2018.

The proceedings before the judge

20. The matter was set for three weeks of hearing and, in a procedure agreed between counsel beforehand and endorsed by the judge on the first day of trial, leading counsel on both sides opened their respective cases expansively.

21. During the course of his opening on behalf of Mrs Coban, Mr Robinson QC confirmed that no evidence would be offered by her in support of the pleaded allegation that Mr Josephs had forged the disputed will. Nor would any evidence be offered in support of the allegation that Mr Josephs had conspired to defraud the deceased's estate.

22. At the end of Mr Robinson's opening, Mr Tonner QC, who then appeared for Mr Josephs, sought leave to discontinue the main action in its entirety. The judge then heard further argument from counsel, including counsel for the Guardian ad Litem, on the appropriate order for the court to make in the light of this wholly unexpected development.

23. Finally, on 22 February 2018, the judge (i) ordered that the main action should stand dismissed; (ii) pronounced against the force and validity of the disputed will; and (iii) reserved the question of costs for hearing at a later date.

24. In a separate application filed on 16 May 2018, Mrs Coban applied for an order that the counterclaim be discontinued with no order for costs.

25. The hearing on the question of the costs of the main action and Mrs Coban's application to discontinue the counterclaim took place on 26 March 2019. At the end of the day, the judge's order was that (i) Mrs Coban's counterclaim should be dismissed; (ii) as between Mr Josephs and Mrs Coban, there should be no order as to the costs of either the main action or the counterclaim; (iii) the costs of the Guardian ad Litem should be paid out of the assets of the deceased's estate (to be taxed on an indemnity basis); and (iv) the costs of Messrs Christian and McKoy should also be met out of the assets of the deceased's estate (to be taxed on the standard basis).

The reasons for judgment[4]

26. The judge arrived at his conclusion by a series of steps. First, he acknowledged that in probate proceedings, as in ordinary civil proceedings, the general rule is that costs will normally follow the event. This is how the judge put it[5]:

> "*13. Costs normally will of course follow the event. However, in cases of probate it is the function of the Court to investigate the execution of a will and the capacity of the maker and having done so to ascertain and declared 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 the Court.*
>
> *14. However, these stated circumstances are very different from those in this case where* [Mr Josephs], *having seen the state of the evidence and of the opening submissions, simply abandoned his case.*
>
> *15. An executor propounding a will in circumstances where he should have known it could not be sustained stands open to be liable in costs under the principles enumerated. In other words,* [Mr Josephs] *is accordingly exposed and rightly so."*

27. The judge then turned to the costs of the counterclaim. In this regard, he referred to (and also appeared to take on board[6]) Mr Tonner's point that, "*with no substantive evidence to support it ever going forward*", Mrs Coban had maintained the serious allegation of conspiracy to defraud the deceased's estate against Mr Josephs right up to the beginning of the trial.

28. The judge nevertheless dismissed these rival submissions as being "*largely unpersuasive*"[7]. Instead, he considered, and again appeared to be attracted to, the submissions of counsel for the Guardian ad Litem, which were to the general effect that it was also open to the court to order costs to or against each party, in accordance with the issues in the case on which they each succeeded or failed. As the judge did, I will set out the Guardian ad Litem's submission on this point in full:

> "*23. In relation to the position following the conclusion of the substantive trial of the action on 22 February 2018, we understand the position to be as follows:*
>
> *23.1. The Defendant lost in relation to the forgery, fraud and undue influence issues. The Defendant has succeeded in*

[4] The judge's written judgment was issued on 17 April 2019
[5] Judgment, paras 13-15
[6] Describing it as an "excellent point": Judgment, para 16
[7] Judgment, para 17

resisting the application for grant of probate of the Disputed Document and was therefore successful in relation to the validity of will issue covering the issues of attestation of the Disputed Document, testamentary capacity ad knowledge and approval.

23.2. The Plaintiff was successful in resisting the allegation that the signature on the Disputed Document was forged and also in relation to the allegations of fraud and undue influence made against him. The Plaintiff lost in propounding the Disputed Document as a will and it being admitted to probate which was in effect a failure to prove the validity of the Will which covers the issues of attestation of the Disputed Document, testamentary capacity and knowledge and approval.

23.3. Therefore it is open to the Court on the principles outlined above to consider if it is appropriate to exercise its discretion to have the Defendant pay the costs of the issues on which the Plaintiff won and have the Plaintiff pay the costs of the Defendant on the issues the Defendant won. Clearly there will be a large degree of overlap between the work done in relation to these and it may be difficult to differentiate work done in order to approach the matter on an issue by issue basis. This will be a matter for taxation and should not prevent the Court making any orders it sees fit.

23.4. As indicated above there are circumstances in which it may be appropriate for the Court to make no order as to costs of the Plaintiff and Defendant and again the Court has the discretion in this regard."

29. The judge then stated his conclusion as follows[8]:

"*18. In principle, there is good deal to be said for the overriding proposition that* [Mrs Coban] *should pay the costs of the issues on which* [Mr Josephs] *won and* [Mr Josephs] *should pay the costs of* [Mrs Coban] *on the issues on which* [she] *won.*

19. However, the Court is acutely aware that such an order, while fully merited, will involve both [Mr Josephs] *and* [Mrs Coban] *in yet a further series of costs so as to meet precisely the terms of such an order. In other words, in the unusual circumstances of this case another form of order should be made. Legal theory should be juxtaposed with financial practicality.*

20. For this reason, and in terms of the broad interests of justice, the Court rules that there should be no order as to the costs of [Mr Josephs] *and* [Mrs Coban]."

[8] Judgment, paras 18-20

The submissions on appeal

30. Mr Robinson submitted that, despite identifying the relevant legal principles correctly, the judge failed to apply them. The general principle is that costs should normally follow the event. Accordingly, in this case, in which Mr Josephs chose to abandon his case entirely at the conclusion of the openings, the judge ought to have awarded costs against him in accordance with the usual rule. In this regard, the fact that there might be additional costs associated with the taxation of the costs of the main action was not a sufficient warrant for departing from the usual rule, particularly given the consideration that the costs of taxation were unlikely to be significant, certainly in relation to the costs of the main action. While an order for costs is a matter for the discretion of the court, the judge's failure to apply the established principles which he had identified made this an appropriate case for this court to disturb the judge's exercise of his discretion.

31. Mr Robinson's primary position was that we should allow the appeal and substitute an order for costs in Mrs Coban's favour. However, in answer to a direct question from my brother Birt during the course of his submissions, Mr Robinson told us that, although he would have resisted the suggestion at the trial, he would at this stage be content if this court were to make an order for costs along the lines of the Guardian ad Litem's submissions. That is, that Mr Josephs and Mrs Coban should each have their costs on the issues on which they succeeded.

32. Responding on his own behalf, Mr Josephs did not challenge the basic thrust of Mr Robinson's submissions. But he was greatly concerned that any order for costs in Mrs Coban's favour should not be borne by him personally. He therefore submitted that the court should order that any order for costs against him should be met out of the deceased's estate.

Discussion and conclusions

33. Section 24(1) of the *Judicature Law*[9] provides that, subject to its provisions, the provisions of any other Law and to rules of court, "*the costs of and incidental to all civil proceedings in – (a) the Court of Appeal; and (b) the Grand Court, shall be in the discretion of the relevant court*". As section 24(7) makes clear, the reference to "*proceedings*" in the section includes the administration of estates.

[9] 2017 Revision

34. This is therefore an appeal against a judge's order made in the exercise of a discretion. I bear in mind, as I must, that the well-known principle in such cases is that this court will not entertain an appeal from such an order unless it can be shown that the judge exercised his discretion under a mistake of law, or in disregard of principle, or under a misapprehension as to the facts, or that he took into account irrelevant matters[10].

35. O. 62, r. 4(2) of the *Cayman Islands Grand Court Rules* 1995[11] ('the *GCR'*), states as its overriding objective the principle that –

> "*… a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court*."

36. Accordingly, O. 62, r. 4(5) goes on to state the usual rule, which is that costs should ordinarily follow the event, save where it appears to the court that some other order should be made:

> "*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 part of the costs."*

37. I should also mention O. 62, r. 4(7), which sets out the orders which the court may make under the rules. These include an order that a party must pay "*a proportion of another party's costs*"[12], and "*costs relating only to a distinct part of the proceedings*"[13].

38. Mr Robinson referred us to a number of authorities to make the point that, subject only to limited exceptions, the general rule is that, as Henderson J said in **Kostic v Chaplin et al**[14], "[t]*he costs of a contentious probate action, like those of any other civil action, are within the discretion of the court and [the procedural rules on costs] will apply*".

39. We were also referred to <u>*Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*</u>[15], in which, after stating that the general rules as to costs apply fully to probate actions, the learned editors observe at 39-01 that:

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[10] See The Supreme Court Practice, 1999, Volume 1,para 59/1/142
[11] Revised Edition, Volume 1
[12] O. 62, r. 4 (7) (a)
[13] O. 62, r. 4 (7) (f)
[14] [2007] EWHC 2909, para 4
[15] The 20th edition of Williams on Executors and the 8th edition of Mortimer on Probate

> "*The notion, sometimes entertained, that the costs of unsuccessful parties will generally be ordered out of the estate in a probate action is wrong."*

40. Then, as regards the exceptions to the general rule in probate actions, we were referred to **Spiers v English**[16], in which Sir Gorell Barnes P identified these as being where (i) the testator or those interested in the residue have caused the litigation; and (ii) the circumstances lead reasonably to an investigation in regard to a propounded document. As Sir Gorrel Barnes P explained[17], "[t]*hose principles allow good cause to be shown why costs should not follow the event".*

41. In a comment on this judgment in **Kostic v Chaplin et al**, to which I have already referred, Henderson J observed[18] that "[t]*his statement of principle makes it clear … that a positive case has to be made out before departing from the general rule that costs should follow the event …".*

42. This limited review of a few of the cases to which we were referred fully supports the proposition that the rule that costs should ordinarily follow the event applies equally to contested probate proceedings. The judge clearly accepted this and nothing has been put before us to suggest otherwise.

43. However, as costs are always a matter for the discretion of the court, there will be cases in which the existence of special circumstances may justify - or even necessitate – a departure from the usual rule. In such cases, as O. 62, r.4(5) of the *GCR* makes plain, it is open to the court to make such other order, as to the whole or any part of the costs, as it thinks appropriate in the circumstances of the case.

44. The Guardian ad Litem's submission that the judge should make an order for costs to reflect the relative success of Mr Josephs and Mrs Coban on particular issues was obviously premised on rule 44.2(4)(b) of the English Civil Procedure Rules 1998 ('CPR'). That rule specifically directs the court, in deciding what order (if any) to make as to costs, to have regard to, among other factors, "*whether a party has succeeded on part of its case, even if that party has not been wholly successful*"[19].

45. O. 62, r. 4(4) of the *GCR* is obviously less specific in its terms than CPR 44.2(4)(b). But, as Lord Woolf MR pointed out in **A.E.I. Rediffusion Music Ltd v Phonographic Performance**

[16] [1907] P 122
[17] At page 123
[18] At para 6
[19] CPR 44.2 (4)(b)

Ltd[20], it was always the position under the old Ord. 62, r. 3 (the exact equivalent of O. 62, r. 4(4)) that the "*follow the event principle will be … a starting point from which the court can readily depart*". The true significance of the CPR, therefore, was "*to require courts to be more ready to make separate orders which reflect the outcome of different issues*".

46. It therefore seems to me that the breadth of the court's discretion under O. 62, r. 4(4) to make such order as to costs as it considers appropriate to the particular case, is clearly sufficient to accommodate an order reflecting the relative success of the parties on particular issues.

47. As has been seen, the judge also accepted this. So the possibilities open to him in this case were to (i) award costs to Mrs Coban as the party who '*won*' the case once Mr Josephs withdrew the action; (ii) award costs to the parties based on the outcome of particular issues; or (iii) to make no order as to costs.

48. There was clearly a strong argument in favour of the first of these three orders, that is, that Mr Josephs should pay Mrs Coban's costs of the main action. Mr Josephs initiated that action to prove the disputed will. But, having set the process in motion, and after a four year run-up to trial, including interlocutory appearances before the Chief Justice, he abandoned it virtually at the outset of a projected three-week hearing. In the result, the court pronounced against the disputed will, thereby defeating the objective which his action had sought to achieve. On one view of the case, therefore, applying the usual rule that costs should follow the event, an order that Mr Josephs should pay Mrs Coban's costs of the main action seemed to be plainly indicated.

49. But costs are, of course, a matter for the discretion of the court. It is clear that, despite the strength of the usual rule, the judge thought it necessary to have regard to Mr Josephs' position. Mr Josephs had, after all, been obliged to prepare to meet the case against him, which involved very serious allegations of forgery and conspiracy to defraud, only to be told, three months before the trial in the case of the former, and at the very last minute in the case of the latter, that those allegations would not be pursued.

50. In these circumstances, it seems to me that the judge was fully entitled to take the view that, each party having had a measure of success, an order that costs should follow the event would not meet the justice of the case. I therefore think that this was, as the judge appeared to think at one point, a classic case for the adoption of the second of the three options which I identified at paragraph 47 above.

[20] [1999] 1 WLR 1507, pages 1522-1523

51. As has been seen, the judge's stated reason for not dealing with the matter in this way was that it would involve the parties in the further expense of taxation of the costs due on either side. But taxation is the mechanism which the law provides for the fixing of the costs of civil litigation in cases in which the parties cannot agree them. There was no evidence, nor was there any reason to suppose, that the cost of taxation in this case was likely to make it an uneconomic proposition for the parties. In my respectful view, therefore, the judge took into account a plainly irrelevant consideration in deciding not to order costs on what he obviously thought was the most appropriate basis in the very special circumstances of this case.

52. The only remaining issue would therefore be Mr Josephs' contention that any order for costs against him should be met out of the deceased's estate. As sympathetic as one might be to Mr Josephs' position, particularly given the fact that, in the end, the serious allegations of criminal misconduct against him remained completely unproven, I do not see how this submission can possibly be justified. Mr Josephs is clearly in a different position from that of Mr Christian and Mr McKoy, whose costs the judge ordered to be met out of the estate. Mr Josephs was the person who set the entire series of events in motion by commencing the main action. In these circumstances, it seems to me that he cannot escape the consequences of his belated decision to discontinue the action.

53. I would therefore allow the appeal and set aside the judge's order that there should be no order as to costs. In place of the judge's order, I would order that (i) Mr Josephs should pay the costs of the issue on which Mrs Coban won, that is, the issue of the status of the disputed will; (ii) Mrs Coban should pay the costs of the issues on which Mr Josephs won, that is, the issues of conspiracy to defraud, forgery and undue influence; (iii) if not sooner agreed, these costs are to be taxed on the standard basis. In this exercise, the question of the appropriate allocation of costs as between the issues will obviously be a matter for the taxation.

54. I would add this in case it is of assistance to the taxing officer, given that there is no order as to costs in relation to the counterclaim and it will therefore be important as to whether costs are regarded as incurred in the claim or the counterclaim. During the course of the hearing, Mr Robinson accepted that the vast majority of the costs will have been incurred on the claim rather than the counterclaim. I agree that this is likely to be so. The allegations made by Mrs Coban upon which she was unsuccessful were essential elements of her defence to the claim as well as being the basis of her counterclaim. Thus, paragraph 9 of the defence alleges forgery and conspiracy to defraud. Similarly the allegation of undue influence is raised in paragraph 10 and the allegations of conspiracy set out in paragraphs 14-16 of the counterclaim are specifically incorporated in the defence at paragraph 10(1) of the defence. It follows that all the matters

upon which Mrs Coban was unsuccessful had to be addressed by Mr Josephs as part of the claim.

The Hon Sir Michael Birt, JA

55. I agree.

The Rt. Hon Sir John Goldring, President

56. I also agree.