

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FAMILY DIVISION

3 CAUSE NO: G 0160/2018
4

5 BETWEEN:

6 CAMPBELLS

7 PLAINTIFF

8 AND:

9 KURT JOSEPHS

10 DEFENDANT
11



12 Appearances:

13 Mr. James Austin-Smith of Campbells
14 for the Plaintiff

15 Mr. Ben Tonner Q.C. of McGrath
16 Tonner for the Defendant

17 Ms. Jessica Vickers of Mourant
18 Ozannes for the Court-Appointed
19 Administrator of the Estate of Delroy
Josephs (Deceased)

20 Before:

Hon. Justice Cheryll Richards Q.C.

21 Heard:

24th May 2019

22 Ex Tempore ruling:

24th May 2019

23 Further Submissions:

21st June 2019

24 Draft Judgment:

14th October 2019
25

26 **HEADNOTE**

27 *Civil Law – Costs, Section 24 of the Judicature Law (2017 Revision), GCR*
28 *Order 62, principles re exercise of discretion not to order costs to the*
29 *successful party.*
30

31 **JUDGMENT**
32

1 INTRODUCTION
2
3

4 1. By Writ of Summons and Statement of Claim filed on the 24th August 2018, the Plaintiff,
5 Campbells, a firm of attorneys, seeks to recover outstanding fees of US\$103,173.90
6 together with interest, for legal services rendered to the Defendant, Kurt Josephs. The
7 services related to the Defendant’s purported executorship and guardianship of his
8 siblings under a Will said to have been executed by his father, Delroy Josephs on the 1st
9 November 2013. Mr. Delroy Josephs passed away on the 23rd November 2013.

10
11 2. The November 2013 Will was disputed (the “Disputed Will”) by the sister of the
12 Deceased, Mrs. Millicent Beth Coban. Various proceedings have ensued in that matter
13 beginning in December 2013 when the Defendant sought to have the said Will probated
14 and Mrs. Coban filed an objection. On 19th August 2015, an Interim Administrator, Mr.
15 Keith Blake was appointed to administer the Estate of the Deceased, (“the
16 Administrator”). On the 22nd February 2018, by Order of McMillan J. the Grand Court
17 pronounced against the force and validity of the Disputed Will and ordered that the
18 appointment of the Administrator is to continue. The issue of costs was reserved by the
19 Court and later determined on the 26th March 2019. The resulting Order was filed on the
20 30th April 2019¹. By this Order, the Defendant was not entitled to recover his costs from
21 the Estate in respect of his attempt to have the Disputed Will probated.

22
23 3. The Plaintiff has been seeking to recover its legal costs from the Administrator. In
24 furtherance of this aim, on the 29th March 2019, the Plaintiff filed a Summons by which
25 it sought leave to amend the August 2018 Writ and Statement of Claim essentially to

¹ First Affidavit of Claire Murphy dated 22nd May 2019- Exhibit CMI



1 substitute the Administrator as the Defendant party to the proceedings and to discontinue
2 the action against the Defendant. The Summons sought the following orders:

3
4 a. "Leave to join Mr. Keith Blake (as court-appointed Interim Administrator of the
5 estate of Delroy Josephs, (deceased)) as second defendant to this action.

6
7 b. Leave to amend the Writ and Statement of Claim in the form annexed.

8
9 c. The Plaintiff and the First Defendant (Kurt Josephs) having agreed terms for the
10 settlement of the claim against the First Defendant, the action against the First
11 Defendant be stayed save for the purpose of bringing the terms of the settlement into
12 effect."

13
14 4. The March 2019 Summons was set down for hearing on the 24th May 2019. On the 17th
15 May 2019, the Plaintiff filed a bundle for the hearing. On the 23rd May 2019, the day
16 before the scheduled hearing, Counsel on behalf of the Administrator filed a skeleton
17 argument and a bundle of authorities. In the main it was contended in that argument that
18 there was no cause of action against the Administrator, that the Defendant had sought to
19 propound a Will which he knew was disputed, and had done so at his own risk. Further,
20 that given rulings by the Grand Court on the matter, the Defendant was not entitled to
21 have his costs met from the Estate.

22
23 5. By email of 23rd May 2019 at 4:55pm, the Plaintiff's attorneys advised the Court in the
24 following terms:

25 *"Following discussions between the parties Campbells will not be proceeding with*
26 *the application listed for tomorrow to join the Interim Administrator. The only issue*
27 *extant for tomorrow relates to the costs of the application"*
28

1 HEARING OF 24TH MAY 2019

2 6. At the hearing on the 24th May 2019, Counsel for the Administrator, from the law firm
3 of Mourant argued that the usual course should apply that costs should follow the event.
4 Counsel on behalf of the Plaintiff argued in response that, had Mourant notified them in
5 a timely manner of the rulings of the Court with respect to the validity of the Will and
6 costs, they would not have filed the Summons or would have reconsidered their position
7 much earlier. I gave an *ex tempore* ruling that the Administrator was entitled to his costs.
8 noting the following sequence of events and correspondence between the parties:

- 9
10 a. By an e-mail dated 15 February 2019, the Plaintiff wrote to the Administrator
11 indicating an intention to apply to join him to the proceedings against the Defendant
12 for the recovery of the Plaintiff's legal fees.
13
14 b. By letter dated 25th February 2019, the Attorneys for the Administrator responded
15 to the Plaintiffs in the following terms:



16 *"We are instructed by Mr. Keith Blake as the court appointed administrator*
17 *(the Administrator) of the Estate of Delroy Josephs (the Estate). We refer*
18 *to your email of 15 February 2019 to the Administrator and the writ of*
19 *summons in cause number 160 of 2018 (the Debt Proceedings).*
20 *Campbells does not have a direct claim against the Estate for payment of*
21 *the outstanding sums in relation to invoices numbered 105268 and 126668*
22 *(the Invoices). Your firm's engagement is with Mr. Kurt Josephs and it is*
23 *Mr. Josephs who retains liability for the payment of your Invoices and with*
24 *whom your firm has reached a settlement.*
25 *In any event, the Invoices appear to relate to Mr. Joseph's application for*
26 *the purported will of Delroy Josephs dated 1 November 2013 (the Disputed*
27 *Will) to be admitted to probate in matter FSD 27 of 2014 (formerly G 444*
28 *of 2013) (the Probate Action). The Probate Action was dismissed and the*
29 *Court pronounced against the force and validity of the Disputed Will by*

1 *order dated 22 February 2018. The Invoices appear to form part of the*
2 *Plaintiff's costs of the Probate Action which the Grand Court has not yet*
3 *ruled on.*

4 *In the circumstances, the Administrator does not agree to be joined as a*
5 *party to the Debt Proceedings and reserves his rights."*

6
7 c. On the 26th March 2019, the Court ruled that the Defendant was not entitled to
8 recover his costs involved in attempting to have the Disputed Will probated.

9
10 d. By Summons filed three days later on the 29th March 2019, the Plaintiff sought leave
11 to join the Administrator of the estate as second defendant to this action. That
12 Summons was supported by the Affidavit of Mr. John Wolf, a solicitor in the law
13 firm of Campbells, dated 9th May 2019. This was served on the Administrator's
14 Attorneys on the said date.

15
16 e. On the 15th May 2019, the Plaintiff wrote to the Attorneys for the Administrator
17 seeking consent to the joinder application.

18 *"We have to say that we cannot see any principled grounds for objection to*
19 *the grant of leave to amend (or to finalise a Tomlin order with Mr. Josephs)*
20 *and you have not put forward any principled objections (and for the*
21 *avoidance of doubt, we have not been provided with anything which*
22 *substantiates the final paragraph of this letter, and would be grateful for*
23 *sight of it. The costs incurred by Mr. Josephs were incurred by him as*
24 *proper expenses of the estate, of which Mr. Blake is now the court appointed*
25 *administrator and they do not form part of the costs of the Probate action*
26 *save in the sense that the Probate action might determine as between the*
27 *parties who pays them, bearing in mind the dispute. They are undoubtedly*
28 *payable by the Estate in the first instance. Please confirm your consent in*
29 *order to save further waste of time and expense."*



1 f. On 16th May 2019 the Attorneys for the Administrator responded in the following
2 terms:
3

4 *“We refer to your email of 15 May 2019.*

5 *The Administrator of the Estate does not consent to the orders sought in*
6 *summons dated 29 March 2019 (the Summons). Campbells has not*
7 *established a cause of action for recovery of its fees against the*
8 *Administrator of the Estate. Campbells’ cause of action for its outstanding*
9 *fees is properly against Kurt Josephs as its client pursuant to the*
10 *engagement letter dated 26 November 2013.*

11 *This is particularly so where, not only did the Grand Court pronounce*
12 *against the force and validity of the Disputed Will pursuant to which Kurt*
13 *Josephs claimed (but later renounced) executorship, but where it also made*
14 *no order as to costs such that Kurt Josephs is unable to recover his costs*
15 *involved in probating the Disputed Will from the Estate. A copy of the*
16 *Grand Courts’ orders dated 22 February 2018 and 26 March 2019 are*
17 *enclosed for your reference. Given the intervening public holiday, we*
18 *propose to serve factual evidence in response, updating the Court on the*
19 *relevant developments in the probate proceedings on Tuesday, 21 May*
20 *2019. We also propose an exchange of skeleton arguments at 12:00pm on*
21 *Thursday, 15 May 2019. Please let us know if this timetable can be agreed.”*
22



23 **SUBMISSIONS POST HEARING**

24 7. In the course of the hearing on 24th May 2019, it was an important issue as to when
25 Campbells became aware that the Disputed Will pursuant to which the Defendant had
26 claimed Executorship had been declared invalid by the Court and whether they
27 (Campbells) had requested information on the progress and outcome of those Court
28 matters. Following oral submissions from the parties and the *ex tempore* ruling given,
29 Counsel for the Plaintiff, who had recently come into the matter, sought an opportunity
30 to review the file and to make further submissions - in particular as to whether requests
31 had been made by the Plaintiff of Mourant for information on the Courts’ rulings.

1 8. Both sides have since provided written submissions.

2

3 9. The Plaintiff submits that the Administrator of the Estate should not be entitled to
4 recover his costs from Campbells. This, based on the fact that Campbells had been
5 asking for their invoices (incurred on behalf of the Estate) to be paid since 2016. It is
6 urged that had the Administrator informed Campbells of the true status of the underlying
7 probate proceedings when he was aware of it, in February 2018 and, more importantly
8 on 26th March 2019, these proceedings could have been avoided in their entirety.

9

10 10. The Plaintiff provides the following chronology of events:

11

12 a. March 2016 to date: Campbells are writing to the Administrator asking for the
13 invoices to be paid by the Estate.

14

15 b. 22nd February 2018: Probate action dismissed. (Campbells not informed).

16

17 c. 15th February 2019: Campbells write to the Administrator indicating intention to
18 apply to join him to the proceedings against Kurt Josephs.

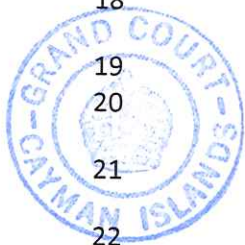
19

20 d. 20th February 2019: Mourant, as Counsel to the Administrator, email, in response,
21 asking for time to take instructions.

22

23 e. 25th February Feb 2019: Mourant write "*The Probate Action was dismissed and the*
24 *Court pronounced against the validity of the Disputed Will by order of 22 February*
25 *2018. The invoices appear to form part of the Plaintiff's costs of the Probate Action*
26 *which the Grand Court has not yet ruled on.*" (No evidence provided to
27 Campbells.)

28



1 f. 13th March 2019: Campbells email Mourant and ask that they consent to the
2 application or fill in a listing form.

3
4 g. 26th March 2019:

5 i. Mourant return signed listing form; and

6 ii. Costs ruling in probate action delivered. (Campbells not informed).

7
8 h. 29th March 2019: Campbells issue summons to join the Administrator.

9
10 i. 9th May 2019: Campbells serve Mourant with the Affidavit of John Wolf in which
11 he states. *“It has been a cause of some difficulty for this firm that, whilst the contest*
12 *[sic] probate proceedings have been in progress (which I understand they still are),*
13 *we have not been kept abreast of any of the details. On numerous occasions we have*
14 *asked various parties, including Kurt, and the Interim Administrator, who was*
15 *appointed as an interim administrator of the Estate by the Grand Court on 19 August*
16 *2015 (Order at pages 19-24) to pay our fees, which we consider were properly*
17 *incurred on behalf of the Estate and should therefore be paid by the Estate. We*
18 *also understand, although we have found it difficult to get confirmation, that Kurt*
19 *has determined not to prove the Will (despite having taken steps as executor), but*
20 *no party has successfully challenged its validity so the Will remains extant without*
21 *an executor. I have been told that there was a hearing in the Probate Matter in early*
22 *April 2019, but we do not know what happened at the hearing.”*

23
24 j. 15th May 2019: Campbells email Mourant: *“We cannot see any principled objection*
25 *to [our application] and you have not put forward any principled objections (and*
26 *for the avoidance of doubt, we have not been provided with anything which*
27 *substantiates the”*

1
2 k. 16th May 2019: Mourant write to Campbells enclosing court orders from 22nd
3 February 2018 and 26th March 2019. “...we propose to serve further factual
4 evidence in response, updating the Court on the relevant developments in the
5 probate proceedings on Tuesday 21st May 2019.” (Counsel with conduct of the
6 matter was in hospital from 17 May to date of hearing.)

7
8 l. 18th – 20th May 2019: Discovery Day long weekend.

9
10 m. 21st May 2019: Mourant serve the further evidence (after close of business).

11
12 n. 22nd May 2019: Campbells review additional evidence and orders and inform
13 Mourant by telephone that the application will not be proceeded with.

14
15 11. It is submitted by the Plaintiff that the evidence that Campbells did in fact make the
16 relevant requests is contained in the Affidavit of Mr. Wolf of the 9th May 2019. This
17 shows, it is said, that Campbells had been seeking this information from the
18 Administrator for some time and would have brought to the attention of the
19 Administrator and his counsel that they were unaware of the outcome of the probate
20 proceedings.

21
22 12. The core submission is that the failure to provide Campbells with the relevant materials
23 resulted in Campbells believing that they had a potential cause of action against the
24 Administrator when in fact they did not. This was compounded by the statement in the
25 letter of Counsel, on behalf of the Administrator dated 25th February 2019 that “*The*
26 *invoices appear to form part of the Plaintiff’s costs of the Probate Action which the*
27 *Grand Court has not yet ruled on.*” This it is said was a clear statement by Mourant



1 that the issue regarding Campbells' invoices was still before the Court and was yet to be
2 ruled on.

3
4 13. Counsel highlights that, although the further decision of the Court was made on the 26th
5 March 2019, the Administrator did not communicate this to the Plaintiff until the 16th
6 May 2019. This was the first time that Campbells had been given the Orders that show
7 tht the relevant proceedings had been dismissed. The failure to update the statement
8 made in February 2019 resulted in Campbells being misled about the status of the claim
9 regarding their fees from the outset. It is submitted that:-

10 a. *"By 9th May it must have been obvious to the Interim Administrator and his counsel*
11 *that Campbells were seeking information about the true position. I note the*
12 *assertion by Mourant below that "This does not constitute a request for copies of*
13 *the Court's orders from the Administrator." Whilst that is technically accurate it*
14 *ignores the true issue: it must have been clear to the Interim Administrator from the*
15 *previous requests made for updates (and abundantly so by that stage) that*
16 *Campbells were under a fundamental misapprehension of the position (contributed*
17 *to by Mourant's letter of 25th February which they failed to update) which the*
18 *Interim Administrator could easily have corrected, and which he did not.*

19 b. *Had the Interim Administrator provided Campbells with the information in his*
20 *possession (and requested by Campbells as set out above) the decision not to*
21 *proceed taken on 22nd May 2019 could have been made before proceedings were*
22 *even issued. Instead, despite knowing Campbells were unaware of the true legal*
23 *position, the Interim Administrator did not provide the materials until the Thursday*
24 *before a long weekend, with the promise of further evidence on the Tuesday after it*
25 *(and the hearing due three days after that). That evidence in fact arrived after close*
26 *of business on the Tuesday: on the Wednesday Campbells indicated that they would*
27 *not proceed with the application."*

28
29 14. In response Counsel on behalf of the Administrator submits that as the successful party,
30 the Administrator is entitled to his costs, that notwithstanding the further submissions of

1 the Plaintiff, matters are exactly as they were before the Court at the hearing on 24th May
2 2019 and that there is nothing which warrants a change to the Order made at that time.

3
4 15. Counsel for the Administrator makes *inter alia* the following points:-

5 i. As at 25 February 2019, it was clear to the Plaintiff that the Disputed Will
6 which had been put forward for probate by the Defendant, was not accepted
7 by the Court and that the Defendant was not the executor of the Estate. It
8 follows on from this, that the Plaintiff ought to have been aware that he did
9 not have an entitlement to have his costs recovered from the Estate and, as
10 a result, any claim by the Plaintiff against the Estate which was dependent
11 on such a recovery was fundamentally misconceived.

12 ii. Despite being aware of the Court's order, the Plaintiff did not request copies
13 of the Court Order nor did Campbells inquire whether a costs order had been
14 made before proceeding to issue its Summons on 29th March 2019. In
15 respect of the allegation that the Plaintiff had been misled, Counsel submits
16 that :

17 *"The Plaintiff has submitted that the Administrator misled the Plaintiff*
18 *by not providing the Plaintiff with a copy of the court's order as to costs*
19 *in the Probate Action immediately following its delivery. This is a strong*
20 *accusation to make in circumstances where the Plaintiff (a) was on*
21 *notice from 25 February 2019 that the court had ruled against the force*
22 *and validity of the Disputed Will, (b) had been informed that a decision*
23 *as to costs was outstanding and (c) had not engaged in further*
24 *correspondence to determine the outcome of the costs hearing prior to*
25 *filing its Summons. Any allegation that the Administrator has misled the*
26 *Plaintiff is strongly refuted. We invite the Plaintiff to withdraw the*
27 *suggestion that the Administrator misled the Plaintiff in any way, at any*





1 *time. In any event, there was no question relevant to the Plaintiff's claim*
2 *which was considered by the Court in granting the costs order or to*
3 *which the costs order was relevant. The Plaintiff's claim was*
4 *fundamentally flawed regardless of the Court's decision on the costs of*
5 *the Probate Action as there is no direct cause of action by the Plaintiff*
6 *as against the Administrator and so there could simply be no issue of*
7 *joining the Administrator as a defendant."*

8
9 iii. A purported executor who has failed to prove a will does not have a right to
10 have his costs recovered from the estate on the basis that such an executor
11 has no contractual or quasi-contractual right to costs out of the estate
12 (*Williams, Mortimer & Sunnucks, Executors, Administrators and Probate*
13 *(20th Ed), Chapter 39 at page 556*).

14 iv. There could be no direct cause of action against the Administrator as the
15 Defendant signed the agreement with the Plaintiff in his personal capacity
16 and not as the purported executor of a will. Further the terms of the
17 engagement between the Plaintiffs and the Defendants do not expressly
18 provide that the Defendants was contracting in the capacity of a purported
19 executor of the Estate.

20 16. With respect to the Plaintiff's submission that the Affidavit of Mr. John Wolf of 9th May
21 2019 evidences that requests had been made for the information, Counsel for the
22 Administrator responds by submitting that the content of that Affidavit does not point to
23 any specific or general request having been made. Further that the information therein is
24 incorrect, in that it refers to the Disputed Will being extant when the Plaintiff had been
25 told in the letter of the 25th February 2019 that the Court had ruled against the force and
26 validity of the Will.

1 17. Counsel argues further that had the Plaintiff engaged in further correspondence before
2 issuing the summons, the Administrator would have sought to provide the Plaintiff with
3 any information it required (where possible) and that the costs incurred in relation to this
4 matter could have been avoided in their entirety. It is submitted that the Plaintiff
5 proceeded without making any requests for information until the 15th May 2019 when
6 the Plaintiff emailed Mourant² stating that they could not see any "principled objections"
7 to the Summons and that the Plaintiff had "not been provided with anything which
8 substantiates the final paragraph of (Mourant's letter of 25th February 2019), and would
9 be grateful for sight of it". The 15th May 2019 was the first time that Mourant had
10 received a request from the Plaintiff for copies of the Court's orders in the Probate
11 Action.

12 **ASSESSMENT**

13 18. Section 24 of the *Judicature Law (2017 Revision)* provides a power to order
14 costs in the discretion of the Court. It is *inter alia* in the following terms:

- 15
16 "24. (1) *Subject to the provisions of this or any other Law and to rules of*
17 *court, the costs of and incidental to all civil proceedings in-*
18 *i. the Court of Appeal; and*
19 *ii. the Grand Court,*
20 *shall be in the discretion of the relevant court.*
21 (2) *Without prejudice to any general power to make rules of court, such*
22 *rules may make provisions for regulating matters relating to the*
23 *costs of those proceedings including, in particular, the entitlement*
24 *to costs, the taxation of costs, the powers of taxing officers and the*
25 *powers of judges to review decisions of taxing officers.*
26 (3) *The court shall have full power to determine by whom and to what*
27 *extent the costs are to be paid.*
28 (4) *In any criminal or civil proceedings, the court may disallow or (as*
29 *the case may be) order the attorney-at-law or foreign lawyer*
30 *concerned to meet the whole of any wasted costs or such part of*
31 *them as may be determined in accordance with the rules of court."*
32
33

² Second Affidavit of Claire Murphy dated 23rd May 2019 – Exhibit CM 2 - page 8

1 19. GCR O. 62 r. 4 provides inter alia:

2
3
4 “(2) *The overriding objective of this Order is that a successful party to*
5 *any proceeding should recover from the opposing party the*
6 *reasonable costs incurred by him in conducting that*
7 *proceeding in an economical, expeditious and proper manner*
8 *unless otherwise ordered by the Court.*

9
10 (5) *If the Court in the exercise of its discretion sees fit to make any*
11 *order as to the costs of any proceedings, the Court shall order the*
12 *costs to follow the event, except when it appears to the Court that*
13 *in the circumstances of the case some other order should be made*
14 *as to the whole or any part of the costs.*

15 (6) *The amount of the costs which a successful party shall be entitled*
16 *to recover from any other party is -*

- 17 i. *the fixed costs prescribed in rule 7;*
18 ii. *the amount assessed by the Judge in accordance*
19 *with rule 8;*
20 iii. *the amount allowed after taxation on the standard*
21 *basis; or*
22 iv. *the amount allowed after taxation on the indemnity*
23 *basis.*



24
25 (7) *The orders which the court may make under this rule include an*
26 *order that a party must pay -*

- 27 2. *a proportion of another party's costs;*
28 3. *a stated amount in respect of another party's costs;*
29 4. *costs from or until a certain date only;*
30 5. *costs incurred before proceedings have begun;*
31 6. *costs relating to particular steps taken in the proceedings;*
32 7. *costs relating only to a distinct part of the proceedings; and*
33 8. *interest on costs (at the prescribed rate for Cayman Islands dollars)*
34 *from or until a certain date, including a date before judgment.”*

35
36
37 20. In accordance with the statutory provisions and the guidance provided in the case of *AEI*
38 *Rediffusion Music Ltd v. Phonographic Performance Ltd*³, I am mindful that the
39 follow the event principle is a starting point only and that it is essential that consideration
40 be given to the circumstances of the case as a whole.

41

³ [1999] 1 WLR 1507

1 21. In that case, Lord Woolf M.R. considered the similarities and distinctions between the
2 exercise of a discretion on costs by a tribunal and that by a Court. The learned Judge
3 stated:

4
5 *“In re Elgindata Ltd. (No. 2) [1992] 1 W.L.R. 1207. Nourse L.J. in that case set out*
6 *some useful general principles which provide a guide as to the ordinary approach*
7 *to costs which he derived from an examination of earlier cases. He said, at p. 1214:*

8 *“The principles are these. (i) Costs are in the discretion of the*
9 *court. (ii) They should follow the event, except when it appears to*
10 *the court that in the circumstances of the case some other order*
11 *should be made. (iii) The general rule does not cease to apply*
12 *simply because the successful party raises issues or makes*
13 *allegations on which he fails, but where that has caused a*
14 *significant increase in the length or cost of the proceedings he may*
15 *be deprived of the whole or a part of his costs. (iv) Where the*
16 *successful party raises issues or makes allegations improperly or*
17 *unreasonably, the court may not only deprive him of his costs but*
18 *may order him to pay the whole or a part of the unsuccessful*
19 *party’s costs. Of these principles the first, second and fourth are*
20 *expressly recognised or provided for by rules 2(4), 3(3) and 10 [of*
21 *R.S.C., Ord. 62] respectively. The third depends on well-*
22 *established practice. Moreover, the fourth implies that a successful*
23 *party who neither improperly nor unreasonably raises issues or*
24 *makes allegations on which he fails ought not to be ordered to pay*
25 *any part of the unsuccessful party’s costs.”*



26
27
28 22. In the Grand Court case of *Sagicor General Insurance (Cayman) Limited and*
29 *Proprietors of Strata Plan No. 151v. Crawford Adjusters (Cayman) Limited and Six*
30 *Others*⁴, Henderson J. referred with approval to the principles enunciated in the said case
31 of *In re Elgindata Ltd*⁵. The learned Judge stated that the Plaintiffs in the former case
32 could be denied part or even all of its costs if they caused a significant increase in the
33 length or cost of the proceedings. In referring to the width of the discretion, the learned
34 Judge stated:

35

⁴ [2011 (2) CILR 474

⁵ (No. 2) [1992] 1 W.L.R. 1207

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- 30. *In argument, the Crawford parties cited Ottway v. Jones (3) and Knight v. Clifton (2).*
- 31. *Ottway (3) involved a landlord and tenant dispute governed by the “very special provisions” of the Rent Acts (see [1955] 1 W.L.R. at 714). The plaintiff proved the facts he was asserting and established an entitlement to possession. The court, however, exercised a discretion to withhold the relief because it seemed to be overly harsh in the circumstances. An order that the successful defendant pay the costs of the unsuccessful plaintiff was upheld by the Court of Appeal. The court observed that in the “ordinary case” such an order would not be a proper exercise of judicial discretion.*
- 32. *In Knight (2), the plaintiffs were unsuccessful in establishing their allegation that the third defendant had breached an injunction and committed a civil contempt. The trial judge awarded costs against the successful defendant, who then appealed. The Court of Appeal reversed the costs order because it was “not a proper exercise of judicial discretion.” The third defendant conceded on the appeal that he was not claiming his costs from the plaintiffs, a fact which was noted with approval by two members of the court.*
- 33. *The decisions in Ottway (3) and Knight (2) confirm that I have jurisdiction to award costs to an unsuccessful party but it is a jurisdiction to be exercised only in “the most exceptional cases” (per Russell, L.J., in Knight (2) ([1971] 1 Ch. at 713)) or in “occasional rare cases” (per Sachs, L.J., ibid.). An order which simply denies a successful party its costs is more common but still exceptional.”*

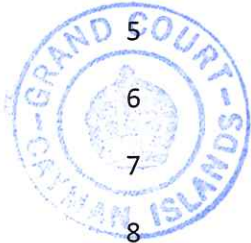
23. In the instant case the Plaintiff conceded that it could not succeed in its application and advised of this shortly before the hearing. The issue for consideration is whether there are factual circumstances which would provide a basis for the exercise of a discretion that costs should not follow the event. The alternatives include that no order be made as to costs in part or in whole or a costs order in favor of the Plaintiff, as the unsuccessful party. The Plaintiff’s contention is for an order which is other than in the usual course on the basis of a failure by the Administrator to provide information in a timely manner.

1 24. I have considered all the submissions of both Counsel with care and I have taken note of
2 all the factual circumstances including those which they have each outlined. At the heart
3 of the approach that I take to this matter is the Administrator's letter of 25th February
4 2019 which advised the Plaintiff more than a month before the filing of the 29th March
5 2019 Summons that the Disputed Will sought to be probated by the Defendant had been
6 declared invalid by the Court. That letter also advised that there was an outstanding issue
7 of costs yet to be ruled on by the Court.

8
9 25. I find it difficult to understand why in the face of this specific information, and without
10 further inquiry, the Plaintiff proceeded to file the Summons nevertheless.

11
12 26. Additionally, this was an open channel of communication and one would have expected
13 that *before* filing the Summons, the Plaintiff would have either awaited receipt of
14 information as to the outcome or followed up to obtain the outstanding information.
15 Could that information have been voluntarily provided by the Administrator?
16 Undoubtedly it could have. The pertinent question is in my view on whom was the onus.
17 Surely it must be on the entity who is seeking to act, to proceed with prudence and
18 caution. I take the view that the onus was on the Plaintiff to ensure that it was proceeding
19 in a thoughtful and considered manner in light of the attendant circumstances, in
20 particular the information which had already been provided that there had been a
21 pronouncement against the validity of the Disputed Will and that there was an
22 outstanding costs issue to be resolved. The letter of 25th February 2019 was in my view
23 a significant red flag which the Plaintiff failed to heed. It should have served to place the
24 Plaintiff on full pause until they had considered all the outcomes including that of the
25 outstanding Court decision.





1 27. I have considered whether the costs could be split over the relevant time periods and
2 whether it might be appropriate for costs to be paid by the Plaintiff only up to the 9th
3 May 2019, the date of the Affidavit of Mr. Wolf which the Plaintiff argues made it clear
4 to the Attorneys for the Administrator that information was being sought and that the
5 Plaintiff must have been unaware of the Court Orders. I note however, that the said
6 Affidavit of Mr. Wolf which was filed in support of the Summons, referred to the issue
7 of the validity of the 2013 Will as still being extant and there was no advertence to the
8 information provided in February 2019, despite the letter of 25th February 2019.

9
10 28. I have alternatively considered whether costs should be awarded up to the 15th May 2019
11 when the Plaintiff in an e-mail made the specific request for the Court documents. The
12 Administrator responded on the following day, 16th May 2019.

13
14 29. On the 17th May 2019, the letter from the Plaintiff to the Administrator did not seek to
15 place a pause on the proceedings having received or at the very least requested the
16 material. Instead, the Plaintiff's letter, suggested that Mourant should cease acting for
17 the Administrator as they had previously acted for Mrs. Coban and that there was a
18 conflict of interest⁶. It was further suggested that the Administrator may need time to
19 seek new Counsel and that Campbells would not object to a short adjournment for him
20 to do this. To this letter Mourant responded by letter of 21st May 2019 in which they
21 referred to an alignment of interest between the Administrator and Mrs. Coban and
22 asserted that the Plaintiff had no standing to seek their removal as legal Counsel.

23

⁶ Second Affidavit of Claire Murphy dated 23rd May 2019, Exhibit CM 2 – page 9

1 30. It is noted that the letter from Campbells on the 17th May 2019, was sent in the
2 intervening period between receiving or at least asking for the outstanding information
3 and *before* submissions and a bundle of authorities were filed by the Administrator.

4
5 31. Indeed it appears that it was not until the eleventh hour that the Plaintiff took the time to
6 consider the circumstances fully. While I do bear in mind the unavailability of Counsel
7 with conduct due to illness, from the 17th May 2019 and the long holiday weekend over
8 the 18th to 20th May 2019, I consider that, the periods before the filing of the Summons
9 on 29th March 2019 and also, upon the filing of the Affidavit on 9th May 2019, were two
10 important missed opportunities for the exercise of caution and prudence by the Plaintiff.
11 The Plaintiff could have made further inquiry to follow up on the letter of 25th February
12 2019 and thus not filed the Summons or alternatively withdrawn the Summons well
13 before the date scheduled for hearing and before further preparation costs were incurred.

14
15 32. Having considered all the circumstances of this case, the submissions made by the
16 Plaintiff and those on behalf of the Administrator, my view is that the circumstances are
17 not such that there should be a departure from the usual course which is that costs follow
18 the event. I accept the submissions made on behalf of the Administrator. Further I do not
19 consider that the circumstances are such that costs should be apportioned with respect to
20 any time frame or event. I will therefore order costs to the Administrator on the standard
21 basis to be taxed if not agreed.

22 **Dated the 21st day of October 2019**

23 



24 **Honourable Justice Cheryll Richards Q.C.**
25 **Judge of the Grand Court**