

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **FINANCIAL SERVICES DIVISION**

Cause No.: FSD 27 of 2014 (RMJ)  
(Originally Cause No. 444 of 2013)

3  
4  
5  
6 **IN CHAMBERS**

7 **BETWEEN: KURT JOSEPHS PLAINTIFF**

8  
9 **AND: MILLICENT E. COBAN DEFENDANT**

10  
11  
12 **AND BY WAY OF COUNTERCLAIM**

13  
14  
15 **BETWEEN: MILLICENT E. COBAN PLAINTIFF BY**  
16 **COUNTERCLAIM**

17  
18 **AND: KURT JOSEPHS DEFENDANTS BY**  
19 **NOEL CHRISTIAN COUNTERCLAIM**  
20 **LUKE McCOY**

21  
22  
23 **Appearances: Mr. Ben Tonner Q.C. and Ms. Helen McConnell of McGrath Tonner for**  
24 **Mr. Kurt Josephs and for Mr. Luke McCoy**  
25 **Mr. Hector Robinson Q.C. and Mr. Christopher Levers of Mourant for Ms.**  
26 **Millicent E Coban**  
27 **Mr. Noel Christian in person**  
28 **Mr. Kai McGriele and Mr. Jamie McGee of Solomon Harris for the Guardian**  
29 **ad Litem**

30  
31  
32 **Before: The Hon. Mr. Justice Robin McMillan**

33  
34 **Heard in**  
35 **Chambers: 26 March 2019**

36  
37  
38 **Judgment**  
39 **Delivered: 17 April 2019**



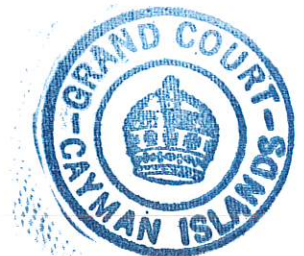
1 **HEADNOTE**

2  
3 *The general rule that costs should follow the event – Circumstances where that rule should not*  
4 *be followed – The broad interests of justice and the need to avoid yet a further series of costs.*  
5  
6  
7  
8

9 **JUDGMENT**

10 **Introduction**

- 11
- 12 1. This action was listed for a three week trial commencing on 19 February 2019. However,  
13 following opening submissions the Plaintiff applied for leave to discontinue his claim for  
14 probate of the purported will of Delroy Winston Joseph (“the Deceased”) dated 1  
15 November 2013 (“the Disputed Cayman Will”).
- 16 2. In the event the Court ordered that the claim be dismissed and it pronounced against the  
17 force and validity of the Disputed Cayman Will.
- 18 3. At this stage there remained on the part of the Defendant an Amended Counterclaim to be  
19 addressed, ultimately on 26 March 2019. This was the subject of a separate Summons for  
20 Discontinuance and correspondingly the Counterclaim was likewise dismissed by the  
21 Court.
- 22 4. With regard to the Counterclaim, the Defendant sought that this should be disposed of  
23 with no order as to costs.
- 24 5. At the same time, in relation to the main action the Defendant sought that the Plaintiff  
25 pay the Defendant’s costs of the action on the standard basis.
- 26  
27  
28



1

2 6. The Plaintiff makes a number of contrary submissions.

3 7. The Plaintiff asserts *inter alia* that the Defendant should pay the costs of the Plaintiff for  
4 the whole action from the moment the Defendant alleged forgery, fraud and undue  
5 influence to the moment it conceded and abandoned those allegations.

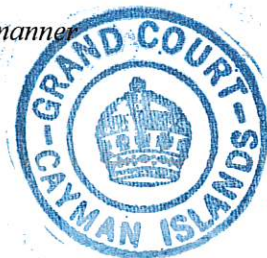
6 8. The Plaintiff also asserts that the Plaintiff should recover all other costs reasonably  
7 incurred (and not otherwise captured above in paragraph 7) from the estate of the  
8 Deceased on the basis that the Plaintiff was *prima facie* entitled to probate the Will and  
9 conducted himself reasonably throughout the proceedings.

10 9. It is noted by the Court that the Plaintiff's Written Submissions as to costs were 23 pages  
11 in length and that the Defendant's and Plaintiff by Counterclaims's Written Submissions  
12 were 26 pages in length. They involved perhaps unavoidably a degree of relitigation of the  
13 various issues already disposed of and to that extent taken as a whole they somewhat  
14 detracted from the conventional principles as to costs now in issue.

15 10. The starting point in relation to costs in contentious probate proceedings is Section 22 of  
16 the Succession Law (2006 Revision) which provides that the Court has the power to  
17 award costs to be paid either out of the Estate or by any litigant to the proceedings.

18 11. Further, the usual rules in relation to costs in civil proceedings apply in contentious  
19 probate proceedings by virtue of Section 24 of the Judicature Law (2017 Revision) which  
20 incorporates the normal costs rules expressly including "*administration of estates*"  
21 proceedings, i.e. the "*loser pays*" principle as set out in GCR Order 62 which provides by  
22 way of its principal provisions as follows:

23 *O.62 r.4 (2) "...the overriding objective of this Order is that a successful party to any*  
24 *proceedings should recover from the opposing party the reasonable costs incurred by*  
25 *him in conducting that proceeding in an economical, expeditious and proper manner*  
26 *unless otherwise ordered by the Court."*



1           o.62 r.4 (5) “if the Court in the exercise of its discretion sees fit to make any order as to  
2           the costs of any proceedings, the Court shall order the costs to follow the event, except  
3           when it appears to the Court that in the circumstances of the case some other order  
4           should be made as to the whole or any part of the costs.”

5           o.62 r.6 (7) “The orders which the court may make under this rule include an order that  
6           a party must pay –

7           (a) A proportion of another party’s costs;

8           (b) A stated amount in respect of another party’s costs;

9           (c) Costs from or until a certain date only;

10          (d) Costs incurred before proceedings have begun;

11          (e) Costs relating only to a distinct part of the proceedings;”

12 12.      When a Plaintiff has discontinued probate proceedings GCR Order 76 is relevant in that  
13           Rule 11 provides that the Court may order on the motion of any party an action to be  
14           discontinued on such terms as to costs or otherwise as it thinks just.

15 13.      Costs normally will of course follow the event. However, in cases of probate it is the  
16           function of the Court to investigate the execution of a will and the capacity of the maker  
17           and having done so to ascertain and declared what is the will of the testator. If fair  
18           circumstances of doubt or suspicion arise to obscure this question, a judicial enquiry is in  
19           a manner forced upon the Court.

20 14.      However, these stated circumstances are very different from those in this case where a  
21           Plaintiff, having seen the state of the evidence and of the opening submissions, simply  
22           abandoned his case.

23 15.      An executor propounding a will in circumstances where he should have known it could  
24           not be sustained stands open to be liable in costs under the principles enumerated. In  
25           other words, the Plaintiff is accordingly exposed and rightly so.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

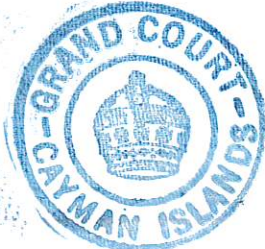
16. Turning to the costs of the Counterclaim, the Plaintiff makes the excellent point at paragraph 42 of its Written Submissions that in relation to an allegation of undue influence or fraud these ought never to be put forward unless the party who makes them has reasonable grounds on which to support them. Nonetheless the Defendant alleged that the Plaintiff, Mr. McCoy and Mr. Christian conspired to defraud the Deceased with no substantive evidence to support it ever going forward.

17. In light of these competitive and largely unpersuasive stances adopted by both Plaintiff and Defendant, the Court finds significant assistance in the following passages of the Guardian ad Litem’s Written Submissions at paragraphs 23.1 – 23.4:

“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 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 and 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.*



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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.”*

18. In principle, there is a good deal to be said for the overriding proposition that the Defendant should pay the costs of the issues on which the Plaintiff won and that the Plaintiff should pay the costs of the Defendant on the issues on which the Defendant won.

19. However, the Court is acutely aware that such an order, while fully merited, will involve both Plaintiff and Defendant 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 the Plaintiff and the Defendant.



1

2

3 21. Meanwhile, the costs of the Guardian ad Litem shall be met out of the assets of the  
4 Estate, as likewise shall be the costs of Mr. Christian and Mr. McCoy respectively, these  
5 gentlemen have been caught up in complex and protracted legal proceedings through  
6 what was in litigation terms ultimately no fault of their own.

7 22. The Ruling of the Court dated 26 March 2019 is hereby confirmed.

8

9

Rob. McMillan



10

11 **THE HON. MR. JUSTICE McMILLAN**  
12 **JUDGE OF THE GRAND COURT**