

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

CLAIM NO. SKBHCV2016/0026

**In the Estate of JOSEPHINE
AUGUSTA ASTAPHAN (née SAHELY),
deceased**

BETWEEN:

GERALD ANTHONY DWYER ASTAPHAN

Claimant

and

LAUREN CUNDARI

Defendant

Appearances:

Mr. Brian Barnes and Ms. Michelle Slack for the Claimant
Mr. Leslie Haynes Q.C., with him, Mr. Sylvester Anthony, Mrs. Angelina Gracy
Sookoo-Bobb and Ms. Renal Edwards for the Defendant

2019: October 12
(Defendant's Submissions received on 16 November 2019)
2020 27 January

JUDGMENT

[1] **VENTOSE, J.:** The underlying claim was a probate claim filed using a Fixed Date Claim on 29 January 2016 against the Defendant by the Claimant alleging that the last Will of Josephine Astaphan dated 4 May 2007 was: (a) executed without the knowledge and approval of the Deceased (b) was procured by the undue influence

of the Defendant, and (c) that Mrs. Astaphan was coerced by the Defendant from revoking the 2007 Will. The Defendant filed a defence in which she denied the allegations in the claim and counterclaimed against the Claimant seeking an order pronouncing in solid form in favour of the validity of the 2007 Will.

[2] The matter came on for trial on 7-12 October 2019 where the court heard the evidence of the parties including the expert evidence of Dr. Rauf Sirman in respect of the mental competency of Mrs. Astaphan relating to the Claimant's allegation that the 2007 Will was executed by Mrs. Astaphan without her knowledge and approval. The trial lasted 6 days ending on Saturday, 12 October 2019, when the court, after hearing the evidence and closing submissions of Counsel for the Parties, gave an oral decision dismissing the Claimant's claim against the Defendant and granting the Defendant's counterclaim against the Claimant.

[3] In relation to costs, the parties disagreed in respect of the order of costs to be made. Consequently, the court ordered the parties to file submissions on costs within 14 days of the date of the trial. To date, the court has only received submissions from the Defendant which were filed on 16 November 2019. The simple issue that arises for determination is whether costs should be assessed costs or should be prescribed costs in accordance with Part 65.5 of CPR 2000.

Prescribed Costs

[4] The prescribed costs regime in CPR 2000 is found in CPR 65.5 which provides as follows:

Prescribed costs

65.5 (1) The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.

(2) The "value" of the claim, whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant –

(a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that

is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or

(b) if the claim is not for a monetary sum it is to be treated as a claim for \$50,000 unless the court makes an order under Rule 65.6(1)(a).

(3) The general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 3 of Appendix B against the appropriate value.

(4) The court may –

(a) award a proportion only of such sum having taken into account the matters set out in rule 64.6(4) and (5); and

(b) order a party to pay costs –

(i) from or to a certain date; or

(ii) relating only to a certain distinct part of the proceedings, in which case it

must specify the proportion of the fixed costs which is to be paid by the party liable to pay such costs and in so doing may take into account the table set out in Appendix C.

[5] This court in **Roberts v Financial and Regulatory Commission** (Claim No. SKBHCV2016/0019 dated 14 October 2019) had the opportunity to examine the provisions of CPR 65.5 in some detail. The court stated as follows:

[12] The starting point is to consider the words of CPR 65.5 to determine whether they expressly cover the situation with which we are here presented, and, if they do not, whether there is any implication that can properly be made or even necessary. CPR 65.5(1) states expressly that the general rule is that where a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and CPR 65.5(2) to (4). It seems to me that this must be the starting point to any determination of prescribed costs in accordance with CPR 65.5. CPR 65.5(2) provides for the situations in which it is necessary to determine the value of a claim. CPR 65.5(3) states that the general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 3 of Appendix B against the appropriate value. Appendix B, entitled “Scale of prescribed costs” provides for the percentages of costs (Column 3) based on the “Value of the Claim” (Column 2). Appendix C states that it is a table “showing the percentage of the prescribed costs to be allowed under Appendix B where a claim concludes prior to trial”. Therefore, the

percentage of prescribed costs is calculated based on the value of the claim in accordance with Appendix B and the amount payable to a party is further calculated in accordance with Appendix C based on the stage of the claim.

[15] ... it is necessary to focus on the chapeau of CPR 65.5(2) which states that “[t]he “value” of the claim, whether or not the claim is one for a specified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant – ”. The important point is that CPR 65.5(2) does not apply in all cases where the value of the claim is to be determined but applies only where the claim is: (1) for a specified sum; or (2) for an unspecified sum; and in both cases where it is (3) coupled with a claim for other remedies. The words “coupled with a claim for other remedies” is the deciding limitation on the scope of CPR 65.5(2). If the claim, whether for a specified or unspecified sum, is not coupled with a claim for other remedies, CPR 65.5(2) does not apply.

[18] It is important not to forget that CPR 65.5(1) states that the general rule is that where a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and CPR 65.5(2) to (4). As stated above, Appendix B provides the scale of prescribed costs based on a percentage of the “Value of the Claim”. CPR 65.5(2) provides for the determination of the value of the claim in the circumstances outlined therein. ...

[19] It seems to me to be obvious that the first place to look to determine the value of the claim is the claim form. Where the claim is for a specified amount that amount is the value of the claim. Prescribed costs are to be determined in accordance with CPR 65.5(1). Where claim, whether for a specified or unspecified sum, is coupled with other remedies, CPR 65.5(2)(a) applies.

- [6] In summary, the decision in **Roberts** made it clear that: (A) an important and first consideration is that CPR 65.5(1) states that the general rule is that where a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and CPR 65.5(2) to (4); (B) CPR 65.5(2) does not apply in all cases where the value of the claim is to be determined but applies only where the claim is: (1) for a specified sum; or (2) for an unspecified sum; and in both cases where it is (3) coupled with a claim for other remedies; and (C) the words “coupled with a claim for other remedies” is the deciding limitation on the scope of CPR 65.5(2). If the claim, whether for a specified or unspecified sum, is not coupled with a claim for other remedies, CPR 65.5(2) does not apply.

- [7] The Defendant accepts the reasoning of the court in **Roberts** but submits further that CPR 65.5 only relates to monetary claims whether it is (a) specified (b) specified and coupled with a claim for other remedies (c) unspecified or (d) unspecified and coupled with a claim for other remedies. On the surface, the Defendant's submission has some merit, but it is clear that this is not what was intended by the drafters of CPR 65.5. It is accepted that the chapeau to CPR 65.5(2) refers to monetary claims whether it is (a) specified (b) specified and coupled with a claim for other remedies (c) unspecified or (d) unspecified and coupled with a claim for other remedies. This fits neatly with CPR 65.5(2)(a) but it seems to me to be incongruous that the chapeau can also apply to CPR 65.5(2)(b) which provides that "if the claim is **not for a monetary sum** it is to be treated as a claim for \$50,000 unless the court makes an order under Rule 65.6(1)(a)" (emphasis added).
- [8] CPR 65.5 (2) cannot apply to claims relating to specified or unspecified sums (both of which are monetary sums) and also apply if the claim is not for a monetary sum, it is to be treated as a claim for \$50,000.00. The Defendant submits that, first, CPR 65.5(2)(b) cannot be taken in isolation and applied to claims which are not for specified or unspecified sums with or without a claim for other remedies; second, the use of the word "non-monetary" is in the context of defining the value of a claim which is either a claim for a specified or unspecified amount with or without a claim for other remedies; and, third, CPR 65.5(2)(b) is obviously meant to cover an unspecified sum with/or without a claim for other remedies.
- [9] I do not understand how a claim for a specified or unspecified sum (whether claimed independently or in addition to a claim for other remedies), which is a claim for a monetary sum irrespective of whether it is specified or not, can also be a claim that is not for a monetary sum. In other words, CPR 65.5(2)(b) seems to be saying that where the claim is for a monetary sum and if it is a claim that is not for a monetary sum it is to be treated as a claim for \$50,000.00. This plainly does not make sense. The Defendant's argument is a logical one based on the clear

reading of CPR 65.5(2)(b) but it leads to a manifest absurdity since the sub-rule in CPR 65.5(2)(b) contradicts the chapeau of CPR 65.5(2). It seems to me that CPR 65.5(2)(b) should have been given an independent standing as it does not relate to a monetary claim which is what the chapeau of CPR 65.5(2) covers.

- [10] The question that now arises is whether it possible to reconcile this to make sense of CPR 65.5(2)(b). In **Bradford Noel v First Caribbean International Bank (Barbados Ltd.)** (Civil Appeal No. 29 of 2006 dated 19 March 2007), Barrow JA stated that in interpreting CPR 65.5 one must avoid a result that may amount to an absurdity (at [20]). To make sense of CPR 65.5(2)(b), it must be read so that the words “whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies”, found in the chapeau of CPR 65.5(2), do not apply. Therefore, CPR 65.5(2)(b) would read as follows:

(2) The “value” of the claim [deleted words] is to be decided in the case of the claimant or defendant –

(b) if the claim is not for a monetary sum it is to be treated as a claim for \$50,000 unless the court makes an order under Rule 65.6(1)(a).

- [11] This interpretation gives effect to the overriding objective since if the Defendant’s argument is correct, then, it would render CPR 65.5(2)(b) otiose since every claim that is not for a monetary sum is also not a claim “for a specified or unspecified or unspecified sum, coupled with a claim for other remedies”. That interpretation would run a coach and horses through CPR 65.5(2)(b) and render meaningless CPR 65.6, which provides as follows:

Applications to determine value of claim for purpose of prescribed costs

65.6 (1) A party may apply to the court at any time before trial –

(a) to determine the value to be placed on a case which has no monetary value; or

(b) where the likely value is known, to direct that the prescribed costs to be calculated on the basis of some higher or lower value.

(2) If an application is made for costs to be prescribed at a higher level, rules 65.8(4)(c) and 65.9 apply.

[12] If the Defendant's arguments were correct, there would be no need to make an application before trial to determine the value to be placed in a case which has no monetary value.

[13] The Defendants cites in support of their argument a passage of this court in **Robert** where it was stated that:

[21] The Court of Appeal in *Ultramarine (Antigua) Ltd. v Sunsail (Antigua) Limited* (ANUHCVP2016/0004 dated 17 April 2017) observed (at [41]) that "CPR 65.5(2)(b) applies to a non-monetary claim, not to an unquantified monetary claim". This statement is obiter. It is clear however that CPR 65.5(2)(b) applies to a monetary claim, whether quantified or not, that is coupled with a claim for other remedies, and it also applies to an unquantified monetary claim. This decision does not assist the Claimant's case. First principles do.

[14] While it is true that the observation of the Court of Appeal in **Ultramarine (Antigua) Ltd. v Sunsail (Antigua) Limited** (ANUHCVP2016/0004 dated 17 April 2017) was obiter, it was correct one based on the interpretation that this court now gives to CPR 65.5(2)(b). The statement of the court in **Robert** that "CPR 65.5(2)(b) applies to a monetary claim, whether quantified or not, that is coupled with a claim for other remedies, and it also applies to an unquantified monetary claim" would be the logical reading CPR 65.5(2)(b) but, as accepted above, it would lead to an absurdity. In any event, that statement by the court in **Robert** was obiter.

[15] I agree with the Defendant that both the claim and counterclaim were not claims for a monetary sum. Based on the court's reasoning above, both fall within the prescribed costs regime under CPR 65.5(2)(b) which means that the "value" of both the claim and counterclaim is to be treated as a claim for \$50,000.00. CPR 65.6(1)(a) provides that a party may apply to the court at any time before trial to determine the value to be placed on a case which has no monetary value. Since both the claim and counterclaim had no monetary value, the Defendant had the option to apply to the court at any time before trial to make an order under CPR 65.6(1)(a). The Defendant failed to make any such application so cannot now

complain that CPR 65.5(2)(b) applies because the trial took 6 days and significant costs were thereby incurred.

[16] In addition, the Defendant failed to apply to the court for budgeted costs pursuant to CPR 65.8. This would have allowed the court to make an order, on application by either party, to set a costs budget for the proceedings (CPR 65.8(1)). Such an application for a costs budget must be made at or before the first case management conference (CPR 65.8(2)). Before any such order is made, the client must consent to the application for budgeted costs (CPR 65.9). Had the Defendant availed itself of this option, it would have avoided the applicability of prescribed costs pursuant to CPR 65.5(2)(b).

[17] The Defendant submits that further support for the submission that prescribed costs do not apply to contentious probate proceedings can be found by comparing costs upon the discontinuance of an ordinary claim as opposed to a contentious probate claim. I fail to appreciate the applicability of CPR 37.7, which deals with quantification of costs in respect of a discontinuance, and CPR 68.9, which disapplies CPR 37 to probate proceedings, to the dismissal of a probate claim after trial. CPR 37.7 and CPR 68.9 are as follows:

Quantification of costs

37.7 (1) The general rule is that, unless an order has been made for budgeted costs under rule 65.8, the costs are to be determined in accordance with the scale of prescribed costs contained in Part 65, Appendices B and C.

(2) If the claimant discontinues part of the case only, the amount of costs must be assessed by the court when the remainder of the claim is resolved.

(3) In determining the appropriate amount of costs to be paid where an order has been made under rule 65.8 (budgeted costs), the court may take into account any written information provided by either party when the costs budget was made.

Discontinuance and dismissal

68.9 (1) Part 37 does not apply to probate proceedings.

(2) At any stage of the proceedings the court may, on the application of the claimant or of any party to the proceedings who has entered an acknowledgment of service order the proceedings to be –

(a) discontinued; or

(b) dismissed;

on such terms as to costs or otherwise as it thinks just, and may further order that a grant of probate of the will, or letters of administration of the estate of the deceased person, as the case may be, be made to the person entitled.

[18] The Defendant argues that CPR 68.9 somehow applies to a dismissal of a probate claim after trial and a dismissal of a probate claim at any stage of the proceedings on application by the claimant or of any party to the proceedings who has entered an acknowledgement of service. The court is of the opinion that CPR 68.9 does not deal costs in probate proceedings generally. CPR 68.9 merely makes it clear that CPR 37, relating to discontinuance, does not apply to probate proceedings. It also provides the cost consequences where a matter is discontinued or dismissed on application by the claimant or any party to the proceedings. The instant claim was dismissed after trial and was neither dismissed on an application by the Claimant nor was it discontinued. CPR 68.9 is plainly not applicable to a claim that is dismissed after trial.

[19] I do not accept the Defendant's submission that the general rule of prescribed costs is not applicable to the instant contentious probate claim, then pursuant to CPR 65.3(3)(b)(iii) costs must be assessed in accordance with either CPR 65.11 or 65.12. If the drafters of the CPR intended that result, they could have simply disapplied CPR 65.5 to probate proceedings altogether.

[20] The Defendant further submits that, first, CPR 65.11 deals with assessment of costs for procedural applications which does not arise, and, second, the matter having been determined after a full trial, therefore, falls to be assessed pursuant to CPR 65.12. Unlike the case in judicial review proceedings where CPR 56.13(5) states that if the judge makes any order as to costs the judge must **assess** them (It also references CPR 65.11 and 65.12 deal with the assessment of costs), there is no rule in the CPR 2000 dealing specifically with costs in probate proceedings

generally or any CPR stating that if the judge makes an order as to costs the judge must assess them. It, therefore, follows that costs after trial in probate proceedings, like most other matters, fall to be determined in accordance with prescribed costs pursuant to CPR 65.5. CPR 65.5(1) provides that the general rule is that where CPR 65.4 (fixed costs) does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C of Part 65 and CPR 65.5(2) to (4).

- [21] Parties should be vigilant in ensuring that issues of costs are dealt with early. Both parties may make an application: (a) at case management for budgeted costs pursuant to CPR 65.8; or (b) at any time prior to trial to determine the value of the claim for purpose of prescribed costs pursuant to CPR 65.6. Parties cannot complain after trial about the cost consequences when they have not availed themselves of the options in Part 65 to avoid them.

Disposition

- [22] For the reasons explained above, I make the following orders:
- (1) Prescribed costs are awarded pursuant to CPR 65.5(2)(b) to the Defendant on both the claim and the counterclaim to be paid by the Claimant within 14 days of today's date. The value of the claim is \$50,000.00
 - (2) The Claimant is also liable for any costs that have been incurred by the Defendant and not included in prescribed costs as outlined in CPR 65.7(2).
 - (3) Liberty to apply in respect of matters covered in Paragraph (2).

Eddy D. Ventose
High Court Judge

By the Court

Registrar