BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Claim No. 553 of 2007

BETWEEN

COLLEEN BRATHWAITE **CLAIMANT**

AND

IAN GLASGOW **DEFENDANT**

Before: The Honourable William J. Chandler, High Court Judge

Date of Decision: 2021 December 22

Appearances:

Mr. Wilfred Abrahams, Attorney-at-Law for the Claimant

Mr. F. Albert Pollard, Attorney-at-Law for the Defendant

Application to strike out statement of case-inherent jurisdiction of the Court- Part 26.3 of the Supreme Court Civil Procedure Rules 2008 - Whether Court should exercise its discretion in favour of striking out-application of the principles established by the Caribbean Court of Justice.

Costs – Security for costs – Defendant applying for security for costs – Plaintiff resident overseas- Whether court has jurisdiction to order security for costs – Whether court would exercise discretion to order security for costs – CPR part CPR 24.2 and 24.3. Applicable principles.

Decision

Introduction:

[1] This matter arises from a contested probate matter in which the Claimant, one of the children of Gordon Winfield Brathwaite, deceased (the deceased) and

one of the persons entitled to a share of his estate upon intestacy, has challenged the Defendant's application for a grant of probate to the last will and testament of the deceased dated 23 December 2005. The Defendant is the sole Executor appointed under the will. The challenge to the will is that, at the time of its execution, the testator was not of sound mind, memory and understanding. There is also an allegation that the will was obtained by the undue influence of the Defendant upon the testator.

[2] This matter transitioned from the former **Rules of the Supreme Court**, **1982** to the **Supreme Court (Civil Procedure) Rules, 2008 (CPR)**.

The application

[3] Before the Court is a Notice of Application filed 23 November 2012 by the Defendant for the following orders:

1. That the claim filed on 29th day March 2007 be dismissed for want of prosecution.
2. Alternatively, that the Claimant be ordered to give security for the defendants costs in the matter.
3. That the proceedings be stayed until the Claimant provides security for the defendant's costs.
4. That unless the Claimant provides security for the defendant's costs on or before 4 March 2013, the matter be dismissed.

The grounds of the application

[4] The grounds of the application are:

1. That the Claimant has taken no steps to prosecute the matter since 2007 during which time new Civil Procedure Rules apply.
2. The Claimant has not complied with the orders of the Master of the High Court at Case Management on the 5 May 2011.
3. The Claimant has not complied with the Defendant's request for information (CPR Part 34.1) filed on 16 May 2011.
4. The Claimant has not complied with the further orders of the Honorable Justice of the High Court made at a pretrial review on 6 December 2011.
5. The Defendant as executor and sole beneficiary of the estate has suffered severe prejudice and financial loss as the assets invite wastage.
6. The Claimant is not ordinarily resident within the Court's jurisdiction and has not been so resident for more than two decades.
7. The Claimant has refused to provide security for the Defendant's costs.
8. The court has inherent jurisdiction pursuant to The Supreme Court of Barbados (Civil Procedure) Rules 2008 Rule 24.1.

[5] The Notice of Application is supported by an affidavit filed 23 November 2012 and deposed to by Mr. F. Albert Pollard, Attorney-at-law for the

Defendant, in which he chronicles the history of filings and deposes, inter alia, that:

a. After the appearance to warning filed 25 July 2006 the Claimant filed the Writ of Summons on 29 March 2007. Since then the matter rested until Mr. Pollard was instructed in the matter after the death of Mr. Chezley Boyce, the then Attorney-at-Law for the Defendant on 1 March 2011. In notice of change of attorney at law was filed 3 March 2011.

b. That the Claimant failed to comply with the orders of the Master of the Supreme Court (the Master) made on 5 May 2011.

c. On 6 May 2011, the Defendant filed his request for information in accordance with CPR 34.1 and that to date the Claimant had failed to comply with the request.

d. The Claimant, counsel deposed, had not complained with the orders of the High Court Judge made on the pre-trial review on 6 December 2011 granting an extension of time to comply with the orders of the Master.

e. The Claimant had taken all steps to prosecute the matter and, as a result of the inordinate delay, the Defendant Executor and sole beneficiary under the will had suffered severe prejudice and

financial loss due to his inability to deal with the assets of the estate which were now falling into disrepair and wastage but more particularly the Executor's inability to dispose of the assets of the estate and settle the legitimate debts of the estate.

f. The Claimant, at the 29 March 2007 when the Writ was filed, was residing in the United States of America (USA) and had been so resident for more than two decades.

g. The defendant had been advised that he would be faced with additional expense in initiating an action against the Claimant in the USA to recover costs if he was successful in defending the matter.

h. In a letter dated 11 January 2012 addressed to the Claimant's attorney at law the defendant requested surety security in the sum of $21,000. The Claimant's attorney-at-law indicated that the Claimant was not prepared to provide security for the defendants' course.

i. That the cost likely to be in curd in the defense of this action of $21,000 prescribed costs was at the lower end of prescribed costs under the CPR.

j. In the circumstances the defendant requested the court to dismiss the claim for want of prosecution or, in the alternative, that the Claimant be ordered to give security for the defendant's costs in the sum of

$21,000 and that, pending the provision of such security, the action be steered and further that, unless such security was provided, the matter be dismissed.

The Defendant's written submissions

[6] Mr. Pollard, counsel for the Defendant, submitted that the court has an inherent jurisdiction to strike out the claim on the grounds of "delay in prosecution." Counsel relied upon **Part 26.3** of the **CPR** to argue that the Court has power to strike out a statement of case where it appeared to the Court that there had been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings. Failure to bring the matter to trial constituted inordinate delay and an abuse and abuse of the process of the court. He relied upon *Biguzzi v Rank Leisure Plc [1999] 1 WLR 1926 at pg. 1933.*

[7] Counsel cited an extract from *Annodeus Limited and others v Mark Gibson and others [Chancery Division] No.99 00576, Wednesday 2nd February 2000,* in support of the application to strike out the matter. It was also his submission that the inordinate delay by the Claimant had been inexcusable, prejudicial to the Defendant and an abuse of the Court's process. Counsel argued that there was no evidence that the challenges stated in the Claimants affidavit filed 17th January 2013 had been or would be sufficiently resolved to enable the

Claimant to discharge the burden of proof which lay upon her and to have an arguable case with a reasonable prospect of success.

[8] Counsel further submitted that the Claimant's response to the request for information, though 19 months late, had still not provided clarity to the Defendant's questions and that the response was a hastily constructed one simply for the purpose of compliance and not intended to throw further light on the Defendant's queries.

[9] As an alternative to the draconian step of striking out counsel urged the Court to exercise its power to order security for costs in accordance with the overriding objective.

[10] With respect to security for costs, it was Mr. Pollard's submission that the court had a discretion to make such an award in favour of the defendant if it was satisfied that it was just to do so where the Claimant was ordinarily resident out of the jurisdiction, he relied upon the **Supreme Court of Judicature Act Cap 117A** and **Parts 24.2 (1)** and **24.3 (a)** of the **CPR**.

[11] It was also submitted that the court had power to order further security for costs where there had been a material change of circumstances of the case.

[12] Citing the general rule was that costs followed the event unless it could be shown to fall within certain exceptions, Mr. Pollard further argued that, where a Claimant unsuccessfully pleads undue influence, the Claimant is condemned

in costs unless the Court holds that there was some merit in bringing the claim, in which case the Claimant would have to pay only part of the costs. Counsel relied upon **Knox v Deane et al. CCJ Appeal No 8 of 2011** and the judgment of **Nelson, JCCJ** at paragraph 42 of the judgment.

[13] Counsel argued that, while an application for security must be made promptly, the Court must take into account the special circumstance of the death of the Defendant's previous Attorney-at-Law and that some months passed before his present counsel was instructed. Counsel required time to acquaint himself with the matter. The Claimant, he also argued, had not acted timely in prosecuting the action thereby causing considerable prejudice to the defendant. He quoted the maxim that he who comes to equity must come with clean hands.

The Claimant's Submissions

[14] Mr. Abrahams, counsel for the Claimant, conceded that his client is ordinarily resident outside of the jurisdiction and has been so resident for over 20 years. He submitted that an order for security for costs is granted at the discretion of the court and ought to be exercised only when it was just to do so. He relied upon *Aeronave SPA v Westland Charters Limited [1971] 3 All ER 53 (Aeronave).*

[15] It was also his submission that a Defendant is not entitled to an order for security simply because a Claimant is impecunious *Cowell v Taylor (1885) 31 Ch. D. 34.* Counsel argued that "any inability of the Claimant to provide security for costs and nothing more does not automatically entitle the Defendant to security and prevent the Claimant from seeking and obtaining justice in respect of the matter".

[16] It was his further submission that the majority of the pleadings had been settled and that the application was made some five years after the writ was filed on 29 March 2007 and consequently ought to be refused since it was not made in a timely manner. Moreover, he opined that the sum of $21,000.00 claimed as security for costs was oppressive and would have the effect of stifling the Claimants bona fide claim against the defendant. Counsel referred to **Harnett, Sorrell and Sons Ltd v Smithfield Foods Limited BB 1987 HC 15**.

[17] Mr. Abrahams also submitted that the Claimant had a good cause of action against the Defendant and that the evidence will support the Claimant's contention that the preparation and execution of the purported will were attended by circumstances of suspicion which the Claimant raised and, if found to be true, the Court would rightly refuse to grant probate. Mr. Abrahams opined that, in all the circumstances, the application for

security was being made oppressively to stifle the Claimant's genuine claim against the defendant. The court, he urged, ought to undertake a balancing exercise and consider the injustice to the Defendant against the possible use of security as an instrument of oppression.

[18] Security, counsel submitted, ought not to be ordered as a matter of course but only if the court felt it just so to do having regard to all of the circumstances of the case. The court, counsel opined, must have regard to the overriding objective and it would not be just in this case for an award of security for costs to be made when to do so would not allow the claimant to obtain justice. Counsel finally submitted that the application ought to be dismissed and the Defendant ordered to pay the Claimant's costs. Unfortunately, not much was urged by Mr. Abrahams in relation to the application to strike out the claim.

The application to strike out

[19] We now deal firstly with the strike out application.

The Applicable Law

[20] The law with respect to striking out a Claim is found in **Part 26.3** of the **CPR** which is now reproduced:

> **"26.3** (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case where it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.

Part 2.3 of the **CPR** defines Statement of Case in the following manner:

> **2.3** "statement of case" includes
> (a) an application, statement of claim, defence, counterclaim, third party (or subsequent) notice or other ancillary claim or defence and a reply to a defence."

Discussion and analysis

[21] It is uncontroverted that the Court has an inherent jurisdiction to strike out any matter for want of prosecution. Apart from this, **Part 26.3 (1)** of the **CPR** grants specific power to the Court to strike out a statement of case or part of a statement of case where it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings. It is therefore unnecessary to revert to an inherent power where specific power is conferred on the Court. The jurisdiction or power to strike out is to be sparingly exercised since litigants ought not lightly to be driven from the judgement seat.

[22] I now turn to the submissions on this issue. Mr. Pollard, relied upon *Annodeus Limited and others v Mark Gibson and Others [Chancery Division] No. 99 0056 2nd February, 2000* and the principles enunciated therein by *Neuberger J* (the *Neuberger* principles) as applicable when a court entertains an application to dismiss a claim for want of prosecution, namely:

> "First, a claimant has and always has had a duty to get on with proceedings, and is liable to sanctions if he does not.

Secondly, this duty was taken more seriously under the RSC even before the Civil Procedure Rules 1998 came into effect.

Thirdly, following the coming into effect of the CPR, keeping to time limits laid down by the CPR or by the court itself is accorded more importance than it was previously.

Fourthly, under the old law a claim could normally only be dismissed for want of prosecution where the plaintiff's default or delay had been intentional and contumelious, or where he had been guilty of inordinate and inexcusable delay, giving rise to a substantial risk that a fair trial would not be possible, or to serious prejudice to the defendant (see Birkett v James [1978] AC 297, [1977] 2 All ER 801.

Fifthly, the court is now prepared to dismiss a claim for delay even if neither of Lord Diplock's two requirements as laid down in Birkett v James is satisfied (see Biguzzi generally and at page 1932B of [1999] 1 WLR 1926 in particular).

Sixthly, the duty of a claimant to pursue an action expeditiously and in accordance with the rules is all the more important when the claimant has already had a significant benefit at the expense of the defendant from the action…

Seventhly, the CPR enable the court to adopt a more flexible approach. The previous all or nothing extremes of either dismissing the claim for delay or permitting it to continue are now merely the two ends of a spectrum. The court has other sanctions at its disposal which it can and, in appropriate cases, should impose, rather than adopting one of the two extreme positions. Those weapons, those sanctions....include payments into court…and…appropriate directions and supervision for the future conduct of the trial.

Eighthly, in light of general principle and the overriding objection (see CPR, r 1.1(2)) the sanction, if any, to be invoked by the court to deal with a particular case of delay should be proportionate. To dismiss a

> claim where the claimant appears to stand a reasonable chance of success and of recovering substantial damages is a strong thing to do.
>
> Ninthly, it appears to me that it is normally relevant to consider the following factors. First, the length of the delay; secondly, any excuses put forward for the delay; thirdly, the degree to which the claimant has failed to observe the rules of court or any court order; fourthly, the prejudice caused to the defendant by the delay; fifthly, the effect of the delay on trial; sixthly, the effect of the delay on other litigants and other proceedings; seventhly, the extent, if any, to which the defendant can be said to have contributed to the delay; eighthly, the conduct of the claimant and the defendant in relation to the action; ninthly, other special factors of relevance in the particular case."

As previously stated, no submissions were received from the Claimant on this issue, nevertheless, it is pellucidly clear from the affidavit of Ms. Duana Peterson (Ms. Peterson), one of the Attorneys-at-Law for the Claimant, hereinafter referred to, that the Claimant does not concede this point.

[23] Whilst I consider the *Neuberger* principles to be of importance in guiding a Court as to the manner in which it should approach an application to strike out, I am bound by the guidelines established by the **Caribbean Court of Justice** in **Barbados Rediffusion Services Limited v Asha Mirchandani et al CCJ Appeal No. CV 1 of 2005 BB Civil Appeal No. 18 of 2000 (Mirchandani)**, which are concise and achieve the same objectives as *Annodeus*. In Mirchandani, the **CCJ** noted that a Court which is called upon to make such an order, must approach the matter holistically and undertake the balancing exercise needed

to ensure that proportionality is maintained and that the punishment fits the crime. Those guidelines are:

> **"Guidelines**
> 44. … A judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken. …
> 45. Broadly speaking, strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the Court's orders. In this context "fairness" means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the Court. If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the Court, then that is a situation which calls for an order striking out that party's case and giving judgment against him.
> 46. …With regard to the use of strike out orders as a response to disobedience of court orders, … While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and to some extent symbolic response to a challenge of the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categorised as contumelious or contumacious."

[24] I agree that the power to strike out a party's case is a draconian measure which ought to be sparingly exercised. I am of the view that I must look at this matter holistically and carry out the balancing exercise necessary to ensure that proportionality is maintained.

[25] With respect to the failure to comply with the Orders of Court, Ms. Peterson, one of the Attorneys-at-Law for the Claimant filed an affidavit on 17 January, 2013 in which she deposed that the Claimant had been beset by a number of setbacks which were beyond her control. She deposed to the numerous efforts

made to contact Dr. Bamidele Babalola who was the deceased's personal physician and whose medical tests and the results thereof from Spectrol Medical Laboratories were critical to the Claimant's case. That doctor had emigrated to New Zealand and could not be located for the purposes of providing a report on the now deceased man.

[26] She also deposed to the fact that they were finally able to contact the doctor who now resided in Australia, who agreed to provide his medical report and advised that he would make himself available to give his evidence in person or remotely.

[27] Ms. Peterson further deposed to the efforts she had made to obtain copies of the Welfare Officer's Report (the Report) on no less than five (5) occasions, the bureaucratic hiccups encountered and the results of those efforts,

[28] She also deposed that the Report was received in December 2012, some seven years after the visit of the Welfare Officer to the now deceased man and some four years after it was first requested and attached a copy of the Report to her affidavit. Her affidavit evidence remains unchallenged.

The Overriding Objective

[29] I am of the opinion that the Overriding Objective of the **CPR** is very applicable to the matter at bar. **Part 1.1** of the **CPR** provides that:

> **"1.1** (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
> (2) Dealing justly with a case includes, so far as is practicable,
> *(a)* **ensuring that the parties are on an equal footing;**
> *(b)* saving expense;
> *(c)* **dealing with the case in ways which are proportionate to**
> (i) **the amount of money involved;**
> (ii) the importance of the case;
> (iii) **the complexity of the issues;** and
> (iv) the financial position of each party;
> *(d)* ensuring that it is dealt with expeditiously and fairly; and
> *(e)* allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. (**emphases added**)"

[30] I have read the Report and consider, without making a determination on its credibility in the absence of cross-examination, that it may be of some importance to the final resolution of the issues in this case. I am also of the view, and find, that the evidence of the now deceased man's personal physician in relation to his mental and physical health particularly as it relates to the period of time during which the last will and testament was executed, would likewise be of importance to a final determination of the issues in this matter.

[31] In the circumstances, I am of the view that the dismissal of the Claim would be contrary to the Overriding Objective of the **CPR**, particularly those parts set out in parenthesis above, and that justice to both parties would be achieved by allowing the case to proceed and the evidence of both sides tested by cross-examination. It must also be remembered that we are dealing with the final wishes of a gentleman who is no longer with us, hence the necessity not to be

precipitous in dismissing a challenge to his will based on lack of mental disposing capacity.

[32] I turn now to the application for security for costs.

The Law

[33] The applicable law is found in the **Supreme Court (Civil Procedure) Rules 2008**. (**CPR**) **24.2** which provides as follows:

> **"24.2 (1) A Defendant in any proceedings may apply for an order requiring the Plaintiff to give security for the Defendant's costs of the proceedings.**
> **(2) Where practicable such an application must be made at a case management conference and without delay.**
> **(3) An application for security for costs must be supported by evidence on affidavit.**
> **(4) The amount and nature of any security ordered shall be such as the court thinks appropriate."**

The conditions which must be satisfied are set out in **CPR 24.3** as follows:

> **"24.3 The court may make an order for security for costs under rule 24.2 against a Plaintiff only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and that**
>
> ***(a)*** **the Plaintiff is ordinarily resident out of the jurisdiction."**

Discussion and Analysis

[34] I reaffirm my opinion given in **Angela Yvonne Harewood v Homesites Barbados Limited, unreported decision in Civil Suit No. 724 of 2009**, **date of decision 1st October, 2020** that the pre-**CPR** law is applicable to the exercise of our discretion with respect to security for costs. In *Michael*

Phillips Architects Ltd v Riklin and another [2010] EWHC 834 (TCC) Akenhead J opined that "Although the case of *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, [1995] 2 BCLC 395 occurred before the Civil Procedure Rules, the judgement of Peter Gibson LJ provides useful guidance as to the criteria to which a court can and should have regard when deciding as a matter of discretion whether to order security for costs in the case of a company:" These are:

> "1. …
>
> 2. The possibility or probability that the Plaintiff will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security . . . .
>
> 3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the Defendant if no security is ordered and at a trial the Plaintiff's claim fails **and** the Defendant finds himself unable to recover from the Plaintiff the costs which had been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim … but it will also be concerned not to be so reluctant to order security as it becomes a weapon whereby the impecunious company can use it inability to pay costs as a means of putting unfair pressure on the more prosperous company . . . .
>
> 4. In considering all the circumstances, the court will have regard to the Plaintiff's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure . . . .
>
> 5. The court in considering the amount of security that might be ordered will bear in mind that he can order any amount up to the full amount claimed by way of security, provided that it is more than simply a nominal amount; it is not bound to make an order of a substantial amount . . . .

> 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can be properly be inferred without direct evidence . . . .
>
> 7. The lateness of the application is a circumstance which can properly be taken into account . . . ."

[35] Having set the provisions of the **CPR** in the context of the case law, I now proceed to analyse the factual matrix of this matter against the applicable legal principles. An order for security for costs is most frequently ordered where the Plaintiff is resident abroad. The rationale is to prevent the Defendant from having to seek an order for costs in another jurisdiction if the Plaintiff's claim fails. There is no dispute that the Claimant is resident abroad and therefore the principal condition under **CPR 24.3 (a)** is satisfied. There is no evidence that the Claimant has any assets within the jurisdiction and, consequently, jurisdiction to make the order is clearly established.

[36] I now turn to the application of the above principles seriatim in the exercise of my discretion whether or not to order security for costs in the peculiar circumstances of this case. It is uncontroverted that the Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances: *Sir Lindsay Parkinson and Company Limited v Triplan Ltd [1973] 2 ALL ER 273.*

[37] It has not been urged before me and I do not consider that there is the

possibility that the Plaintiff will be deterred from pursuing her claim if an order for security for costs is made, consequently, this is no basis upon which to refuse the grant of an order for security for costs.

[38] In carrying out the balancing exercise, I must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, I must weigh the injustice to the Defendant if no security is ordered and the Plaintiff's claim fails and the Defendant finds himself unable to recover from the Plaintiff the costs which had been incurred by him in his defence of the claim. In this regard, I have already said that I do not believe that the Plaintiff will be deterred from pursuing her claim by an order for security for costs. On the other hand, whilst there would be some injustice to the Defendant if no order is made and the Defendant is successful, this injustice will pale in comparison to that which might be suffered by the Plaintiff whose father is the testator and whose estate is estimated at $1,005,798.72. if she is unable to pursue her claim.

[39] There is no legitimate evidential basis for any suggestion that the Defendant is seeking to use the order sought as a weapon to stifle the Plaintiff's claim and I do not believe therefore that the order for security will be used as a weapon to deter the Plaintiff from pursuing her case.

[40] I must be concerned not to allow the power to order security to be used as an

instrument of oppression, such as by stifling a genuine claim. In this matter the Claimant has not suggested that she is unable to pay costs if ordered so to do. This suggestion arises from her counsel's submission and is not buttressed by any evidence of means or lack of means verified by affidavit. There is no legitimate basis to support any such suggestion and I am unable to find any on the papers before me.

[41] I must consider the Claimant's chances of success given all the circumstances of the case. In doing so, I bear in mind that this principle is qualified by the dictum of *Davey J* in *Crozat v Brogden [1894J 2 QB 30* that:

> "... the Court cannot, upon an application for security for costs to be given by a Plaintiff, go into the merits of the action. It appears to me that it would be highly inconvenient to do so, and as the reason for giving security for costs is not dependent on the merits of the action, I do not see why the merits of the action should be looked into at all. If the Defendant has no defence, or if it is a frivolous defence, and a mere attempt to try the action over again, there are appropriate means for setting aside and removing from the files of the Court a statement of defence which affords no real ground of defence, but which is frivolous and vexatious."

The modern case law suggests that the court should not go into a detailed analysis of the merits of the Claimant's claim in order to determine whether to grant an order for security for costs. In this regard, I am reminded of the dictum that: *"The weakness of a party's case would ordinarily be relevant only where he had no real prospect of succeeding". Allen v Bloomsbury Publishing pic and another [2011] All ER (D) 213* per *Kitchin J* quoting approvingly *Ali v Hudson (trading as Hudson Freeman Berg [2003] EWCA*

Civ 1793.

[42] While I do not propose to go into the Claimant's case in detail, I am of the view that it is not frivolous or vexatious and that there are arguable issues with respect to mental competency and undue influence on the pleadings. It has not been contended on behalf of the Defendant that the Claimant's case is frivolous or vexatious.

[43] With respect to the issue of whether the Plaintiff's claim is likely to be stifled as a result of the Defendant bringing this application. It is for the Claimant to prove that her claim is likely to be stifled as a result of the Defendant's application for security. This has not been argued on her behalf and, on the facts, there is no reason for this court to believe that the Claimant's case will likely be stifled in consequence of an order being made. Similarly, there is no evidence that the Plaintiff will not be capable of providing the funds required thus stifling her claim *Kuenyehia and others v International Hospitals Group Ltd [2007] J EWCA Civ 274*. I repeat that the argument with respect to impecuniosity is not grounded in fact but is only a submission.

[44] This is a contested probate matter in which the Claimant is the daughter of the testator and the Defendant of no relation to the testator. The general rule in civil proceedings is that the Court will order the unsuccessful party to pay the costs of the successful party (**CPR 64.6 (1)**), however the Court has a very

wide discretion under **CPR 64.6(2)** where the Court may, however, while acting judicially, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.

[45] The usual order in estate matters is for the estate to bear the costs of the application unless the application is without merit. Where, however, there is an allegation of undue influence or fraud, costs would usually be ordered against an unsuccessful applicant. I also wish to point out that the costs regime under the **CPR** gives the Court very wide powers and discretion in relation to costs notwithstanding that the **CPR** retain the old rule that the successful party is normally entitled to its costs.

Conclusion

[46] There has been no suggestion that the Claimant would fail to honour any cost order which may possibly be made and I reiterate that there is no evidence of impecuniosity on the part of the Claimant. Accordingly, I have decided to make the order for security for costs.

[47] I now turn to the issue of the quantum of costs. The Defendant has suggested the sum of $16,000.00 whilst proferring that the estate is valued at $1,005,798.72 and submitting a cost assessment of $96,173.94 pursuant to **Part 65.5(2)(b)** and **Appendices B** and **C** of the **CPR**. No counter figure has been proffered by the Claimant.

[48] The Defendant's suggested sum is predicated upon the value of the estate, however, the relief prayed for in the Writ of Summons filed in this matter is:

> "(i) That the Court shall refuse the grant of probate and pronounce against the force and validity of the alleged will.
>
> (ii) That the court shall grant to the Plaintiff Letters of Administration of the estate of the deceased.
>
> (iii) A declaration that the Defendant has no interest in the estate of the deceased.
>
> (iv) The said sum of $13,000.00.
>
> (v) Costs.
>
> (vi) Interest pursuant to section 35 of the Supreme Court of Judicature Act, Cap 117A of the Laws of Barbados.
>
> (vii) Further or other relief."

The Claim is principally concerned with non-monetary relief and I am of the opinion that **Part 65.5(1) (iii)** of the **CPR** is more applicable than the Rule relied upon by Mr. Pollard. This **Rule** provides that:

> "(iii) where 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)*."

[49] Similarly the Defendant's Counterclaim is for (1) the dismissal of the Claim and costs, (2) admission of the last will and testament to probate and for a grant of probate to the Defendant and (3) the denial of a Grant of Letters of Administration or any other relief to the estate of the deceased and the denial

of the relief claimed by the Plaintiff.

[50] No order has been made under **Rule 65.6(1)** ***(a)***, accordingly I will treat the claim as one for $50,000.00 where the appropriate costs would be $12,500.00. The case law suggests that the Court will prescribe a percentage of the full costs as security or about 2/3, I will follow that formula and Order the sum of $8,333.00 as security for costs.

Disposal

[51] In the circumstances, it is ordered that:

a. The Claimant is ordered to provide security for the Defendant's costs in the sum of $8,333.00 which may be provided for by lodgment of that sum with the Registrar of the Supreme Court or the provision of a bond in the said sum on or before 30 March 2022.

b. Further Case Management is set for 30 March 2022, and

c. The costs of this application shall be the costs in the cause.

William J. Chandler

High Court Judge