IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 86 OF 2020 (IKJ)

IN THE MATTER OF THE ESTATE OF BRIAN RICHARD SELBY UZZELL (THE "ESTATE")

AND

IN THE MATTER OF SECTION 8 OF THE SUCCESSION LAW (2006 REVISION)

BETWEEN:

(1) JUSTIN UZZELL

(2) JULIEN UZZELL

(3) SIMON UZZELL

(4) JASON UZZELL

Plaintiffs

-and-

ANDREA WONG SAM

Defendant

IN CHAMBERS

Appearances: Ms Shân Warnock-Smith QC instructed by Ms Morven McMillan and Mr Adam Huckle, Maples and Calder, on behalf of the Plaintiffs

Mr Anthony Akiwumi, Etienne Blake, on behalf of the Defendant

Before: The Hon. Justice Kawaley

Heard:	On the papers
Close of submissions:	4 September 2020
Draft Judgment circulated:	10 September 2020
Judgment delivered:	14 September 2020

HEADNOTE

Costs of contested application to remove executor-entitlement of removed executor to be indemnified for her costs-relevance of 'Calderbank' letters-appropriate basis for taxation of costs-Grand Rules Order 22 rule 14 and Order 62 rules 4(2), (5), (11) and 6(2)

COSTS RULING

Introductory

1. By an Originating Summons dated May 5, 2020, the Plaintiffs sought the removal of the Defendant as an Executor and the appointment of an independent Executor in place of the incumbents (the 1st Plaintiff and the Defendant). The Plaintiffs are the Testator's sons with a 95% stake in the Estate, while the Defendant (the Testator's former companion) has a mere 5% stake. The Plaintiffs' application was successful over the Defendant's opposition, for the reasons set out in *Uzzell-v-Sam*, FSD 86/2020 (IKJ), Judgment dated August 7, 2020 (unreported).

2. The Plaintiffs seek their costs on the usual contentious proceedings basis taxed on the indemnity basis by reason of the Defendant's allegedly unreasonable conduct before and throughout the course of the present proceedings. The Defendant contends that her costs should be payable out of the Estate, and invited the Court to have regard to a late change in the legal basis of the Plaintiffs' case for removal.

3. The issues requiring determination may be summarised as follows:

(a) whether costs should follow the event or whether the Defendant's costs should be payable out of the Estate in any event because she was an Executor;

(b) what account, if any, should be taken of the 'Calderbank' letters sent by the Plaintiffs before and after the commencement of the present proceedings and the Defendant's rejection of the relevant offers;

(c) whether, if the Defendant is required to pay the Plaintiffs' costs, taxation should be on the indemnity basis.

Should costs follow the event?

4. The Plaintiffs' counsel's submissions simply relied upon the pre-eminence of the costs follow the event rule. Ms Warnock-Smith QC relied upon GCR Order 62 rule 4:

> "*(1) This rule shall have effect unless otherwise provided by any Law.*
>
> *(2)The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*"

5. Mr Akiwumi rightly responded that regard must also be had to the following rule:

> "***Cases where costs do not follow the event (O. 62, r. 6)***
>
> *6(1) The provisions of this rule shall apply in the circumstances mentioned in this rule unless the Court orders otherwise.*
>
> *(2) Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative, mortgagee, chargee or official liquidator he shall be entitled to the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the fund and the Court may order otherwise only on the ground that he has acted unreasonably or, in the case of a trustee, personal*

representative or official liquidator has in substance acted for his own benefit rather than for the benefit of the fund or the creditors as the case may be..." *[emphasis added]*

6. He submitted in the 'Submissions on behalf of the Defendant on Costs':

> "*The Defendant's entitlement to be indemnified by the Estate is circumscribed only by a finding that she acted for her own benefit rather than for the benefit of the Estate, qua her position as executor. Acting for her own benefit, in the circumstances described would have to be tantamount to a breach of trust and, by parity of reasoning, 'misconduct' the measurement of which is foreclosed by section 8 of the Succession Law…*"

7. The emphasis placed on "only" was important, because it distinguished between the lower threshold of "unreasonable" conduct, clearly capable of summary determination in the costs context, and "misconduct" justifying removal for cause which I found in the Judgment (at paragraph 11) required oral evidence and cross-examination. However, in the context of the present case, the distinction between the two limbs of rule 6(2) is not material for two reasons. Firstly, in my judgment the two grounds for displacing the usual 'payment out of fund' rule, acting "*unreasonably*" and acting "*in substance…for his own benefit*" apply conjunctively to "*a trustee, personal representative or official liquidator"*, not disjunctively. The grounds only operate disjunctively in relation to a "*chargee*" or "*mortgagee*", persons who are mentioned in the first limb of rule 6(2) but are not mentioned in the second limb of the rule. This flows from an entirely straightforward reading of the words of the relevant rule. GCR Order 62 rule 6(2) is based on the corresponding pre-CPR English rule. Although no authority is required to support this finding, my own researches reveal that the English Court of Appeal in *Weth and Others-v-HM Attorney General* [2001] EWCA Civ (Mummery LJ) held:

> "*57. I now consider the order of Mr Collins QC as to costs. Mr Henderson argued before him, as he did before us, that at no time after the appointment of the receiver and manager could Mr Weth and his colleagues be considered trustees within the meaning of that word in RSC O.62 rule 6(2). However, Mr Henderson conceded before the judge that Order 62 rule 6(2) was declaratory of a general equitable jurisdiction to order costs to be paid out of the trust property. In my view Mr Collins QC correctly approached the question of the costs of the proceedings before him on*

the basis that (whether as an application of RSC Order 62 rule 6(2) or the analogous equitable jurisdiction) Mr Weth and his colleagues were entitled to be indemnified out of the assets of the trust until such time, if at all, as they were acting unreasonably ***or*** *in substance for their own benefit rather than that of the fund. The policy of the law is to encourage trustees to make Beddoe applications in cases of doubt or uncertainty; and it is important that people who generously give their time and energy to acting as trustees should be able to seek the guidance of the court at no personal risk as to costs, provided only that they are not acting unreasonably or for the benefit of themselves rather than that of the fund."[Emphasis added]*

8. Secondly, reliance on the second limb of GCR Order 62 rule 6(2), acting "*in substance…for his own benefit*", does not necessarily require proof of misconduct, such as intermeddling with the Estate property. There will be some cases where the right to an indemnity will be based on allegations of serious misconduct which require a full inquiry to establish. In other cases, such as the present, it may be possible to summarily determine that an executor or trustee was clearly not acting in a representative capacity in relation to the relevant litigation, without recording a finding of misconduct capable of supporting removal for cause.

9. The Plaintiffs' counsel in any event directly addressed the basis upon which it was possible to summarily engage the costs follow the event rule in relation to a personal representative. Ms Warnock-Smith QC relied upon more recent post-CPR English authority, *Perry-v-Neupert* [2020] WTLR 221; [2019] EWHC 2275 (Ch). This decision is very persuasive because, as here, it concerned unsuccessful opposition to a removal application. The equivalent to GCR Order 62 rule 4(2) is CPR 44, and the equivalent to GCR Order 62 rule 6 is CPR 46 and paragraph 1.1 of the related Practice Direction. Differences in drafting are not material, for present purposes at least. Reliance was aptly placed on the following paragraphs of HHJ Eyre QC's judgment in *Perry-v-Neupert:*

> "*28.* [The defendant's] *contention that this was not hostile litigation and that CPR 44* [the costs-follow-the-event principle] *does not even come into play is, in my judgement, not a tenable reading of what has happened here. This was an application which was opposed. The opposition from the first defendant was in robust terms…*
>
> *29. It follows that the starting point lies in the provisions of CPR 44* [the costs-follow-the-event principle]…

30. That being the starting point I then have to take account of the consideration set out in CPR 46-3 and the Practice Direction. I have to consider whether the costs incurred by the first defendant and the liability in costs to the claimants as the successful party, arose through acting properly in his role as executor acting in the interests of the estate."

10. The term "*acting properly in his role as executor acting in the interests of the estate*" was clearly not used to suggest a requirement that improper conduct sufficient to justify removal needs to be formally found. HHJ Eyre was making a summary costs finding. Moreover, the grounds for depriving a representative party of his or her right of indemnity out of an estate or trust fund include, according to paragraph 1.1 of the CPR Practice Direction, not just cases where a trustee or personal representative acted otherwise than for the benefit of the estate, but also where they:

> "*(c) acted in some way unreasonably in bringing or defending, or in the conduct of the proceedings.*"

11. The core principles under the English CPR and the GCR are substantially the same in this context. Did the Defendant act "*unreasonably*" or "*in substance for* [her] *own benefit*" so as to lose her right to be indemnified from the Estate for her costs (GCR Order 62 rule 6(2)), and so as to engage the usual costs follow the event rule (GCR Order 62 rule 4)? She clearly did in rejecting the Court's encouragement (on the eve of the hearing of the Originating Summons) to accept the Plaintiffs' offer to replace both Executors with an independent professional appointee. As recorded in the Judgment:

> "*22…(d) the Defendant refuses to step down and unreasonably contends that she should continue as an executor alongside an independent executor in place of the 1st Plaintiff. If she does not get her way, she contends there should be a trial of the 1st Plaintiff's filed removal application and her own prospective removal cross-application…*
>
> *23. Without considering the merits of the respective accusations, the 1st Plaintiff's proposition that both disputants should step down and be replaced by an independent professional reflects a minimum objective appreciation of the need to meet the best interests of the beneficiaries as a whole. The Defendant's*

insistence that she remain in office despite the small size of her stake and the questions which have been raised about her fitness, regretfully, merely highlights her failure to appreciate the need for an executor who is also a beneficiary to be a champion for interests other than her own."

12. Taking into account solely what happened on the day of the hearing of the Plaintiffs' Originating Summons, the Defendant clearly acted more like an adversarial litigant than a personal representative neutrally seeking guidance from the Court. In principle, the Plaintiffs are entitled to their costs of the hearing. It remains to consider the impact of the '*Calderbank*' letters on the pre-hearing costs and the significance of the legal pivot which the Plaintiffs' case took shortly before the same hearing.

Without prejudice save as to costs correspondence and the Defendant's right to be indemnified in relation to the general costs of the action

13. GCR Order 22 rule 14 (2) provides that "*the Court shall take into account any offer which has been brought to its attention when making an order for costs*". Considering whether it was reasonable for a party to refuse a without prejudice offer in the context of a costs application is generally only necessary where it is unclear which party should be awarded their costs applying the *prima facie* governing rule. It may be relevant because it is unclear which party has won overall (*Re eHi Car Services Limited*, FSD 115/2019 (RPJ), Judgment dated March 31, 2020 (unreported)). Or, alternatively, without prejudice correspondence may be deployed with a view to justifying a departure from the 'costs follow the event' rule (*G-v-G* [2010] (1) CILR 365).

14. In the present case, the Plaintiffs most significantly are entitled to rely on the '*Calderbank*' letters to displace the usual rule that a personal representative should be indemnified for their legal costs out the Estate. Irrespective of whether or not it was reasonable to accept the offers in purely commercial terms, the Defendant's response demonstrates unambiguously that the present proceedings were commenced on an adversarial basis and that she was not in relation to the relevant issue acting, *qua* Executor, in a reasonable manner. In summary:

    (a) the First '*Calderbank*' Letter was dated December 6, 2019 and was sent by Maples and Calder to Broadhurst LLC, the Defendant's then lawyers. It offered a seemingly generous uplift to her allotted 5% entitlement under the Will if the Defendant would

step down as Executor to facilitate an expedited and efficient administration of the Estate. It crucially stated:

> "*If your client refuses our clients' offer of settlement and refuses to resign as executor and director of CPL, we are instructed to issue an application seeking, amongst other things, her removal as an executor of the Estate in the Grand Court of the Cayman Islands. Our clients will seek payment of their costs of doing so from your client and will resist any attempt by your client to have her costs of defending such an application paid from the Estate*";

(b) Broadhurst LLC does not appear to have responded in conciliatory terms or at all. An open letter from Etienne Blake dated January 24, 2020 to Maples and Calder prompted a January 31, 2020 open reply on behalf of the Plaintiffs indicating that "*the relationship of trust and confidence between your client and her co-executor and other beneficiaries of the Estate has broken down irretrievably*". It made an open proposal that both Executors step down and that an independent sole Executor should be appointed in their stead. Etienne Blake's sabre-rattling response dated February 7, 2020 demanded that the 1st Plaintiff step down, or face removal proceedings brought by the Defendant. More typical lawyerly 'pleasantries' were exchanged before the Plaintiffs issued their Originating Summons on May 5, 2020;

(c) the Second 'Calderbank' Letter was sent by Maples to Etienne Blake on Friday July 24, 2020, four days before the hearing. With a view to saving costs, it communicated the Plaintiffs' offer to pay the Defendant's costs on an indemnity basis if she consented to the relief sought in the Originating Summons by 12.00 noon on Monday July 27, 2020;

(d) this second without prejudice save as to costs letter prompted a counter-offer in the form of the Third '*Calderbank*' Letter from Etienne Blake dated July 27, 2020. This proposed the payment of an "*additional pecuniary legacy*" to the Defendant of an amount more than the Plaintiffs' rejected December 2019 First '*Calderbank*' letter plus Executor's expenses in an amount marginally more than the cash payment offered in December 2019. The counter-offer was advanced in return for the Defendant not pursuing a full forensic inquiry into the 1st Plaintiff's own alleged misconduct.

15. The only reasonable inference from the documentary record is that the Defendant was, in the prelude to the commencement of the present proceedings, not acting in the capacity of a reasonable and proper executor at all. She was, it seems obvious, a disappointed and disgruntled beneficiary acting with primary regard to her personal interests when confronted with the objectively reasonable proposal in late 2019 that an independent executor be appointed to allow the administration of the Estate to progress in an efficient and expeditious manner. I do not find it necessary to record a positive finding as to whether or not the Defendant ought to have accepted the specific commercial package which was offered in the First '*Calderbank*' Letter. However, an Executor acting in substance on behalf of the Estate would not have waited over 7 months before responding to the Plaintiff's opening offer, apparently unconcerned about the Estate being in limbo in the interim. The Defendant's non-response was manifestly unreasonable in light of the fact that she was removed from office 8 months after the First '*Calderbank*' Letter on the same grounds (irretrievable breakdown of relations between the two Executors) which underpinned the Plaintiffs' December 2019 offer.

16. The Second '*Calderbank*' Letter was less significant, coming when it did. The hearing was determined in, a technical legal sense, on the basis of supplementary submissions prepared by the Plaintiffs' counsel in reply to the Defendant's legal submissions. It is not immediately obvious that the Defendant acted entirely unreasonably in refusing the offer or by responding with the extremely ambitious counter-offer in the Third '*Calderbank*' Letter. But the pertinent reasonableness criterion under present consideration requires one to ignore the Defendant's interest as a beneficiary in maximizing her distribution from the Estate. It requires one to focus solely on what a reasonable executor would have done, acting in the best interests of the Estate. Obviously, such a person would have, at a minimum, agreed in principle that both Executors should step down, subject perhaps to a reservation of rights in respect of disputed issues being addressed by the new appointee. Instead, the Defendant donned her battledress and marched boldly onto the battlefield, tossing her neutral Executor's garb aside.

17. In summary, the present action was clearly commenced to resolve an adversarial dispute in which the Defendant "*acted unreasonably or… in substance acted for* [her] *own benefit rather than for the benefit of the* [Estate]": GCR Order 62 rule 6(2). She accordingly gave up her right to be indemnified from the Estate for any costs relating to the present proceedings.

The impact of the modified legal basis for the Defendant's removal

18. The legal arguments advanced on each side and the basis for the ultimate decision were described in the Judgment as follows:

"*3…The simple and in my view compelling legal point advanced in the Defendant's Written Submissions was that the Court could not decide the serious allegations the parties were forensically firing at each other without adjourning for a proper trial of the issues with oral evidence and cross-examination. I reiterate the observation I made in the course of the hearing that based on the parties' initial round of submissions, I would have accepted Mr Akiwumi's central contention that the removal allegations based on section 8 of the Law could not be summarily determined and would have to be tried.*

4. The Plaintiffs' counsel prepared a Supplemental Skeleton Argument which advanced the alternative argument that this Court in fact had a broader supervisory jurisdiction over executors than the express terms of section 8 of the Law would suggest. The Defendant's counsel prepared Additional Submissions as well…

5. Accordingly, it was decided that I should determine whether or not the application could be dealt with summarily on the basis of a broader removal jurisdiction than that conferred by section 8 of the Law. If no broader jurisdiction existed, directions would then be made for a trial of the removal issues, including the Defendant's cross-application to remove the 1st Plaintiff.

6. For the reasons set out below, I have concluded that this Court's jurisdiction to remove executors is not limited to that conferred by section 8 of the Law and that sufficient grounds have been established by the Plaintiffs to justify summarily appointing an independent professional executor."

19. It is true that the '*Skeleton Argument on behalf of the Plaintiffs for the hearing on 28 July 2020*' (at paragraphs 22-24) suggested that the English law test for removal applied, but no reasoned grounds were advanced to justify applying a totally different test to that prescribed by the far narrower statutory provision relied upon, section 8 of the Succession Law (2006 Revision). I found that section 8 did not support a summary removal applying the flexible English removal test. Nonetheless, the central factual case relied upon at the hearing of the eventual application for summary removal, and set out in the Plaintiffs'

initial Skeleton Argument, was ultimately accepted. Only one paragraph in the initial Skeleton meaningfully mentioned section 8 at all:

> "*Section 8 of the Succession Law (2006 Revision) provides that the Court '…may, on the petition of any beneficially interested person, remove any personal representative found responsible for neglect or misconduct in the management or administration of the estate and may appoint another suitable person in his place*'."

20. Accordingly, although the Defendant succeeded in demonstrating that section 8 did not support a summary removal, virtually no costs at all were actually expended by the Plaintiffs in advancing the limb of its initial argument which the Court rejected. As the Cayman Islands Court of Appeal recently confirmed in its costs Judgment in *Deputy Registrar of the Cayman Islands Government Registry-v-Day and Bush*, CICA (Civil) 9 of 2019, Judgment dated December 18, 2019 (unreported):

> "*16. Moreover, a party may be deprived of all or a part of its costs if it has caused a significant increase in the length or cost of the proceedings: Sagicor General Insurance (Cayman) Limited and Proprietors of Strata Plan No151 v Crawford Adjusters Limited and Six Others [2011] (2) CILR at §12, citing In re Elgindata Ltd (No. 2) [19920 1 WLR 1207 at § 29.*"

21. A party who wins overall but incurs significant costs on a point which is rejected may have those costs disallowed. In all the circumstances of the present case, I find that none of the Plaintiffs' costs should be disallowed because of their unsuccessful initial pursuit of removal on the basis of section 8 of the Succession Law, because no significant increase in the overall costs occurred.

22. The *Elgindata* principle (referred to in *Re eHi Car Services Limited* at paragraph 25, which the Plaintiffs' counsel placed before the Court) is typically applied by way of disallowing costs incurred by the party who has succeeded overall. It is designed to prevent the injustice of the overall winner being compensated for substantial costs incurred in relation to a point that the losing party reasonably contested. There may perhaps be exceptional cases where the party who has lost overall may invoke this same principle to recover costs which their opponent has unreasonably forced them to incur. GCR Order 62 rule 4(5) confers a broad discretion to modify the 'costs follow the event' rule. However, I find that no, or no

sufficient, basis for exercising this exceptional jurisdiction in favour of the Defendant arises in the present case. This is essentially because:

(a) it was not unreasonable for the Plaintiffs to rely upon section 8 of the Succession Law in the absence of clear authority that English law (through section 42) applied to fill the gap;

(b) the Plaintiffs' substantive argument in any event was that the English test for removal without cause applied and they succeeded on this substantive point in any event, losing only what was in reality a legal technicality; and

(c) the Defendant clearly made a tactical decision to pursue a valid technical point, not with a view to vindicating her strict entitlement as a beneficiary under the Will, but rather with a view to obtaining more than what she apparently viewed as an unduly modest testamentary disposition in her favour. It is impossible to fairly infer that if the jurisdictional argument which ultimately prevailed had been advanced from the start, the Defendant would have thrown in the proverbial towel.

Basis of taxation: indemnity or standard basis?

23. The Plaintiffs seek indemnity costs on the grounds of:

(a) the Defendant making unfounded and un-particularised allegations of dishonesty in pre-action correspondence and in her First Affidavit; and

(b) procedural misconduct including failing to apply for relief sought in her Affidavit, defects in filing and serving evidence and making substantive rather than editorial comments on the draft Judgment.

24. I summarily reject the submission that the procedural misconduct complained of justifies an award of indemnity costs. None of the matters complained of had any significant impact on the course of the proceedings. There is at first blush more substance to the allegations of dishonesty complaint. However, on closer analysis these allegations were advanced in part in response to the evidential case the Plaintiffs advanced for the Defendant's removal

for cause. The Court never considered either of the opposing sets of allegations. In these circumstances, it would be inappropriate to take them into account at this stage.

25. The Defendant has, it is true, acted unreasonably in her capacity as Executor and I have found that the costs penalty for this is the very significant loss of her right to be indemnified out of the Estate. That same conduct cannot, in my judgment, be relied upon for a second time, in the context of assessing costs against the Defendant as a party to adversarial litigation, as grounds for awarding costs on the indemnity basis. In the Defendant's Written Submissions on Costs, it was argued:

> "*8. As to the hearing on 28th July 2020, in light of the novel arguments raised by the Plaintiffs, the Defendant was entitled to take a principled stand both by reason of established precedent and consistent with her appointment by the Testator as an Executor…*"

26. I have summarily rejected above the proposition that the Defendant acted reasonably as Executor in relation to the present litigation overall. In that capacity, she should have, for instance, accepted the Court's encouragement to agree to a new independent professional replacing the incumbents. But as a disgruntled beneficiary, it was not clearly unreasonable to attempt to get negotiating leverage by forcing a full trial of the respective sets of allegations, bearing in mind (a) based on the Plaintiffs' initial jurisdictional case, summary removal was not available, and (b) that I am unable to determine the merits of the respective allegations at all. The position would of course be different if the respective misconduct allegations had been tried and the Defendant's allegations rejected. For similar reasons, the pre-action unreasonable conduct complained of as grounds for depriving the Defendant of her right to an indemnity out of the Estate, cannot ground an award of costs on the indemnity basis.

Summary

27. The Overriding Objective in the Preamble to the Grand Court Rules imposes a positive duty on civil litigants to conduct litigation in a "*just, expeditious and economical way*". Similar principles are expressly incorporated in GCR Order 62 rule 4(2). These overarching guiding principles require this Court to apply the fundamental costs principles in a consistent and predictable manner so litigants know where they stand. The costs discretion may in some respects be broad, but it is firmly constrained by certain parameters. Where

sympathetic litigants such as the Defendant hold a representative office yet conduct proceedings in an unreasonable manner, Judges must steel themselves against the risk of compromising legal certainty and clarity through being "*too full of the milk of human kindness*". The Plaintiffs are accordingly entitled to an Order substantially in the following terms:

(1) The Plaintiffs' costs of and occasioned by the Originating Summons (including the costs of the present costs application) shall be paid by the Defendant personally, such costs to be taxed on the standard basis if not agreed;

(2) The Defendant shall bear her own costs of the Originating Summons and any right she might otherwise have had to seek an indemnity out of the Estate in relation to her costs (including her obligation to bear the Plaintiffs' costs pursuant to paragraph (1) hereof), is disallowed.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT