IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Claim No. 2023/PRO/cpr/00010

In the Estate of KATHERINE LESLIE SCRIMGEOUR, also known as KATHERINE SCRIMGEOUR, late of Angel Cove, Palmetto Point in the Island of Eleuthera, one of the Islands of the Commonwealth of The Bahamas.

AND

In the Matter of a Last Will and Testament of KATHARINE SCRIMGEOUR, also known as KATHERINE SCRIMGEOUR, deceased, dated the 17th day of December, A.D., 2021

AND

In the Matter of a Last Will and Testament of KATHERINE SCRIMGEOUR, also known as KATHARINE SCRIMGEOUR, deceased, dated the 4th day of February, A.D., 2014

BETWEEN

HAROLD CARTER SCRIMGEOUR

1st Claimant

AND

KEVIN BRUCE SCRIMGEOUR

2nd Claimant

AND

MACGREGOR KIRK SCRIMGEOUR

3rd Claimant

AND

TIMOTHY ATWATER

Defendant

BEFORE: The Honourable Madam Justice C.V. Hope Strachan

APPEARANCES: Margaret Gonsalves-Sabola for the 1st, 2nd and 3rd Claimants
Gail Lockhart Charles, K.C. and Syann Wells for the Defendant

HEARING DATES: 7th December 2023

Civil Practice and Procedure — Application for security for cost by the defendant pursuant to Part 24 of the CPR — Whether the claimants were ordinarily resident outside of the Bahamas — Whether the claimants have assets within the jurisdiction to satisfy a cost order should they be unsuccessful in their claim- considerations for grant of order for security of costs- necessity to provide draft –Bill od costs.

RULING

Background:

[1.] This case involves contested probate proceedings of competing wills. The Claimants are the only surviving children of Katherine Scrimgeour deceased ("the testatrix") of Angel Cove, Palmetto Point, Eleuthera, The Bahamas, who died on 9th February, 2022. They are in possession of a Will dated 4th February, 2014 ("the first will") which they contend is the genuine last will and testament of the testatrix. The Testatrix's son Harold Scrimgeour (Harold) is appointed executor of this will and all of the benefits under this will including property called Angel Cove are bequeathed to the said children.. The Defendant who is not related to the testatrix, is in possession of a second will dated 17th December, 2021 which he purports is the last will and testament of the testatrix. Under the terms of this second will hthe Defendant is named Executor and is the beneficiary of Angel Cove. The children are contesting the purported 17th December 2021will on the basis that it was obtained from the testatrix, by the Defendant, through undue influence and/or fraudulent calumny on the part of the Defendant. Harold also alleges that Angel Cove, could not be disposed of by the testatrix in the 2021 will, because she held it upon constructive trust for him, pursuant to a promise made to him by the testatrix to bequeath that property to him, in consideration of monies advanced to the testatrix or persons on her behalf, during her lifetime, for repairs to her home and to Angel Cove. Additionally Harold claims to be the owner of the testatrix's half interest in the moiety of property called Lubbers Quarters Cay, it having been conveyed to him by the testatrix by Deed of Gift (DG) in 1999. He contends that the DG renders Lubbers Quarters Cay no longer subject to the direction given to the Defendant in the 2021 will to sell the property and to share the proceeds between Harold and his siblings. The 2nd and 3rd Defendants support Harold's contentions and they collectively resist the application by the Defendant for security for costs.

THE APPLICATION

[2.] The Defendant's Application was filed on 12th July 2023 pursuant to Part 24 of the Supreme Court Civil Procedure Rules ("the CPR"). The Application was made for an Order that the first, second and third Claimants (hereinafter referred to as "the Claimants") give security for the Defendant's costs in this action on the ground that they are ordinarily resident out of the

jurisdiction. The Application was supported by an Affidavit of Sheila Cuffy filed on 12th July 2023.

[3.] After hearing the submissions on the application for security for costs on 7 December 2023, I reserved my ruling. Having considered all of the evidence in this case, I deny the Defendant's Application for security of costs and set out my reasons hereunder.

THE LAW

[4.] The Defendant's application was brought pursuant to Part 24.2 of the CPR which provides the procedure when an application for an order for security for costs can be made:-

> **"(1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.**
>
> **(2) Where practicable such an application should be made at or before a case management conference.**
>
> **(3) An application for security for costs must be supported by evidence on affidavit.**
>
> **(4) The amount and nature of the security shall be such as the Court thinks fit."**

[5.] The Court's duty is to be satisfied that the claimant is ordinarily resident out of the jurisdiction as only then can the discretion be exercised to grant security for costs:-

a) ***"The Court may make an order for security for costs under rule 24.2 against a claimant 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 —the claimant is ordinarily resident out of the jurisdiction." (See 24.3 (g))***

[6.] The Defendant relied on the Statement of Truth in the Claimants Fixed Date Claim Form and Statement of Claim dated 16th March 2023 and filed on 17th March 2023 where the Claimant's attorney Mrs. Mary Margaret Gonsalves-Sabola confirmed that

> ***"... the 1st, 2nd and 3rd Claimants cannot give the certificate because they reside in three separate locations outside of the jurisdiction..."***

[7.] The Claimants response by way of an Affidavit sworn by Harold filed on the 14th August 2023 confirmed that the 1st, 2nd and 3rd Claimants are the only children of the Testatrix, and that they all reside in the State of Maryland in the United States of America.

[8.] Since the Applicants and the Claimants acknowledge that the Claimants reside outside of the jurisdiction, in three separate addresses in the United States of America prima facie case exists for a Security for Costs order pursuant to Part 24 of the Civil Procedure Rules to be considered.

[9.] In defending the application Harold in the lone affidavit filed on behalf of the Claimants, exhibited a copy of a letter dated 11th July 2023 from the Defendant's attorney requesting that the Claimants pay One Hundred and Fifty Thousand ($150,000.00) dollars as security for costs. He also exhibited the Defendant's Application to this Court filed the following day on 12th July 2023, in which the Defendant is seeking an Order for the increased sum of Two Hundred Thousand ($200,000.00) dollars. In both the letter and the application, the Defendant neglected to offer any explanation as to how the sums requested was arrived at, nor why there was such a significant change in the numbers. Harold also contends that these documents, filed the day before the trial date on 13th July, 2024 demonstrate that the timing of the requests, in light of the trial date, was not a genuine attempt to procure an agreement from the Claimants, with respect to the disposition of any costs order that might be made against the claimants, and was motivated by bad faith. In fact the Claimants are of the view that the request and the present application is an attempt to stifle their genuine claim.

[10.] Harold also exhibited a photo copy of a Deed of Gift, dated 16th November 1999 "the DG") between the Testatrix and himself. The property purportedly gifted was in fact Lubbers Quarters Cay, comprising 6-7 acres of land in Abaco Bahamas (hereinafter referred to as "Lubbers Quarters"). The purpoerted interest is a half moiety owned jointly with the heirs of one Elizabeth Bethel, reputed to be the sister of the testatrix, and the Claimants' late aunt.

[11.] The purpose of Harold including the DG in his affidavit is to convince the court that Lubbers Quarters being within the jurisdiction of the Bahamas, is an asset that can be used to satisfy and enforce payment of any costs order against the claimants in the subject action. More particularly ownership of this property would obviate the need for a security for costs order in favour of the Defendant. The DG bears the imprint from the treasurer of the Bahamas that stamp duty was paid on 14th March, 2001. However, there is no indication on the photocopy provided that the DG was recorded in the Registry of Records. In the premises it is critical for the court to assess this document and determine its authenticity in concluding the application.

[12.] Notwithstanding the Claimants contentions as to the applicant's motivations, (which will be determined hereunder) this application for security for costs did not come out of the blue. The purpose of ordering security for costs was explained in the case of **Porzelack K.G v Porzelack (UK) Ltd. [1987] 1 WLR 420**, whereby Sir Nicolas Browne-Wilkinson V.-C opined at p. 422 that:

"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs."

[13.] Then Lord Denning, M.R.in **Aeronave SPA and another v. Westland Charter Ltd. and another [1971] 3 All E.R. 532** stated at p. 533 where it is just to grant security for costs:-

"It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order."

[14.] Although non residence is a reason for granting an order for security for costs, it is not dispositive of the matter. All of the circumstances under which the request is made must be examined, and should the court consider any of those circumstances paramount to the other considerations, notwithstanding the residence qualification, the court has a wide discretion whether to grant the relief sought by the Defendant. Given that there is no dispute between the parties that the Claimants reside outside of the jurisdiction. I move now to the question whether there are assets within the jurisdiction to settle any costs should the Defendant be successful in this action as this is also a consideration to be regarded for the grant or refusal of the application.

Assets within the jurisdiction

[15.] In the case of **Lloyd and Roycan International Banking Limited et al BS 1990 SC 93**, Sawyer J, referred to the case of **Ebrard v Gassier (1885) 28 Ch. D. 232**, specifically p. 235 where Bowen L.J. stated: -

"The plaintiffs being abroad were prima facie bound to give security for costs, and if they desired to escape from doing so they were bound to show that they had substantial property in this country, not of a floating, but a fixed and permanent nature, which would be available in the event of the defendants being entitled to the costs of the action."

[16.] However, in **re The Apollinaris Company' s Trade Marks [1891] 1 Ch. 1** at p. 3, Lord Halsbury, L. C. said:–

"It seems to me that the application is made under a misapprehension of what the rule originally was, whatever its application to the Court of Appeal may be. There is no such hard and fast rule as has been suggested, that; because a person is resident abroad he must necessarily give security for costs. His being so resident makes a prima facie case for requiring him to give security; but it is subject to a well-known and ordinary exception that if there are goods and chattels of his in this country which are sufficient to answer the

possible claim of the other litigant, and which would be available to execution the courts will not order him to give security for costs."

[17.] It is notable at this juncture that the Claimants do not rely on the disputed Angel Cove property as an asset within the jurisdiction for the purposes of this application, and rightly so, as it is clear from the Claimant's own averments in Harold's affidavit, that Angel Cove is and was at all times subject to disposition only upon the death of the Testatrix. It is also fair to say that nothing can be done with Angel Cove until the court decides which of the two (2) wills propounded is the valid will of the testatrix.

[18.] Counsel for the Defendant submitted that Lubbers Quarters Cay does not amount to sufficient security for several reasons. Firstly, there is no evidence before the court that the property is unencumbered. Secondly, that it is not in the names of the Claimants and is therefore not readily transferrable. Thirdly, that there is no indication that title to the property has passed onto the beneficiaries of the testatrix and/or Elizabeth Bethel or her heirs. Further they contend that there is no official appraised value of the property adequate for security and most importantly in its present condition there is no indication that the property is marketable or that it can be sold, (given the joint ownership with the Heirs of Elizabeth Bathell). Additionally no evidence has been produced showing that the real property tax is up to date.

[19.] I deem it wise in the circumstances to conduct a detailed scrutiny of this document. By a cursory review of the DG I take note of the following: The value of the undivided moiety is expressed as Seventy Thousand Dollars ($70,000.00). Stamp Duty in the sum of Four Thousand Two Hundred and Four Dollars ($4,204.00) appears to have been paid to the Treasurer of the Commonwealth of the Bahamas on 14th March, 2001. However the attached is only a photo copy of the DG and it displays that the DG is unrecorded in the Registry of record of the Commonwealth of The Bahamas.

[20.] I am also immediately struck by the fact that;

i. The document is a DG as opposed to a conveyance.
ii. The document describes the Grantor's interest as unencumbered fee simple possession of an undivided moiety or half part in the said hereditaments.
iii. The testatum of the DG speaks to it being pursuant to an agreement but nowhere in the document is such an agreement stated.
iv. Aside from the absent agreement the consideration spoken of in the DOG, is natural love and affection and not the moneys claimed to have been advanced or loaned to the grantor.
v. The Deed of gift though it has been stamped is not recorded.
vi. The attesting affidavit on the D G was not notarized.

These factors evoke further investigation as to the veracity of the DG as the asset suitable for the purpose submitted by Harold.

[21.] The efficacy of the DG as opposed to a conveyance or other document is indisputable when it is a voluntary transfer of property gratuitously made and not in expectation of death with the full intention that the property is a gift, that it shall not return to the donor, and the recipient keeps it. (***Halsbury's Laws of England,*** Gifts (Volume 52 (2020))

[22.] If a contrary contention is obvious on the face of the Deed it might fail. Although there is none apparent on the face of this DG the existence of the December, 2021 will and the gifting of Lubbers quarters in that will, (which admittedly has yet to be proven), educes questions concerning the voluntariness of the testatrix's actions and her intentions about the permanence of the Lubbers Quarters gift to Harold.

[23.] By the Claimants own words he made monetary advances to Katherine to enable repairs to her home on Harbour Island. At para. 7 of his statement of claim he says;

> ***It was agreed and understood between the 1st Claimant and the Testatrix that these monetary advances were loans that the 1st Claimant was making to the testatrix and were repayable by her. To that end the testatrix executed three promissory notes dated 20th January, 2007, 11th September, 2010 and 4th February, 2014 in which she promised to repay principal amounts and interest either during her lifetime or upon her death. The first Claimant will rely at the trial on the three promissory notes for their true meaning and effect."***

[24.] I do not see how promising to repay principal and interest on loans translates into the promise of a bequest of land or in fact a demonstration of an intention on the part of the testatrix, to gift Lubbers Quarters to Harold. The failure to record the DG and the fact that Harold does not possess the original of the DG calls into question whether the testatrix had the intention to permanently grant Harold the gift. The delay in payment of the Stamp duty on the DG is also suggestive of some undercurrent of impermanence in the DG. Promises to repay a loan upon death does not necessarily amount to a transfer of the title to land but could in fact mean paying the loans owed from the proceeds of the sale of the land. I am not satisfied that the Testatrix intentions are clear.

[25.] ***The fact is that Deeds of Gift are subject to be set aside by the courts: "A court will have the power to set aside a Deed of Gift that can be shown to have been made by mistake or under undue influence. To limit disputes and avoid challenges, the donor must freely give away the relevant asset subject of the Deed of Gift without any undue influence. The donor or parties to such an arrangement should be careful in recording the gift of the asset. It is advisable that the parties are able to record or demonstrate the donor's solvency and sound mind as well as the reason for the gift. (Reference, Tolley's Commercial Contracts, Transactions and Precedents*** Practical Guidance/Issues List) ***2nd Ed. 2015, Deed of Gift 8.7)(Tolleys)***

While the Claimants nor the Applicants have raised the issue of mistake or undue influence in relation to the DG, I feel that the issue cannot be ignored given that the claimants are contending that the Testatrix was unduly influenced in signing the will in 2021 and until the court hears evidence on the matter, the pleadings call into question the Testatrix's mental capacity until a final determination is made on that issue.

[26.] Whether the property, Lubbers Quarters is unencumbered is also relevant and has been questioned by the applicant. The position is that to be effective such assets being transferred or **gifted** is usually unencumbered. In certain cases, it may be subject to consent and proper arrangements or include mortgaged or charged assets. ***(Reference, Tolley's Commercial Contracts, Transactions and Precedents*** Practical Guidance/Issues List) ***2nd Ed. 2015, Deed of Gift 8.7)(Tolleys)***

[27.] This deed expresses that the grantor is gifting Lubbers Quarters to Harold in unencumbered fee simple. However it is difficult to place much faith in this assertion as the document gives no reference as to how the grantor became seised of the fee simple of the property. Moreover Harold neglected to state in his affidavit whether or not Lubber's Quarters Cay is unencumbered. Frankly, his knowledge in this direction may be lacking given that the property remains an undivided half moiety, which up to the time of the DG was not partitioned, between the testatrix and her sister Elizabeth Bethell. There is no suggestion that since the gifting in 1999 any effort was made to partition Lubbers Quarters. It is not a completely true statement when the applicant states at par 7 of his affidavit filed 14th August, 2023 :

> ***"There are no other claims to ownership of the Lubbers Quarters property than those of 1st Claimant solely or alternatively the Claimants equally,"***

[28.] The mention in the Testimonium of the DG to an agreement raises the issue of the substance of such an agreement. The terms of such an agreement is presently unknown. The mention of receipts by the Claimants in their statement of claim cannot be connoted as "an agreement" and no clarity is offered otherwise. Any attribution to the receipts evidencing such an agreement is pure speculation.

[29.] The DG mentions further that the testatrix was conveying to Harold out of natural love and affection. To my mind if there were receipts being advanced for moneys lent and the testatrix intended to gift the property to Harold with no intention for it to revert back to her it was easy enough to quote the amount of the loans as consideration even if only together with natural love and affection. I am of the view that the testatrix intentions are not sufficiently clear that she expected that the property would not return to her upon the payment in her lifetime of even upon her death. The fact that Harold never recorded the DG even to this day warrants that view.

[30.] In this jurisdiction documents which transfer title are required to be stamped and recorded. at the Registry of Records.

> ***S. 29 of the Stamp Act, Chapter 370.***
>
> ***(1) Every deed of gift or other voluntary transfer of property inter vivos shall be subject to stamp duty based on the value of the property in accordance with the Second Schedule.***
>
> ***(2) No such deed of gift or other voluntary transfer shall be deemed to be duly stamped unless the Treasurer has expressed his opinion as to the stamp duty chargeable thereon.***
>
> ***(3) Subsections (1) and (2) shall not apply to a conveyance or transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan; or under which no beneficial interest passes in the property conveyed or transferred; or made to a beneficiary by a trustee or other person in a fiduciary under any trust, whether expressed or implied, subject as provided herein; or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property; and this subsection shall have effect notwithstanding that the circumstances exempting the conveyance or transfer from charge under this section are not set forth in the conveyance or transfer.***

[31.] I take no issue with the fact that the DG was stamped on 14th March, 2001 by the Treasurer except to say that it is curious that it was not done until a year and four (4) months after it was executed. Nothing turns on it at this time. However the same cannot be said for the recoding requirements.

[32.] Upon review of the DG I noted the absence of a notary seal on the Attesting affidavit. This is a requirement under the ***Registration of Records Act, Chapter 187 of the Statute Laws of The Commonwealth of The Bahamas ("the RRA"):***

> **S. 6 RRA – "All oaths and acknowledgments required to be made by this Act shall be in writing endorsed on the deed, document or other writing to which they relate or securely attached thereto.,"**

[33.] **S.7.** RRA – tells us the persons empowered to administer oaths and take acknowledgements. the Registrar, such clerk in the Registry as is designated for the purposes of this Act pursuant to section***10, justices of the peace and notaries public; (b) In the Out Islands — commissioners, justices of the peace and notaries public; ....."***

[34.] The authenticity of any document such as the DG is critical to whether the court regards it as an existing asset to counter the Applicants claim. There are specific rules in this jurisdiction that spell out how documents are to be authenticated;

> ***The "signature of Notary public or Justice of the peace to be authenticated.***
>
> ***S. 8. (1) The Registrar shall cause to be endorsed on every deed, document or other writing accepted for record the name of the person lodging the same and the date on which the same was lodged, and all deeds, documents or other writings so lodged shall be numbered and recorded in the order in which they are received.***
>
> ***When a deed, document or other writing is recorded the Registrar shall cause to be endorsed a certificate showing the book in which the same is recorded and the pages containing such record, and that such deed, document or other writing has been authenticated in conformity with the provisions of this Act, which certificate shall be dated, signed by the Registrar and bear his seal of office.***
>
> ***S 9. All deeds, documents and other writings which have a certificate thereon in accordance with the provisions of any Act; the records thereof; and all copies of such records certified by the Registrar to be true copies, shall be admitted as evidence in any court of law or equity in The Bahamas without any further proof:***

[35.] The significance of this provision in law to the Claimants assertions about the purported DG of Lubbers Quarters is that since the Deed has not been recorded it lacks authentication by the Registrar. The lack of authentication of the DG is amplified when the lack of a notary seal is glaring from the photo copy put in evidence as opposed to a certified copy. It is doubtful whether the photo copy deed of gift as appears in the Claimant's filings is even adequate proof of the fact and existence of the DG, without extrinsic, cogent evidence surrounding its execution.

> ***30.*** ***S. 10 RRA. "If any person after having made and executed any conveyance, assignment, grant, lease, bargain, sale or mortgage of any lands or of any goods or other effects within The Bahamas, or of any estate, right or interest therein, shall afterwards make and execute any other conveyance, assignment, grant, release, bargain, sale or mortgage of the same, or any part thereof, or any estate, right or interest therein; such of the said conveyances, assignments, grants, releases, bargains, sales or mortgages, as shall be first lodged and accepted for record in the Registry shall have priority or preference; and the estate, right, title or interest of the vendee, grantee or mortgagee claiming under such conveyance, assignment, grant, release, bargain, sale or mortgage, so first lodged and accepted for record shall be deemed and taken to be good and valid and shall in no wise be defeated or affected by reason of priority in time of execution of any other***

such documents: Provided that this section shall not apply to any disposition of property made with intent to defraud.

[37.] As is provided in the foregoing provisions under the Registration of Records Act, the title to a document, first in time to be recorded, will have without more an unassailable title to any previously executed document that remains unrecorded except, for fraud. I am satisfied that this unrecorded DG relied on by the Claimants, in its unauthenticated state, might well have been or at the very least still stands to be overtaken by another document recorded after it..

[38.] There are other problems attendant upon the subject DG – as previously stated the testatrix owned an undivided moiety in Lubbers Quarters with her deceased sister Elizabeth Bethell. Elizabeth's heirs are apparently now the owners of the other half undivided moiety. Neither the Claimants nor Elizabeth's heirs own an entire estate in the land. The land can only be severed by a Deed of partition. What the Bethell descendants intend to do with their interest in the land remains a mystery despite Harold's attempt to apprise the court of their intentions. A true and clear intention might easily have been obtained by one or more of the descendants of Elizabeth Bethell affirming their position by way of affidavit in these proceedings. Given the familial connections between the claimants and the Heirs of Elizabeth Bethell's estate that should not have been difficult to accomplish. Alas, this is not the case. Also, Harold himself isn't very clear that they have clearly articulated a desire to a joint sale of Lubbers Quarters with the Claimants. Another alternative open to the heirs of Elizabeth Bethell that was capable of exploration in this application, was that they could assist the Claimants with any costs they become liable for. An indication of this has been recognized in law to cause the courts to refuse applications for security for costs. ***(see Keary Developments (infra).*** As it turns out the Claimants are in no position to say what if anything the other half moiety owners intend to do with the property in question.

[39.] In this regard, the Court agrees with and accepts the submission of Counsel for the Defendant in relation to the property. The Court is of the view that based on the irregularities in the DG documentation that is presently before this Court, there is no cogent proof of ownership of the property in the names of the 1st Claimant or indeed all of the Claimants. Accordingly it is doubtful whether there is good and marketable title to Lubbers Quarters Cay, that is readily transferrable to satisfy a Court order for security for costs. The property has also not been appraised to determine its current value. That being the case it cannot be said that the 1st Claimant or the Claimants have any assets within the jurisdiction.

[40.] That determination however is only prima facie to granting an order for security for costs in the Defendant's favour. Legal authorities are clear that the foregoing are not the only considerations for the court in deciding applications of this nature. The Court, has an obligation to look at other circumstances of the case prior to granting such an order. It is important to do so, as

these circumstances have many times influenced the outcome of the cases notwithstanding the favourable findings on the jurisdictional and asset presence factors.

Lateness of the Defendant's Application

[41.] One of the mentioned circumstantial issues to consider is whether the lateness of the Defendant's Application is a factor for the Court's refusal in granting an order for security for costs.

[42.] The Claimants in their submissions have stated that there has been a delay in the Defendant making the Application. They say the request for security for costs and the Application were not made as early as possible and that by waiting until 48 hours prior to the first hearing of the Fixed Date Claim, to make a written request for security to be provided, the Defendant did not make a good faith attempt to try to agree on security for costs with the Claimants, prior to making the application. Consequently there was insufficient time for the Claimants to respond to the Defendant's late written request for security for costs.

[43.] In the Court of Appeal's decision of ***Responsible Development for Abaco (RDA) Ltd v The Right Honourable Perry G. Christie and others SC Civ App No. 248 of 2017***, Sir Michael Barnett opined at p. 3 of the judgment that:-

> ***"Delay in applying for security for costs might, depending on the circumstances of the case, be a ground for refusing the application, where the applicant's delay had caused the other party to commit itself to a level of costs to which it would not otherwise have become committed, thus altering its position to its detriment. Whilst it is arguable that the application for security for costs should have been made or at least foreshadowed prior to a few days before the commencement of the trial, the lateness of the application was not in my view sufficient to deny the respondent an otherwise meritorious application for security."***

[44.] Moreover, to this point I repeat Point 7 which states at p. 542 that:-

> ***"7. The lateness of the application for security is a circumstance which can properly be taken into account. But what weight, if any, this factor should have and in which direction it should weigh must depend upon matter such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless, it is appropriate for the Court to have regard to what costs may yet be incurred."***

[45.] In the present case, the Defendant's Application for security for costs was made 48 hours before the hearing of the Fixed Date Claim Form. In accordance with Part 24.2 (2) of the CPR, an application for security for costs where practicable should be made at or before a case management conference. In the instant case, such application was not made pursuant to the CPR. The ***Responsible Development*** case (supra), which was ruled upon prior to the CPR, is quite similar to this case in that their application for security for costs was filed a few days before the trial commenced. In weighing all of the circumstances, ***Sir Michael Barnett*** did not refuse the respondent's application due to the late filing. Following Sir Michaels rationale, I am of the view that the late filing in this case does not necessitate a denial of the application but it may very well impact the final outcome sufficient to deny the Defendant's application outright. However the proviso in the case, appears to be ascertaining that there is an "***otherwise meritorious application for security.***" This I believe presumes and expects the examination of the circumstances to determine whether the application is in fact meritorious. Turning to consider the other existing circumstances and conditions the timing of the application is therefore at the forefront of my deliberations.

Conditions to consider in granting security for costs

[46.] The conditions for determining whether to grant security for costs. ***Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd. [1973] Q.B. 609.*** Lord Denning noted at p. 626 established that the court has a wide discretion, he stated:-

> ***"The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstance. Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim) that too would count. The court might also consider whether the application for security was being used oppressively so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants such as delay in payment as delay in doing their part of the work."***

[47.] ***Keary Developments Ltd. v. Tarmac Construction Ltd. [1995] 3 All ER 534 also provides guidelines as to the criteria*** to determine whether to grant security for costs. Gibson, LJ stated at p. 539 of his judgment:-

> ***"1. As was established by this court in Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.(emphasis mine)***
>
> ***2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering***

security (see Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see Pearson v Naydler [1977] 3 All ER 531 at 536–537, [1977] 1 WLR 899 at 906 per Megarry V-C).

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 the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have 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 by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see Farrer v Lacy, Hartland & Co (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see Pearson v Naydler [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).

4. In considering all the circumstances, the court will have regard to the plaintiff company'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 (see Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see Roburn Construction Ltd v William Irwin (South) & Co Ltd [1991] BCC 726).

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 properly be inferred without direct evidence (see Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

Is the Claim Bona Fide or a Sham?

[48.] It is my view that the validity of the Defendant's application as it relates to meeting the criteria established for these applications is indisputable. However the question of bona fides or the genuineness of the application lies in discerning the Applicant's motives in bringing the application. This can only be determined after looking at the conduct of the applicants through the evidence put forward for the application. In this regard I am of the view that the timing of the correspondence when the issue of the Claimants providing security for costs was first introduced by the defendant is material.

Does the Case have a good prospect of Success?

[49.] Counsel for the Claimants submit that the Claimant's claim is bona fide and not a sham and has reasonably good prospects of success. Further that the 1st Claimant has documentary evidence of the promises made to him by the Testatrix with respect to the repayment of the loans made to her upon her death. The Claimants allege that the Defendant in his Defence denies any knowledge of these matters and consequently has no contrary evidence to produce to rebut the Claimants documentary proof. The Defendant does not attest to the strength of his defence or the likelihood of successfully defending the Claim in his affidavit.

[50.] I accept that the Defendant did not mention the prospects of success in his affidavit. However, the merits of a case should not be a determinable factor in the Court exercising its discretion to grant an order for security for costs. Per Akenhead J at principle 4 of **Keary Developments v Tarmac Construction (supra).** (This is of course distinct from what Sir Michael in Responsible called an otherwise meritorious application.") Notwithstanding, the admonition to avoid going into the merits of the case, a cursory review of the Fixed Date Claim, the Statement of Claim and Defence demonstrates that there are arguable issues with respect to mental competency and undue influence as it relates to the Testatrix. This is a contested probate matter involving disputed wills where the Claimants are children of the testatrix and the Defendant does not appear to be of any relation to her. Issues which to my mind are worthy of a trial on the evidence.

[51.] Since there has been no admission on the Pleadings or payments into court by the Defendants I can turn my attention to the other considerations.

[52.] Firstly, I regard the Claimant's claim as genuine for the reasons indicated. Secondly, I ask whether the application is being used oppressively and/or to stifle what is a genuine claim? There is justification for why the Claimants submit that the security for costs application made by the Defendants at this stage is being used oppressively and to stifle their claim. The demand for the payment of Two Hundred Thousand dollars ($200,000.00) within Seven (7) days of the date of the

order, coupled with the lateness of the application, raises suspicion regarding the motives behind the application. However, it is not for the court to act on mere suspicion it is for the Claimants to prove that their claim is likely to be stifled as a result of an order for security for costs being made against them. Nowhere in Harold's affidavit does he allude to the stifling of the claim should a security for costs order be made. Moreover while exhorting that there are assets within the jurisdiction which can be relied upon for costs, the Claimants failed to provide any evidence that they would not be capable of paying any costs awarded or that they are impecunious; (See ***Kuenyehia and others v International Hospitals Group Ltd. [2007] JEWCA Civ 274.***) These deficiencies in the evidence are not helpful at all to the Claimants defence of the application at all.

[53.] Counsel for the Claimants argue further that the Defendant's failure to provide the court with any evidence as to how they arrived at the requested One Hundred and Fifty Thousand dollars ($150,000.00) and then Two Hundred Thousand dollars ($200,000.00) is also a clear indication of their efforts and motives at stifling their genuine claim. The two requested amounts do not appear to have been based on any good faith assessment of what the Defendant's costs have been to date or are likely to be in the future. Further the request that security in such a large sum be provided within seven (7) days is wholly unrealistic and amplifies the bad faith motivations on behalf of the Defendant. They further submitted that the purpose of the security for costs order is not to provide the applicant with an easy or convenient method of enforcement which seems apparent from the application.

[54.] While I harbor my own misgivings in contemplating the circumstances under which the application was made, I am not prepared to go as far as to say that the principal reason for the application was to stifle the claim. I accept that the application was made in the surrounding circumstances because counsel saw an opportunity for a strategic advantage in not only securing costs in a not so favourable environment but the possibility that an order for security for costs might bring an end to litigation for her client at this stage of the proceedings was an opportunity that could not be ignored. In other words the stifling of the claim could well be the unintended consequences of granting security for costs.

[55.] Counsel for the Defendant submitted that in the absence of an order granting security for costs, the Defendant would be required to undertake a costly exercise to engage counsel in three different jurisdictions to seek to enforce this Court's order should a costs order be made. It was further submitted that the absence of an order granting security for costs in these circumstances has the dual effect of causing substantial financial strain to the Defendant. Again I reiterate the absence of critical information in the Affidavit evidence in support of the application and in fact in the Claimants affidavit. Nowhere has it been posited that the Claimants would fail and/or refuse to honour any cost order made against them. ***Chandler J in Colleen Brathwaite v Ian Glasgow in Claim Supreme Court of Judicature, High Court, Civil Div. Barbados, No. 553 [2007]***

[56.] **I adopt the view taken by *Chandler J in Colleen Brathwaite (supra)*** when he set out the practice regularly followed by courts in Barbados but which occurs here in our jurisdiction

> ***" 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 a successful party is normally entitled to its costs."***

Notwithstanding the allegations of undue influence and fraud in this case clearly the courts discretion is unfettered on the costs issue, there being no obligatory mandate for costs in one direction or the other.

[57.] Carrying out the balancing exercise the court must weigh the injustice to both the Claimants and the Defendant. Having examined all the circumstances of this case, it is apparent that there are sufficient advantages and disadvantages on both sides for the Defendant in granting the application and the Claimants in not granting the application. It is incumbent upon me to point out however that the application evidence and the responses thereto were both lacking in certain material particulars as I have demonstrated before and below.

[58.] In conclusion and in applying the conditions expounded in ***Sir Lindsay Parkinson v Triplan Ltd. (supra) and Keary Developments v Tarmac Construction (supra).*** I find the following:

i. The Courts have a wide discretion to grant Security for Costs pursuant to Part 42 of The Civil Procedure Rules, 2022

ii. The Defendant has satisfied the prima facie requirement under the rules that the Defendants all reside outside the jurisdiction of the Courts of The Commonwealth of The Bahamas.

iii. I accept the Defendants position that the Claimants do not own any marketable land within the jurisdiction readily available to satisfy a costs order should this court make such an order against them.

iv. There is no evidence that the Claimants have refused or are unwilling to honour any costs they are ordered by this court to pay.

v. There is no evidence or even a suggestion by the Claimants or the Applicant that the Claimants are impecunious.

vi. While there is a suspicion of bad faith in bringing the application on the part of the Defendant there is insufficient compelling evidence to determine that truly is the case.

vii. The court accepts that the merits of the case are not material at this point (unless it was glaringly obvious) and ranks the respective chances of the Claimants and Defendants equally, at 50/50.

[59.] Weighing the paucity of the evidence put before the court for this application and in light of all of the existing circumstances, I am not sufficiently compelled to grant the order for security for costs. I tip the balance in favour of the Claimants when I consider the chance that a matter of such significance and importance as determining a testator's true intentions through a trial of all the relevant evidence and circumstances should be subject to a possible stifling of the Claim. However, aside from all of the other considerations discussed herein, I find counsel's failure to provide the court with any evidence at all as to how costs in the sum of Two Hundred Thousand dollars ($200,000.00) was arrived at, outweighs all other considerations. No draft Bill of Costs was put before this court in support of the application for security for costs. Such applications are usually grounded in the provision of a draft bill. There is a wealth of authority which speaks to this and provides guidelines for the calculation of costs upon such applications. A discussion which I still consider relevant in rationalizing my decision.

Amount of Security

[60.] The amount of security to be granted is in the discretion of the Court. In the case of ***T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction [1974] 3 All ER 715***, reference was made by Lane J at p. 720 of the judgment to the White Book Supreme Court Practice 1973, vol. 1, p 385, para 23/1–3/22 where it was stated that:-

> ***"The amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not the practice to order security on a full indemnity basis. The more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered; but there is no hard-and-fast rule. It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose*** **a skeleton bill of costs usually affords a ready guide." (emphasis mine).** 32. In ***Procon (GB) Ltd v Provincial Building Co Ltd | [1984] 1 WLR 557*** *Cumming-Bruce L.J quoted at p. 565 of the judgment a passage that Lord Lindley M.R. made in* ***Dominion Brewery Ltd. v. Foster (1897) 77 L.T. 507*** *at p. 508:*
>
> `***"It is obvious that, as to a question of quantum such as this, you cannot lay down any very accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of the kind is this, that you must have regard, in deciding upon the amount of the security to be ordered, to the probable costs which the defendant will be put to so far as this***

can be ascertained. It would be absurd, of course, to take the estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case."

[61.] A Look at the material facts belies the merits of the application. Counsel for the Defendant submitted a letter dated 11th July 2023 to the Claimants attorney requesting payment of One Hundred and Fifty Thousand dollars ($150,000.00) as security for costs. The next day on the 12th July, 2023, the Defendant made an Application requesting payment of Two Hundred Thousand dollars ($200,000.00) for security for costs in the affidavit of Sheila Cuffy. There was no breakdown of the amount being requested nor was there a Bill of Costs to accompany the affidavit. As a result, the Court is not in an informed position to grant any costs and declines to speculate regarding the details and general information usually required for draft bills. Some of the required information relates to counsels years and standing at the bar, the amount of counsel certified to act, counsel's hourly rates, or per diem rates, what degree of complexity is involved in defending the claim, the estimated time involved in the conduct of the litigation at hand, these are some of the myriad issues which the draft bill would ordinarily address. The court can make an informed decision on whether the order should be made and how much security for costs to order. In applying the principles in ***Procon v Provincial Building*** (supra), the Court cannot take the estimate asked by the Defendant without a breakdown of the costs.

[62.] The Defendants also failed at the same time to give a value of the claim in their application. Aside from certain denials and averments the defence fails to include any particular relief being sought by the defendant. Nothing can be gleaned from the statement of Claim filed by the Claimants either as to the value of the claim given that the reliefs they seek are non-monetary reliefs, which include decrees, declarations, a conveyance, directions and costs.

[63.] This court is not in the position even to aid the Defendants under the provisions of **CPR 72.26.** which provides:

"(1) On determining any interlocutory application except at a case management conference, pre-trial review or the trial, the Court must –

Decide which party, if any, should pay the costs of that application;

b) Assess the amount of such costs; and
c) Direct when such costs are to be paid.

CPR 72.26

(5) A party seeking assessed costs must on making any such interlocutory application supply to the court and to all other parties a brief statement showing –
(a) the attorneys fees incurred or estimated;
(b) how the party's attorney's costs are calculated; and
(c) the disbursements incurred or estimated.

[64.] CPR 72. 26 is a clear demonstration of the requirements for costs to be calculated by the court only under specific conditions. Therefore, I am satisfied that whether it relates to calculations before a registrar or judge at the end of a trial, or at the determination of an interlocutory application, the same principles apply. While the grant of the security for costs is wholly discretionary and ultimately the same can be said for the granting of costs, no court should speculate as to the matters pertinent to deciding the issue and to do so when no basis at all is provided is beyond the boundaries of accepted judicial norms. The glaring deficiencies I have pointed out are fatal to the application.

[65.] The Application by the Defendants for Security for costs is dismissed. Fixed costs of the application are awarded to the Claimants in the sum of $3,500.00.

Dated this 5th day of APRIL A.D. 2024

The Hon. Madam Justice C.V. Hope Strachan