

Offshore Cases

British Virgin Islands

High Court (Civil)

Werner Fuhrken Batista (Applicant) v Dietrich Fuhrken Batista (Respondent) Judgment given on 30 November 2022

Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017 - Contentious Probate Proceedings

INTRODUCTION AND BACKGROUND

On 24 June 2022, the Applicant (“**W**”) filed an application to the High Court seeking permission to apply for a grant of probate in respect of the Estate of his deceased father who died in Brazil on 18 June 2019 (the “**Deceased**”). The application was brought under the Non Contentious Probate Rules (“**NC Probate Rules**”) r 67(1)(b) on the basis that the Respondent who was his estranged brother (“**D**”) had not applied for a grant and/or had failed to proceed with his application for a grant with reasonable diligence (the “**Application**”).

Prior to making the Application, on 22 February 2022 W served a citation on D to take or refuse probate which D acknowledged on 21 March 2022. The acknowledgment of service confirmed D as the sole named executor of the Estate of the Deceased¹ and confirmed D’s intention to apply for a grant of probate with all reasonable diligence.

Upon service of the Application, W learned that D had in fact applied for a grant of probate on 7 June 2022 in his capacity as named Executor (the “**Probate Application**”). It was clear that W had not conducted the requisite High Court Search of the Probate Registry prior to filing the Application, following W’s initial search on 26 May 2022.

After the Application was filed, D requested that W withdraw the Application to allow the Probate Application to progress before the Registrar. W ignored that request and instead filed a Caveat (“**Caveat Proceedings**”) asking that no grant be made in the Estate of the Deceased without notice to him. In voluminous rounds of affidavit evidence filed in support of the Application, W asserted various reasons (all of which were disputed by D) why D was purportedly unfit to administer the estate of the Deceased. W further alleged that the delay by D in filing the Probate Application and the reasons for such delay required scrutiny.

COURT’S FINDINGS

The Application was dismissed on (3) grounds.

Jurisdictional Ground

Firstly, the Court held that an application under r.67(1)(b) of the NC Probate Rules should in the first instance be made to the Registrar and not to a Judge of the High Court. In support of that determination, reference was made to the construction of Rules 5 and 8 of the NC Probate Rules.

Rule 5 states that “*An application for a grant of probate or letters of administration shall be made to the Registrar ...where all caveats, warnings, citations, acknowledgements of service and notices of application under these Rules shall be filed.*”

Further, Rule 8 requires that an application for a grant of probate must be made in Form P1 and by an executor. W satisfied none of these requirements, since he was not a named executor in the Will and having had not renounced his right to apply for a grant of probate.

In coming to its decision, the Court relied on the *obiter dicta* of Hariprashad-Charles J in **Donovan v Donovan BVIHCV2009/0058 (delivered 31 March 2010)** who, applying rules 3(1) and 10(1) of the Non-Contentious Probate Rules, 1985 (which are the equivalent to Rule 5 of the NC Probate Rules), opined that the Registrar is the proper judicial officer to admit a will to probate or to grant letters of administration at first instance.

Abuse of Process Ground

Secondly, and alternatively, the Court concluded that D’s Probate Application to the Registrar was first in time and had not been stayed. The Court considered that W provided no good reason why the Caveat Proceedings before the Registrar could not be allowed to proceed. As Caveator, W had the option to

¹ Pursuant to the Last Will and Testament of the Deceased dated 14 June 2021.

issue and serve a notice of application for directions in Form P2 but opted not to do so.

The concurrent Caveat Proceedings appeared to weigh heavily on the Judge's mind and the Court ultimately took the view that it was improper and an abuse of the court's process and resources for the Application to be pursued while proceedings before the Registrar are pending.

Procedural Ground

Thirdly, the Judge took the view that the Application was not a mere procedural irregularity which could be rectified under the Court's case management powers conferred by Civil Procedure Rules 26.1(2) (w) or 26.9. It should also be noted that CPR Part 2.2(3)(c) expressly provides that the CPR does not apply to non-contentious probate proceedings.

EFFECT OF JUDGMENT

While the Court did not determine the considerations which would apply when assessing whether an application was made with "*reasonable diligence*" under NC Probate Rules 67(1)(b), the Court importantly highlighted the fact that the Applicant would not be prejudiced if he continued with his Caveat Proceedings before the Registrar. In the Court's view, continuing the Caveat Proceedings may result in the matter coming before the High Court Judge under CPR Part 68, which deals with *contentious* probate matters being apposite in this case.

Parties seeking to invoke NC Probate Rules r. 67(1)(b) should be aware that a key consideration underpinning the Judge's decision was what was the nature of the proceedings before the Court. On the evidence, the parties were clearly in a bitter and contentious dispute as to who should administer the estate of their deceased father. Thus, there was no doubt in the Court's mind that this was a contentious probate dispute. As a result, the Court agreed and adopted the view taken by Danckwerts L.J. in **Jolley v Jarvis and Another [1964] 2 W.L.R. 556** that "*the non-contentious rules can only apply to non-contentious business*".

The decision is an important one for clients and probate practitioners alike. It is imperative that first instance applications are made to the appropriate judicial officer when making applications in citation proceedings to accept or refuse grants of probate. Further, it appears the Court will not countenance the NC Probate Rules being applied inappropriately to contentious business.

Finally, the importance of conducting an updated High Court search as close as reasonably practicable before filing an application to obtain a grant of probate, cannot be understated. It could result in substantial costs savings for clients.

A link to the full judgment is [here](#).