[2025] JMCC Comm 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2024CD00430

IN THE ESTATE of **GORDON ARTHUR CYRIL STEWART** also known as **GORDON ARTHUR "BUTCH" STEWART** late of 76 Barbican Road, Kingston 6, St. Andrew, Businessman, Deceased, Testate

AND

IN THE MATTER of the Companies Act

AND

IN THE MATTER of the Trusts Act, 2019

Re: Gordon Arthur Cyril Stewart and the Companies Act and the Trusts Act

IN CHAMBERS VIA VIDEO CONFERENCE

Appearances: Mr. Walter Scott K.C., Mr. Ian Wilkinson K.C., Mr. Conrad George, Mr. André Sheckleford, Ms. Anna Gracie, Mr. Lenroy Stewart instructed by Gabrielle Chin of Hart Muirhead Fatta, Attorneys-at-Law for the Ancillary Claimant

Mr. Michael Hylton K.C., Mr. Kevin Powell K.C. and Ms. Timera Mason instructed by Hylton Powell, Attorneys-at-Law for the Ancillary Defendant

Mr. John Graham and Ms. Peta-Gaye Manderson instructed by John G Graham & Co watching proceedings for Gorstew Limited

Mr. John Vassell K.C., Mrs. Julianne Mais Cox and Ms. Allyson Mitchell instructed by DunnCox Attorneys-at-Law watching proceedings for Appliance Traders Limited

Mrs. Symone Mayhew K.C. and Ms. Aaliyah Myrie instructed by Mayhew Law watching proceedings for Robert Stewart

Mrs. Daniella Gentles-Silvera K.C., Ms. Kathryn Williams and Mrs. Kerri-Ann Allen Morgan instructed by Livingston Alexander and Levy watching proceedings for Executors Elizabeth Desnoes and Hugh Martin Veira

Heard: 18th June and 17th November 2025

Application for Declaration – Wills – Construction – Whether No Contest Clause Valid – Whether No Contest Clause Engaged – Exercise of Discretion by Trustees – Ouster of Court's Jurisdiction to Review Exercise of Discretion

BROWN BECKFORD J

INTRODUCTION

[1] Mr. Gordon Arthur Cyril Stewart also known as Gordon Arthur "Butch" Stewart (The Founder) died on the 4th January 2021. He founded several well-known companies and his conglomerate extended beyond Jamaican borders, operating nationally and internationally. He devolved his substantial estate, not already settled by trusts, by way of a Will, the beneficiaries of which included his son Mr. Adam Stewart (hereafter referred to as "**Adam**"). The Executors and Trustees named in the Will, who have since obtained probate, are Elizabeth Desnoes, Martin Veira, Cheryl Hamersmith-Stewart and Trevor Owen Patterson **("The Executors")**.

[2] The Will contained a "no contest clause" in the terms that a beneficiary who brings a claim, as defined in the Will, that could materially affect the interests of any other beneficiary forfeits his bequests under the Will. It was also provided that a beneficiary who brings a claim against Trevor Patterson or the law firm of Patterson Mair Hamilton, in connection with the preparation and execution of the Will, except in the case of fraud or other deliberate act of dishonesty, would be treated as contesting the Will and similarly forfeit his bequest.

[3] The Will also contained a clause purporting to limit the Court's jurisdiction to review the Executors' exercise of discretion made in good faith.

[4] The Executors have brought a claim seeking the Court's authorization for an "urgent 'red flag' audit" to be carried out of Gorstew Limited, Appliance Traders Limited and their subsidiaries. The majority shares of the two companies were held by the Founder at his death and so formed a part of his estate. The necessity for such an audit was said to have arisen as a result of Adam's management under the title of Executive Chairman of Gorstew Limited, as well as on allegations of financial malfeasance. Adam successfully applied to be joined in the Fixed Date Claim. He was thereafter granted permission by this Court to make this Ancillary Claim in which he seeks a declaration that the No Contest Clause in the Founder's Will is not triggered by his participation in the Fixed Date Claim brought by the Executors.

[5] Three issues arose for consideration in this Ancillary Claim:

1. Whether the No Contest Clause is valid in this jurisdiction?

2. Whether the No Contest Clause is engaged by Adam Stewart's participation in the claim brought by the Executors?

3. Whether the jurisdiction of the Court to interpret the Will and review the exercise of discretion by the Executors is ousted by virtue of the provisions of the Will.

[6] The Court agrees that Adam's participation in the Fixed Date Claim brought by the Executors does not engage the No Contest Clause and will therefore grant the declarations sought.

THE ANCILLARY CLAIM

[7] By his Ancillary Fixed Date Claim, Adam seeks the following Orders:

1. A declaration that any defence by or opposition to this Claim by or on behalf of the Ancillary Claimant, including the giving of evidence, the making of

submissions or any other formal steps taken in respect of this Claim, does not engage the no contest provision in clause 27 or the provision in clause 28.5 (together, the "**No Contest Clause**") of the last Will and testament of Gordon Arthur Cyril Stewart (the "Founder") dated 15 May 2020 (the "**Will**").

2. Without prejudice to the above, a declaration that the relief sought in paragraph 6 of the Notice of Application for Court orders filed by the Ancillary Claimant in the Claim in the form exhibited to the Second Affidavit of Adam Stewart (the "**Application**") does not engage the No Contest Clause.

3. Such further or other relief as the court shall consider appropriate; and

4. Provision for costs

[8] The Application is said to be grounded in his inability to: *"…properly and fairly engage in, and respond to, the claim or progress the Application without having the assurance that doing so (including making applications and defending the Claim) will not result in him forfeiting his very valuable interest under the Will*." Not securing the consent of the Executors that such actions do not engage the no contest clause, as is his view, and having concerns that the Executors may improperly exercise the no contest clause, he has sought these Declarations from the court to that effect.

[9] The grounds are set out in full below:

(1) The Claim to which this Ancillary Claim relates was commenced by the executors of the Estate (the "**Executors**") and seeks, inter alia, that the Executors be *"authorised to carry out an urgent "red flag" audit* (if necessary, a court supervised audit)" over certain companies within the Estate (the "**Companies**"), in which the Ancillary Claimant is the 52% majority beneficial shareholder pursuant to Clause 13.1 of the Will.

(2) The Ancillary Claimant was joined as a party to the Claim pursuant to the order of Mr Justice Batts dated 26 February 2025. Pursuant to the directions

given by Mr Justice Batts on 26 February 2025, the Ancillary Claimant is required to file evidence in response to the Claim by 30 April 2025.

(3) The Ancillary Claimant intends to participate in the Claim, including by the filing of evidence and submissions. The Ancillary Claimant also reserves the right to bring interlocutory applications in the Claim, including, but not limited to, applications for strike-out and/or other procedural relief, if so advised.

(4) The Will contains a No Contest Clause in the following terms:

a. By Clause 27.2, if the Claimants, in their discretion, determine that a beneficiary has brought any "Claim" (as defined at clause 27.1) which could materially affect the interests of any other beneficiary then such beneficiary shall be excluded by deed or deeds from benefits under the Will to the intent that the bequest of such beneficiary shall be forfeited; and

b. By clause 28.5, if any beneficiary shall bring any claim or legal proceedings against the First Claimant (Mr Trevor Patterson) in connection with the preparation and the execution of the Will then except in the case of fraud or other act of deliberate dishonesty any such claim shall be treated as contesting the validity of the Will and therefore be deemed to be a "Claim".

(5) The Ancillary Claimant cannot properly and fairly engage in, and respond to, the Claim or progress the Application without having the assurance that doing so (including making applications and defending the Claim) will not result in him forfeiting his very valuable interest under the Will.

(6) The Ancillary Claimant does not consider that either making the Application to strike out this Claim or defending, opposing or otherwise taking steps in respect of this Claim could fall within the terms of, or engage, the No Contest Clause. However, notwithstanding his own clear views, the Ancillary Claimant does not consider that he can safely proceed on that basis and therefore properly or fairly participate in the Claim without receiving confirmation of this from the Claimants or obtaining a declaration to this effect from the Court.

(7) The Ancillary Claimant will seek such confirmation from the Claimants on service of the Application with this Ancillary Claim in draft form for two reasons: (i) in light of the Claimants' position that they require sight of the Application in its full form before they are able to provide such confirmation; and (ii) not wishing to delay the listing and determination of the Ancillary Claim and the Application (which will have a bearing on the case management of the Claim) by engaging in further correspondence.

(8) In the absence of such confirmation from the Executors or a declaration from the Court, the Ancillary Claimant has serious concerns that the Claimants would exercise the No Contest Clause in ways which are unprincipled, unexpected and unforeseeable and which would result in the forfeiture of the Ancillary Claimant's highly valuable interest under the Will. These concerns are borne of the Ancillary Claimant's loss of trust and confidence in the Executors and positions adopted by some of the Executors in respect of the No Contest Clause, including:

a. improper threats made by two of the Executors - Mr Patterson and Ms. Hamersmith-Stewart, in correspondence to invoke the No Contest Clause in response to legitimate concerns raised by the Ancillary Claimant in relation to the administration of the Estate; and

b. statements made by Mr Patterson on oath before this Court that the Claimants may make any decision regarding the application of the No Contest Clause and, so long as it is taken in good faith (which Mr Patterson does not define and which the Ancillary Claimant does not have confidence that he or the Executors would exercise) this can never be subject to challenge or review.

(9) The relief sought by the Ancillary Claimant is therefore necessary in order to provide clarity as to the application of the No Contest Clause and to allow the Ancillary Claimant to properly and fairly participate in the Claim (the conduct and outcome of which directly affects his interests as a beneficiary of the Estate and the majority beneficial shareholder in the Companies) without risk or threat adverse consequences.

(10) It is in accordance with the overriding objective, and the interests of justice, the Court determine this issue as a preliminary matter at the earliest opportunity as to avoid any unnecessary satellite litigation, unnecessary costs, or procedural prejudice.

NO CONTEST CLAUSE

[10] The No Contest Clause in the Founder's Will is in the following terms:

> ***No Contest Clause***
>
> *27.1 In this my Will "Claim" means in respect of sub-clause 27(2) below all claims, demands, actions, proceedings or counterclaims of any nature:*
>
> *(a) in which any Beneficiary hereunder or other person or object shall object to or directly or indirectly contest:*
>
> *(i) any provision hereof or any other deed of trust or trust indenture made by me;*

(ii) any provision of any Memorandum or Letter of Wishes made by me;

(iii) any provision of this my Will or Wills dealing with the devolution of my estate upon my death;

(iv) any provision of any gift made by me;

(v) any provision of any instrument or agreement governing any business entity owned, in whole or in part, by me or any of my issue;

(vi) any provision of any instrument or agreement governing any business entity owned, in whole or in part, by a trust created by me or any of my issue; or

(vii) any provision of any instrument or agreement governing any business entity affiliated with me or any of my issue; or

(b) by which any Beneficiary or other person or object shall attempt to prevent any provision under any deed, indenture, will, instrument or agreement described in above from being carried out in accordance with its terms.

27.2 If the Trustees, in their discretion, determine that a Beneficiary has brought any Claim which could materially affect the interest of any other Beneficiary then such Beneficiary shall be excluded by Deed or Deeds from benefits under this my Will and such exclusion shall have effect from the date of such determination by the Trustees to the intent that the bequest of such Beneficiary shall be forfeited.

[11] A testator generally, subject to legislative provisions such as **The Inheritance (Provision for Family and Dependants) Act** which allows a court to make an Order for financial provision for spouses, ex-spouses, parents and children, has the right to dispose of his estate as he sees fit. No Contest Clauses are designed to discourage legal disputes and litigation between and/or by beneficiaries, and to protect the testator's wishes by imposing the ultimate penalty, forfeiture of the inheritance.

[12] The Latin phraseology which underpins the law relating to “No Contest Clauses” is perhaps considered apt for a claimant in the position of Mr Adam Stewart, the Ancillary Claimant in this matter. The Latin expression *“in terrorem”* means “intimidating” (see: Oxford Dictionary of Law 7th edition.) The reasons generally posited for the use of these

clauses include the cost of litigation which is usually expensive, the risk of conflict and resulting potential fall out in high value estates, where there is unequal disposition of property between family members, to prevent challenges to the state of health and mental capacity of the testator, to prevent public examination of the testator's private affairs, to prevent delay in the administration and distribution of the estate (see: **Sim v Pimlott and Others** [2023] EWHC 2296 (Ch) at para. 224)

[13] The validity of such clauses has not been the subject of any decision in this jurisdiction but has been accepted in the United Kingdom, other Commonwealth jurisdictions, and common law jurisdictions such as the United States of America. The principal English case is **Cooke v Turner** (1846) 15 M. & W. 727. In that case, the testator who had been duly found a lunatic under a Commission of Lunacy had inserted in his Will the following clause:[1]

> *And my will further is, that if my said daughter, or her husband, or any person or persons in her, his, there, or any or either of their behalf, shall dispute this may will, or my competency to make the same, or if my said daughter and her husband, or either of them, shall refuse to confirm this my will, as far as he or she lawfully can, when required by my executors or either of them to do so, or if they or either of them, or any person or persons in the name or on behalf of them or either of them, shall lodge any caveat against proving the same, and if my said daughter and husband, or either of them, shall refuse or neglect to withdraw or cause to be withdrawn such caveat, fourteen days after request made by my executors or either of them to that effect; or if any proceedings whatsoever shall at any time be had or taken by any person or persons whomsoever, by any possible result of which any estate or interest could be in any way attainable by my said daughter, or her husband, or any person or persons in her right, of larger extent or value than is intended for her by this my will, and such proceeding shall not be formally disavowed, stayed, or resisted by my said daughter and her husband, to the full extent of their, her or his ability to do so, then I revoke the use and disposition hereinbefore contained, for the raising and payment, during the life of my said daughter, in manner hearing before mentioned, off the aforesaid yearly sum of £2000, and also the use and disposition hereinbefore contained in her favour, in the event here in before mentioned, of the rents and issues and profits of my estate hearing before devised, and also the liberty of residing in my said mansion-house, and all*

[1] (1846) 15 M. & W. 727, pg 1044

> *other benefits hereby given to or in trust for my said daughter, or derivable by her under this my will, and in lieu thereof I devise to the use of my trustees, by an out of the net rents, issues, and profits of my said real estate, thence forth, the yearly sum of £300 only, during the natural life of my said daughter, by equal half yearly payments, the said yearly sum to be paid into the proper hands of my said daughter, and not into the hands of any other person or persons whomsoever.*

[14] The testator's daughter and her husband disputed her father's Will and his competency to dispose of the property and refused to do any act to confirm the Will. The court had to consider whether the beneficiary had forfeited her bequests in the Wills. The daughter contended that the provision was invalid, as it offended public policy. She argued that every heir ought to be left at liberty to contest the validity of his ancestor's Will. Rolfe, B rejected this argument holding that there was no reason that a person could not be restrained by a condition from disputing any doubtful question of fact or law on which the title of a devisee or grantee may depend. The provision in the Will was held to be valid and not against public policy.

[15] **Cooke v Turner** was approved by the Judicial Committee of the Privy Council in **Evanturel v Evanturel** (1874) L.R. 6 P.C. 1, an appeal from the province of Quebec, Canada discussing the validity and effect of a penal clause. It was stated that:[2]

> *It was well observed during the argument that the determination of what is contrary to the so-called "policy of the law" necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion. And in dealing with the question before them, their Lordships think that very great weight is due to the opinions and decisions of modern French Jurists.*
>
> *Though the question is one to be determined by the law of Lower Canada, and not by that of England, their Lordships think it right to say something upon the English authorities which have been cited before them.*
>
> *There are undoubtedly dicta and even decisions in some of the earlier cases to the effect that conditions of this kind were to be held to be in terrorem only, and, in the language of the Touchstone, "against the liberty*

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[2] 1874 L.R. 6 P.C. 1, pgs 29-30

> *of the law." But, in the case of personal legacies, effect was given to the condition if there was a gift over on the breach of the condition. The whole law on this subject appears to their Lordships to have been considered and put upon a sound foundation by the Court of Exchequer in Cooke v. Turner (1) upon the case sent to them by the Court of Chancery. It was suggested at the Bar that that ruling was not acted upon by the Court of Chancery in the particular case. But, from the report of that case in the 15th volume of Simon's Reports, it appears that, though pressed to send the case before another Court of Law, the Vice-Chancellor of England declined to do so, but directed, in the interest of the unborn issue of a marriage, an issue so framed as not to involve the forfeiture by the legatees of their legacy under the clause assumed to be valid. The case of ex parte Dixon (1), which was decided by Lord Cranworth as Vice-Chancellor, after his judgment in Cooke v. Turner (2), is supposed to conflict with the latter. But it does not really do so. No doubt the learned Judge says of such conditions as the present that they had been "considered (whether justly or not it is unnecessary to inquire) as contrary to the policy of the law." But he was not in any way called upon to decide that question; he was dealing with a condition of a very different kind, to which he gave effect. The real effect of his judgment is only that, if the condition be conditio rei licitæ, it ought to be enforced. It does not affect the authority of Cooke v. Turner (2).*

[16] In **Nathan v Leonard and others** [2002] EWHC 1701 (Ch), the English Courts again had to consider whether a forfeiture clause in a Will was valid. It was reiterated that, "*A condition to the effect that a beneficiary who challenges a will loses the benefits given to him by the will is in principle valid, at least where there is a gift over."* It was also pointed out that the mere presence that such a condition might present difficult choices for intended beneficiaries was not a sufficient ground to render it contrary to public policy. Additionally, the court observed that the forfeiture conditions were not confined to unsuccessful challenges.

[17] In **AN v Barclays Private Bank and Trust (Cayman) Limited and Others** (2006) 9 ITELR 630 ("**AN v Barclays**"), the court considered a case involving discretionary trusts that included a no-contest or forfeiture clause. The plaintiff, the settlors' daughter and a discretionary beneficiary, brought an action seeking, among other reliefs, a declaration that the clause was invalid. Smellie CJ first declared that it was settled that there was no

general rule of law that precluded testators from including no contest or forfeiture clauses in their Wills. He stated:[3]

> *It is settled from the leading cases of Cooke v Turner (1846) 15 M & W 727, 153 ER 1044 and Evanturel v Evanturel (1874) LR 6 PC 1, 43 LJPC 58 (both more fully considered below) that there is no general rule of law that precludes testators from including in their wills provisions which would prevent or discourage beneficiaries from going to court to contest a will and to provide for the forfeiture of interests where such contests are unsuccessfully mounted. Further, such a provision cannot be imposed merely in terrorem as an idle threat but, instead, has to be one that effects the termination of the forfeited interest by making a gift over of that interest to someone else: Leong v Chye (Lim Beng) [1955] AC 648, [1955] All ER 903. (But see Re Hanlon [1933] Ch 254, 102 LJ Ch 62, where there was a forfeiture without a gift over but it was held nonetheless to be effective because the doctrine of in terrorem is only applicable to conditions in restraint of marriage and disputing a will; there the condition was in restraint of the legatee daughter having relations with a particular man.)*

[18] Given the extensive and erudite analysis conducted by Smellie CJ, **AN v Barclays** can now be treated as the modern exposition of the common law on No Contest Clauses. For ease of reference, portions of the judgment tracing the development of the law and discussing the cases are reproduced here.

> *[68] … An examination of other cases dealing directly with public policy objections to forfeiture clauses is therefore necessary.*
>
> *[69] The recognised starting point is Cooke v Turner (1846) 15 M & W 727, 153 ER 1044. There the question for the Court of Appeal was whether a certain condition in a will, devising real estate including a life interest to the testator's daughter, was valid. The challenge was brought in the face of the condition which stipulated that if the daughter or her husband or anyone on their behalf were to dispute the will or the testator's competency to make it or should refuse when required by the executors to confirm it, the disposition in her favour should be revoked. The condition construed both as a condition precedent (referencing her refusal to confirm the will) and subsequent (referencing her challenge after the will was deemed effective), was held to be valid. The result was that the daughter forfeited her bequests.*

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[3] 9 ITELR 630, para 30

[70] Notwithstanding that the testator had in 1826, some 15 years before he made his will in 1841, been duly adjudged to be a lunatic, the court found no public policy basis for an objection to the condition in the will. In his judgment given on behalf of the court, Rolfe B said (15 M & W 727 at 734–736; 153 ER 1044 at 1046–1047):

'The ground on which the argument against the [condition] was made to rest was, that every heir at law ought to be left at liberty to contest the validity of his ancestor's will, and that any restraint artificially introduced might tend to set up the wills of insane persons, and would, in the language of [Shepard's] Touchstone be "against the liberty of the law." We cannot, however, adopt this reasoning. There appears no more reason why a person may not be restrained by a condition from disputing sanity, than from disputing any other doubtful question of fact or law, on which the title of a devisee or grantee may depend.

…

The truth is that in none of [the cases considered] is there any policy of the law on the one side or the other. The conditions said to be void, as trenching on the liberty of the law, are those which restrain a party from doing some act which it is supposed the state has or may have an interest to have done. The state, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition to a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the state that he should do. So, the state is interested in having its subjects embarked in trade or agriculture, and therefore will not allow a condition defeating an estate, in case its owner should engage in commerce or should plough his arable land, or the like. The principle on which such conditions are void, is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation. But in the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another.'

While that trenchant discourse upon the limitations of public policy intervention in private arrangements for the disposition of property appears to have stood the test of time, it does, with respect, beg the question whether the law should intervene where there is doubtful capacity to make such arrangements.

[71] With the passage of time and from the perspective of a changed social context in which there is no longer legislative indifference to the disinheritance of dependents, one wonders whether Cooke v Turner would be decided differently today involving, as it did, the possible suggestion of insanity and thus, implicitly, fraud avoiding the will. Although the case was subsequently approved by the Privy Council in Evanturel v Evanturel (1874) LR 6 PC 1, 43 LJPC 58, it is quite clear from the result there that its impact has been significantly reduced. While, in approval of Cooke v Turner, it was held that a no-contest clause by which a testator sought to protect his estate and representatives against attempts to litigate his will would not be contrary to public policy, and would be valid, the Privy Council also declared that this would not apply to cases where the challenge was successful. That result was achieved by the introduction of the principle that—

'… such a condition [of forfeiture] can only, in practice, be applied where a will has been unsuccessfully contested, and would, therefore, be ineffective to protect an illegal disposition, or to render operative an invalid testament.' (See headnote at LR 6 PC 1 at 2.)

[72] The outcome in Evanturel v Evanturel is readily reconcilable with the circumstances of that case. There, a daughter of the testatrix, in the face of a no-contest provision, by protracted litigation unsuccessfully challenged the validity of the will itself on grounds of lack of execution and as having been obtained by fraud and captation and undue influence of her brother, the appellant, upon their mother. Moreover, to the extent that she had been allowed to recant her challenge before the final judgment was given, the daughter had not done so. She was held to have forfeited because her challenge had been unsuccessful, although no such qualification had been written upon the forfeiture clause itself which (roughly translated, as agreed by counsel) stated that—

'… if any of her legatee daughters "takes any step whatever (whether directly or indirectly) to contest my present will, then and in that case my said daughters or any of them who would so wish to seek to contest my present will shall be deprived of all rights whatever in my said succession.'"

[73] The following question was posed and the answer was given in the following terms on behalf of the Judicial Committee by Sir James Colvile (LR 6 PC 1 at 26–27):

'[T]he question is, therefore, reduced to this, viz., Is this clause contrary to public order, because it is designed to prevent the doing of that which it is against public order to discourage? … And [their Lordships] must deal with the proposition laid down by [counsel for the daughter] and indeed involved in the judgment of Mr. Justice Taschereau [in the Supreme Court for the Province of Quebec] viz., that every condition which implies the prohibition to dispute a will as a whole, as distinguished from a particular clause in it, upon any grounds which affect the legal validity of the instrument as a testamentary disposition, sins against public order, and must be treated as

"non-écrite" [invalid] … For if society has an interest in securing the trial of the question whether all legal formalities have been observed in the execution of a will, it seems to have an equal interest in the trial of the question whether a will has been obtained by fraud, or the exercise of undue influence from a person of imperfect capacity.

The question may be considered on principle and on authority. Upon principle, it is to be observed that the prohibition cannot be absolute, and can be invoked only where the validity of a will has been unsuccessfully contested. If there be a clear and patent defect in the formalities attending the execution of the instrument, or if the incapacity of the alleged testator be clear and notorious, the heirs or other parties interested will, of course, contest the will, and, contesting it successfully, will set it aside with the clause of forfeiture. On the other hand, it is not easy to see why a testator may not protect his estate and representatives against unsuccessful attempts to litigate his will, by saying to a legatee, "I, being master of my own bounty, and free to give or to withhold, give you this legacy subject to the condition that you do not dispute the general disposition of my estate. You may contest the validity of my will if you please; but you do so at the peril of losing, if it be established, what it gives you.'"

So, I think it is fair to discern from Evanturel v Evanturel at least implicitly, the recognition and acceptance of a public policy interest in ensuring that persons who may be interested in taking under an estate, should not be barred from raising before the courts a challenge to the will which turns out to be successful, notwithstanding the existence of a no-contest clause to the contrary. This view of the ratio of the case is, I think, supported by the fact that the Privy Council also took into consideration arts 760 and 831 of the Civil Code of Quebec which identify such public policy concerns (LR 6 PC 1 at 23):

'The 760th Article of the Code Civil (by which it is agreed on all hands that this case is governed) is in these words: "Gifts, inter vivos, or by will, may be conditional. An impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift inter vivos depends, is void, and renders void the disposition itself, as in other contracts. In a will, such a condition is considered as not written, and does not annul the disposition." This clause must be read in connection with the 831st, which declares that "every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."'

Important as Evanturel v Evanturel is, however, it does not directly answer the question whether an extant challenge, as yet unresolved as to its merits by judicial determination, may be regarded nonetheless as having triggered a no-contest forfeiture provision.

[74] Support for the notion of a meritorious but ultimately unsuccessful challenge being spared from forfeiture appears to have been first recognised by the law as long ago as 1688 in Powell v Morgan (1688) 2 Vern 90, 23 ER 668. The surviving report of that case, written in the style of the time, is not easily explained, although it is clear that the legacy in question was given on the condition that the plaintiff 'shall not dispute the will' of his mother, the testatrix. While the testatrix's parents were alive, they owned land in respect of which she had been the beneficiary of the income from a lease granted over the land. When her father died, she inherited the land outright and so the leasehold rights 'merged' in law with the fee in her. By her will, she purported to bequeath the leasehold as if it had remained a separate portion charged upon her estate to someone else (it seems a creditor) who would get the income, and gave the plaintiff a legacy of the fee, upon the condition that he did not disturb or interrupt her will.

[75] The plaintiff nonetheless contested the validity of the will, arguing correctly in law that upon her succession to the legal estate in the property, the testatrix's interest in the lease had merged with her legal estate and consequently, as her legatee and heirs-at-law, he was entitled to the property outright. The court, in the exercise of its equitable jurisdiction, decided to grant 'relief against the merger' and decreed the portion under the lease to go according to her will. The point which next arose for the court was whether the plaintiff had forfeited his legacy, having thus unsuccessfully contested the validity of the will. The decision of the court on that question is reported as given in one sentence: 'There was probabilism causa litigandi, and [the litigation] was not a forfeiture of the legacy.' In other words, having had good cause at law for litigating the issue, the contest of the legatee son did not operate as a forfeiture of his legacy. Had equity not relieved against the merger, he would have been entitled to succeed.

[76] This conclusion does not appear to have been arrived at so much as a matter of the construction of the will to find the intention of the testatrix, but rather as an axiomatic statement of principle: equity would not admit of a construction resulting in injustice. To the extent that the concerns for the intentions of the testatrix influenced the outcome, it seems that could only have been in the sense that she ought not to have been taken as intending otherwise.

[77] In Adams v Adams [1892] 1 Ch 369, 61 LJ Ch 237, a forfeiture clause which prohibited the plaintiff from 'in any way intermeddling with or interfering in' or attempting so to do, in the management of the testator's estate, was, although strictly construed, upheld by the Court of Appeal. The result was that the plaintiff forfeited the bequeathed annuities there being a gift over to someone else, because his challenge to the management of the testator's estate by the trustees, one of whom was his sister, on allegations of deliberate fraud and misappropriation were found to be 'frivolous and vexatious.'

[78] Approval of the first instance judgment of Fry LJ (sitting as an additional Judge in Chancery) was expressed differently by the Lord Justices of Appeal. First, by Lindley LJ in these words ([1892] 1 Ch 369 at 373):

'It appears to me that the Lord Justice took the view which is in accordance with authority, and in accordance with good sense. He said that if the Plaintiff had any reason to complain of his trustees and was seeking the protection of the Court to vindicate and establish his rights, that would not be such an interference as would amount to a forfeiture of his interest; but this action was nothing of the kind; it was a frivolous and vexatious action, the object being to get a receiver appointed and to get the management of these estates out of the hands of the Defendants.'

By Lopes LJ (at 375):

'The learned Lord Justice seems to have interpreted [the words in the will] in this way. He holds that if this had been a bona fide action brought for the purpose of vindicating the annuitant's rights, then it would not have been such an intermeddling or interference as contemplated in this proviso. But if, on the other hand, it was, as he holds it is, a frivolous and vexatious proceeding on his part, then it is that sort of intermeddling and interfering which is contemplated by the testator. I think the Lord Justice is perfectly right …'

And, finally, per Kay LJ (at 377–378):

'I entirely concur in what Lord Justice Fry said in his judgment to the effect that if this had been a bona fide action brought in defence of [the] Plaintiff's rights, it should not be held to be an attempt to interfere with the management. If this had been a bona fide action brought for the protection of the annuitant – if, for example, the annuities had been improperly withheld from him, and he could not get them without suing for them – even if he had asked for a receiver in a case of that kind, I am not at all prepared to say that that would have been such an attempt as would have come within the proviso; and for that again there is distinct authority in the case which was cited … namely Powell v. Morgan 2 Vern. 90, in 1688. There was a similar provision in that case and the judgment is given in two lines: 'There was probabilis causa litigandi, and it was not a forfeiture of the legacy.' Those are pregnant words, and they shew that if there had not been an excuse for litigation, probabilis causa, the Court in that case would have held that it was a forfeiture.

Here there was no excuse whatever for any part of this litigation …'

Note, from these passages, the range of the dicta used to describe the qualification upon the draconian effect of the proviso—involving variously a requirement that there be 'a reason to complain,' that the contest 'not be merely frivolous and vexatious,' but 'bona fide,' 'based on probabilis causa,' or 'an excuse for litigation.' Again here, it seems the process was not merely one of construction by which the qualifying words were implied as

attributable to the intention of the testator, although what the testator would have contemplated was held by Lopes LJ as embodied within them. Lindley and Kay LJJ both referred to the qualifying words as being 'consistent with authority.'

[79] Similarly in Re Williams, Williams v Williams [1912] 1 Ch 399, 81 LJ Ch 296, the provision did not operate as an outright forfeiture but, instead, so as to visit by way of penalty the entire costs of any court action upon the respective share of a plaintiff beneficiary. It was held that the provision did not apply to the action which was brought on grounds of wilful default on the part of the executors and trustees. Swinfen Eady J rested his decision primarily on the footing that the penalty clause could not oust the power of the court to award costs in the action, as it would in its discretion, think fit. He went on also to say by reference to decided principles:

'I do not, however, rest my judgment on that ground alone. I am quite satisfied that clause 13 has no application to a case like the present. In the first place it does not apply to an action for administration on the footing of wilful default, which is the gist of the present action. This point is really covered by Powell v. Morgan and Adams v. Adams, where it is pointed out that such a clause does not apply where there is probabilis causa litigandi. In this case, where capital moneys have been withheld for years and the trustees have been guilty of wilful default and the cestuis que trust have been driven to take proceedings to enforce their rights, the clause is inapplicable.

Again, the clause if applicable to such an action would be void for repugnancy.'

[80] Re Whiting's Settlement, Whiting v De Rutzen [1905] 1 Ch 96, 74 LJ Ch 207 was, among the many cases cited in the arguments, the only one involving an inter vivos settlement, but it did not involve a no-contest provision. The forfeiture clause was of the archaic kind formerly often seen in settlements in purported restraint of marriage. There was a condition providing for the forfeiture of interests given by the settlor to his daughter and her children to operate upon the marriage of the daughter at any time under the age of 26 without the consent of the settlor or, after his death, of his wife or his trustees or, if she were to marry at any time whatsoever someone not of an approved ethnicity. The condition was held to be valid and enforceable, as it was not generally in restraint of marriage (and so not contrary to public policy) and as there was a gift over of the fund to charity, following Dashwood v Lord Bulkeley (1804) 10 Ves 230, 32 ER 832 and Scott v Tyler (1788) 2 Dick 712, 2 Br 431, 29 ER 241, 21 ER 448.

[81] The Court of Appeal considered itself bound by a settled line of authority to hold that the daughter's interest was forfeited when she married in breach of the condition, since there was a gift over but (per Vaughan Williams LJ ([1905] 1 Ch 96 at 121)) could not regard the present state of the law as satisfactory and 'should have been very glad if we could have decided otherwise.' Romer LJ and Cozens-Hardy LJ ([1905] 1 Ch 96 at

125) were equally unenthusiastic but were not prepared to overrule '… this long series of decisions extending over two centuries.' Additionally, in my view, of some passing relevance here, Cozens-Hardy LJ concluded that—

'… although our attention has not been called to any case in which the rule [that is, the long series of decisions] has been applied to a deed, as distinct from a will, I can see no ground for drawing any distinction between the two.'

[82] While that case can easily be distinguished from the present on the basis that it did not deal with a no-contest clause (but one in partial restraint of marriage), the provision, regarded by the Lord Justices of Appeal as repugnant to precepts of fairness and human dignity, was upheld nonetheless because it was not applied merely in terrorem, was not repugnant to the gift under the settlement and, in light of the by then settled case law especially on provisions on partial restraint of marriage, was not contrary to public policy. It is just as well that for present purposes, the only guidance I need take from Re Whiting's Settlement is to be found in the last observations of Cozens-Hardy LJ as to the lack of distinction between a deed of settlement and a will.

[83] I consider that I need mention only three more of the cases cited in the arguments on this point, and then only for the purposes of distinguishing them. In Re Gaynor [1960] VR 640, the Supreme Court of Victoria considered a condition in a will that if either of the testator's beneficiaries (a son and a daughter)—

'… be dissatisfied with any of the provisions of this my will and institute or cause to be instituted … any action … or other proceeding to contest any of the provisions of this my will such beneficiaries shall upon the institution of such action … forfeit all … share and interest in my estate.'

[84] The daughter wished to make application under Part IV of the Administration and Probate Act 1958 for further provision for herself. It was held that—

(i) such an application would be a proceeding 'to contest' the provisions of the will;

(ii) the declaration contained a condition subsequent attached in the case of the daughter's legacy to a gift of personalty which provided for a bare forfeiture on the happening of the condition with no gift over on forfeiture and having regard to the nature of the condition, it was merely imposed in terrorem, was repugnant to the gift and void; and

(iii) the condition was also void as being against public policy because its object and effect was to deter the beneficiary from having recourse to the courts in a matter in which it was in the public interest—there as reflected by the statute—that she should be free to have recourse.

[85] A similar view was taken by the British Columbia Supreme Court in 1982 in Re Kent (1982) 139 DLR (3d) 318 where a no-contest provision which allowed only such recourse to the courts as may be 'necessary for judicial interpretation' of the will or for the direction of the court was held to be void on similar grounds of public policy. The provision was void 'because the Wills Variation Act 1979, c 435, under which the applicants wished to apply for an order for support, was enacted as a matter of public concern that a testator's dependants should not be left without adequate provision for their maintenance and support.'

[86] In Nathan v Leonard [2002] EWHC 1701, 4 ITELR 909, [2003] 4 All ER 198, a similar problem arose for consideration in England under the Inheritance (Provision for Family and Dependants) Act 1975. There, while a no-contest clause was held to be void on grounds of uncertainty, the Deputy High Court Judge did go on (in the event the case were taken on appeal) to consider the other grounds of objection which included repugnancy and public policy. He concluded that the clause would not have been void for repugnancy because it did not purport to operate in a manner that was inconsistent with the nature of the interests given to the donee—a conclusion readily understood on the facts of the case where the donee's interest was only of a limited reversionary kind.

[87] The public policy objections raised at least two different issues. One was the question whether the state had an interest in the prompt and orderly administration of the deceased's estate and whether the purported forfeiture provision would have operated in such an arbitrary and disruptive manner as to be contrary to that public interest. In light of the authorities and in particular Cooke v Turner (1846) 15 M & W 727, 153 ER 1044, no such broadly stated basis for a public policy interest was found. However, the conclusion expressed obiter, that the clause would not operate to prevent, but only deter, applications to the court by dependants under the Act, and so was not contrary to public policy, is less readily understood (particularly in light of the other cases such as Re Gaynor and Re Kent).

[88] However, I need not take a firm view on that. As we have seen, no such statutory entrenchment upon a settlor's freedom of disposition of his bounty exists in the Cayman Islands, imposing any such public policy reason to invalidate a no-contest provision in a trust settlement. The answer here therefore depends upon what is to be made of the pronouncements at common law from the many cases cited above.

[89] From the foregoing survey of the case law, I consider that it is safe to summarize the principles which guide my decision here as follows: First, to be valid, cl 23, subject to the severability of any invalid limb, must be certain within the meaning settled in Clavering v Ellison (1859) 7 HL Cas 707, 29 LJ Ch 761.

[90] Secondly, in the case of a challenge to the essential validity of the trust itself (a limb 1 contest) there is no general public policy reason why a no-contest provision should not be valid (see Cooke v Turner and Evanturel v

> *Evanturel). Such a challenge, if successful, would likely serve to set aside the trust as invalid and with it, the provisions of the no-contest clause itself. If the challenge is unsuccessful and without any good cause, there appears no public policy reason why the clause should not operate to exclude the contender from benefit and, subject to any discretion of a court if it exists (a matter to be considered below) to give relief from forfeiture, he will be excluded. However, even in a case of a challenge to essential validity (limb 1 or limb 2) as in any other case of challenge, including as to the validity of decisions or actions of a trustee (limb 3), a no-contest clause cannot be validly construed so as entirely to shut out challenges which are based on probable cause or good faith or which are not taken merely frivolously and vexatiously or without good reason (see Adams v Adams [1892] 1 Ch 369, 61 LJ Ch 237, Re Wynn's Will Trusts, Public Trustee v Newborough [1952] Ch 271, [1952] 1 All ER 341, Re Williams Williams v Williams [1912] 1 Ch 399, 81 LJ Ch 296, and Re Raven, Spencer v National Assoc for the Prevention of Consumption anf other forms of Tuberculosis [1915] 1 Ch 673, 84 LJ Ch 489).*

[19] Smellie CJ pointed out that as that jurisdiction had passed no statute treating with the topic, the common law applied.

[20] In the Canadian case of **Mawhinney v Scobie** 2019 ABCA 76, Ms. Mawhinney, who was a beneficiary under a Will which contained a no contest clause, brought an action seeking to obtain formal proof of the Will. The Court of Appeal of Alberta held that the clause was designed to discourage challenges not prohibit them. An aspiring claimant therefore would have to assess the strength of his case. Interestingly, **Mawhinney v Scobie**, which was decided after **AN v Barclays**, made no reference to that case. It was noted however that in the United States jurisdiction, so long as challenges were not frivolous and were made in good faith or for probable cause, there would be no dire consequences for the challenger. The Court further noted that the English approach was more restrictive, as conditions which purport to prohibit proceedings pursuant to dependence relief legislation, as well as conditions which are judged to constitute attempts to exclude the jurisdiction of the courts, would be held void pursuant to the principles of public policy. Smellie CJ however came to the conclusion that:[4]

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[4] (2006) 9 ITELR 630, No. 2 of Held

> *There was no public policy reason why the forfeiture clause should not be enforced where a challenge to the trust or a particular disposition was unsuccessful and without good cause. The forfeiture clause would not be applied so as to protect an illegal or invalid disposition nor so as entirely to shut out challenges based on probable cause or good faith and which were not vexatious or without good reason. This was so even where the trust deed contained mechanisms for controlling a defaulting trustee. The trustees could not be exonerated from their core obligations and it would be repugnant to the trusts and contrary to public policy to hold that the beneficiaries could not enforce the trusts. With this gloss the clause could be interpreted so as to eliminate concerns about repugnancy or ouster of the jurisdiction of the courts (see paras [71], [90]–[93], [97], post). Evanturel v Evanturel (1874) LR 6 PC 1applied.*

[21] The reasoning of Smellie CJ can be seen from the conclusion drawn after a thorough review of the English cases.[5]

[22] In Bermuda, in the decision of **The Estate Of PQR, Deceased** [2014] SC (Bda) 95 Civ (8 December 2014), Kawaley CJ rejected the argument that a forfeiture clause was void for repugnancy on public policy grounds. The reasoning of Smellie CJ in **AN v Barclays** was fully accepted, though in this case the no contest clause was found to be void for being in terrorem as the clause contained no specific gift over provision.

[23] In **The Estate Of PQR, Deceased**, it was noted that the Caymanian position and the English position converge, as was pointed out by reference to a passage from Lewin on Trusts. The court said:[6]

> *The Caymanian authority referred to by Lewin is of course the Barclays Private Bank and Trust case. In that case, the judicial analysis on repugnancy began very logically with the following recitation of the umbrella principles governing repugnant clauses in wills:*
>
> > *"59. .As to repugnancy, Williams on Wills 8thed., para. 34.5, at 347 (2002) states the principle thus: '[A] repugnant condition is one which attempts to make the enjoyment of a vested gift contrary to the principles of law affecting the gift'4 citing Saunders v Vautier5 …"*

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[5] Ibid. para 90
[6] [2014] SC (Bda) 95 Civ (8 December 2014), paras 46-47

> *This articulation of the fundamental legal basis of repugnancy is essentially a fundamental rule of construction if one considers that the phrase "principles of law affecting the gift" embrace rules of public policy as well as rules of (private) property law. Another important rule of construction, referred to by Ms. Rana-Fahy and dealt with by 'Williams on Wills' (at paragraph 53.2) under the rubric of uncertainty, is the following well known rule. This is a rule which in my judgment applies with equal force to construing an ouster-type clause which is potentially void on public policy or similar grounds, and justifies a construction which seeks to give effect to the testamentary intent so far as legal policy permits…*

[24] The question again came on for consideration in the jurisdiction of the Bahamas in **Stewart v Stewart & Ors** 2021 /CLE/gen/01043, heard on 23 and 24 November 2022 and decided on 22 June 2023, involving, as the name suggests, the same family in this matter. In that matter two trusts set up by the Founder contained a No Contest Clause in similar terms to the one under consideration. Cheryl Hamersmith-Stewart, widow of the Founder, sought a declaration that the claim being brought by her did not engage the No Contest Clause. Winder CJ noted that it was common ground between the parties that No Contest Clauses are generally valid and enforceable. He noted the rationale as explained in **Cooke v Turner** and **Evanturel v Evanturel**. In the Bahamas, however, No Contest Clauses have been placed on a statutory footing by virtue of the **Trustee Amendment Act, 2011**. For that reason, Winder CJ found **AN v Barclays,** now considered to be a leading authority on the subject, to be of limited assistance in the matter before him.

[25] In the recent case of **Sim v Pimlott and Others** [2023] EWHC 2296 (Ch) confirmed the validity and effectiveness of such clauses.

[26] I find myself in such esteemed company, I am loathe to say much more than I concur, and I have nothing further to add. However, I hope to be forgiven as I posit the position in this jurisdiction, there existing no authoritative statement on the issue. The approach of Kawaley CJ commends itself to me. He stated:[7]

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[7] Ibid. paras 50-51

> *Had I not been required to find that clause 10 was ineffective altogether through the application of the in terrorem rule, I would have adopted the above approach to construing the clause, which both counsel in substance commended to the Court. It was adopted by way of fall-back position by D's counsel. But Mr. Kessaram affirmatively submitted that D should be permitted (a) at a minimum to enforce her rights under the Will, and (b) at most to make only those adverse challenges which were asserted in good faith or for good cause. I would have construed clause 10 as merely restricting D's right to unjustifiably commence or participate in the prohibited classes of litigation. This would include applications for the due administration of the Will and any other good faith adverse challenges for which there was good cause.*
>
> *Such an approach is also justified by broader considerations of legal policy. It is a notorious fact that an important limb of Bermuda's economy involves encouraging high net worth individuals to establish trusts and wills which are expressed to be governed by Bermudian law. Such instruments are almost invariably drafted by reference to English precedents and, in significant cases, with input from English solicitors and counsel. Local statutory departures and particular factual idiosyncrasies apart, this Court should generally lean towards rules of construction which are consistent with the corresponding English law approach. In many cases, as here, the best persuasive authority may be found in the jurisprudence of sister offshore jurisdictions whose legal policy aspirations in this area of the law are generally consonant with our own.*

[27] No issue was taken as to the validity of such clauses in Jamaica. No position was taken by the Applicants, Ancillary Claimant in the Ancillary Fixed Date Claim Form to this application. There is no statute treating with No Contest Clauses in a Will in this jurisdiction. The laws in force in Jamaica are derived from the Constitution, Statutes and the Common Law. **Section 41 of The Interpretation Act** in the side note indicates that English laws remained in force in the Island. The section reads:

> **41**. All such laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island.

[28] I would hold that the relevant applicable law is the common law of England, not having been changed by statute. No Contest Clauses that contain a gift over provision

and are not merely in terrorem, are not repugnant to public policy and are therefore valid and enforceable in this jurisdiction. The weight of persuasive authority also supports this position.

WHETHER THE NO CONTEST CLAUSE IS ENGAGED?

[29] A fuller appreciation of the circumstances leading to this application in the Ancillary Claim is in order. A sufficient background is given in the Ancillary Claimant's written submissions, which I adopt with some redactions of opinions and contested facts.

> ***Relevant Background - the Bequest of the ATL Group and Hostilities***
>
> *6. The relevant background is set out in paragraphs 4-14 of the Ancillary Claimant's first affidavit in the Claim **("Stewart/1")**. In summary:*
>
> *(a) By his Will, the Founder bequeathed the ATL Group, which is defined at clause 12 of the Will to include Gorstew Ltd and the Appliance Traders Ltd, in the following percentages to the following beneficiaries:*
>
> *i. the Ancillary Claimant - 52%;*
>
> *ii. the Ancillary Claimant half-brother, Robert Stewart ("Bobby") - 24%; and*
>
> *iii. the Ancillary Claimant's half-brother, Gordon Jackson Stewart -24%*
>
> *(b) The Ancillary Claimant is the majority beneficial shareholder of the ATL Group. The Will makes clear the basis of this: "[t]he allocation in the ATL Group recognizes The Applicant's important role in expanding and developing the ATL Motor Sub-group"*
>
> *(c) Clause 14 of the Will further makes clear express wishes with respect to the*
>
> *ATL Group, including that:*

a. "the ATL Group be managed and operated along strict business lines with a strong professional board of directors to generate income for the named beneficiaries" (clause 14 (b));

b. the Ancillary Claimant be "be the chairman of the ATL Group so long as he is willing and able to hold that office" (clause 14 (d)); and

c. the Ancillary Claimant "may establish a management company or team to manage the businesses comprised in the ATL Group ..." (clause 14 (e)).

(d) ….

(e) This lack of progress is symptomatic of an irretrievable breakdown in relationships and hostilities:

i. between members and different branches of the Founder's family; and also

ii. between the Executors on one hand and certain of the beneficiaries of the Estate on the other.

(f) For a period of more than four and a half years since the Founder's passing, the Executors [not] transfer[red] the shares in the ATL Group to their specific legatees (including the Ancillary Claimant as the majority beneficial owner) in accordance with the Will …

(g) …

(h) …

The Executors' Fixed Date Claim and context for the Ancillary Claim

7. The Executors commenced this claim by Fixed Date Claim Form issued on 14November 2024 (the "FDCF").

8. The main relief sought in the FDC is that:

> *"The (Executors) are authorised to carry out an urgent "red flag" audit (if necessary, a court supervised audit) of Gorstew Limited Appliance Traders Limited, and their subsidiaries."*

…

14. Notwithstanding that the Executors present this claim in the commercial division as a claim for directions which are necessary for the administration of the Founder's Estate, the Executors did not give notice of the claim to, or join, any beneficiaries of the Estate to the claim, including the beneficiaries (including the Ancillary Claimant) who inherit the shares in the ATL Group under the Will. …[A]t the hearing of the Permission Application,

counsel for the Executors specifically asked that the Court make an order that the US Family (as defined in clause 5 of the Will only one of whom benefits from shares pursuant to clause 13.1 but will benefit if the Ancillary Claimant's bequest is forfeited by virtue of clause 27.3) and Mr. Robert Stewart be served with the AFDCF (see paragraph 8 of the Order made on 9 May 2025).

15. The Executors are advancing what they characterise as a "red flag" audit into the affairs of Gorstew Ltd, Appliance Traders Ltd, and their respective subsidiaries. This audit is purportedly predicated on a series of financial and governance concerns, described as "red flags", …

16. …

17. …

18. In light of the nature of these allegations and their direct bearing on the Ancillary Claimants' personal and professional reputation, the Ancillary Claimant repeatedly asked to be served with the proceedings, which was refused by the Executors. The Ancillary Claimant therefore applied to be joined by application filed on 21 February 2025, which was opposed by the Executors, but granted by the Honourable Mr Justice Batts on 26 February 2025. In granting the joinder application without the need to reference the papers filed in support of that application (the papers seemingly having not been sent to His Lordship from the Court's registry), Batts J expressly acknowledged Ancillary Claimant's substantial interest in the outcome and the seriousness of the claims made against him.

19. In view of certain case management orders and directions made by Batts J on 26 February 2025, including deadlines for the filing of evidence in answer to the claim (on or before 30 April 2025), the Ancillary Claimant sought confirmation from the Executors that (a) defending the Claim, (b) filing evidence in the proceedings, and (c) applying to strike-out all or a part of the Claim, would not in their view engage the No-Contest Clauses. This was not forthcoming, with the Executors' then stance being that they could not meaningfully consider the operation of the No-Contest Clauses "when they do not know the basis or bases on which your client intends to "defend the proceedings", the contents of the affidavit evidence he proposes to file or the details of the applications he plans to make". The Applicant then filed and served the Permission Application, and renewed his request for the Executors to clarify their position as to the meaning and effect of the No-Contest Clauses vis-a-vis his proposed steps. This was again refused by the Executors, with the stance now being that the Executors do not have the power to "waive or ignore" the application of the No-Contest Clauses.

JURISDICTION

[30] No issue was taken at the hearing that the court lacked the jurisdiction to make the Declarations sought. In related proceedings (more fully explained below) it was argued on behalf of the Executors that as the Executors had not as yet exercised any discretion with regard to the No Contest Clause, the Court would be engaging in an abstract, hypothetical or academic exercise, which the court ought not to do. This argument cannot be accepted. Adam sought and was granted permission to participate in a claim which is already before the court which would (absent an order from the court as to whether the No Contest Clause is engaged) attract the consideration of the Executors as to whether to apply the penalty. In circumstances where the Executors have expressly refused to state a position. I point out that in the above-cited Bahamian case of **Stewart v Stewart** the Trustees also had not made a decision as to whether to exercise their discretion with respect to the No Contest Clause.

[31] The Ancillary Claimant grounds the claim in the provisions of the **Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)**, **Part 67**, particularly **67.1 and 67.2(1) and 67(4)**. I therefore only need make reference to the observations of the Learned Authors of *Lewin on Trusts*, referred to at paragraph 37 below.

[32] As already pointed out, there are no precedents in this jurisdiction to guide the Court in this area of law. Adam asserts that by this action he is not contesting the provisions of the Will, and so the No Contest Clause is not engaged. This begs the question what constitutes a contest.

[33] The cases referred to above do not suggest that the word is used in any technical sense. It therefore carries its ordinary meaning: "making a subject of dispute, to litigate, to oppose, to challenge, to resist." Any attack that will defeat the intention and wishes of the testator as expressed in his Will, will come within the No Contest Clause.

[34] The Executors argue, in the application to be joined in the related claim (**Claim No. SU2025CD00271 – Adam Stewart v Robert Stewart, Dmitri Singh and Gorstew Limited**), after this hearing, that:

1. the No Contest Clause provides that a claim challenging any provision of the Will, ergo contesting the no contest clause would attract the possibility of the Executors applying the penalty of forfeiture of the bequest; and

2. the power to determine whether the no Contest Clause is engaged is solely vested in the Executors.

[35] This position is referred to in the Skeleton Submissions made on behalf of the Ancillary Claimant. It was indicated that Mr. Patterson had asserted in separate proceedings, involving the parties and concerning the Founder's Will, that the interpretation and application of the No Contest Clause is solely within the discretion of the Executors. Further, that any control or review of that discretion by the court is excluded unless the Executors act in bad faith. This is taken from Mr. Patterson's Amended Notice of Application to strike out in Claim No. SU2024ES03011.

[36] It is remarkable that the latter position is being taken by the Executors, one of which is Ms. Hamersmith-Stewart who successfully argued that whether the no contest clause was engaged was a *"question for the court and not for anyone else because it is a matter of law and must therefore be determined by the court*", the very position now being proffered by Adam. It is true that the claim brought in the Bahamas concerned trusts but as Smellie CJ said in **AN v Barclays**, the relevant principles of construction developed in cases dealing with testamentary dispositions were equally applicable to discretionary trusts and I would say vice versa.

[37] The answer was given by Winder CJ at paragraph 29 of his judgment in **Stewart v Stewart**, referring to a passage by the learned authors of **Lewin on Trusts:**

> *29. The learned authors of Lewin on Trusts do tend to support Cheryl's manner of proceeding in this action. According to Lewin, at paragraph 6-012:*
>
> > *[6-012] Cautious beneficiaries, who are concerned that a "no contest" clause in the trust might conceivably be invoked against them if they commence any kind of trust proceedings, have in the past sought, as the first claim for relief, a declaration that the substantive relief secondly claimed does not come within the "no*

> *contest" clause, and the substantive relief is claimed only if such a declaration is granted. We consider that this is an effective procedure and is, perhaps, more prudent than before, since it now appears that the application of the "no contest" clause may turn upon whether probable cause can be demonstrated, but there is scope for doubt as to what probable cause amounts to. Yet there is a concern that the court may decline to grant a declaration on the ground that it is inappropriate to determine the existence or otherwise of probable cause until after the substantive claim has been determined and so leave the beneficiary to take the risk of litigation being caught by the "no contest" clause if he dares to litigate. Such an approach is understandable in the case of a beneficiary who is content to embark on litigation without taking any protective measures and then seeks to argue the issue of probable cause half way through his litigation. But it would, in our view, be regrettable if the court were unwilling to consider the grant of declaratory relief in circumstances where a beneficiary was advised that he had a meritorious claim but was unwilling to embark on litigation, in view of the draconian consequences, unless he had the protection of an order of the court. There would appear to be no difficulty in the court determining the issue of probable cause at the outset, in much the same way, for instance, that the court determines the question of a serious issue to be tried in applications to serve trust proceedings out of the jurisdiction, though there might be circumstances in which a declaration would be qualified so as to protect the commencement of proceedings but not necessarily their continuation after a particular stage in the proceedings had been reached*

Adam relies on this exposition in support of his Ancillary claim.

[38] The Fixed Date Claim seeks directions from the Court to carry out an 'urgent red flag audit' of Gorstew Limited, Appliance Traders and their subsidiaries. The Executors are seeking these Orders on the basis that there were serious concerns about the way in which the companies' business and affairs had been conducted since the Founder's death. The actions of Adam in relation to his management of the entities are being specifically questioned. It is this direct assault on his actions, and I daresay character and reputation, that led a court to grant him the right to intervene in the matter. The Executors assert that the audit was necessary to prepare the accounts of the estate for the administration of the estate in accordance with the terms of the Will. It is this action that the Ancillary Claimant by his action is seeking to prevent.

[39] In **Stewart v Stewart**, a similarly worded provision was the subject of an application for a declaration that the No Contest Clause was not engaged by the bringing of a claim to replace trustees or appoint additional trustees on the basis of conflicts of interest of the existing trustee. The question was whether the action fell within the definition of "Claim" in the trust deed. It was argued on behalf of Cheryl Hamersmith-Stewart, that she was not seeking to challenge any provisions of the trusts or any other provision mentioned in it. This was accepted as the position Winder CJ where it was stated:[8]

> *50. Whilst the nature of Cheryl's attack and its effect appears clear, I am not satisfied that it falls squarely into the four corners of the definition a (sic) Claim as outlined in Clause 6.3.1. I also bear in mind that clauses of this nature must be constructed strictly. See Sir Anthony Smellie CJ in AN v Barclay at paragraph 39.*
>
> *51. I accept Mr. Rajah KC's submissions that there is no provision in any of the documents which prohibits a claim seeking the removal (sic) Cromwell. I also accept the submission that it is not intended that Cromwell will always be the trustee, in perpetuity. The expressed definition of Cromwell in each of the Trusts is as "the first trustee"…*

[40] It is noted that the term "*all claims, demands, actions, proceedings or counterclaim of any nature"* used at Clause 27 of the Will is not absolute but is qualified by the sub paragraphs (a) and (b). Contesting the application for an audit of the accounts of Gorstew, ATL and subsidiaries does not call into question, or challenge any of the elements of Clause 27.1(a). To the extent that it is necessary to prepare accounts of the estate, it does not prevent any of the provisions of the Founder's Will from being carried out. Winder CJ pointed out, following **AN v Barclays**, that common law principles require that clauses of this nature be construed strictly. In my view, and I so hold, the Ancillary Claim brought by Adam does not constitute an infringement of the No Contest Clause in the Will of the Founder.

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[8] 2021/CLE/gen/01043, paras 48, 50-51

[41] Similarly, Clause 28.5 is not open ended, it is limited to *"claims or proceedings in connection with the preparation and or execution of the will"* not in relation to the administration of the estate. This is readily seen from the fact that the protection is afforded to Trevor Patterson and Patterson Mair Hamilton, who were responsible for the preparation and due execution of the Will, and not all the Executors. The Ancillary Claim does not raise any such challenge and, therefore, does not come within the provisions of the No Contest Clause.

[42] As to the Court's authority to make this determination, this is discussed below.

OUSTER OF COURT'S JURISDICTION

[43] This finding is sufficient to resolve this claim in favour of the Ancillary Claimant. However, in deference to the arguments made, I will treat with the question of whether the Court's jurisdiction has been ousted by the terms of the Founder's Will.

[44] The issue of whether the Court's jurisdiction was ousted by virtue of the provisions in the Founder's Will also arose in Claim No. SU2025CD00271 which involved some of the parties herein. By virtue of the agreement reached between the parties, the issue was not determined. The Claimant agreed that the issue is relevant to this application. I have therefore taken the submissions made in that application into account. It was proffered on behalf of the Executors that this was the case.

[45] The relevant provisions of the Founder's Will are as follows

> *27.2 If the Trustees, in their discretion, determine that a Beneficiary has brought any Claim which could materially affect the interest of any other Beneficiary then such Beneficiary shall be excluded by Deed or Deeds from benefits under this my Will and such exclusion shall have effect from the date of such determination by the Trustees to the intent that the bequest of such Beneficiary shall be forfeited.*
>
> *…*
>
> *28. 4 All determinations which my Trustees are authorized to make and all powers and discretions which are given to the Trustees to exercise, shall be made and exercised by them in what they consider to be in the best interest of the beneficiaries, as a whole. Their good faith decisions are*

> *absolute and conclusive and are not to be controlled or reviewed by the beneficiaries or by any court of law or tribunal.*

INTERPRETATION/CONSTRUCTION OF THE WILL

[46] Adam argues that the question of interpretation is a matter for the Court. Counsel on his behalf relied on the cases of **Charles v Barzey** [2002] UKPC 68**, Sylvia Gayle Henry v Lloyd Gayle and Cedrick Gayle** [2018] JMCA Civ 5 and **Ann Marie Llewellyn Young and Louise Hilda Llewellyn v Louise Hilda Llewellyn and Others** [2019] JMSC Civ 129.

[47] It is only in the last of these cases that there is a specific reference to the court's jurisdiction to interpret Wills as arising from the **Wills Act and the Interpretation Act**. In the first two cases, this jurisdiction appears to have been accepted as trite law. In **Marley v Rawlins and Another** [2015] AC 129, Lord Neuberger of Abbotsbury PSC pithily stated that[9]:

> *Until relatively recently, there were no statutory provisions relating to the proper approach to the interpretation of wills.* ***The interpretation of wills was a matter for the courts*** *...* (Emphasis mine)

Lord Neuberger also considered that the approach to interpreting Wills should be the same as interpreting contracts. The aim being to identify the intention of the parties or parties to the document by interpreting the words used in their documentary factual and commercial context. He said:[10]

> *When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, in light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provision of the document, (iv) the facts known or assumed by the parties at the time the document was executed, and (v) common sense, but be ignoring subjective evidence of any parties intentions.*

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[9] [2015] AC 129 para 17
[10] Ibid. para 19

[48] In **Re Bronson** [1958] O.R. 367-373 a term in the Will empowered the trustees *"…in their absolute discretion to determine any such question and their judgement and decision thereon shall be final and binding upon the persons interested therein."* Relying on the English case of **Re Raven, Spencer, v. National Association etc.,** 1915 1Ch. 673, Wells J stated[11]:

> *Dealing with para. 11 first, in my view the executors have not the power arbitrarily to declare whether certain funds of the estate are capital or income or how it may be apportioned.* ***They cannot take unto themselves the jurisdiction which is vested only in the Court. The matter is set out in 34 Hals., 2nd ed., p. 162, para. 214, where it is said****:--*
>
> *The jurisdiction of the Court in the construction of a will is not ousted by the fact that the will is in a foreign language or has to be construed by foreign rules of construction; or by any direction or recommendation by the testator that questions of construction are to be decided in a different manner, for example, by the trustees or executors, or by arbitration; …*

OUSTER

[49] It is trite law that as a rule, provisions which seek to oust the jurisdiction of the court have been considered to be void as against public policy. Wells J in **Re Bronson** continued:

> *… and a direction that a beneficiary resorting to litigation for the purpose shall forfeit his interest is inoperative so far as it prevents him from seeking the aid of the Court.*
>
> *The leading authority on which this statement is made would appear to be the decision in the case of Re Raven, Spencer, v. National Association etc., [1915] 1 Ch. 673. This was a decision of Warrington, J., and after pointing out that the testator had bequeathed a legacy of one thousand pounds to the National Association and that he had then inserted at p. 676:*
>
> > *'If any doubt shall arise in any case to' -- meaning of course 'as to'--'the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties.' It is said that in this case a doubt has arisen whether the legacy in question ought to be given to one institution or another. The trustees*

desire to decide the question finally if they have power so to do. Of the two institutions between whom it said that a doubt exists, one desires that the trustees should decide and the other desires -- and this is the important point -- to have the question determined by the law of the land, that is to say, by the King's Courts administering the law. The question is whether the alleged legatee, -- I try to use some expression that shall be entirely without prejudice -- or the institution which claims to be the legatee, is debarred from having the decision of the Court on the question because the testator has inserted this direction in his will. In my opinion it is not competent for a testator to confer certain legal rights by giving legacies and at the same time to say that the question whether that legal right is or is not to be enjoyed is not to be determined by the ordinary tribunal -- in other words, it is not competent for him to deprive the person to whom that legal right is given of one of the incidents of that legal right; and if necessary I should be prepared to rest my decision upon the ground that the attempt to do so is an attempt to do two inconsistent things. In my opinion the gift of a legacy to a legatee, even if it be of doubtful construction, is in fact a gift to the person who shall be determined to be the legatee according to legal principles, and to give effect to a provision such as the provision which the testator has inserted in his will in the present case is in fact to assert the direct contrary and to say that the gift is not to the person who shall be determined to be the legatee by the Courts which administer the legal principles to which I have referred, but to the person who shall be decided to be the legatee by the trustees, who by the will [to be inserted] unfettered and may make their decision upon such grounds as they think fit. I think therefore that I can safely, decide the point on that ground alone; but I also think that I may and ought to decide it on wider grounds, namely, that it is contrary to public policy to attempt to deprive persons of their right of resorting to the ordinary tribunals for the purpose of establishing their legal rights. That particular point has been decided in Ireland in a case the judgment in which though not binding on me is certainly in accordance with my own opinion, and, even if is were not, it still one to which I should pay the greatest respect. I refer to the decision of Chatterton, V.C., in Massey v. Rogers, 11 L.R. Ir. 409, 416, 417, which seems to me to be exactly in point in the present case. The head-note to the report on this particular matter is, "A testator cannot, by constituting private individuals a forum domesticum to decide whatever questions may arise upon the construction of his will, oust the jurisdiction of the Court to determine such questions.'

[50] *Halsbury's Laws of England* goes straight to the point in issue. The Learned Authors stated:[12]

> *An agreement purporting to oust the jurisdiction of the courts entirely is illegal and void on grounds of public policy1; for example a provision in a testator's will which purports to empower the trustee to determine all questions and matters of doubt arising under the will and to make that determination conclusive and binding on all persons interested under the will is void on this ground.*

[51] In **AN v Barclays**, Smellie CJ recognized that the earlier cases dealing with No-Contest Clauses concerned challenges to the validity of the Will itself or to the gifts vested by it and not with challenges to the trustees' decision. In that case, the plaintiff complained that the trustees of the trust, of which she was a beneficiary, had acted unreasonably and failed to hold the balance evenly between beneficiaries, and had acted in a manner prejudicial to the interests of herself and the remoter beneficiaries as a whole. It was held that the court was willing to scrutinize the actions of trustees on such grounds even where there were provisions which deemed the trustees decision to be final and binding.

[52] There is some authority in this jurisdiction that assists the Court. In **Beverley Williamson and Richard Roberts v The Port Authority of Jamaica** [2019] JMCA Civ 8, concerned a contractual discretion vested in an employer to grant a retirement benefit to former employees in certain circumstances. The facts are dissimilar to this case and so not necessary to be detailed. One of the issues raised was whether the PAJ's discretion was unfettered or reviewable in accordance with the principles that the PAJ must exercise it rationally and in good faith. This question was answered in the affirmative by the trial judge and was not questioned on appeal. The decision of the trial judge was approved. A provision which seeks to oust the court's jurisdiction to review the exercise of discretion would therefore be void as against public policy.

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[12] Halsbury's Laws of England Courts and Tribunals (Volume 24A (2025)) 2. Courts (2) The Jurisdiction of Courts (i) In General 28. Ouster of jurisdiction by agreement.

[53] In **AN v Barclays**, the Court determined that a forfeiture clause would not be applied so as to entirely shut out challenges brought with probable cause or in good faith, and that were not vexatious or without good reason. This remained the case even where the trust contained mechanisms for addressing a default by the trustee. The trustees would not be exonerated from their core obligations, and it would be repugnant to the trust and contrary to public policy to hold that the beneficiaries could not enforce the trusts. The Court therefore interpreted the clause in a way that eliminated any concern about ousting the jurisdiction of the courts.

[54] In **Stewart v Stewart**, Winder CJ did not consider that the similar clause ousted the jurisdiction of the court since, unlike **AN v Barclays** where there was an automatic barring of the beneficiary with no right to approach the court, in that case the trustees had a fiduciary discretion whether the claim fell within the No Contest Clause and whether to remove the beneficiary. He contended that the Court retained the jurisdiction to review an unreasonable exercise of the trustees discretion. On either view, the position taken by the Executors is not sustainable. The No Contest Clause, as a matter of construction, could not be interpreted to exclude challenges based on probable cause or good faith, and which were not frivolous or vexatious.

[55] In my view, a useful analogy on the question of what constitutes good faith may be the requirement from **S. 212 of The Companies Act**, that a claimant seeking leave to bring a derivative claim must satisfy the court that he is acting in good faith. Sykes J as he then was expounded the following principles in **Sally Ann Fulton v Chas E Ramson Ltd** [2016] JMSC Comm 14[13]:

> *Bringing it all together*
>
> *From all the case law reviewed and this court's understanding the court states what it considers to be the principles applicable to section 212 (2):*

[13] [2016] JMSC Comm 14, para 98

(1) notice to the directors is required but that notice need not articulate all possible causes of action that may be pursued. The notice need not take any particular form. The statute does not require the notice to be in writing but it is very strongly recommended that it be in writing.

(2) whether the time between the giving of notice and the filing of the application is reasonable is to be decided by closely examining all the surrounding circumstances. This includes whether there was discussion between the directors and the complainant before the notice; the nature and content of those discussions; whether the issues raised required the directors to understand any complicated technical issue;

(3) the good faith requirement is purely subjective and does not have any objective component;

(4) good faith refers to the subjective state of mind of the applicant and it includes:

(a) an honest and sincere belief that the claim should be brought;

(b) an honest and sincere belief in the legal merit of the proposed claim;

(c) an honest and sincere intention to pursue the claim to its ultimate conclusion;

(5) matters such as whether the claim is frivolous and vexatious or it lacks legal merit (objectively viewed) are not conclusive one way or the other but are factors that may be taken into account when deciding whether the complainant has met the good faith standard;

(6) a conclusion that the complainant is acting in good faith but that the claim is in fact frivolous and vexatious or lacking in legal merit does not mean that the claim must go forward because those considerations can be taken into account under the "interests of the company" criterion;

(7) the presence of animosity, ill-will, personal interest and the like does not automatically mean that the complainant lacks good faith;

(8) for there to be an absence of good faith where ill-will, self-interest and the like are present then these other motivations must be so dominant that they make it difficult if not impossible for there to be the existence of good faith in the complainant;

(9) if the claim has good legal merit it is easier to conclude that the complainant is acting in good faith;

> *(10) if the claim has little or no legal merit it may be an indication that good faith is lacking but that is not conclusive;*
>
> *(11) if the claim has little or no legal merit then it is a strong indication that that the claim is not in the interest of the company;*
>
> *(12) if the proposed claim is an abuse of process then that is an indication that it is not in the interest of the company and may be an indication of a lack of good faith;*

[56] In **Williamson and Roberts v The Port Authority of Jamaica**, in defining good faith in the context of an employment contract, Morrison P stated it meant to act honestly, avoid capricious arbitrary or irrational behaviour. The Court of Appeal in coming to its decision said: [14]

> *With these authoritative statements in mind, I therefore approach the matter on the basis that, in exercising its contractual discretion to grant a special retirement benefit to the appellants, the PAJ was obliged to act in good faith. "Good faith" in this context means that the PAJ was not only required to act honestly, but also to avoid capricious, arbitrary or irrational behaviour; to have regard to the purpose for which the discretion existed; and not to decline to grant a benefit for extraneous reasons.*

[57] Adam's case is predicated on the concern that the Executors are acting or may be acting in bad faith, as was evidenced by the highly personal attacks which impugn his conduct, judgment and integrity contained in the affidavits in support of the claim, and which go well beyond mere factual background. These serious and far reaching allegations, the Executors refusal to serve him with the proceedings and their objection to him being joined in the claim, even in light of the direct bearing that the Fixed Date Claim may have on him, support his concern. Further, he has been threatened through correspondence from two of the Executors, Mr. Patterson and Ms. Hamersmith-Stewart, with invoking the No Contest Clause in circumstances where it would not be applicable. These factual contentions are yet to be determined but are the predicate on which he seeks to participate in the claim.

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[14] [2019] JMCA Civ 8, para 63

[58] To be clear, Adam does not contend for the invalidity of the No Contest Clause, nor has there been any decision taken by the Executors that is being reviewed. This decision is therefore of a purely legal nature and only to state that the validity of the exercise of the Executors discretion is reviewable by a court. Further, on a true construction of the Founder's Will, the forfeiture clause would not be applied to shut out challenges based on probable cause or good faith and which were not vexatious or without good reason, even if unsuccessful.

CONCLUSION

[59] In all the circumstances, the Ancillary Claimant succeeds in the application and the Orders are granted as prayed.

ORDERS

[60] It is hereby ordered and declared as follows:

1. That any defence or opposition to this Claim by or on behalf of the Ancillary Claimant, including the giving of evidence, the making of submissions or any other formal steps taken in respect of this Claim, does not engage the No Contest Clause of the Will of the Founder.

2. That the relief sought in paragraph 6 of the Notice of Application for Court Orders filed by the Ancillary Claimant in the Claim in the form exhibited to the Second Affidavit of Adam Stewart does not engage the No Contest Clause.

3. The Ancillary Claimant and the Ancillary Defendant are to file and exchange submissions on Costs on or before 24 November 2025.

4. Notice of Application for Court Orders filed 17 April 2025 is adjourned to 17 December 2025 at 11:00 A.M. with respect to paragraphs 6 and 7 of the said Application.

5. The Ancillary Claimant's Attorneys-at-Law are to prepare, file and serve this Formal Order.

POSTSCRIPT

[61] I wish to record my thanks to Counsel and the parties for their indulgence regarding the delay in the delivery of this Judgment. I also wish to thank Counsel who made submissions in this matter, providing valuable authorities for the Court's consideration.

_____

Brown Beckford J

Puisne Judge