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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 77/81

BEFORE: THE HON. MR. JUSTICE ROWE, J.A. - PRESIDING
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

BETWEEN: HOPETON GAYLE - PLAINTIFF/APPELLANT

A N D HAZEL NUGENT (GUARDIAN AD LITEM) - DEFENDANTS/RESPONDENTS
EZEKIEL ASPHALL (AN INFANT)
DELCETA ASPHALL (" ")
LLOYD ASPHALL (" ")

Dr. L.G. Barnett for the appellant instructed by Mr. Norman O. Samuels.

Mr. M. Hylton for the respondents instructed by Mr. Carlton Williams.

October 6 and November 10, 1982.

CAMPBELL, J.A. (AG.):

The appellant by his writ and statement of claim filed on February 17, 1981 sought the following reliefs namely.

"(1) A declaration that the Defendants are liable to pay to him one-quarter of the sum of US$47,042.20 credited to the second, third and fourthnamed Defendants (hereinafter called "the infant Defendants") in banks in the United States of America and one-quarter of the half-yearly interest on the said sum paid and to be paid to them.

(2) An account of the half-yearly interest on the said sum of US$47,042.20 already come to the hands of the Defendants or received by any other person on their behalf or account and an order that the Defendants do pay to the Plaintiff one-quarter of any sum so found.

"(3) An order that each of the infant Defendants on attaining the age of 18 years take all reasonable steps to secure payment to him/her of his/her share of the said amount of US$47,042.20 and any further interest thereon and on obtaining payment as aforesaid pay to the Plaintiff all unpaid amounts due to him under (1) above."

The basis of the claim for relief as extracted from the statement of claim is that Hazel Nugent who is the mother of Ezekiel, Delceta and Lloyd, infant children of Valentine Asphall, deceased, had cause to, and did retain the appellant, and executed a contingency agreement for his fees. The circumstances necessitating the retainer and contingency agreement were that Valentine Asphall died in Brooklyn, New York, U.S.A. on September 29, 1975. At the time of his death he was married to one Helen Asphall who as his administratrix instituted suit in the Supreme Court of the State of New York claiming on behalf of herself and the above infant children damages for personal injuries and for his wrongful death. She was represented in this suit by Mr. Harvey Sackstein an Attorney-at-Law of 401 Seventh Avenue, New York, U.S.A. In order to perfect the claim on behalf of the infants and to secure satisfactory evidence relative to their legal status as children of the deceased, Mrs. Helen Asphall through her Attorney-at-Law wrote to Hazel Nugent requesting copies of any paternity proceedings establishing the deceased as the father of the said three infant children. Hazel Nugent accordingly on the 17th day of November, 1975 by written retainer, retained the appellant for the purposes disclosed in paragraph 8 of the statement of claim which reads thus:

"8. By written retainer dated the 17th day of November aforesaid the firstnamed Defendant then retained the Plaintiff to represent her and the infant Defendants in all matters concerning suit or settlements or otherwise in connection with the death of the said Valentine Asphall as well as in connection with the payment of any

"moneys to the infant Defendants on any ground whatsoever as a result of the said death."

This retainer was subsequently followed by a letter dated the 7th day of May, 1976 agreeing to pay the appellant's fees in the manner stated in paragraph 12 of the statement of claim which reads thus:

"12. By letter to the Plaintiff dated the 7th day of May, 1976, the firstnamed Defendant agreed to pay the Plaintiff for services performed by him as set out in paragraph 8 above one-quarter of any moneys which she or the infant Defendants or any of them may receive from the estate of the said Valentine Asphall."

Following upon and in consequence of his retainer the appellant alleges in his statement of claim that he was in constant communication with Mr. Harvey Sackstein seeking particulars of the nature of the proof required to establish that the infants were in fact the children of the deceased Valentine Asphall. It was confirmed to him, that what was required in order that the infants could benefit from the anticipated favourable judgment in the suit in progress in the Supreme Court of the State of New York, was a judgment by a competent court in Jamaica adjuging or declaring the deceased Valentine Asphall the father of the infant children.

The appellant states that he accordingly obtained a further written retainer from Hazel Nugent dated the 24th day of August, 1976 pursuant to which he filed Suit No. E40 of 1977 in the Supreme Court of Judicature of Jamaica on the 7th day of March, 1977 petitioning the court for a declaration that the said Valentine Asphall was the father of the infants. The declaration was granted by Mrs. Justice Allen, retired, on the 5th day of May 1977 and attested copies thereof authenticated by the United States Vice Consul in Jamaica were duly despatched to Mr. Harvey Sackstein for use in the suit in the Supreme Court of the State of New York.

On a subsequent date namely the 5th day of December 1978 the appellant participated in a telephone conference with Judge Thomas Jones who was seised of the suit in the aforesaid Supreme Court and he provided valuable information to assist the judge in coming to a decision on the quantum of the approved settlement of US$85,000.00 which was to be apportioned to each of the infants.

The suit was settled with the approval of Judge Thomas Jones and the shares of the infants totalling US$47,042.20 were deposited by order of the Supreme Court in approved banks in the U.S.A. with interest thereon being periodically paid to the infants in Jamaica through Hazel Nugent since about mid 1980.

The appellant avers in his statement of claim that he has in addition rendered diverse other services relative to the suit in New York but that the aforesaid Hazel Nugent has subsequent to the settlement refused to disclose the dates or the quantum of interest she has been receiving. He apparently views this conduct of Hazel Nugent as evincing an intention to repudiate the contingency agreement referred to in paragraph 12 of his statement of claim and accordingly instituted action seeking the reliefs earlier recited.

The respondents moved the court by summons dated the 24th day of September, 1981 to have the writ and statement of claim struck out on the ground that they disclose no reasonable cause of action against them.

The summons was heard in Chambers before Morgan, J. on the 2nd day of December 1981 when it was ordered that:

> "The Writ of Summons and Statement of Claim be struck out on the ground that they disclose no reasonable cause of action against the Defendants with costs to the Defendants to be paid by the Plaintiff."

Against this order the appellant appeals on the grounds that the learned judge erred and misdirected herself in law in holding that:

"(a) it was necessary for the plaintiff/appellant to tax his costs before taking action for the recovery of his fees;

(b) the plaintiff/appellant's Writ and Statement of claim disclosed no reasonable cause of action."

Before us it has been agreed by learned counsel for the parties that the issues raised before the learned judge were:

(1) Whether on the facts disclosed in the writ and statement of claim the Attorneys fees being claimed had to be taxed as a precondition to the commencement of the suit without which taxation no reasonable cause of action was disclosed.

(2) Whether having regard to the facts disclosed in the aforesaid statement of claim namely that no damage or other compensation was shown to have been recovered by the 1st respondent any reasonable cause of action arose against her under the contingency agreement.

Dr. Barnett for the appellant submitted as generally relevant to both grounds of appeal that since the documents evidencing the retainer and the agreement for the payment of fees were not before the learned judge for her interpretation the ruling that the writ and statement of claim disclosed no reasonable cause of action must be considered on the basis that she accepted as proved, for the purpose of the summons the facts stated in the statment of claim. Considered thus, Dr. Barnett further submitted that the statement of claim by paragraphs 8 and 12 disclosed that the appellant was retained on a contingency fee basis. Other paragraphs in the statement of claim catalogued the various services rendered by the appellant as necessary preliminaries to and in support of the claim for damages brought on behalf of the infant respondents. There was a recovery of damages by them in the suit in the Supreme Court of the State of New York. There was a repudiation by the respondents of the appellant's claim to a percentage share of the sums so recovered. This prima facie amounted to a repudiation of the agreement for

fees. The appellant in these circumstances does prima facie have locus standi to seek a declaration of his entitlement under the agreement since he is seeking a declaration as to an alleged contractual right which is an appropriate subject matter for a declaratory judgment.

With specific reference to the second ground of appeal Dr. Barnett submits that the matters pleaded in paragraph 12 of the statement of claim clearly disclosed that the obligation of the first respondent to perform her contract was not predicated exclusively on her recovering damages personally arising out of the death of Valentine Asphall. Since the fact of her not having personally recovered damages did not per se prima facie negate liability under the agreement pleaded, it cannot be said that the statement of claim disclosed, in relation to her, no reasonable cause of action.

In relation to the infant respondents Dr. Barnett submitted that the real ground of decision of the learned judge was that the prima facie cause of action which undoubtedly was disclosed in the writ and statement of claim was completely eroded when regard was had to the Judicature (Civil Procedure Code) Law - Section 226. In this Dr. Barnett said the learned judge erred in law in placing any reliance on this section which had application only to actions commenced by or on behalf of infant plaintiffs in Jamaica. The Judicature (Civil Procedure Code) Law provides a code regulating civil proceedings in the Supreme Court of Jamaica and the actions envisaged by Section 226 are actions in the Supreme Court of Jamaica. Accordingly, the prescription relative to Attorneys' fees can have no application to fees in relation to legal work done by an Attorney relative to suits commenced and prosecuted in foreign jurisdictions.

Secondly, Dr. Barnett submitted that even if Section 226 of the Judicature (Civil Procedure Code) Law did previously exclusively regulate suits brought by or on behalf of infants, in whatever jurisdiction, the position since the Legal Profession Act came into force is different because Section 21 of the Legal Profession Act gives authority for a contingency fee for any kind of legal work done, and in any jurisdiction, and in relation to such fees, taxation is not a condition precedent to action for recovery of the same.

Finally Dr. Barnett submitted that on the face of the writ and statement of claim the issues raised necessitated the construction of statutes and documents and also the adduction of evidence in order to determine the appellant's rights. Accordingly the learned judge had no jurisdiction to strike out the writ and statement of claim because the jurisdiction summarily to strike out a writ and statement of claim is exercisable only in plain and obvious cases showing no reasonable cause of action.

Mr. Hylton for the respondents conceded that the principle stated by Dr. Barnett on which a writ and statement of claim may be struck out as showing no reasonable cause of action is correct. He however submitted that on the face of the writ and statement of claim there was disclosed no enforceable contract for the reason that some of the defendants are infants and Section 226 of the Judicature (Civil Procedure Code) Law governed and concluded the matter. Developing on this proposition Mr. Hylton submitted that Section 226(6) of the aforesaid law was applicable whether the action in relation to which the cost became payable was prosecuted in Jamaica or in a foreign jurisdiction. Secondly, he submitted that the said sub-section was applicable because the appellant nowhere in his statement of claim averred that what he did was to prosecute

a claim in a foreign court, to the contrary what he averred that he did by way of legal work included the filing of suit in Jamaica which came within Section 226.

Section 226 (1) (2) and (6) reads as follows:

Section 226:

"(1) In any cause or matter in which money or damages are claimed by or on behalf of a person who is an infant or of unsound mind, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court or a Judge.

(2) Where in any cause or matter whatever, money paid into court is accepted by or on behalf of any such person or money is adjudged, ordered or agreed to be paid to or for the benefit of any such person, the money shall be dealt with in accordance with directions given by the Court or a Judge and not otherwise; and without prejudice to the generality of the power of giving directions under this paragraph, the directions may provide that the money shall wholly or partly be invested or otherwise dealt with.

The form No. 2 in Schedule XI to this Law shall be used in any case to which it is applicable.

.....

(6) The costs of the plaintiff or if more than one of all the plaintiffs in any such cause or matter or incident to the claims therein or consequent thereon shall be taxed by the Registrar, as between party and party and as between solicitor and client, and the Registrar shall certify the respective amounts of the party and party and solicitor and client costs, and the difference (if any) and the proportion of such difference (if any) payable respectively by any adult party to the cause or matter and by or out of the moneys of any party who is an infant or person of unsound mind, and no costs other than those so certified shall be payable to the solicitor for any plaintiff in the cause or matter."

In my view Mr. Hylton's submission that Section 226(6) is applicable to and prima facie negatives any reasonable cause of action otherwise appearing on the appellant's statement of claim on the ground that the section has extra-territorial validity is fallacious. As Dr. Barnett has correctly stated the Judicature (Civil Procedure Code) Law prescribes and regulates the procedure to be followed in causes and matters prosecuted in the Supreme Court of Judicature of Jamaica.

Section 3 of the Judicature (Civil Procedure Code) Law reads thus:

> "Where mention is made in the Judicature (Supreme Court) Law of the Civil Procedure Code, this Law shall be taken and meant to be referred to."

Sections 27 and 28 of the Judicature (Supreme Court) Act re-enacting Sections 24 and 25 of the Judicature (Supreme Court) Law provide as follows:

> "Section 27:
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> Subject to subsection (2) of Section 3, the Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island ...."

> "Section 28:
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> Such jurisdiction shall be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Code and the law regulating criminal procedure, and by such rules and orders of court as may be under this Act ....."

It is patently clear having regard to the above provisions that the "cause or matter" referred to in Section 226(1) of the Judicature (Civil Procedure Code) Law relates to cause or matter in the Supreme Court of Jamaica exercising jurisdiction in the Island in accordance with the aforesaid Civil Procedure Code.

The Judicature (Civil Procedure Code) Law being adjectival cannot extend the territorial jurisdiction given to the Supreme Court by the Judicature (Supreme Court) Act. Since Section 226(6) relates to Attorney's costs in the cause or matter mentioned in Section 226(1) it must necessarily be confined to cause or matter prosecuted in the Supreme Court exercising jurisdiction in Jamaica.

Mr. Hylton further submitted in the alternative that even if Section 226(6) did not have extra-territorial effect it could still be invoked because the appellant as part of the legal services rendered on behalf of the infant respondents did in fact institute legal proceedings here, the fees in relation to which are covered by the contingency agreement. In this again Mr. Hylton's submission is unsound because the "cause or matter" specified in Section 226(1) to which Section 226(6) relates is a "cause or matter in which money or damage are claimed." The suit brought by the appellant in Jamaica was not such a cause or matter but rather one seeking a declaration as to paternity albeit necessary for the successful conclusion of the suit for damage in the Supreme Court of the State of New York. It follows therefore that Section 226(6) does not cover the claim for fees in the present case because the appellant's statement of claim is not a claim for costs arising out of any cause or matter brought by or on behalf of an infant in the Supreme Court of Jamaica in which a claim for money or damages is made.

Having concluded that Section 226 of the Judicature (Civil Procedure Code) Law does not control or govern the matter, it is unnecessary for me to consider the alternative submission of Dr. Barnett relative to the effect of Section 21 of the Legal Profession Act on the said Section 226. I accordingly expressly refrain from placing any interpretation on the scope and effect of Section 21 of the Legal Profession Act.

I am of the view that the learned judge erred in law in applying the provisions of Section 226 of the Judicature (Civil Procedure Code) Law in the determination of the issue that the appellant could not sue on his contingency fee agreement but only in respect of his taxed costs.

I consider next whether, the writ and statement of claim were rightly struck out as showing no reasonable cause of action by the application thereto of established principles independent of the erroneous application of Section 226 of the Judicature (Civil Procedure Code) Law.

The learned judge is authorised by Section 238 of the Judicature (Civil Procedure Code) Law to order the striking out of any pleading on the ground that it discloses no reasonable cause of action or answer. In construing Order 18 - R. 19 of the Rules of the Supreme Court in England which is pro tanto in pari materia with our Section 238, the courts in England have consistently held as firmly established that the summary procedure of striking out pleadings can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" - see Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company (1892) 3 Ch. 274 and Wenlock v. Maloney & Others (1965) 2 All E.R. 871. In the present case once it is accepted as the basis for determination, that the facts averred in the statement of claim are to be taken as proved for purposes of the summons, then the following facts emerge namely:

(1) a written agreement for fees in the terms stated in paragraph 12;

(2) services rendered within the scope of the written retainer as stated in paragraph 8;

(3) repudiation of the agreement by the first respondent on behalf of all the respondents after all ressonable services within paragraph 8 have been rendered;

(4) absence of any statutory provision or rule of law prohibiting an action claiming such rights as may flow from the contractual relationship bearing in mind the pleading that the services rendered to the infants constituted necessaries suited to their condition and station in life and were for their benefit.

In my view, the statement of claim does disclose a cause of action. Whether or not it is likely to succeed is not a ground for striking it out. We feel that, but for the learned judge's pre-occupation with the applicability of Section 226(6) of the Judicature (Civil Procedure Code) Law to the issue raised before her, she would have given due weight to the facts pleaded and would undoubtedly have applied the correct principle namely that since the statement of claim cannot be said to be so plainly and so obviously unsustainable, then it was not a case in which her summary jurisdiction could be exercised to strike out the pleadings.

For the reasons given I am satisfied that the appellant's appeal ought to be allowed.

ROWE, J.A.:

I agree. The appeal is accordingly allowed and the order of the court below is set aside. There will be cost to the appellant to be agreed or taxed.

CAREY, J.A.:

I entirely agree.