[2021] JMCA Civ 21A

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00053, COA2020CV00001 & COA2020CV00015

BETWEEN	**DIAN WATSON**	**APPELLANT**
AND	**CAMILLE FEANNY**	**1ST RESPONDENT**
AND	**ANNA AGUILAR**	**2ND RESPONDENT**
AND	**HEADLEY FEANNY JR**	**3RD RESPONDENT**
AND	**HEADLEY FEANNY**	**4TH RESPONDENT**

Written submissions filed by Dr Mario Anderson for the appellant

Written submissions filed by Munroe & Munroe for the respondents

21 May 2021

(Ruling on Costs)

PHILLIPS JA

[1] I have read in draft the judgment of Simmons JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

P WILLIAMS JA

[2] I, too, have had the opportunity of reading in draft the judgment of Simmons JA and agree with her reasoning and conclusion and have nothing useful to add.

SIMMONS JA

[3] On 16 April 2021, the court gave the following decision in these appeals:

> "(1) The appeal against the order of L Pusey J made on 15 May 2019 is dismissed.
>
> (2) The appeal against the order of D Fraser J made on 13 December 2019 is dismissed, save and except the order for the bill of costs to be taxed by the registrar, as the said bill of costs does not comply with section 22 of the LPA.
>
> (3) Paragraph 4 of the order of D Fraser J made on 13 December 2019 directing the registrar to tax the bill of costs is set aside.
>
> (4) The appeal against the order of D Fraser J made on 6 January 2020 is dismissed.
>
> (5) Costs are awarded to the respondents to be agreed or taxed, unless the appellant within 14 days of the date of this order files and serves written submissions for a different order to be made in relation to costs. The respondents shall file written submissions in response to the appellant's submissions within seven days of service upon them of the appellant's submissions."

[4] In keeping with the direction of the court, the appellant and the respondents filed their submissions on costs on 30 April and 6 May 2021, respectively.

[5] The background to this matter is set out in detail in **Dian Watson v Camille Feanny and others** [2021] JMCA Civ 21 and so only needs now to be briefly stated for this ruling on costs.

[6] The appellant, an attorney-at-law, was retained in February 2014 by the respondents, who were the personal representatives in the estate of Headley Feanny, deceased, to provide legal services in relation to the estate. The appellant obtained a grant of probate and completed the transmission of the properties in the estate to the

respondents in 2015. She subsequently signed and issued an invoice and a final statement of account for those services which indicated that $27,894,166.62 was due and payable.

[7] In 2018, the respondents terminated her retainer and, through their new attorneys-at-law, disputed the amount said to be owing as fees. Having not received payment from the respondents in satisfaction of the fees itemized in the bill of fees, the appellant, on 26 September 2018, lodged caveat no 2148976 against the certificates of title for the properties in the estate

[8] On 30 January 2019, a bill of costs in the amount of $225,191,591.90 was filed by Dr Anderson on the appellant's behalf in the Supreme Court for taxation ('the taxation proceedings'). The said bill of costs was signed by Dr Anderson and not the appellant. A default costs certificate was issued by the registrar of the Supreme Court as the respondents, having been served with a notice to serve points of dispute, did not do so.

[9] The respondents lodged an instrument of transfer in respect of one of the properties in the estate ('Little Spring Garden') and the appellant was consequently served with a notice to caveator on 11 March 2019, which indicated that the respondents were attempting to deal with that property.

[10] On 1 April 2019, the appellant filed an *ex parte* application for an injunction in the taxation proceedings to restrain the sale of the Little Spring Garden property and for a declaration that the caveat should not be removed. An interim injunction was granted by Thomas J. The respondents then filed an application to strike out the proceedings and to discharge the interim orders made by Thomas J. Both applications were heard on 15 May 2019 by L Pusey J, who discharged the interim orders and ruled that the "matter as presently formulated [did] not lend itself to injunctive relief". That decision was the subject of appeal no COA2019CV00053.

[11] A notice of application was then filed in this court, in which the appellant sought an injunction to restrain the Registrar of Titles and the executors from registering any dealing with the Little Spring Garden property. She also sought an order restraining the

Registrar of Titles from removing caveat numbered 2148976 from any other property in the estate.

[12] The application was considered by a single judge of this court on 6 June 2019 who agreed with the reasoning of L Pusey J and refused to grant the relief sought. The single judge stated that a claim would have to be filed in order for the appellant to recover her fess. Notwithstanding, the appellant pursued the matter by filing an application for a provisional order for attachment of debts in the court below ('the attachment of debts proceedings'). D Fraser J (as he then was) granted the provisional order on 14 November 2019 and on 13 December 2019, having heard the parties, set aside the default costs certificate and the provisional attachment of debts order and ordered the taxation of the bill of costs. This was the subject of appeal no COA2020CV00015.

[13] The respondents filed a claim in the Supreme Court on 16 April 2019, seeking the removal of caveat no 2148976 which was lodged against the certificates of title for the properties and to restrain the appellant from lodging any further caveats, on the basis that the appellant's fees did not entitle her to an interest in the properties (caveat proceedings). On 6 January 2020, D Fraser J having heard the parties, ordered the Registrar of Titles to remove the caveat lodged against the certificates of title for the properties and declared that the appellant had no legal or equitable interest in any property belonging to the estate. The Registrar of Titles was also directed not to register any alleged claim for fees owed by the estate and/or its personal representatives. This was the subject of appeal no COA2020CV00001.

[14] On 23 January 2020, the appellant's application in this court for a stay of the orders in the caveat proceedings was refused by Brooks JA (as he then was) in **Dian Watson v Feanny and others** [2020] JMCA App 1 ('**Dian Watson** 2020'). The appellant was also advised to pursue the claim for the recovery of her fees in the court below.

[15] Notices of appeal were filed in respect of the order of L Pusey J and the two orders of D Fraser J. All three appeals were disposed of as indicated in paragraph [3] of this judgment.

Appellant's submissions

[16] Counsel for the appellant commenced by directing the court's attention to rule 64.6(1) and (2) of the Civil Procedure Rules, 2002 ('the CPR'). Rule 64.6(1) states that the court must order the unsuccessful party to pay the costs of the successful party. Rule 64.6(2) on the other hand, gives the court the discretion to order the successful party to pay a part of those costs or make no order as to costs.

[17] Counsel submitted that there should be no order as to costs on the basis that the procedure pertaining to the recovery of an attorney-at-law's fees are of interest to the public at large. Reference was made to the cases of **Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9 and **Capital & Credit Merchant Bank v Real Estate** [2013] JMCA Civ 48 in support of that submission.

[18] It was also submitted that the appellant cannot be faulted for accepting the rules which state that a costs certificate including a default costs certificate is to be enforced as an order or judgment of the court. Counsel stated that whilst there was consensus that an attorney-at-law was required to tax his or her bill of fees in order to recover the same and that a default costs certificate could be obtained, the rules are unclear pertaining to its enforcement. It was also stated that Simmons JA (Ag), as she then was, "made it clear that a claim did not need to be filed to start the taxation process between an attorney and her client or to obtain the default costs certificate and disagreed with the learned judge below that a claim had to be filed".

[19] In the alternative it was submitted that in light of the appellant's partial success on the issue of the procedure which is to be followed for the recovery of an attorney-at-law's fees and the ratio in the court below in respect of the discharge of the caveat, the respondents should be awarded 30% of their costs. Counsel argued that although the

appellant was unsuccessful in relation to the caveat issue, she could not be faulted for lodging the caveat to protect her fees. Reference was made to **Ken Sales and Marketing Limited v Cash Plus Development Limited** [2015] JMCA Civ 14 in support of that submission.

Respondents' submissions

[20] On behalf of the respondent it was submitted that the costs order should not be disturbed as the respondent was successful in every material aspect of the appeals. It was stated that in two of the appeals (injunction and default costs certificate and charging order) the court found that the bill of costs was not in conformity with the Legal Profession Act. In the caveat appeal the court found that the appellant had no interest in or charge on the properties in the estate.

[21] It was further submitted that the appellant, prior to the hearing in February 2020, was aware that two of the appeals were unlikely to succeed as the appellant's application for an injunction was refused by a single judge of this court and also by the court on the same basis as in this appeal.

[22] With respect to the comments made by Simmons JA (Ag) regarding the interplay between section 22 of the LPA and rules 64 and 65 of the CPR, it was submitted that that ground was not determinative of any issue that was central to the appeal. It was pointed out that the court was unanimous in its finding that the bill of costs did not comply with section 22 of the LPA.

[23] The court was also asked to take judicial notice of the fact that the respondents have been successful at every hearing before the Court of Appeal and the Supreme Court and have spent significant sums in the conduct of the litigation.

[24] Where the authorities relied on by the appellant are concerned, it was submitted that they are largely distinguishable or support the respondents' submissions that the cost order should not be disturbed. It was stated that **Ken Sales** is not relevant to the

issue of costs and had already been assessed by the court and deemed unhelpful to the appellant. **Clarke** was said to be distinguishable on the basis that there was no constitutional question in the instant appeals. It was also submitted that there is no special public interest in this matter and as such **Capital & Credit** was also unhelpful to the appellant.

[25] In conclusion, it was submitted that costs generally follow the event and since the respondents were successful in all appeals costs ought to be awarded to the respondents.

Analysis

[26] Rule 1.18(1) of the Court of Appeal Rules ('the CAR') provides that the provisions of part 64 and 65 of the CPR shall apply to the award and quantification of costs in this court. Rule 64.6 of the CPR embodies the well-known principle that costs follow the event. It provides, in part, as follows:

> "(1) If the court decides to make an order about the costs of any proceedings, the general rule is that it **must** order the unsuccessful party to pay the costs of the successful party…
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
>
> (3) In deciding who should be liable to pay the costs the court must have regard to all the circumstances." (Emphasis supplied)

[27] The factors which are to be considered by the court are set out in rule 64.6(4). They are:

> "(a) the conduct of the parties both before and during the proceedings;
>
> (b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(c) ... ;

(d) whether it was reasonable for a party –

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(e) the manner in which a party has pursued-

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue; …".

[28] Counsel for the appellant has urged the court to depart from the general rule on three bases. Firstly, that the issue of whether parts 64 and 65 of the CPR apply to proceedings under section 22 of the LPA are of great public importance. Secondly, that the appellant was partially successful in relation to the issue of the procedure adopted to claim her fees. Thirdly, that there was no pronouncement by this court or the court below, to the effect that a caveat could only be lodged by the appellant if a claim had been filed.

Is the issue of whether parts 64 and 65 of the CPR apply to proceedings under section 22 of the LPA of great public importance?

[29] Counsel for the appellant placed great reliance on the cases of **Clarke** and **Capital & Credit** in respect of this issue. We however, agree with counsel for the respondent that those cases are of no assistance to the appellant. In **Clarke**, this court was concerned with the issue of the constitutionality of rule 2.4(3) of the CAR (now repealed) which empowered a single judge to consider a procedural appeal on paper. Such was the importance of the matter that it was heard by a panel of five judges. Harris JA addressed the issue of costs in this way at paragraph [70]:

> "[70] However, the fact that the issue raised ended favourably for the applicant, this, in itself, does not mean that the respondent should be made liable for costs. The matter proceeded at the instance of the court. The questions as to the constitutionality and validity of the rules permitting a

> single judge to hear and dispose of an appeal have been a concern for the court and in its opinion, the issue, being a matter of law and of great public importance ought to have been resolved. The resolution of the matter is not merely one which inures for the benefit of the applicant but for all litigants. In the circumstances, it would be just that each party bears his own costs. Consequently, there shall be no order as to costs."

[30] It should also be noted, that as pointed out by Morrison JA (as he then was), in **Capital & Credit**, the resolution of the constitutionality issue in **Clarke**, did not resolve the dispute between the parties.

[31] In **Capital & Credit**, the appellant who was the unsuccessful party sought to convince the court that each party should bear its own costs as the matter was one of general public importance. Morrison JA, who delivered the decision of the court, stated that although the matter was one in which sections of the public may have an interest, such an order was not appropriate in the circumstances of the case. He stated at paragraphs [12] and [13]:

> "[12] As CCMB acknowledges, **Clarke v Bank of Nova Scotia Jamaica Ltd** was a matter concerned entirely with a question of public law. Once the constitutionality of rule 2.4(3) of the CAR [sic], a question going to the jurisdiction of a single judge of this court to hear and determine an appeal, was put in issue, the appeal could not proceed, and the dispute between the parties could not be resolved, without it being settled. The resolution of the question by this court did not itself resolve the underlying dispute between the parties. The jurisdiction of the single judge having been clarified, that dispute still remained to be addressed and ultimately determined in the manner sanctioned by the court's decision. Given not only the interests of the parties, but the manifest public interest in knowing the appropriate procedure to adopt in pursuance of a right of appeal, it seems to me to be hardly surprising that the court should have decided that each party should bear its own costs in that case.
>
> [13] In my view, this case is in an entirely different category. I expect that it may well be true that sections - perhaps

> significant sections - of the public may have an interest in the court's interpretation of the Real Estate Dealers and Developers Act ("a novel statute", as CCMB described it). But I would also expect this to be equally true of many of the various types of matters which come before the court from time to time. This appeal was essentially a contest between CCMB's commercial interests and the Board's regulatory powers. Interested as members of the public at large may be in the outcome, there is nothing in that circumstance, in my view, that necessarily makes an order that each party should bear its own costs the most appropriate order in this matter."

[32] The appeals in this matter arose out of a dispute between the appellant and the respondents in respect of her fees. The appeal in the taxation proceedings was resolved in favour of the respondents as no claim had been filed by appellant which could ground her application for injunctive relief.

[33] Where the attachment of debts proceedings are concerned, we found that the bill of costs that had been laid for taxation (which was not signed by the appellant), bore no relationship to the bill of fees that had been signed by the appellant and served on the respondents. As such, the appellant had failed to comply with section 22 of the LPA. We also found that in the absence of a claim being filed, enforcement proceedings could not be invoked.

[34] The comments made by Simmons JA (Ag) were clearly obiter. Paragraph [94] and [124] of the judgment state:

> "[94] Consequently, as counsel for the respondent correctly submitted, the bill of costs, having not been signed by the appellant or served on the respondent as is required by section 22(1) of the LPA, was not eligible to be taxed whether by default or at a hearing before the registrar. In the circumstances, any proceedings based on this bill of costs which did not comply with section 22 were flawed and irregular. **The resolution of the issue of whether section 29 of the LPA embraces the parts 64 and 65 of the CPR would therefore be unnecessary for the determination of the appeal of the decision of D Fraser J.** The default

> costs certificate and the order for attachment of debts were correctly set aside by him."
>
> "[124] I agree with counsel for the appellant that a default costs certificate can generally be issued in taxation proceedings between an attorney and his or her client. **However, this finding does not affect the outcome of this appeal against the order of D Fraser J setting aside the default costs certificate as the bill was not properly laid for taxation**. The learned judge's order setting aside the default costs certificate was correct." (Emphasis supplied)

[35] There was no resolution of the issue of whether parts 64 and 65 of the CPR apply to proceedings under section 22 of the LPA. That was clearly not the main focus of the judgment. In the circumstances, the comments being obiter, cannot be utilized in the determination of the award of costs.

Was the appellant partially successful in relation to the issue of the procedure adopted to claim her fees?

[36] Counsel for the appellant submitted that there was consensus that a default costs certificate could have been obtained if a proper bill of costs had been laid for taxation. That comment is entirely erroneous (see paragraph [34] above). As stated above, the comments in relation to that issue were obiter. In the circumstances, I do not agree with counsel for the appellant that her appeal was partially successful.

Whether there was any pronouncement by this court or the court below, to the effect that a caveat could only be lodged if a claim had been filed?

[37] Counsel for the appellant had argued that the appellant was entitled to secure her fees by lodging a caveat on the properties in the estate on three bases. Firstly, that the fees were a debt owed by the estate. Secondly, that by virtue of section 139 of the Registration of Titles Act ('the ROTA') she had a right to do so. Thirdly, that she was entitled to a solicitor's lien. Brooks JA in **Dian Watson 2020**, found that she was not entitled to lodge the caveat on any of those bases.

[38] Where the executors' obligation to pay all debts and testamentary expenses was concerned, the learned judge of appeal stated that whilst it would be prudent for the executors to settle the debts of the estate before distributing the assets, that obligation did not "bind the assets of the estate".

[39] Brooks JA also found that the appellant was not a beneficiary in the estate nor could she properly claim an estate or interest in any of the properties of the estate. He stated that even if a judgment had been obtained by the appellant there was no automatic entitlement to a caveat, as a court order charging the land with the debt would have had to been obtained pursuant to section 134 of the ROTA.

[40] The submission that the appellant was entitled to a solicitors' lien was described by Brooks JA as "misplaced". He also stated that "[a] solicitor may exercise a lien on documents and property in his or her possession. A solicitor does not obtain a right to charge real property in respect of which the solicitor has done work". He also made the point that there was no real property in the possession of the appellant to which such a lien could be attached.

[41] The learned judge of appeal found that the appeal had no real prospects of success. The appellant was also advised to "pursue her claim filed in the court below, to prove that the respondents are indebted to her for her fees".

[42] This court also found that the appellant was not entitled to lodge the caveat on the same bases. There was no finding that a caveat could only be lodged if a claim had been filed. That was not the issue.

Conclusion

[43] The issue of whether parts 64 and 65 of the CPR are applicable to proceedings under section 22 of the LPA, whilst it is important, is not one which can properly be described as being of interest to the public at large. This was a dispute between an attorney-at-law and her client, which in the words of Morrison JA at para. [13] of **Capital**

& Credit, whilst it may be of interest to sections of the public, "[i]nterested as members of the public at large may be in the outcome, there is nothing in that circumstance…that necessarily makes an order that each party should bear its own costs the most appropriate order...".

[44] In addition, there was no consensus in respect of this issue. The appeals were determined on the bases that the bill of costs laid for taxation did not conform with the requirement of section 22 of the LPA and there was no claim filed in respect of which a judgment could have been enforced. There is also no basis for counsel for the appellant's assertion that the appellant was partially successful in these appeals. The issue of the court not having pronounced that a claim needed to be filed before a caveat could be lodged is a "non-issue" as that was not the subject matter of the appeal in the caveat proceedings. There therefore, seems to me to be no special circumstances which would justify a departure from the long established principle that costs should follow the event.

[45] In my judgment, therefore, the respondents having prevailed, an order for costs in their favour against the appellant is appropriate.

PHILLIPS JA

ORDER

Pursuant to order no 5 made in **Dian Watson v Feanny and others** [2021] JMCA Civ 21 made on 16 April 2021, costs are awarded to the respondents to be agreed or taxed.