[2019] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00053

APPLICATION NO COA2019APP00133

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES
THE HON MISS JUSTICE SIMMONS JA (AG)

BETWEEN	**DIAN WATSON**	**APPLICANT**
AND	**ESTATE OF HEADLEY FEANNY (Deceased)**	**1ST RESPONDENT**
AND	**CAMILLE FEANNY**	**2ND RESPONDENT**
AND	**ANNA AGUILAR**	**3RD RESPONDENT**
AND	**HEADLEY FEANNY JR**	**4TH RESPONDENT**
AND	**HEADLEY FEANNY**	**5TH RESPONDENT**

Dr Mario Anderson for the applicant

Clive Munroe instructed by Munroe & Munroe for the respondent

4 and 20 December 2019

PHILLIPS JA

[1] Dian Watson (the applicant) sought an order from this court that would vary or discharge the order made by P Williams JA on 6 June 2019, wherein she refused to grant various injunctive relief pending appeal. The grounds upon which the variation or discharge of this order was sought are that, *inter alia*, the learned judge of appeal had

erred in not accepting that for the purposes of Part 64 of the Civil Procedure Rules 2002 (CPR), a bill of costs is equivalent to a claim; and had used the wrong test in determining whether to grant injunctive relief.

Background

[2] The applicant (an attorney-at-law) was retained by the estate of Headley Feanny (deceased), whose personal representatives are Dr Camille Feanny, Ms Anna Feanny, Mr Headley Feanny Jr and Mr Headley Feanny (the respondents), to obtain a grant of probate and transmission of properties in the said estate to the executors. The estate terminated that retainer before the process was complete and engaged the services of other attorneys-at-law. The applicant claimed that the estate was indebted to her for unpaid legal fees, and so she lodged a caveat against the estate. A bill of costs was laid against the respondents in the sum of $225,191,591.90. No points of dispute having been filed, a default costs certificate was issued against the respondents.

[3] Having received a notice to caveator from the National Land Agency that the respondents had lodged a transfer with respect to property owned by the estate, the applicant sought an injunction, ex parte, restraining that transfer. That application was heard by Thomas J on 3 April 2019, who made orders restraining the sale of that particular property, and preventing the removal of the caveat lodged against the estate, until 30 April 2019, on condition that the applicant filed a supplemental affidavit giving her usual undertaking as to damages in the claim, in the event that her attempt to recover the sums due was unsuccessful. An affidavit was filed by the applicant in compliance with that condition.

[4] The respondents filed an application seeking to, *inter alia*, strike out the bill of costs that had been laid, the default costs certificate that had been issued pursuant thereto, and to discharge the order made by Thomas J. The main grounds of that application were that the bill of costs that had been laid did not constitute a claim pursuant to the Legal Profession Act (LPA) and the CPR, and so there was no claim before the court; the order has been made ex parte; the applicant had no interest in the estate; and the estate was not indebted to the applicant. That application was heard by L Pusey J on 15 May 2019, who made the following orders:

> "a) Interim order made on the 3rd day of April, 2019 by the Honourable Miss Justice A. Thomas is discharged.
>
> b) The Court rules that this matter as presently formulated does not lend itself to injunctive relief.
>
> c) Costs of this hearing to the Respondents to be taxed if not agreed.
>
> d) Leave to appeal refused...."

[5] An appeal against that decision was filed on 29 May 2019, and amended on 17 June 2019, challenging various findings of fact and law as follows:

> "1. That an Attorney laying a Bill of Costs against her client was not equivalent to filing a claim in the Supreme Court.
>
> 2. That a Default Costs Certificate was not equivalent to an Order of Judgment of the Court despite the clear wording of Rule 64.2(3) of the Civil Procedure Rules 2002 and the definitions therein of the term 'order'.
>
> 3. That the [applicant] had to file a separate Claim to determine her interest in the Estate of Headley

Feanny, when the Respondent had already done so on the 16th day of April, 2019 by filing Claim No. SU 2019 CV 01657 and in fact, a Default Costs Certificate was issued determining the extent of her interest in this claim SU 2019 CV 00262."

[6] The appeal was filed on the following eight grounds:

"1. That the Learned Judge erred by finding that the Bill of Costs was not equivalent to a Claim in the Supreme Court.

2. The Learned judge erred by finding that a Default Costs Certificate was not equivalent to an Order of Judgment of the Court.

3. The Learned Judge, failed to recognize that the SU 2019 CV 01657 had been filed by the Respondents to determine the interests of the [applicant] on the 16th day of April, 2019, which was before the Inter Partes Hearing held on the 15th day of May, 2019.

4. The Learned Judge erred in discharging the interim Injunction on the basis that it was not formulated as required by Civil Procedure Rules 2002, Part 17.

5. The Learned Judge failed to appreciate that the extent of the charge against the estate was determined by the taxation procedure, and that this was a charge against the Estate of Headley Feanny.

6. The Learned Judge failed to apply or consider the principles of post judgment relief.

7. The Learned Trial Judge failed to consider the effect of a Solicitor's/Attorney's lien on the Estate and the role of equity in protecting such a lien.

8. The Learned Judge failed to analyse the principles of granting an injunction."

[7] The orders being sought in the appeal are:

> "1. That an injunction be granted restraining the Respondents/Executors or their agents, and the Registrar of Titles from dealing with transfer no 2169154 until further ordered by this Court.
>
> 2. That Caveat no. 2148976 shall not be removed from the Titles in the Estate until further ordered by this Court.
>
> 3. In the event, that Caveat number 2148976 on the title of property registered at Volume 1078 Folio 6 has lapsed, that the proceeds of the sale of property registered at Volume 1078 Folio 6 be paid into Court until the appeal is determined.
>
> 4. Costs of this Appeal and costs below to the [applicant] to be agreed or taxed."

[8] On 29 May 2019, the applicant also filed a notice of application seeking orders restraining the registration of the property for which the transfer was being sought; preventing the removal of the caveat that had been lodged against the estate; or in the alternative, if the caveat had lapsed, for payment of the proceeds of sale of that property into court. The notice of application was heard by P Williams JA on 6 June 2019, where she made the following orders:

> "Application for injunction pending appeal under rule 2.11(1)(c) of the Court of Appeal Rules is required to show that [the] applicant has an appeal that shows a reasonable prospect of success. The applicant has failed to demonstrate that Pusey J was plainly wrong in discharging the interim injunction.
>
> It seems to me that even after billing the former client, the applicant would still be required to commence an action for recovery of the fees which would require filing a claim. See

sec 22 Legal [Profession] Act and [8.1(1)] of the Civil Procedure Rules.

In any event, I am not satisfied that the injunctive relief applied for would have been appropriate in these circumstances.

The notice of application for court orders filed 29th May 2019 is therefore refused."

The application to vary or discharge the order of P Williams JA

[9] As indicated, on 24 June 2019, the applicant filed an application before the full Court of Appeal, seeking to vary or discharge the order made by P Williams JA on 6 June 2019, on the following grounds:

"1. The Court has the power pursuant to Section 2.11 (2) of the Court of Appeal Rules to vary or discharge any order made by a single judge.

2. Section 22 of the Legal Profession Act provides that an Attorney seeking to recover her costs may have her bill taxed; the Applicant in fact did lay a bill of costs and obtained a Default Costs Certificate, dated the 8th day of March, 2019.

3. Filing a bill of costs pursuant to Part 64 of the Civil Procedure Rules by an Attorney for costs against her client is equivalent to a claim for the purposes of the Civil Procedure Rules and thus satisfies Rules [8.1(1)] in all of the circumstances.

4. The Applicant is entitled to an injunction to protect her Solicitor's lien.

5. Injunctive relief ought to have been granted to keep the caveat in place on property registered at Volume 1078 Folio 6 and not to remove the said caveat from other properties in the Estate as a part of post – judgment relief to protect the Court's Order granting the Default Costs Certificate or as prayed for in the

alternative that the net proceeds of the sale be paid into Court until the appeal is heard.

6. The test for injunctive relief ought to be analysed based on the established principles of whether there is a serious issue to be tried and whether granting such an injunction causes irremediable harm to the Applicant or the Respondents, rather than whether the applicant has a reasonable prospect of success."

Discussion and analysis

[10] It is clear that this court has the power to vary or discharge an order made by a single judge of this court (see rule 2.11(3) of the Court of Appeal Rules 2002 (CAR)).

[11] Section 22 of the LPA, particularly section 22(4), does provide for an attorney (the applicant) to have fees taxed by the taxing master after giving notice to the party (the estate of Headley Feanny), and to proceed as if a reference for such taxation had been ordered by the court. However, the issue which forms a main ground of appeal before the court in the notice of appeal and which is yet to be heard, is whether that bill of costs is equivalent to a claim in the Supreme Court.

[12] To draw an analogy between the applicant's bill of costs (which must be taxed) and a notice of appeal being filed as an originating document, Dr Mario Anderson, counsel for the applicant, relied on the statement of Brooks JA from this court in **RBC Royal Bank (Jamaica) Limited and Others v Ocean Chimo Limited** [2016] JMCA App 2. The main issue in that case was whether a notice of appeal was equivalent to a claim form. In deciding that issue, Brooks JA at paragraph [25] said:

> "...[I]t must be held that for these purposes a notice of appeal was the equivalent of a claim form. This inference may be drawn from the fact that both documents are originating documents for the purposes of the proceedings before the respective courts...."

[13] It is of significance to note **Royal Bank (Jamaica) Limited v Ocean Chimo** related to a completely different situation, as it turned on whether time ran in the long vacation for the purposes of filing a notice of appeal. It followed the dictum in **Michael Stern v Richard Edward Azan and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 93/2008, Application No 122/2008, judgment delivered 19 September 2009, that the claim form should be considered equivalent to the notice of appeal. The learned judge of appeal also took note of the fact that on 16 November 2011, rule 3.5 of the CPR was amended to state that in respect of all statements of case, except the claim form, time does not run during the long vacation.

[14] However, as indicated, in this appeal, the main issue is whether the bill of costs can be considered equivalent to a claim form. It was the position of Mr Clive Munroe, counsel for the respondents, that section 22 of the LPA was applicable to the instant case, but there was no connection whatsoever between that section and the regime set out in Parts 64 and 65 of the CPR. In my view, on the face of it, taxation obtained by way of section 22 of the LPA may only certify the figure that is being claimed by an attorney. Prima facie, it does not allow for collection of the fees as it is not a judgment. Moreover, since no claim has been filed based on any known cause of action, even if a default costs certificate was obtained thereafter (allegedly pursuant to section 29 of the

LPA and Parts 64 and 65 of the CPR), the issue would still arise as to whether a claim ought to have been filed in order to obtain recovery of outstanding fees, and to get enforcement of the same, particularly, if a injunction is being requested, and an undertaking as to damages may have to be ordered (as was done in this case by Thomas J).

[15] In the event that his previous arguments were not accepted, Dr Anderson proffered alternative arguments relating to how the learned judge ought to have treated with the applicant, having obtained the "judgment" in the form of the "default costs certificate", prior to a claim having been filed. He referred to rule 8.1 of the CPR, which embraces rule 3.7 and indicates that a "document" is filed by delivering it, posting it or faxing it to the registry where the claim is proceeding or intending to proceed. He argued that pursuant to rule 11.5(3) of the CPR, an application made before a claim has been issued must be made to the registry where it is likely that the claim to which the application relates will be made. He also relied on rule 17.2(1) of the CPR which states that an interim remedy may be made at any time including before a claim has been made, and after judgment has been given. However, there are specific conditions and bases for this to be done. Rules 17.2(2), (3) and (4) read as follows:

> "(2) However –
>
> (a) paragraph (1) is subject to any rule which provides otherwise;
>
> (b) the court may grant an interim remedy before a claim has been made only if –
>
> (i) the matter is urgent; or

(ii) (ii) it is otherwise desirable to do so in the interests of justice;

(c) unless the court otherwise orders, a defendant may not apply for any of the orders listed in rule 17.1(1) before filing an acknowledgment of service in accordance with Part 9.

(3) Where the court grants an interim remedy before a claim has been issued, it must require an undertaking from the claimant to issue and serve a claim form by a specified date.

(4) Where no claim has been issued the application must be made in accordance with the general rules about applications contained in Part 11."

[16] Dr Anderson has not shown us that any of the above requirements have been met, and even if those provisions had been complied with, it would nonetheless be a matter for L Pusey J, in the exercise of his discretion, to decide whether he was satisfied that such an interim remedy ought to have been given. In the exercise of his discretion, L Pusey J thought that the suit "as presently formulated does not lend itself to injunctive relief". We must always remember the words of Diplock LJ in the case of **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, with regard to the role of the appellate court when reviewing the exercise of discretion of a single judge.

[17] There are clearly issues to be determined by the full court, but I do not think that Dr Anderson has persuaded us that L Pusey J and or P Williams JA were plainly wrong. Both judges seemed to have interpreted section 22 of the LPA as requiring that a claim must be filed for the recovery of fees, and that taxation, per se, is a

quantification of fees claimed by an attorney, and not a judgment permitting enforcement thereafter. This is particularly so as it was obtained pursuant to a bill of costs and subsequent notice of taxation, and not by way of a claim between party and party, on a cause of action recognized by the court.

[18] The issue of the use of injunctive relief to keep the caveat in place, falls under the same rubric as to whether a claim form should have been filed to commence the proceedings in order for the attorney to recover his fees, obtain a judgment and thereafter enforce the same. This extends also to the question of an injunction to protect the solicitor's lien. However, this raises an additional question as to whether the facts of this case support a solicitor's lien at all, particularly, as the costs do not arise from contentious litigation proceedings, and there is no property in the hands of the attorney.

[19] We accept the dictum of Harris JA in **Barrington Earl Frankson v The General Legal Council (Ex parte Basil Whitter at the instance of Monica Whitter)** [2010] JMCA Civ 52, that where the services of the attorney had been terminated, while section 21 of the LPA would be inapplicable, recourse could be had pursuant to section 22. However, we would wish to make a comment on **Adolphy DeCordova Samuels and Others v Clough Long & Co** [2016] JMCA Civ 28. One must be careful how one draws an analogy on facts that are entirely different. We agree with Dr Anderson that that case and the case at bar are distinguishable, as the instant case does relate to an attorney/client relationship with regard to collection of outstanding fees, which was not the case in **Adolphy Samuels v Clough Long & Co**.

[20] In that case, Clough Long & Co, who were the attorneys-at-law for the vendors in an agreement for sale, prepared, filed and served a bill of costs and notice of taxation, attempting to collect outstanding sums due from a purchaser in that agreement, which also included amounts agreed to have been paid to the firm by way of closing costs. Both counsel appearing before the Court of Appeal in that case agreed that sections 21 and 22 of the LPA could not apply. Therefore Clough Long & Co's endeavour to pursue those sections, having issued a bill of costs and notice of taxation, and then trying to collect on taxation allegedly by way of alternate relief, and not through an action for recovery of sums due on an agreement for sale, was clearly entirely inapplicable, and wrong.

[21] However, we also agree with Mr Munroe that, prima facie, it appears from **Adolphy Samuels v Clough Long & Co**, that in the attorney/client relationship, the attorney can pursue sections 21 and 22 of the LPA, but in our view, there were no details in the dicta of that case setting out exactly how that was to be done, and nothing had been said as to what effect, if any, section 29 of the LPA and Parts 64 and 65 of the CPR had on issues relating to an attorney/client relationship. Indeed, section 29 of the LPA appears to refer to rules promulgated with reference to matters concerning the LPA itself which would therefore preclude any interaction arguably between Parts 64 and 65, and section 22 of the LPA. Additionally, as one may recall, pursuant to the Supreme Court Rules promulgated in 1882 and repealed by the CPR, an action under that regime for the recovery of costs could not have been commenced

until the costs had been taxed by the registrar after notice to the party intended to be charged.

[22] What is clear in the instant case is that counsel for the applicant could not point to any provision in the LPA, the CPR or CAR which specifically states that the attorney could commence collection of fees by filing a bill of costs and notice of taxation simpliciter, nor could he identify any specific expressed provision which stated that the attorney could enforce a default costs certificate as a money judgment having only filed a bill of costs and a notice of taxation. Those issues will have to be decided by the full court on appeal, but at this stage, we cannot say that there seems to be a good chance of success in showing that L Pusey J, in the exercise of his discretion, or P Williams JA, in refusing to grant an injunction, were palpably wrong.

[23] The applicant has not indicated how the order made by P Williams JA is to be varied or discharged, but we have assumed, by inference, that the injunction prayed for ought to be in the terms ordered by Thomas J which order was discharged by L Pusey J. Additionally, if the caveat has lapsed and the property has been sold, then the applicant would wish that the proceeds should be restrained, and also that the caveat in relation to all the other properties named therein, should be removed. However, this latter order would have required much more information to have been submitted to the court, such as the values of the properties and the potential prejudice to the parties.

[24] As a consequence, we are constrained to make the following orders:

1) The application filed 20 June 2019 to vary and discharge the order of P Williams JA is refused.

2) Costs of the application abide the outcome of the appeal.