[2021] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00053, COA2020CV00001 & COA2020CV00015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

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**

Dr Mario Anderson for the appellant

Clive Munroe Jr instructed by Munroe & Munroe for the respondents

24, 25 February 2020 and 16 April 2021

PHILLIPS JA

[1] I have had the opportunity of reading in draft the full reasons of my learned sister Simmons JA (Ag), in relation to the three appeals which were before us for determination. I accept and adopt gratefully the detailed background facts set out by her and will not repeat them. I am in agreement with her reasoning and the disposal of appeal no COA2019CV00053, against the decision of L Pusey J, made on 15 May 2019 refusing

injunctive relief. I agree with Simmons JA (Ag)'s finding that the bill of costs filed in the matter did not equate to a claim in the Supreme Court, which in the circumstances was required. There appear to be several issues in dispute with regard to the contract between the appellant and the respondents in respect of the work which was to have been performed by her, and the fees that she was to have been paid. Indeed, the respondents claim that the appellant has been overpaid.

[2] I wish to note that with regard to the grounds of appeal filed against the decision of L Pusey J, the grant of the default costs certificate was not an issue before him. He made no finding that the default costs certificate was not equivalent to an order or judgment of the court. Nor did he make any finding that the appellant's fees were a charge on the estate which were to be determined by the taxation procedure. There also was no indication that there were any submissions before L Pusey J in relation to the effect of a solicitor's lien with regard to this matter. It was L Pusey J's position that "the matter as presently formulated did not lend itself to injunctive relief". The appellant had commenced the matter for the recovery of her fees by way of a bill of costs, on an indemnity basis.

[3] I accept the detailed analysis of my learned sister Simmons JA (Ag) with regard to the appeal from the decision of L Pusey J, as set out in paragraphs [56] to [72] of her reasons for judgment. The appellant was required to file a claim to recover her fees pursuant to section 22 of the Legal Profession Act (LPA). Any injunction to restrain the respondents/ executors from dealing with property in the estate, or particularly lands part

of Little Spring Garden in the parish of Portland, registered at Volume 1078 Folio 6 of the Register Book of Titles, by way of transfer no 2169154, or any order restraining the removal of the caveat numbered 2148976 from the said certificate of title, ought to have been requested in a claim properly filed. L Pusey J's order, to set aside the injunctive relief granted by Thomas J on 3 March 2019, was therefore correct.

[4] With regard to the orders of D Fraser J, firstly, those made on 13 December 2019 in appeal no COA2020CV00015 (default costs certificate and provisional attachment of debt proceedings), I agree with my learned sister Simmons JA (Ag) that, on the application of the respondents, D Fraser J was correct in setting aside the default costs certificate and the provisional order for the attachment of debts. I agree with the reasoning of my learned sister, as set out in paragraphs [90] to [94] in her reasons for judgment, that the appellant failed to comply with the provisions of section 22(1) of the LPA. There was no evidence that she had submitted a bill of fees to the respondents which had been signed by her, and which after the expiry of one month, and nonpayment of the same, she had filed a claim for the recovery of the said fees. In fact, the appellant has not filed any claim at all for the recovery of her fees. Additionally, the amount claimed in her statement of account to be due to her as fees from the respondents, was completely different from the amount stated to be due to her in the bill of costs signed and filed by Dr Anderson allegedly on her behalf, by approximately $200,000,000.00, without any explanation therefor. So, ultimately, there was no bill of fees signed by her, which had been served on the respondents, and certainly not in the amount stated in the bill of costs of $225,000,000.00. The respondents would therefore have had no notice of

the sum being claimed in the bill of costs. As a consequence, I agree that there is no bill of fees submitted pursuant to section 22(1) of the LPA, which could properly be submitted for taxation. Accordingly, in my view, in the circumstances of this case, there would be no basis to consider the question of the validity of the issue of the default costs certificate, or the provisional order for the attachment of debts which was based on it, for enforcement as an order or judgment of the court. The taxation procedure would not have arisen in this case. The orders made by D Fraser J setting aside those orders were therefore clearly correct. The grounds of appeal could not succeed. We have not had the benefit of D Fraser J's reasons as none have been provided, and so we have made our decision on the basis of the material before us. Suffice it to say that save for his direction that the bill of costs should be taxed, the orders made by D Fraser J cannot be faulted. The bill of costs however cannot be taxed, for, as stated, it does not comply with section 22(1) of the LPA, and I would so order.

[5] In passing, I will address the extensive submissions by Dr Anderson on the impact of section 29 of the LPA on the deliberations and determination of this matter. Those submissions, related to whether parts 64 and 65 of the Civil Procedure Rules (CPR) are part of "the rules of court which may be made repealing, varying or adding to any of the provisions of this Part [V] other than section 21" (section 29 of the LPA), thereby including the default costs certificate regime in the taxation procedure in the CPR. For my own part I would have expected that rules would have been specifically promulgated under the LPA pursuant to that section, indicating the particular application, if at all, of the relevant provisions of the CPR. At the moment the references lack specificity and suggest more

questions than answers. They seem far too vague to me, as currently stated, for the repeal, and certainly not the implied repeal, of the primary legislation requiring taxation of the attorney's bill of fees. If the default costs certificate regime set out in part 65, section 2 of the CPR was to be embraced by the LPA, through section 29 of the LPA, and to have the expressed intention of taxing the attorney's fees by the registrar under the LPA, I would have expected the rules if promulgated pursuant to section 29 to have made the nature and scope of the power clear and plain, in order for it to be effective in that regard. Contrary to that contention, however, my learned sister Simmons JA (Ag) has opined, inter alia, that section 29 of the LPA is a Henry VIII clause or provision in a primary act which gives power for subsidiary legislation to include a provision to amend repeal or otherwise affect provisions of the main act, and thus the CPR, particularly parts 64 and 65, repeal, vary, alter and/or add to the relevant sections of the LPA, dealing with the taxation procedure, between attorney and client. This however would not include enforcement of any order made on such taxation, as a claim had not been filed. Ultimately, however, in my view, it is not necessary to decide that point, or to come to any conclusions on those issues in this case, as the taxation procedure was not triggered either under the LPA or potentially under the CPR, in any event.

[6] With regard to appeal no COA2020CV00001 - the caveat proceedings, I have no doubt, and am in entire agreement with the reasoning of my learned sister Simmons JA (Ag), that the appellant was not entitled to have the caveat no 2148976 registered on the certificates of title in the estate of Headley Feanny deceased, on the basis of a solicitor's lien. The alleged outstanding fees did not entitle the appellant to any legal or

equitable interest in the properties in the estate, and so did not constitute a legal or equitable charge on the said real property of the estate. D Fraser J was correct in so finding and ordering the discharge of the said caveat, from binding the property. Additionally, the appellant claimed that there was an obligation by the executors to pay all debts and testamentary expenses, which included legal fees for securing probate, and that created a charge on the estate. But it is important to note that those expenses do not bind the assets of the estate. Executors are at liberty to deal with the assets of an estate by way of sale or otherwise at any time prior to satisfying that obligation. However, they would be advised to make those payments before distributing the assets of the estate to the beneficiaries. But, as indicated, those expenses do not bind the assets of the estate. The grounds of appeal therefore in relation to this appeal must fail.

[7] In the light of the above, I would dismiss the appeals with costs to the respondents, to be taxed if not agreed. However, the order of D Fraser J directing the registrar to tax the bill of costs cannot stand as the said bill does not comply with section 22 of the LPA.

P WILLIAMS JA

[8] I have had the opportunity of reading in draft the contribution of my sister Phillips JA and the full reasons of my sister Simmons JA (Ag). I, like Phillips JA, accept and adopt the detailed background facts set out by Simmons JA (Ag). I am also in agreement that the final disposition of these appeals must be that they are to be dismissed. In arriving at this position I am in full agreement with the reasoning of Simmons JA (Ag) and the

comments and observations of Phillips JA regarding appeal nos COA2019CV00053 and COA2020CV00001. I am however compelled to indicate that in appeal no COA2020CV00015 against the decision of D Fraser J made on 16 December 2019, in the absence of reasons as to his decision, there is sufficient material that satisfies me that the appellant had not established that the bill of costs signed and filed by Dr Anderson truly represented her fees for legal business done by her. This was the first hurdle she had to pass before any taxation proceedings could commence. For the reasons identified by my sisters the appellant failed to surmount this hurdle. To my mind this is sufficient to dispose of this appeal. However, the order directing the registrar to tax the bill of costs would have to be set aside. I note that both my sisters have sought to address the issue regarding section 29 of the LPA and its impact on parts 64 and 65 of the CPR, Simmons JA (Ag) more fully than Phillips JA. I am not totally convinced that the impact is as Dr Anderson submitted, with which my sister Simmons JA (Ag) seems to agree based on her analysis of the issue. I am however inclined to think that certain relevant sections of parts 64 and 65 of the CPR may possibly be utilised by the registrar, as required, in carrying out her role as taxing master in the taxation process authorised under the LPA. Ultimately however, I do not think it necessary in the circumstances of this case to express any final view in regard to this issue.

SIMMONS JA (AG)

[9] These are three appeals which have arisen as a result of the termination of the retainer of the appellant, Ms Dian Watson, attorney-at-law, who was engaged by the respondents who are the personal representatives of the estate of Headley Feanny,

deceased (the estate) to provide legal services in relation to the estate. Specifically, the appellant was engaged by retainer agreement dated 5 February 2014 to prepare all documentation necessary and to obtain a grant of probate, finalize payment of all probate and death duties and complete the transmission of the properties in the estate to the respondents. The fees, expenses and payment arrangements were also set out in the retainer agreement.

[10] The estate was said to be worth in excess of $2,000,000,000.00 and involved some 34 properties (the properties).

[11] The appellant obtained a grant of probate in August 2012 and the transmission of the properties to the respondents was completed in 2015. The estate did not have sufficient funds to pay the requisite taxes and duties, and as such the Friendship Pen property located in the parish of Saint Thomas, which was owned by the deceased's company, was sold in order to defray those costs. The sale of that property was completed in 2015 and the relevant taxes and duties for the transmission of the properties in the estate were paid therefrom.

[12] In 2015, the appellant signed and issued an invoice and a final statement of account for the grant of probate and transmission of the properties which indicated that $27,894,166.62 was due and payable. The said statement also indicated that fees amounting to $50,400,00.00 had been waived.

[13] In 2017, the appellant advised the respondents that she would be leaving the country. She, however, made arrangements for her office to remain open and for her

paralegals as well as two other attorneys, including Dr Anderson, to complete the sale of properties.

[14] In 2018, the respondents terminated her retainer and their new attorneys-at-law, Munroe and Munroe requested the appellant's final statement of account. The appellant complied with that request. Upon receipt of the said statement of account in the amount of $27,894,166.62, Munroe and Munroe, by way of letter dated 17 July 2018, addressed to Dr Anderson, requested the insertion of the dates to which the items in the bill of fees related. They also indicated that the respondents were not minded to pay any fees in relation to the Friendship Pen transaction as the appellant had not been retained to act for them in that matter.

[15] The appellant having not received payment from the respondents in satisfaction of the fees itemized in the bill of fees, lodged caveat no 2148976 against the certificates of title for the properties on 26 September 2018.

[16] Having not arrived at an agreement with the respondents for the payment of her outstanding fees, Dr Anderson filed a bill of costs on the appellant's behalf in the Supreme Court for taxation. This was done on 30 January 2019, in the amount of $225,191,591.90 and was signed by Dr Anderson and not the appellant. In her affidavits sworn to on 29 April 2019 and 22 May 2019 the appellant stated that, as her retainer had been terminated in 2018, she was entitled to be paid for work done and completed prior to its termination on a *quantum meruit* basis. There is no explanation as to the difference between the amount claimed as outstanding in her statement of account

($27,894,166.62) and the amount which Dr Anderson claimed on her behalf in the bill of costs. The respondents have asserted that no money is owed to the appellant and that it is she who owes them.

[17] The bill of costs was given claim no SU2019CV00262 (the taxation proceedings) and was served on the attorneys-at-law for the respondents on 1 February 2019. A notice to serve points of dispute was also filed on that date. The respondents did not file their points of dispute and a default costs certificate dated 8 March 2019 was issued in favour of the appellant[1].

[18] 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.

[19] On 1 April 2019, the appellant filed an *ex parte* application for an injunction in the taxation proceedings to restrain the sale of that property and for a declaration that the caveat should not be removed. In her affidavit in support of that application, the appellant stated that a bill of costs had been filed on her behalf but was not yet taxed. An interim injunction was granted by Thomas J and the perfected order was emailed to the respondents' attorneys. The respondents then filed an application to strike out the taxation proceedings and to discharge the interim orders made by Thomas J. The applications were heard on 15 May 2019 by L Pusey J, who discharged the said interim

[1] See rules 65.20(5) and 65.21 of the CPR.

orders and ruled that the "matter as presently formulated [did] not lend itself to injunctive relief". He refused leave to appeal. It is noted that it was during the hearing of that application that the court and the respondent were informed that a default costs certificate had been issued in favour of the appellant.

[20] On 29 May 2019 the appellant filed an appeal (no COA2019CV00053) against the decision of L Pusey J as well as a notice of application for 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. Among the grounds on which the application was based were the following:

> "3. The Caveat numbered 2148976 lodged on behalf of the Applicant relates to outstanding and unpaid legal fees for services provided by the Applicant to obtain a grant of probate in the Estate of Headley Feanny and transmission of the properties in the Estate [to] the Executors…
>
> and
>
> 6. The Applicant filed a bill of Costs in the Court for Taxation SU 2019 00262, and has obtained a Default Costs Certificate dated the 8th day of March, 2019."

[21] The application was considered by P Williams JA on 6 June 2019 and was refused. The learned judge of appeal stated:

> "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." (Emphasis supplied)

[22] Accordingly, the caveat lapsed and the Little Spring Garden property was sold. Thereafter, another property was sold when the caveat, having been warned, lapsed.

[23] Notwithstanding P Williams JA's orders, the appellant filed, on 2 September 2019, pursuant to the default costs certificate, an application for a provisional order for attachment of debts in the taxation proceedings. D Fraser J (as he then was) granted the provisional order on 14 November 2019. The estate filed an application to set aside the provisional order and the default costs certificate. On 13 December 2019, D Fraser J having heard the parties made the following orders:

> "1. The orders made by the Court on November 14, 2019, including the Provisional Order for Attachment of Debts are set aside;
>
> 2. The Default Costs Certificate issued to the Attorney in this matter by the Deputy Registrar of this Honourable Court is set aside;
>
> 3. The Registrar is directed:

(a) in this matter, not to entertain or issue any application, writ, order or enforcement mechanism pursuant to the stamped Bill of Costs, Default Costs Certificate or Provisional Order for Attachment of Debts issued to the Attorney;

(b) in any other matter within the jurisdiction of this Honourable Court, not to entertain or issue any writ, order or enforcement mechanism pursuant to the stamped Bill of Costs, Default Costs Certificate or Provisional Order for Attachment of Debts issued to the Attorney;

(c) in any other matter within the jurisdiction of this Honourable Court, to revoke and/or recall any writ, order or enforcement mechanism pursuant to the stamped Bill of Costs, Default Costs Certificate or Provisional Order for Attachment of Debts issued to the Attorney.

4. The Court directs that the Registrar of the Court shall tax the Bills of Costs before the Court in this matter, as a matter of priority. This order is stayed pending the outcome of the appeal in COA2019CV00133, or directions from the Court of Appeal concerning how the taxation of the Bill of Costs is to proceed."

[24] The respondents also filed a claim in the Supreme Court on 16 April 2019, (SU2019CV01657) which sought 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. 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 of 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. The Registrar of Titles has complied with those orders.

[25] On 9 January 2020 the appellant filed an application in this court for a stay of the aforementioned orders. On 23 January 2020, that application was refused by Brooks JA (as he then was), on the basis that the alleged debt did not constitute a charge on the real property of the estate and as such the appeal had no real prospect of success. A notice of appeal (no COA2020CV00001) of D Fraser J's order dated 6 January 2020, directing the removal of the caveats, was filed simultaneously with the application.

[26] The appellant was granted leave to appeal the order of L Pusey J made on 15 May 2019, refusing injunctive relief (no COA2019CV00053) and that of D Fraser J made on 6 January 2020 directing the removal of the caveats (no COA2020CV00001). Those appeals were set down for hearing on 24 February 2020. On that day, we granted permission to the appellant to appeal the order of D Fraser J made on 13 December 2019 (no COA2020App00263), setting aside the default costs certificate and the provisional attachment of debts order. The appellant was also directed to file and serve forthwith a notice of appeal in the same terms as the draft notice which is at page 10 of volume 3 of the record. We also ordered that appeal Nos COA2020CV00001 and COA2020CV00015 (filed 24 February 2020) were to be heard with appeal No COA2019CV00053.

[27] It was discovered after the hearing of the appeals that the incorrect notice had been filed in appeal no COA2020CV00015. In order to regularize the situation, pursuant to rule 26.9 of the CPR which empowers the court "to make an order to put matters right"

where there has been a procedural error or failure to comply with an order or direction, counsel was asked to file the correct notice of appeal which he did. There was no issue of prejudice as the matter was fully argued before us.

Appeal No COA2019CV00053 (the taxation proceedings)

[28] By way of an amended notice of appeal filed 17 July 2019, the order of L Pusey J discharging the interim injunction granted by Thomas J, was appealed. The grounds of appeal were as follows:

> "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 or Judgment of the Court.
>
> 3. The Learned Judge, failed to recognize that a suit SU 2019 CV 01657 had been filed by the Respondents to determine the interests of the Appellant 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 analyze the principles of granting an injunction."

[29] By virtue of this appeal, the appellant is seeking the following orders:

"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 Appellant to be agreed or taxed."

Appeal No COA2020CV00001 (claim no SU201901657) – caveat proceedings

[30] On 9 January 2020, the appellant filed a notice of appeal which sought to set aside the judgment of D Fraser J dated 6 January 2020, in which the Registrar of Titles was directed to remove the caveats lodged by the appellant against 34 certificates of title registered in the name of the estate. The grounds of appeal were as follows:

"1. The Learned Judge erred by finding that [the] Appellant did not have an equitable lien capable of grounding a caveat.

2. The Learned Judge failed to take into account the fact that other work done by the Appellant included litigation in court for the payment of property taxes by the estate and thus erred in finding [that she did] have a solicitors lien related to the 'fruit of the works'.

3. The Learned Judge erred by finding that testamentary funeral and administrative expenses, though a charge on an estate did not amount to a charge capable [of] grounding a caveat, but merely indicated that there was an obligation by the Executors to pay such debts before distribution of the assets of the estate.

4. The Learned Judge, erred in finding that in order for an Attorney to lodge a caveat to protect her fees after billing her client, these fees had to be proved prior to lodging a caveat.

5. The Learned Judge failed to recognized [sic] that, an attorney's final bill to her client is deemed to be reasonable and valid until proved otherwise in a court. Further the principle is recognized in taxation of a bill of costs between attorney and client which is done on an indemnity basis.

6. The Learned Judge failed to recognize that removing a caveat from the properties in the Estate would cause severe prejudice and irremediable harm to the Appellant, in circumstances where the Executors had already started distributing same in [sic] without any regard to paying the attorney any of her flees, whereas any perceived prejudice to the respondent if the caveat remains would be significantly less than the irremediable harm to the appellant if the caveat is removed."

Appeal No COA2020CV00015 (default costs certificate and provisional attachment of debts proceedings)

[31] By notice of appeal dated 1 February 2021 the orders made by D Fraser J on 13 December 2019, setting aside the default costs certificate and the provisional attachment of debts order, were appealed. The orders directing the registrar not to entertain or issue

any enforcement mechanism based on the default costs certificate and for the bill of costs to be referred to the registrar for taxation were also appealed. The grounds of appeal were as follows:

> "1. The Learned Judge erred by finding that an Attorney taxing her Bill of Costs – as required in circumstances where her retainer was terminated by her client, and there is no contentious litigation in Court – is not equivalent to a claim.
>
> 2. The Learned Judge erred by finding that Rule 64.2(2) and Section 2 of Part 65 of the Civil Procedure rules 2002 were not applicable when taxing a bill of costs between an attorney and her client, [despite] the express wording of Rule 64.2(2) and Section 2 of Part 65, and further [fell] into error in finding that for Part 64 and Part 65 to be applicable there had to be a claim in the Court.
>
> 3. The Learned Judge erred in setting aside the Default Costs certificate as he failed to consider all the relevant factors required by law before doing so.
>
> 4. Consequently, the Learned Judge erred in setting aside the Provisional Order for Attachment of Debts.
>
> 5. The Learned Judge failed to consider the interests of justice by refusing leave to appeal when the basis of his judgment was being considered by the Court of Appeal and was set for hearing the week being 24th day of February, 2020."

Issues

[32] We heard submissions from counsel Dr Anderson and Mr Munroe in respect of all three appeals. The grounds of appeal and submissions of counsel raise three issues for our determination. They are as follows:

1. Whether a bill of costs can be treated as a claim /originating document giving rise to an order or judgment of the court capable of injunctive relief? (L Pusey J - taxation proceedings)

2. Whether the learned judge (D Fraser J) erred in setting aside the default costs certificate and the provisional attachment of debts order (default costs certificate and provisional attachment of debts proceedings)

3. Whether in the circumstances of this case, the appellant is entitled to a solicitor's lien in respect of the real property in the estate which could be protected by lodging a caveat against the certificates of title? (D Fraser J – caveat proceedings)

Whether a bill of costs can be treated as a claim/originating document giving rise to an order or judgment of the court capable of injunctive relief? (taxation proceedings)

Appellant's Submissions

[33] Dr Anderson, counsel for the appellant, submitted that where the retainer of an attorney-at-law is terminated, the only recourse to recover same is to commence

proceedings by laying a bill of costs for taxation. In this regard, counsel relied on section 22(4) of the LPA and part 64.2(2) of the CPR. Section 22(4) of the LPA states:

> "An attorney may without making an application to the Court under subsection (3) have the bill of his fees taxed by the taxing master after notice to the party intended to be charged thereby and the provisions of this Part shall apply as if a reference for such taxation has been ordered by the Court."

Part 64.2 (2) of the CPR states:

> "64.2 …
>
> (2) Where costs of-
>
> …
>
> (c) an attorney-at-law to his client, are to be taxed they must be taxed in accordance with Section 2 of Part 65 [Taxation Procedure]."

[34] In support of his contention, Dr Anderson referred to **Barrington Frankson v The General Legal Council** [2012] JMCA Civ 52 (**Barrington Frankson**), in which Harris JA stated:

> "It is clear that termination of the agreement rendered Section 21 inapplicable. … The appellant's remedy therefore, would be founded in section 22 of the Act. In keeping with the provisions of this section, his recourse would have been for him to have laid a bill of costs for taxation and to have it taxed."

[35] He stated that based on the above case, the appellant had no choice but to commence proceedings by laying her bill of costs. It was submitted that since the appellant was required to begin the process to recover her fees in this way, the bill of

costs is an originating document and is therefore equivalent to a claim. In support of that submission, reference was made to rule 65.17(2) which begins with these words:

> "Where the costs to be taxed **are claimed by an attorney-at-law from his or her client,**…" (Emphasis supplied)

Counsel also reminded the court that the CPR defines a "claim for a specified sum of money" as "a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic, and is recoverable under a contract". Reference was also made to rule 64.2(3) of the CPR which states that costs authorised to be recovered under a certificate of costs may be enforced in the same way as a judgment or order for payment of a sum of money. Dr Anderson submitted that this rule supports his argument that a bill of costs is equivalent to a claim form.

[36] In bolstering the submission that a bill of costs is equivalent to a claim, counsel relied on **McAllister v Santa Cruz Investment Co Ltd (no 2)** [1985] CILR 411 (**McAllister**), a decision of the Grand Court of the Cayman Islands in which Summerfield CJ stated that "a bill of costs is a form of pleading…".

[37] It was also submitted that rule 64.2(3) of the CPR was also indicative that a bill of costs was the counterpart of a claim as "[c]osts authorised to be recovered under a certificate of costs signed by the registrar may be enforced in the same way as a judgment or order for the payment of a sum of money".

[38] Having referred to **RBC Royal Bank (Jamaica) Ltd et al v Ocean Chimo Ltd** [2016] JMCA App 2 (**RBC Royal Bank**), Dr Anderson submitted that the bill of costs as

the originating document ought to be treated in the same way as the notice to appeal in that case. Specific reference was made to paragraph [25] which states:

> "…it 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."

[39] Counsel submitted that to require an attorney, who has obtained a certificate of costs, to start a new claim to recover the same sum "would be a mockery of the rules and defeat the entire overriding objective of the CPR in terms of saving expense and ensuring that matters are dealt with expeditiously and fairly". He further submitted, that the issue of whether a bill of costs was equivalent to a claim form was not relevant to the issue of taxation. In this regard he reminded the court that rule 64.2(2) of the CPR states that a bill between an attorney and his client is to be taxed in accordance with section 2 of part 65 of the CPR. Dr Anderson also stated that there was no requirement in the CPR or the LPA for a claim to be filed before the bill of costs can be laid for taxation between an attorney and his or her client.

[40] Counsel stated that the procedure for the taxation of an attorney and client bill under the CPR is different in some respects from that set out in the LPA and the rules of court which predated the CPR. However, section 29 of the LPA states that rules of court may repeal, vary or add to the provisions of part V which deals with the recovery of fees, with the exception of section 21 of that Act. That section he submitted, facilitates the amendment of Part V of the LPA by the CPR even though the latter is secondary

legislation. It was posited that given the tension between the CPR and the provisions of the LPA particularly section 25, a decision was required on how they are to be interpreted.

[41] In this regard, counsel referred to the rules of statutory interpretation. In particular, the court was reminded of the need to have regard to (i) the technical meaning of words in the general context of the statute and (ii) the need to be wary of the ordinary course of the words which lead to a contrary purpose of the statute.

[42] Applying these principles, it was posited that section 29 of the LPA sought to make the CPR of paramount consideration. This, Dr Anderson said, was fortified by the reading of section 27 of the LPA which provides that "[t]he certification of the taxing officer…shall, subject to the rules of the court be final and conclusive as to the amount due". Counsel stated that the main differences between parts 64 and 65 of the CPR and the LPA are procedural. However, the provisions are no different in their intent. He pointed out that under the CPR points of dispute are central to the process of taxation as where they are not filed and served no taxation hearing can take place. He submitted that parts 64 and 65 of the CPR govern the taxation process in its entirety. As such, where a paying party fails to file points of dispute a default costs certificate can be obtained. This was in contrast with the old regime, where the registrar could proceed to tax the bill even if the paying party having been served with the notice of the hearing was absent. He stated that the power to issue a default costs certificate was geared towards greater efficiency in the process. Counsel also pointed out that rule 65.23 of the CPR does not permit the scheduling of a taxation hearing if no points of dispute have been filed. In the

circumstances, he argued that a client could delay proceedings indefinitely by not filing points of dispute. It was said that there is no distinction where such certificate is obtained as a consequence of litigation.

[43] Dr Anderson pointed out that the CPR does not distinguish between the taxation of costs between litigants and that between an attorney and his or her client. Therefore, where, as in this case, the client fails to file points of dispute within the stipulated time, a default costs certificate can be issued. In conclusion, counsel submitted that the CPR, in particular parts 64 and 65 of the CPR, govern the taxation process in its entirety and where there was seemingly a conflict with the LPA, the CPR should prevail.

[44] Where the issue of whether the delivery of the bill of costs on the respondents' new attorneys-at-law by facsimile transmission and email was proper service is concerned, Dr Anderson stated that the respondents, and their new attorneys Munroe and Munroe, had made it clear that the said firm would be representing them and were authorized to deal with matters in relation to the outstanding fees. Counsel also submitted that the respondents' attorneys were served with a hard copy of the bill of costs on 1 February 2019, and in such circumstances, the service of same was neither unlawful nor irregular.

[45] It was submitted that the interim injunction ought not to have been discharged by L Pusey J as the default costs certificate had not yet been set aside. Counsel stated that the grant of the injunction would have been in keeping with rule 17.2(1) of the CPR which allows for the grant of an interim remedy before a claim is filed or before judgment is

given. Counsel argued that such a remedy was required in this case to protect the equitable charge which the appellant had arising from unpaid work carried out on behalf of the estate.

[46] Dr Anderson stated that a *quia timet* injunction was required to prevent the threatened infringement of the appellant's rights. He stated that such an injunction is only granted where (i) there is a strong possibility that in the absence of the injunction there is a real and imminent risk that the appellant's rights would be breached and (ii) an award of damages is not a sufficient remedy. Reference was made to **American Cyanamid v Ethicon** [1975] 1 ALL ER 504 and **Vastint Leeds BV v Persons Unknown** [2018] EWHC 2456 (Ch).

[47] It was submitted that, based on the facts of the instant case, damages would not have been an adequate remedy as the estate was said to be insolvent and a claim against the executors would be onerous. He stated that the failure to grant the injunction would result in there being no method available to ensure the payment of the outstanding fees by the estate. He stated that the caveat which had been lodged against the properties would therefore allow time for the parties to decide how to resolve the issues and an undertaking as to damages would prevent any serious prejudice. Dr Anderson submitted that L Pusey J's refusal to grant the injunction, on the basis that no claim was filed was in the circumstances, palpably wrong and unjust.

Respondents' submissions

[48] Mr Munroe commenced by submitting that there was no basis on which this court should interfere with the order of L Pusey J. In this regard, he referred to **The Attorney General v John Mackay** [2012] JMCA App 1, in which Morrison JA (as he then was), having cited **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046, stated that an appellate court should not interfere with the orders of a judge below unless that judge was wrong in his understanding of the law or of the facts before him or in his application of the law to the particular facts before him. His submission was that this was not the case in any of these three appeals.

[49] It was Mr Munroe's contention that since the appellant had not completed the work purportedly agreed between the parties, pursuant to section 27 of the LPA, a bill of costs would have to be laid before the registrar in order to determine the amount of the fees which were to be paid. The bill of costs he said, was filed in the civil registry instead of being properly laid before the registrar and as such the matter was "fatally flawed *ab initio*" and was a "blatant abuse of the Court's process".

[50] Counsel submitted that it was settled law that a bill of costs was not a claim within the meaning of the LPA or the CPR and the appellant had therefore, incorrectly sought to commence proceedings with the bill of costs. He stated that the proper course was for the bill of costs to be laid before the registrar and be taxed. Since a bill of costs was not a claim, he contended that "it could not be the vehicle for injunctive relief". Reference was made to **Adolphy DeCordova Samuels et al v Clough Long & Co (a firm)**

[2016] JMCA Civ 28 (**Adolphy Samuels**), in which it was held that the filing of a bill of costs as a claim for outstanding fees was irregular and in circumstances where an enforcement writ was issued following a default costs certificate, it was an abuse of the court's process.

[51] Counsel argued that the court in **Adolphy Samuels** stated explicitly that part 65 of the CPR did not apply to an attorney's bill of costs which was laid for taxation pursuant to section 22(4) of the LPA. The bill, he said, was laid before the registrar for quantification. Therefore, because this was not a claim before the court, no judgment could arise from it.

[52] Mr Munroe also submitted that part 65 of the CPR did not affect, vary, repeal or amend part V of the LPA although section 29 of the LPA stated that rules of court may be made to do so, with the exception of section 21. He argued that in order for the CPR to affect the provisions of part V, it had to be expressly stated and that there is no provision in the CPR to that effect. This he said, was unlike the situation in the United Kingdom where that CPR makes specific reference to the relevant legislation. Consequently, the use of the taxation procedure in the CPR in relation to the appellant's bill of fees was unlawful.

[53] Additionally, counsel referred to section 22 of the LPA which states that an attorney is not entitled to commence any suit for his fees until the expiration of one month after "the bill for fees signed in the manner provided and enclosed in or accompanied by the letter as provided was duly served", and submitted that the bill of costs was not properly

served on the respondents. The bill of costs, he explained, was emailed to the respondents' counsel but not served on the respondents personally. It was the respondents' position that they filed points of dispute as a result of the other occurrences in this matter such as the *ex parte* injunction which was granted by Thomas J and the issuance of the default costs certificate.

[54] Mr Munroe also submitted that the bill of costs was not in compliance with section 22 of the LPA, as it was signed by Dr Anderson who was not the appellant's attorney nor was he in a partnership with the appellant. Accordingly, the default costs certificate on which the appellant sought to rely on was issued in error.

[55] In any event, he submitted, L Pusey J had already ordered that the matter did not lend itself to injunctive relief and therefore the orders sought by the appellant, could not stand. Counsel noted that P Williams JA, on 6 June 2019, had declared that L Pusey J was correct in ruling that the bill of costs was not a claim. He further highlighted that the appellant's application for a variation of P Williams JA's order was refused by this court. Consequently, he submitted, the order of L Pusey J accurately reflected the law that a bill of costs was not a claim and so the appellant could not seek injunctive relief.

Analysis

[56] Where a client has failed to pay the fees charged by his attorney-at-law, the said attorney-at-law may seek to recover same by utilizing the regime under section 22 of the LPA. The section states:

> "(1) An attorney shall not be entitled to commence any suit for the recovery of any **fees for any legal business** done by him until the expiration of one month after he has served on the party to be charged a bill of those fees, the bill either being signed by the attorney (or in the case of a partnership by any one of the partners either in his own name or in the name of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to the bill:
>
> Provided that if there is probable cause for believing that the party chargeable with the fees is about to leave Jamaica, or to become bankrupt, or compound with his creditors or to do any act which would tend to prevent or delay the attorney obtaining payment, the Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the attorney be at liberty to commence an action to recover his fees and may order those fees to be taxed.
>
> (2) Subject to the provisions of this Part, any party chargeable with an attorney's bill of fees may refer it to the taxing officer for taxation within one month after the date on which the bill was served on him.
>
> (3) If [an] application is not made within the period of one month aforesaid a reference for taxation may be ordered by the Court either on the application of the attorney or on the application of the party chargeable with the fees, and may be ordered with such directions and subject to such conditions as the Court thinks fit.
>
> (4) **An attorney may without making an application to the Court under subsection (3) have the bill of his fees taxed by the taxing master after notice to the party intended to be charged thereby and the provisions of this Part shall apply as if a reference for such taxation has been ordered by the Court**." (Emphasis supplied)

Fees are defined in section 2 of the LPA as including "charges and disbursements".

[57] In reliance on this provision, a bill of costs was filed on the appellant's behalf by Dr Anderson, thereby purportedly initiating taxation proceedings. Within these

proceedings, the appellant in an effort to secure her fees, filed an application for an injunction to restrain the 3rd respondent from registering any dealing with one of the properties in the estate. On 15 May 2019 that application was refused by L Pusey J on the basis that the matter as formulated did not lend itself to injunctive relief. In other words, there was no claim.

[58] The appellant has argued that the decision of L Pusey J was wrong in law, as the laying of the bill of costs was equivalent to the filing of a claim.

[59] The Oxford Dictionary of Law, 7th ed defines a claim as "a demand for money or assertion of a right, especially the right to take a particular case to court (court action)". In Black's Law Dictionary, 9th ed, it is defined as "the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional".

[60] Rule 2.4 of the CPR states that the term 'claim' is to be construed in accordance with part 8. Part 8 deals with how proceedings are to be commenced and states that proceedings are commenced when a claim form or a fixed date claim form are filed in the Registry of the Supreme Court[2]. Nowhere in part 8 is the laying of a bill of costs mentioned as a means of commencing a claim.

[61] Counsel for the appellant placed great reliance on **RBC Royal Bank** to support his assertion that the bill of costs was the equivalent of a claim where it was filed pursuant

[2] See rule 8.1(2).

to section 22 of the LPA. He also referred to **McAllister**. Respectfully, I do not agree that either case is of any assistance to him.

[62] In **RBC Royal Bank** the question arose as to whether time ran during the legal vacation in respect of the filing and service of the notice of appeal. Brooks JA, as he then was, agreed that the notice of appeal was to be treated in the same way as a claim form under rule 3.5 of the CPR as both are originating documents. Having referred to the judgment of K Harrison JA in **Michael Stern v Richard Edward Azan and Haskell Thompson** (unreported), Court of Appeal, Jamaica, Application No 122/2008, judgment delivered 19 September 2008, Brooks JA stated:

> '[24] The learned judge of appeal then concluded that a notice of appeal was the equivalent of a statement of case. On his reasoning, since rule 3.5(1) of the CPR stipulated that time did not run during the legal vacation for filing and serving statements of case, it necessarily followed that time did not run during the legal vacation for filing and serving notices of appeal. The learned judge said in arriving at his conclusion:
>
> > '16. Since we are here dealing with the question of 'time', it is beyond dispute that Part 3 of the CPR comes into operation. Rule 3.5 deals specifically with the filing and serving of a statement of case during the vacation period but with the necessary modification I see no reason why the words 'notice of appeal' could not be substituted for the words 'statement of case'. In my judgment, there is considerable merit in the submissions made by Mr. Anderson on behalf of the Appellant/Respondent. 17. In the circumstances, I do agree with Mr. Anderson when he submitted that having regard to Rule 3.5 of the CPR, time would not run against the Appellant/Respondent during the legal vacation….'
>
> [25] Although Harrison JA did not so state, it 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. The point is important for interpreting rule 3.5 after it was amended on 16 November 2011.
>
> [26] [The] Stern v Azan case was, of course, decided before those amendments were made to the CPR. Among those amendments was one which affected the issue of the filing and serving of statements of case during the legal vacation. Rule 3.5(1) of the CPR was amended to exclude the filing and serving of a claim form from the operation of that rule. The rule was amended to read:
>
> > 'During the long vacation, the time prescribed for filing and serving any statement of case **other than the claim form**, or the particulars of claim contained in or served with the claim form, does not run.' (Emphasis supplied)
>
> [27] In applying the changed rule 3.5 of the CPR to the inference to be drawn that a notice of appeal is the equivalent of a claim form for these purposes, it necessarily follows that the long vacation does not prevent time from running for the purposes of filing and serving a notice of appeal. A notice of appeal would have been expressly excluded from the operation of that rule, as amended."

[63] The above case, can in my view be distinguished on the basis that a notice of appeal by virtue of rule 1.9 of the Court of Appeal Rules, 2002 is the method by which an appeal is commenced. It states:

> "Except for appeals under section 256 of the Judicature (Resident Magistrates) Act an appeal is made by filing a notice of appeal at the registry of the court and takes effect on the day that it is received at the registry."

A claim in the Supreme Court is commenced by filing a claim form or a fixed date claim form. Part 65 of the CPR relates to the commencement of proceedings for taxation and not proceedings generally. In addition, section 22 of the LPA envisages the

commencement of a suit/claim by an attorney for the recovery of his fees after the expiration of one month after the service of his bill of fees.

[64] In **McAllister** the statement by Summerfield CJ that "…a bill of costs is a form of pleading" does not take the appellant's case any further. Pleadings are defined in Osborn's Concise Law Dictionary, 7th ed, in the following terms:

> "Written or printed statements delivered alternatively by the parties to one another, until the questions of fact and law to be decided in an action have been ascertained, i.e. until issue is joined. The pleadings delivered by (a) the plaintiff, and (b) by the defendant, are as follows: (1)(i) statement of claim; defence. (2) reply…"[3]

The equivalent of a statement of claim under the CPR is the particulars of claim. Pleadings, as defined above, therefore do not include the originating document. In any event, the statement by Summerfield CJ was clearly obiter as the issue before the court was whether certain items could properly be claimed and allowed on a taxation.

[65] Section 22 of the LPA speaks to the recovery of an attorney's bill of fees and the taxation of those fees. Those fees arise out of a contract for the provision of legal services. Where a client refuses to pay his attorney that would prima facie amount to a breach of contract and the remedy lies in a claim for damages for breach of contract. The fees are a debt owed to the attorney. However, the LPA has set out the parameters in which such claims may be pursued.

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[3] Page 254

[66] In **Barrington Frankson** Harris JA stated that where there was an issue between an attorney and his client the remedy lay in section 22 of the LPA and that his recourse would be to have "laid a bill of costs for taxation and to have it taxed".[4]

[67] In **Adolphy Samuels** the respondent obtained a default costs certificate having laid an "Attorneys-at-law and Purchasers' Bill of Costs" for taxation. At first instance, the court ruled that part 65 of the CPR was applicable and refused the appellants' application to strike out the claim. The appeal was allowed on the basis that there was no attorney and client relationship between the parties. Phillips JA, in paragraph [36] of her judgment, also found that the judge's finding that taxation was an alternative to the filing of a claim to recover fees was wrong. She stated:

> "[36] The learned judge in his reasons for judgment failed to appreciate the fact that there was no attorney and client relationship between the appellants and the respondent, and as a consequence misconstrued the application of the provisions of the LPA and part 65 of the CPR to the facts of the case at bar, and so fell into error. **His finding that the respondent had an alternative procedure to filing a claim, which was taxation, and therefore commencing 'a claim' by the document 'Attorneys-at-Law and Purchasers' Bill of Costs' which related to balance purchase price and not fees, was appropriate was also clearly palpably wrong. His finding therefore that part 8 of the CPR did not apply was also demonstrably wrong. His finding also that part 65, was applicable inclusive of the default costs regime, was also clearly wrong**." (Emphasis supplied)

[68] Costs are usually awarded to a litigant who has obtained a judgment or order in his favour. The taxation proceedings as stated previously, were quite correctly,

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[4] Paragraph [101]

"commenced" by the laying of the bill of costs. This act, in my view is a preliminary step in the process by which an attorney can seek to recover his or her fees. Taxation is the means by which the reasonableness of amount said to be owed is ascertained[5] and is somewhat akin to the taking of an account by the registrar. Once the bill of fees has been taxed, section 22 of the LPA requires the filing of a claim by the attorney to recover his fees.

[69] The power to enforce the certificate of the registrar is derived from the determination of a claim whether by trial or default. It has its foundation in a judgment or order of the court. Where a costs certificate is issued in relation to proceedings under section 22 of the LPA, it simply reflects a quantification of what is said to be owed, as there has been no determination that the sums are in fact owed. That would require the filing of a claim.

[70] Taxation is quite distinct from a claim in which any dispute as to whether the amounts are in fact owed could be raised. To say otherwise would be to exempt attorneys-at-law from the well-trodden path of making a claim for a breach of contract like any other litigant. Such a course would also deprive the other party of the opportunity to file a defence, request disclosure of documents and have the matter fully ventilated.

[71] In this regard, I have noted from the correspondence between Munroe & Munroe and Dr Anderson that the respondents were denying that any fees were owed and were

[5] See **McDonald Millingen v Margie Geddes & Bardi Ltd** [2019] JMCC COMM 30 at paragraphs [43] – [50].

asserting that the appellant had been overpaid in the sum $65,000,000.00. There was also a dispute as to whether the appellant had been retained in relation to the sale of the property at Friendship Pen. The latter issues will be dealt with in issue two. These matters could not properly be addressed by the registrar in taxation proceedings and would have required the filing of a claim in which evidence could be presented and the matter judicially considered and determined.

[72] Where the decision of L Pusey J to discharge the injunction is concerned, it should be noted that, in order to ground an application for an injunction the applicant must demonstrate that he has a claim (see **Fourie v. Le Roux** [2007] 1 WLR 320). The matter having been commenced with the laying of a bill of costs for taxation does not, as L Pusey J stated, "lend itself to injunctive relief" as there was no claim before the court. The order of L Pusey was therefore correct.

Whether the learned judge (Fraser J) erred in setting aside the default costs certificate and the provisional attachment of debts order? (default costs certificate and provisional attachment of debts proceedings)

Appellant's submissions

[73] Counsel, Dr Anderson, relied on his submissions regarding the interface between section 29 of the LPA and parts 64 and 65 of the CPR, which are stated in paragraphs [39] to [43] of this judgment. He further contended that since the respondents did not file and serve their points of dispute within the requisite period of time, the appellant was properly entitled to proceed to obtain a default costs certificate.

[74] It was also submitted that the respondents' assertion that service had not been properly effected had no merit, as the bill of costs had been sent by facsimile and email to Munroe and Munroe, their new attorneys-at-law, who were authorized to accept service and deal with all matters, including litigation on their behalf. Dr Anderson asserted that the said attorneys' confirmation of their receipt of the bill of costs and enquiries in respect of the amounts that were outstanding, indicated that they were authorized to deal with matters arising from the fees due to the appellant. He submitted that in such circumstances, the registrar was mandated to sign the default costs certificate.

[75] In dealing with the bases on which a default costs certificate should be set aside, counsel relied on **Advantage General v Marilyn Hamilton** [2019] JMCA App 29 **(Advantage General)**. It was submitted that the guiding factors identified therein, included: (i) the circumstances leading to a default; (ii) consideration of whether the application to set aside was made promptly; (iii) consideration of whether there was clearly articulated dispute about the costs sought; and (iv) consideration of whether there was a realistic prospect of successfully disputing the bill of costs.

[76] Dr Anderson pointed out that the respondents, having been served with the default costs certificate on 16 May 2019, filed their application to set it aside on the same date but had failed to file their points of dispute within the required time and have not served them on the appellant.

[77] Counsel submitted that the respondents did not have clearly articulated points of dispute and that the said points of dispute were designed to "mislead and to obfuscate." In this regard, Dr Anderson submitted that the respondents in their points of dispute sought to accept the parts of the retainer agreement that provided for a conditional waiver of fees and discounts, yet rejected the parts which related to the agreed fees. He stated that the respondents' points of dispute asserted that the appellant appropriated $35,000,000.00 for legal fees, but there was no indication of how they arrived at that amount. He noted that the points of dispute indicated that the appellant agreed to accept and was paid, $2,000,000.00 for obtaining the grant of probate and the transmission of the properties in the estate to the executors; however, based on the said retainer agreement, that $2,000,000.00 was an initial payment. He argued that there would be no need for the formalization of the agreement if that sum represented full payment for the services of the appellant. Specific reference was made to clause 2(c)(1) of the retainer agreement which states that the sum of $2,000,000.00 was an "initial retainer". Counsel also pointed out that it was stated in the retainer agreement that the charge for the appellant's services was 3% of the agreed gross value of the estate.

[78] Counsel further submitted that since the retainer agreement was terminated, the appellant was entitled to her fees for all the work she did on a *quantum meruit* basis as well as for compensation for breach of contract as it relates to her conditional waiver of fees and discounts.

[79] In addressing D Fraser J's decision to set aside the default costs certificate, counsel stated that it was made solely on the basis that there was no claim to ground its issuance. He submitted that the learned judge erred as there was no requirement that a claim had to be filed before a bill of costs could be taxed between an attorney and his or her client.

[80] Moreover, it was submitted that section 21 of the LPA was inapplicable where the retainer had been terminated. The appellant therefore could not rely on this section to sue to recover her fees. He also argued that she also could not file a claim for the recovery of any fees after taxation since there would be no agreement on which to sue. It was also submitted that there would be no need to file a claim as rule 64.2(3) of the CPR allows for the enforcement of costs as a judgement or order (see **Barrington Frankson)**.

[81] Additionally, it was submitted that by virtue of section 27(3) of the LPA the certification of the taxing officer is final and conclusive as to the amount due. He stated that there was no need to file a claim as the bill had been subjected to the tests for reasonableness. There was therefore no need for prolonged litigation which would be a waste of the court's time and result in increased costs to the parties. This he said, would be contrary to the principles of the overriding objective of the court.

[82] In conclusion, Dr Anderson contended that the respondents have no real prospect of successfully challenging the appellant's bill of costs and the default costs certificate should not have been set aside.

Respondents' submissions

[83] Mr Munroe submitted that in order to succeed, the appellant must demonstrate to the court that D Fraser J was wrong in his understanding and/or application of the law (see paragraph [48] of this judgment). He stated that D Fraser J was correct when he set aside the default costs certificate and the provisional attachment of debts order as no claim had been filed in the taxation proceedings. In this regard he stated that, based on the decisions of this court in **Barrington Frankson** and **Adolphy Samuels**, the laying of a bill of costs is not equivalent to the filing of a claim. Reference was also made to **McDonald Millingen v Margie Geddes & Bardi Ltd** [2019] JMCC COMM 30 in which Laing J stated that an attorney and client bill of costs which was laid before the registrar for taxation was not a claim and set aside the default costs certificate that had been issued.

[84] Counsel also submitted that part 65 of the CPR was inapplicable where a bill of costs was filed in accordance with section 22 of the LPA. Consequently, the default costs certificate could not be enforced as a judgment.

[85] Mr Munroe also referred to the orders made by P Williams JA on 6 June 2019 in which she stated that a claim for the recovery of fees was still required where a bill of fees was laid for taxation under section 22 of the LPA. He submitted that the laying of the bill of costs could not "ungird any enforcement mechanism since those mechanisms are consequent on a judgment being granted by the court".

[86] Counsel submitted that the appellant was not entitled to a default costs certificate as the bill of fees was not properly laid before the registrar having not been signed by the appellant nor personally served on the respondents as required by section 22 of the LPA. In addition, the default costs certificate did not relate to a claim.

[87] It was submitted that although there was provision in the CPR for an application to be made to the registrar to set aside the default costs certificate, the learned judge was correct to hear the application before him, as based on **Rodney Ramazan and another v Owners of Motor Vessel CFS Pamplona** [2012] JMCA App 37 and **Gordon Stewart v Noel Sloley and others** [2016] JMSC Civ 50, an appellant could elect to either apply to the registrar, a single judge or to the court for an order to set aside a default costs certificate. The only restriction, he posited, was that the appellant could not apply to the court to set aside the certificate if the registrar had already heard the application. Mr Munroe submitted that for the following reasons, D Fraser J was not precluded from hearing the application:

(1) The application had not been heard by the registrar;

(2) The appellant was not entitled to the default costs certificate; and

(3) There was material non-disclosure by the appellant as the orders of Pusey J and P Williams JA were not brought to D Fraser J's attention.

[88] Counsel stated that among the factors that are to be considered in determining whether there is a good reason to set aside a default costs certificate were:

> "(1) the circumstances leading to the default;
>
> (2) consideration of whether the application to set aside was made promptly;
>
> (3) consideration of whether there was a clearly articulated dispute about the costs sought;
>
> (4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs…"

[89] Counsel submitted that in light of the circumstances, outlined in paragraphs [54] and [55] of this judgment, the default costs certificate was irregularly obtained and as such, D Fraser J did not err when he set aside the said certificate and the provisional attachment of debts order.

Law/analysis

[90] Section 22(1) of the LPA stipulates that an attorney is not entitled to commence a suit for the recovery of his fees until the expiration of one month after he has served on the party to be charged, a copy of the bill of fees signed by him or encloses the bill in a letter signed by him referring to the bill (see paragraph [56] above).

[91] It is clear that this section is referring to the recovery of fees by an attorney from his client for work done by him. There is no dispute that the instant case falls within ambit of section 22 of the LPA. Therefore, as a starting point it must be considered whether it has been established that the appellant served a bill of fees signed by her, on the respondents.

[92] The statement of account dated 24 September 2015, which was signed by the appellant, indicated a balance of $27,894,166.62 for legal fees. That statement was served on the respondents. The bill of costs, which was laid on her behalf on 30 January 2019 in the amount of $225,191,591.90, was signed by Dr Anderson and was emailed to Munroe & Munroe, the attorneys-at-law then representing the respondents. There is no evidence that any bill of fees in the amount of $225,191,591.90 was ever signed by the appellant and served on the respondents. It is noted that in the several affidavits filed by the appellant, although she referred to a bill of costs having been filed on her behalf, there is no reference to the amount now being claimed or any explanation of how that figure was arrived at.

[93] In this case, it is an understatement that the amount claimed in the statement of account that was served on the respondents differs significantly from the bill of costs which was signed by Dr Anderson and laid for taxation. The respondents would therefore have had no prior notice of the sum being posited as outstanding fees.

[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. His order for the matter to proceed to taxation, however, was wrong on the facts of this case. In the circumstances, his order that the registrar should proceed to tax the bill of costs should therefore be set aside.

[95] However, given the heavy reliance of counsel for the appellant on the question of whether section 29 of the LPA embraces the parts 64 and 65 of the CPR, I feel constrained to give my views on what I consider to be a very important issue.

[96] Section 22(4) of the LPA, as previously stated, speaks to the taxation of an attorney's bill of fees by the taxing master. Section 23 of the LPA defines that taxing master as:

> "…the Registrar or such other person as may be prescribed by rules of court."

The reference to the registrar in the above section, is, by virtue of section 2 of the LPA a reference to the registrar of the Supreme Court.

[97] Section 25 of the LPA sets out the procedure which is to be utilized in the event that either the attorney or the client refuses or neglects to attend the taxation. It states as follows:

> "Upon any reference, if either the attorney or the party to be charged, having due notice, refuses or neglects to attend the taxation, the taxing officer may proceed to tax and settle the bill ex parte."

[98] Dr Anderson has argued that by virtue of section 29 of the LPA, the default costs regime in part 65 of the CPR is applicable in respect of bills laid in accordance with section 22 of the LPA. Mr Munroe has disagreed with that interpretation on the basis that the CPR does not make specific reference to section 22. He stated that in order for the CPR to repeal or vary part V of the LPA, it must do so expressly.

[99] Section 29 of the LPA provides:

> "Rules of court may be made repealing, varying or adding to any of the provisions of this Part other than section 21."

[100] The CPR are properly described as rules of court, having been approved by the Rules Committee of the Supreme Court. They may also be classified as delegated legislation. They were published in the Jamaica Gazette (Proclamations, Rules and Regulations), Legal Notice No 2 of 2003. The Rules Committee derives its authority from the Judicature (Rules of Court) Act, which gives it the power to:

> "**make rules (in this Act referred to as 'rules of court'**) for the purposes of the Judicature (Appellate Jurisdiction) Act, the Judicature Cap. 177 1953 (Supreme Court) Act, the Judicature (Supreme Court) (Additional Powers of Registrar) Act, the Justices of the Peace (Appeals) Act, the Indictments Act and **any other law or enactment for the time being in force relating to or affecting the jurisdiction of the Supreme Court**, or the Court of Appeal or any Judge **or officer of such respective Court**." (Emphasis supplied)

Section 4(7) of that Act states that:

> "…A reference in any law or enactment made after the commencement of this Act to rules of court shall be construed in the absence of a contrary intention as a reference to rules of court made under this section or having effect as if so made."

[101] The LPA was promulgated in 1972 and the Judicature (Rules of Court) Act in 1961. Based on section 4(7) the reference to rules of court in section 29 of the LPA is a reference to rules of court made pursuant to the Judicature (Rules of Court) Act.

[102] At the time when the LPA was enacted there was only one procedure for taxation. By virtue of the now repealed General Rules and Orders of the Supreme Court of Judicature of Jamaica which were promulgated in 1882 (the old rules), the bill would be taxed at a hearing before the registrar whether or not the opposing party was in attendance as long as he or she was served with a notice of taxation. With the advent of the CPR that has changed. Points of dispute are required to be filed and served in order to proceed to a taxation hearing. Where no points of dispute have been filed, it is now possible to obtain a default costs certificate.

[103] Section 29 of the LPA raises the issue of whether the provisions of the CPR can in fact vary or add to the procedure in part V. In my view, the answer is in the affirmative. The words in section 29 are clear. That section is what is known as a Henry VIII clause or a provision in a primary act which gives power for subsidiary legislation to include a provision which amends, repeals or are inconsistent with the main act.

[104] Mr Munroe has argued that the provisions in the CPR cannot affect those in part V of the LPA, in the absence of an express provision to that effect. I do not agree. In Bennion on Statutory Interpretation, 6th ed at page 267, the learned author states:

> "Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has the power to override, but the provisions of the later enactment

> are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them".

[105] In **R (on the application of ToTel Ltd) v First-tier Tribunal (Tax Chamber)** [2012] EWCA Civ 1401, the issue of whether delegated legislation could amend a statute was addressed. In that case Moses LJ addressed the issue thus:

> "[29]…But provided the power conferred by one statute to amend the provisions of another by delegated legislation is clear and express so that it is plain that Parliament understood the nature and scope of the power it was conferring on the executive, there is no reason in principle why the statute should not do so.
>
> [30] The true principle is that expressed in *Bennion on Statutory Construction* (5th edn Section 81 p 293-4) 'An Act may confer power for the amendment of itself or another Act by delegated legislation. **An amendment made by the use of such a power is as effective as if made directly by an Act**.'
>
> [31] *Bennion* acknowledges the need to ensure that the delegated legislation is not *ultra vires* whilst criticising judicial expressions of disapproval of this process. There is no need, in the instant case, to express any disapproval: had the words in the Finance Act 2008 been sufficiently clear, the rules in the Transfer Order of 2009 could have achieved their purpose." (Emphasis supplied)

[106] Delegated legislation is defined in Words and Phrases Legally Defined 3rd ed as:

> "…legislation made by a person or body other than the Sovereign in Parliament by virtue of powers conferred either by statute or by legislation which is itself made under statutory powers. It is frequently referred to as delegated legislation in the former case, and sub delegated legislation in the latter…
>
> The names given to instruments of a legislative character made in the exercise of delegated powers are various. Chief

> amongst them are proclamations, Orders in council, Orders of council, orders, regulations, rules, schemes, directions, bylaws and warrants. (44 Halsbury's Laws (4th edn) paras 981, 982)."

[107] The CPR would fall within the definition of delegated legislation. Section 29 of the LPA, conferred on the rules of court, in this case, the CPR, the power to amend certain provisions in part V of the LPA. In accordance with the rules of statutory interpretation an amendment made by the use of that power is as effective as if made directly by an Act. I have borne in mind that the provisions of part V of the LPA with the exception of section 21, deal with the procedural issues surrounding the recovery of an attorney's fees. The inclusion of section 29 is therefore, in my view, geared towards ensuring flexibility where the rules of court are amended in order to ensure greater efficiency in the courts' processes.

[108] Whilst section 2 of rule 65 of the CPR does not explicitly amend part V of the LPA, it does, in my view, do so by implication, as the portions which deal with the filing and service of points of dispute and the issue of a default costs certificate are inconsistent with section 25 of the LPA which speaks to the procedure where a party does not attend before the registrar for taxation. Under section 25 of the LPA the bill is to be taxed *ex parte*. In addition, taxation proceedings under the CPR which is later in time, encompasses both hearings and default proceedings.

[109] It is to be noted that the definition of fees in section 2 of the LPA "includes charges and disbursements". The definition of costs in the rule 64.2(1) of the CPR includes "an attorneys-at-law's charges and disbursements, fixed costs, basic costs, summarily

assessed costs and taxed costs". This definition, in my view, would include fees under section 22 of the LPA as the other items referred to in the CPR's definition bear no relationship to the relationship between an attorney and his client. In arriving at that conclusion I have borne in mind that rule 64.2(2) of the CPR makes specific reference to costs between an attorney-at-law and his client. It states:

> "Where costs of-
>
> (a) Arbitration proceedings; or
>
> (b) Proceedings before a tribunal or other statutory body; or
>
> (c) An attorney-at-law to his client,
>
> are to be taxed they must be taxed in accordance with section 2 of Part 65."

[110] In addition, rule 65.14(2) of the CPR, which comes under section 2, states that on the taxation of an attorney-at-law's costs the expression "receiving party" refers to the attorney-at-law and "paying party" to the client. The above reference to taxation of costs between an attorney-at-law and his client is in my view, a reference to taxation under section 22 of the LPA.

[111] Rule 64.2(1) of the CPR states that taxation is "the procedure by which the amount of costs is decided by the registrar in accordance with Section 2 of Part 65". Section 22 of the LPA clearly contemplates a hearing before the taxing master. However, rule 64.2(2) of the CPR states that where the costs of an attorney to his client are to be taxed, it is to be done in accordance with section 2 of part 65.

[112] Rule 65.18(1) of the CPR states that taxation proceedings are commenced by the filing of a bill of costs at the registry of the Supreme Court and the service of that bill. The bill of costs must contain or have attached to it a notice indicating to the paying party of the need to file and serve points of dispute and the consequences of a failure to do so (see rule 65.18 (6) of the CPR).

[113] Where the paying party fails to serve points in dispute, the receiving party may request a default costs certificate (see rule 65.20(5) of the CPR). The default costs certificate issued by the registrar includes an order to pay the taxed costs.

[114] I have also noted that rule 64.2(3) of the CPR provides that "costs authorised to be recovered under a certificate of costs signed by the registrar may be enforced in the same way as a judgment or order for the payment of a sum of money". The receiving party would, without more, have the options available under rule 45.2 of the CPR which include an order for seizure and sale, charging order and attachment of debts order.

[115] It is to be noted that whether the taxation proceedings are by way of default or a hearing, the registrar on completion of the process is required to issue a certificate. Rule 65.21(2) of the CPR speaks to the issue of a default costs certificate and rule 65.25 to the issue of a final costs certificate after a hearing. In both cases the certificates include an order to pay the costs to which it relates and would *prima facie*, be subject to rule 64.2(3) which deals with enforcement. The issue of whether they are enforceable in the same way as a judgment or order would therefore arise whether the certificate was obtained by default or after a full hearing before the registrar.

[116] Whilst it is settled that an attorney who wishes to recover his or her fees is required to lay his bill of fees for taxation before the registrar in accordance with section 22 of the LPA, the LPA and the CPR do not specifically address what happens after an attorney has taxed his or her bill of fees. As pointed out by Phillips JA in **Dian Watson v Estate of Headley Feanny (Deceased) and others** [2019] JMCA Civ 32 (**Dian Watson 2019**), under the old rules, no action for recovery of costs could be commenced until the costs were taxed (Part VII rule 31). This is in keeping with well-known legal principles relating to the recovery of debts.

[117] One of the grounds of appeal of D Fraser J's order was that he erred when he found that section 2 of part 65 of the CPR was inapplicable when taxing a bill of costs between an attorney and his or her client. I do not agree that the learned judge was correct in light of the provisions of rule 64.2(2) of the CPR. I am however mindful of the comments made by Phillips JA and Brooks JA in **Adolphy Samuels**. At paragraphs [36] (which was cited at paragraph [67] of this judgment), Phillips JA found that there was no attorney and client relationship between the parties and also stated that the learned judge's finding that part 65 of the CPR applied was wrong. At paragraph [87], Brooks JA stated:

> "The appellants are, however, entitled to insist that the bill be taxed. That was clearly set out in the terms of the letter of 1 May 2014. The taxation should have been in accordance with section 22(4) of the Legal Profession Act, rather than be finalised by a default costs certificate, pursuant to part 65 of the CPR. Neither the formal order nor the letter compromises the appellants' position in that regard. The appellants objected to the part 65 procedure from the beginning and

> have consistently maintained that position. CL should act in accordance with the terms of the 1 May 2014 letter. On that basis the bill of costs should be laid and either agreed or taxed."

[118] That comment was, in my view, made based on the particular facts of the case. In light of counsel for the appellant's reliance on that case I have found it necessary to deal with the facts in some detail. In **Adolphy Samuels**, there was no attorney and client relationship between the parties. The respondents, Clough Long & Co (Clough Long) were the attorneys-at-law for the vendor KED Investments Limited and the appellants (the Samuelses) were the purchasers. The agreement for sale stipulated that certain sums were to be paid by the Samuelses to Clough Long. Those monies appear to have been paid. However, a dispute arose in respect of fees for other work which was done and a bill of fees was laid for taxation. No points of dispute were filed and a default costs certificate was obtained on 17 April 2013. A writ of seizure and sale was issued on 26 June 2013. On 2 July 2013, an application for a stay of the default costs certificate was granted in the supreme court. Clough Long then filed an application to set aside that order, and for the writ of seizure and sale to proceed. The matter was heard by King J, who ruled that in the absence of points of dispute being filed, the default costs certificate was properly obtained and execution could proceed.

[119] The Samuelses filed a notice of appeal and an application for a stay of execution. That application was granted by a single judge of this court on condition that the appellants paid the sum of $2,501,586.00 into a joint account on or before 11 April 2014. The Samuelses failed to meet that deadline and Clough Long took steps to proceed with

the execution of the writ of seizure and sale. The Samuelses again applied for a stay of execution of the said writ. On 1 May 2014, it was ordered by consent, that the execution of the writ of seizure and sale was stayed on condition that the Samuelses pay the sum of $2,000,000.00 to Clough Long, on or before 7 May 2014, pending the outcome of the appeal. The payment of that sum was subject to Clough Long filing a new bill of costs. The subsequent letter from the Samuelses' attorneys-at-law to Clough Long enclosing payment indicated that the payment being made was subject to the determination of the amount due by the registrar in taxation. A new bill of costs was filed but no points of dispute were filed and a default costs certificate and order for seizure and sale were again obtained. It was in this context that Brooks JA made the comments at paragraph [87] of the judgment.

[120] It was conceded on appeal, that the parties from whom Clough Long was claiming costs were not their clients, and as such, the bill of costs and the default costs certificate issued in respect of that bill were invalid. Brooks JA stated that the bill of costs that had been initially laid for taxation by Clough Long was "really a purchaser's statement of account and the sum claimed represented a number of items including legal fees, the outstanding balance on the purchase price and interest on that balance". Phillips JA stated the position as follows:

> "[35] In my view, counsel for the respondent's [Clough Long] concession that the bill of costs filed in the claim did not relate to client costs was correctly made. The document "Attorneys-at-Law and Purchasers' Bill of Costs" does not fall into either sections 21 and 22 of the LPA and was irregular and

> unenforceable. The writ of seizure and sale issued on it was equally unenforceable."

As such, this court ruled that the initial bill of costs was invalid and set aside the default costs certificate and the writ of seizure and sale.

[121] The facts in **Adolphy Samuels** can therefore be distinguished from those in this appeal on the basis that in the former there was no attorney and client relationship and there was an agreement between the parties as to the way forward. In those circumstances, from the inception, no bill ought to have been laid for taxation and no request for a default costs certificate ought to have been made.

[122] In **Dian Watson 2019** the possibility of a default costs certificate being obtained was raised by Phillips JA, who commented on it at paragraph [14] of her judgment. It reads as follows:

> "[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 [sic] injunction is being requested, and an undertaking as to damages may

> have to be ordered (as was done in this case by Thomas J)."
> (Emphasis supplied)

[123] The critical issue is, in my view, one of enforceability and not the manner in which the bill was taxed.

[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. He did however fall into error when he directed the registrar to tax the said bill.

[125] The applicant also sought to utilise the provisions of rule 45.2 of the CPR by applying for an attachment of debts order in those same proceedings. A provisional attachment of debts order was granted on 14 November 2019 by D Fraser J. However, when the matter was heard *inter partes* on 13 December 2019, that order was set aside.

[126] Rule 45.2 speaks to the enforcement of judgments. In light of my comments at paragraphs [69] – [71] of this judgment which, in a nutshell, indicate that enforcement proceedings must be underpinned by a judgment or order arising from a claim, it is my view that D Fraser J was also correct when he set aside the provisional attachment of debts order.

[127] Before leaving this issue I wish to say a few words on the law and procedure as it now stands. First of all, I am of the view that we could all benefit from further clarity in

respect of the procedure that is to be used when section 22 proceedings are invoked. In this regard I have found the Civil Procedure Rules 2007 (UK) (the UK Rules) and the Costs Practice Direction (UK) to be particularly helpful.

[128] Section 69 of the Solicitor's Act of the United Kingdom is similar to section 22 of the LPA in some respects. The United Kingdom's legislation is, however, buttressed by detailed practice directions and the UK Rules which are quite comprehensive. Rule 48.10 of the UK rules which deals with the assessment procedure for the assessment of costs between a solicitor and his client under the Solicitors Act states:

> "Assessment procedure
>
> **48.10**—(1) This paragraph sets out the procedure to be followed where the court has made an order under Part III of the Solicitors Act 1974(1) for the assessment of costs payable to a solicitor by his client.
>
> (2) The solicitor must serve a breakdown of costs within 28 days of the order for costs to be assessed.
>
> (3) The client must serve points of dispute within 14 days after service on him of the breakdown of costs.
>
> (4) If the solicitor wishes to serve a reply, he must do so within 14 days of service on him of the points of dispute.
>
> (5) Either party may file a request for a hearing date—
>
> (a)after points of dispute have been served; but
>
> (b)no later than 3 months after the date of the order for the costs to be assessed.
>
> (6) This procedure applies subject to any contrary order made by the court."

[129] Section 56 of the UK Costs Practice Direction states that in order to recover such costs a claim is to be made in accordance with the alternative procedure for claims under part 8 of the rules. Part 8 claims are similar to those which may be brought by way of fixed date claim form in our jurisdiction. However, whilst under rule 48.10 of the UK rules, points of dispute are required to be filed, section 56.7 of the UK Practice Direction provides that the provisions relating to default costs certificates are inapplicable in respect of solicitor and clients' bills of costs. There is no such provision in our jurisdiction. Similarly, there is no provision in the Solicitors Act which is similar to our section 29.

[130] In the event that it was not intended for the provisions relating to default costs certificates in section 2 of part 65 of the CPR to be applicable to bills of fees under section 22 of the LPA, it ought to be addressed by way of a practice direction, an amendment of the CPR or perhaps both.

Whether in the circumstances of this case, the appellant was entitled to lodge a caveat to protect her purported interest by virtue of a solicitor's lien on the properties of the estate or a charge for testamentary funeral and administrative expenses? (caveat proceedings)

Appellant's submissions

[131] Dr Anderson submitted that the personal representatives of an estate have an obligation to pay all of the estate's debts including funeral and testamentary expenses before the assets are distributed. It was also submitted that the legal costs to obtain the grant of probate and the transmission or conveyance in the properties in an estate to the executors would fall within the definition of testamentary and administrative expenses. Reference was made to **Sylbern Haughton v Pearl Haughton-Cassells and George**

H Haughton, (unreported), Supreme Court, Jamaica, Suit No P187 of 2002, judgment delivered 28 June 2002, in support of that submission. Counsel pointed out that the learned authors of Tristram and Coote's Probate Practice 28th ed at page 154, stated that funeral, testamentary and administration expenses are a first charge on the estate of the deceased.

[132] It was also submitted that at common law, attorneys-at-law have always been entitled to a lien for the payment of their costs and disbursements. In this regard counsel relied on the case of **Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited** [2018] 1 UKSC 21 (**Gavin Edmondson**), where Lord Briggs found that equity provides the solicitor's equitable lien as a form of security for solicitors to recover costs arising from litigation. This, he stated, would enable solicitors to offer such services on credit to clients who had a meritorious case but lacked the financial resources to pursue the matter.

[133] Reliance was placed on the Australian case of **Michael Quinn v Aaron Lovell** [2011] WL 6965886, which it was said illustrates the principle that the assets in an estate are subject to a solicitor's lien for unpaid costs.

[134] Dr Anderson submitted that it has been accepted that the principles surrounding the solicitor's lien apply to registered property. Reference was made to **Wossildo v Catt and another** (1934) 52 CLR 301 in support of that submission. It was further submitted that these equitable rights exist even before the court is asked to intervene to protect them, and were capable of injunctive relief (see **Firth v Centrelink** [2003] ALMD 6740).

[135] It was also submitted that this court in **Ken Sales & Marketing Limited v Cash Plus Development Limited** [2015] JMCA Civ 14 (**Ken Sales**) affirmed that sums payable under an agreement for sale of registered land including the realtor's commission are capable of supporting a claim for a lien. Counsel posited that, by extension, fees payable in respect of a conveyance of land support a claim for a lien. It was further submitted that in **Ken Sales** this court affirmed that a lien is an interest in the affected property. Reference was also made to **Lysagth v Edwards** (1876) 2 Ch D 499.

[136] Dr Anderson asked this court to consider the effect of there being a last will and testament in the estate and the acknowledgement of the debt by the respondents who were said to have agreed to pay the appellant's fees out of the sale of land belonging to the estate. This situation it was submitted, would support the creation of an equitable charge on the properties as illustrated in **Rosh Development Limited v Cayjam Development Limited et al** [2017] JMCC Comm 4. In that case the court stated that an equitable charge was created "...when property is expressly or constructively made liable, or specifically appropriated, to discharge of a debt or some other obligation, and confers on the charge a right of realization by judicial process…."

[137] Section 139 of the ROTA was also relied on as permitting the lodging of a caveat by a beneficiary or any other person who is claiming an estate or interest in land. This section provides:

> "Any beneficiary or other person claiming any estate or interest in land, under the operation of this Act, or in any lease, mortgage or charge, under any unregistered

> instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar."

[138] It was counsel's submission that D Fraser J failed to take into account the fact that other work was done by the appellant such as, appearing in court for the estate regarding payment of property taxes. He argued that this would have also entitled the appellant to a solicitor's lien. Those costs, he contended, created an interest or charge which was capable of supporting the caveats which she lodged against the titles for the properties.

[139] Counsel submitted that it was not necessary to prove the appellant's costs before the lodging of the caveat. This he said was consistent with the LPA and the interpretation given to section 139 of the ROTA by this court in **Helga Stoeckert v Paul Geddes** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 50/1998, judgment delivered 1 March 1999. He stated that in that case, this court made it clear, that a caveat may be lodged regardless of whether a claim is proved, as where such a caveat is lodged without reasonable cause, the caveator may be subject to sanctions.

[140] It was submitted that although Brooks JA in **Dian Watson v Feanny and others** [2020] JMCA App 1 (**Dian Watson 2020**) took account of the effect of a solicitor's lien, he did not analyse the effect of the decision in **Gavin Edmondson**. Counsel stated that **Gavin Edmondson** extended equity's role to protect a solicitor's lien beyond that which is afforded to the usual common law solicitor's lien. Dr Anderson stated that this more modern approach has been applied in other jurisdictions which utilize the Torrens System of land registration. Reference was made to **Re Brooks' Caveat** [2014] QSC 76 in

support of that submission. In that case the court cited with approval the following passage in **Re Henderson's Caveat** [1998] 1 QD 4 632:

> "There is now weighty opinion in the High Court suggesting that an equitable interest in land can exist when a claimant is entitled to something less than a full decree of specific performance ordering conveyance, that is it can exist provided that a claimant is entitled to equitable relief by way of injunction or other remedy to maintain and protect his interest… With an expanded view of what can constitute an equitable interest in land, a correspondingly wider view of a caveatable interest under s. 98 of the Real Property Act can apply."

[141] It was submitted that section 98 of the Real Property Act is similar in effect as section 139 of the ROTA as it provides that "any person claiming an estate or interest in land may by a caveat forbid the registration of any instrument affecting such land or interest".

[142] Counsel also asked this court to consider the effect of there being a written retainer agreement providing that the fees of the appellant are to be paid from the sale of property in the estate. By virtue of that agreement, it was submitted that the properties in the estate were security for payment of those fees thereby creating an equitable charge, which is an interest that may be protected by caveat pursuant to section 139 of the ROTA.

[143] Counsel relied on the case of **Patrick John Moloney v Maria Coppola & Anor** [2012] NSWC 728 which he said considered the same issues as are now before this court. That is, whether a claim under a solicitor's costs agreement is an equitable charge giving rise to a solicitor's lien which could support the lodging of a caveat. He stated that the court in that case concluded that the costs agreement amounted to a charge over the

defendant's land and the solicitor was entitled to a charge by way of a solicitor's "fruit of action" lien on the defendant's properties in respect of his unpaid costs.

[144] It was submitted that the appellant acted to her detriment by incurring costs, and spending money and time in reliance on the respondents' promise that she would be paid out of the proceeds of the sale of the properties. Counsel stated that having benefitted from her work, the respondents failed to pay the appellant in full and should not be allowed to renege on their agreement. These circumstances, it was submitted provided the appellant with a remedy based on the principles of proprietary estoppel. Dr Anderson stated that the appellant was entitled to have her fees paid out of the estate and the respondents' failure to settle those fees gave rise to an equitable charge or an interest in the properties of the estate. In the circumstances, she was entitled to lodge a caveat to protect her interest.

[145] Dr Anderson took issue with Brooks JA's finding in **Dian Watson 2020**, that the appellant did not have the right to lodge a caveat to secure the fees allegedly owed to her by the estate. He also submitted that the lodging of the caveat would not extinguish the executor's powers to deal with the properties but rather "puts a brake" on their power to sell.

[146] It was his position that the appellant's fees, being part of the testamentary and administrative expenses were a charge on the assets of the estate. As such, a solicitor's lien against those assets for her unpaid fees for obtaining the grant of probate and the conveying/transmission of the properties in the estate to the executors, as well the

conduct of litigation in the Portland Parish Court and the Supreme Court, were capable of supporting the caveat which was lodged in accordance with section 139 of ROTA. It was counsel's submission therefore that the appellant has an interest in the estate and was therefore entitled to lodge a caveat on the properties to protect that interest.

Respondents' submissions

[147] Mr Munroe submitted that the issue which has to be determined is whether an allegation that fees are owed by a former client to his attorney can form the basis of an equitable or legal estate to ground a caveat. He stated that section 139 of the ROTA makes it clear that a caveator must have a legal or an equitable interest in the property in order to justify the lodging of the caveat. In this regard, counsel referred the court to the provisions of section 139 of the ROTA. Reference was also made to **Barbara Wakefield and others v Olive Dostey**, (unreported), Supreme Court, Jamaica, Suit No E 510/2000, judgment delivered 9 April 2002. Mr Munroe contended that the appellant has no such interest.

[148] Counsel also submitted that this issue was disposed of by the ruling of Brooks JA in **Dian Watson 2020**, in his consideration of the appellant's application for a stay of execution of the orders of D Fraser J made on 6 January 2020. He stated that Brooks JA found that the appellant did not have a legal or equitable interest in any of the estate's properties which could support the lodging of a caveat under section 139 of the ROTA. Specific reference was made to paragraph [13] where the learned judge of appeal stated:

> "Ms Watson is not a beneficiary to the estate, nor can she properly claim an estate or interest in any of the properties

> forming part of the estate. She performed work for the executors of the estate and, should she, after filing a claim against the executors, prove an outstanding debt, she is entitled to secure a judgment against them. Where a judgment has been secured there is still no automatic entitlement to lodge a caveat. The judgment creditor must secure a further order of the court charging the land with the debt pursuant to section 134 of the Registration of Titles Act."

[149] With respect to the issue of whether the appellant was entitled to a solicitor's lien which the appellant argued would represent a charge on the properties in the estate, Mr Munroe submitted that **Gavin Edmondson**, on which Dr Anderson relied, was of no assistance to the appellant. Counsel stated that in that case it was noted that where a solicitor's lien exists, the solicitor holds a charge for unpaid fees over the fruits of a judgment arising out of litigation pursued on the client's behalf until the fees are paid. In this regard, he pointed out that the appellant did not represent the estate in any contentious matters and there was no judgment or pool of funds from litigation involving the estate. Specific reference was made to paragraph 35 of **Gavin Edmondson** in which Lord Briggs stated:

> "**[35]** *Barker v St Quintin* (1844) 12 M & W 441 shows, better than any other, that the equitable lien operates by way of security or charge. Baron Parke said:
>
> > 'The lien which an attorney is said to have on a judgment (which is, perhaps, an incorrect expression) is merely a claim to the equitable interference of the Court to have that judgment held as a security for his debt'."

[150] Reference was also made to paragraph 10 of **Quinn v Lovell** in which Douglas J referred to the following paragraph in **Ex parte Patience; Makinson v The Minister** (1940) 40 SR (NSW) 96, 100:

> "A solicitor has no lien for his costs over any property which has not come into his possession. If, however, as the result of legal proceedings in which the solicitor has acted for the client, the client obtains a judgment or award or compromise for the payment of money, although the solicitor acquires no common law title to his client's right to receive the money or to any part of that right, he acquires a right to have his costs paid out of the money, which is analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor…"

[151] Mr Munroe stated that the appellant did not have any of the estate's property in her possession to which such a lien could attach, even if it was justified. Reference was again made to **Dian Watson 2020** in which Brooks JA found that the appellant's submission that she had a solicitor's lien against the properties in the estate was misplaced, as a solicitor's lien on property, relates to real property already in the attorney's possession, or property which was the subject of a judgment obtained by the attorney's efforts. Mr Munroe stated that the appellant did not claim to have any of the properties in the estate in her possession, and the latter circumstance did not arise on the facts of this case.

[152] Where Dr Anderson's submission that the unpaid fees fell into the category of testamentary expenses and were therefore a charge on the estates' properties, is concerned, Mr Munroe disagreed with that contention. He stated that testamentary

expenses as a first charge over an estate is not a security over land but is a statement of the duties of an executor to pay proven debts before the disbursement of gifts to the beneficiaries. Reference was made to **Dian Watson 2020**, in which Brooks JA stated that the term in a will which authorizes an executor to "pay all debts and testamentary expenses, including attorney's fees for securing probate" did not create a charge on the estate's assets, nor did it bind them. As such, Brooks JA determined that the appeal had no real prospects of success and refused the application.

[153] It was also submitted that Dr Anderson's reliance on **Ken Sales** was misplaced as that case was concerned with a vendor's lien pursuant to an agreement for sale. Reference was made to paragraphs [25] to [32] of the judgment in that case, in support of his submission. He stated that the appellant was never a party to any agreement for sale nor did she possess a vendor's lien in respect of any of the properties in the estate.

[154] Mr Munroe posited therefore that this appeal has no real prospects of success. He submitted that Fraser J was correct in his finding that the debt claimed by the appellant was not capable of constituting a charge on the properties of the estate and as such, his order discharging the caveat ought to be affirmed.

Law/analysis

[155] The appellant sought to ground her entitlement to the caveat on the existence of a solicitor's lien which it was argued, arose from the estate's failure to pay her legal fees. These outstanding fees it was said, created an equitable charge in respect of the properties in the estate which ought to be protected.

[156] At common law, a solicitor who is owed fees by a client, has the right to retain property belonging to that client which is in their possession, until those outstanding fees are paid. This is what is known as a solicitors' lien. In **Gavin Edmondson** on which counsel Dr Anderson relied, Lord Briggs described the solicitor's lien in the following terms:

> "Solicitors have, since time immemorial, been entitled to a common law retaining lien for payment of their costs and disbursements. That is an essentially defensive remedy, which merely enables them to hold on to their clients' papers and other property in their actual possession, pending payment. It affords no assistance where there is nothing of value in the solicitor's possession …"

[157] In Halsbury's Laws of England, the learned authors have described the solicitors' lien as follows:

> "720. Right to exercise lien and duty to inform client.
>
> …
>
> At common law a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity and the second is the right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery. …."

[158] In **Gavin Edmondson**, Lord Briggs in addressing the nature of the solicitors' lien, stated:

> "1 This appeal tests the limits, in a modern context, of the long-established remedy known as the solicitor's equitable lien. In its traditional form it is the means whereby equity provides a form of security for the recovery by solicitors of

> their agreed charges for the successful conduct of litigation, out of the fruits of that litigation. It is a judge-made remedy, motivated not by any fondness for solicitors as fellow lawyers or even as officers of the court, but rather because it promotes access to justice. Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit. It is called a solicitor's lien because solicitors used to have a virtual monopoly on the pursuit of litigation in the higher courts. Nothing in this judgment should be read as deciding whether the relaxation of that monopoly means that the lien is still limited only to solicitors.
>
> 2 Solicitors have, since time immemorial, been entitled to a common law retaining lien for payment of their costs and disbursements. That is an essentially defensive remedy, which merely enables them to hold on to their clients' papers and other property in their actual possession, pending payment. It affords no assistance where there is nothing of value in the solicitor's possession, and is powerless where, in a litigation context, the defendant to the claim pays the judgment debt or agreed settlement amount direct to the solicitor's client, the claimant. But equity deals with that deficiency in the common law by first recognising, and then enforcing, an equitable interest of the solicitor in the fruits of the litigation, against anyone who, with notice of it, deals with the fruits in a manner which would otherwise defeat that interest."

[159] Based on the above, the lien creates a passive right as it would only entitle the appellant to retain property which was in her possession until her legal fees were paid.

[160] Such a lien however, does not confer any right to charge real property. Brooks JA, in **Dian Watson 2020**, stated:

> "[14] … A solicitor does not obtain a right to charge real property in respect of which the solicitor has done work".

He also cited with approval paragraph 779 of Volume 66 (2015) Halsbury's Laws of England:

> "**A lien on property recovered does not attach to real property**, nor generally to maintenance payments, nor to money which ought to be paid to a receiver in an action and comes to the solicitor's hands as solicitor for the claimant or with a view to paying it over to the receiver but, with these exceptions, it applies to property of every description such as money payable under a judgment or an award (including costs ordered to be paid to the client or the proceeds of an execution in the hands of the sheriff), money paid into court whether as security for costs or by way of defence or otherwise and money received by way of compromise.
>
> The property must, however, have been recovered or preserved in consequence of the solicitor's exertions and by means of litigious or arbitration proceedings, and the solicitor must have been acting on behalf of the person against whom the lien is claimed." (Emphasis supplied)

[161] Upon the retainer being terminated and the estate retaining new counsel to represent them, the appellant was not in possession of any papers or property for the estate in respect of which a lien could be claimed. This was one of the bases on which Brooks JA refused the appellants' application for a stay of execution of D Fraser J's order. I agree with his conclusion that in such circumstances the appellant did not have a solicitor's lien. A solicitor's lien does not attach to real property.

[162] The appellant also relied on the executor's duty to pay all debts and testamentary expenses in the estate to ground her purported interest in the properties. Whereas the testamentary and administrative expenses of an estate do include the legal costs accrued to obtain the grant and administer the estate, that obligation on the executors to pay same does not restrain them from dealing with its assets. Additionally, that obligation cannot operate to give the appellant a vested interest in the properties on which she could base an entitlement to a caveat.

[163] Dr Anderson relied on section 139 of the ROTA to support his contention that the appellant was entitled to a caveat on the basis that she had an interest in the properties. Section 139 of the ROTA provides:

> "Any beneficiary or other person claiming any estate or interest in land under the operation of this Act, or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar … forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat."

[164] This provision in my view does not assist the appellant. She is clearly not a beneficiary nor was she entitled to any estate or interest in the properties. The appellant's right to be paid for legal work done on behalf of the estate was not equivalent to a charge and so she did not have a legal or equitable interest in the property itself.

[165] Accordingly, the appellant's recourse would be to commence proceedings by filing a claim to recover the sums due to her, if any, and if judgment is obtained in her favour, seek its enforcement in accordance with rule 45.2 of the CPR which would permit an application being made for a charging order on the properties. Without a judgment or order in her favour, the appellant would not be entitled to register a charge or to lodge a caveat. In light of the above, I find that the appellant did not have a solicitor's lien and she was therefore, not entitled to lodge a caveat on the estate's properties. The decision of D Fraser J was, therefore, correct.

Conclusion

[166] Based on the above analysis, the application for the injunction was correctly refused by L Pusey J, on the basis that there was no claim. With respect to the order of D Fraser J setting aside the default costs certificate, although I do not agree that section 2 of part 65 of the CPR is generally inapplicable where a bill of fees is to be taxed under section 22 of the LPA, its issue was irregular as the bill of costs laid before the registrar had not been signed by the appellant and differed significantly from the statement of account that had been signed by her and served on the respondents. Consequently, no further steps could have validly been taken based on that bill of costs. I have also concluded that in the absence of a claim there is no basis on which the provisions of rule 45.2 of the CPR can be invoked. D Fraser J was therefore correct when he set aside the default costs certificate and the provisional attachment of debts order.

[167] The imposition of the caveat on the properties in an effort to secure the appellant's fees was clearly not supported by any legal principles or the ROTA. The appellant was not entitled to a solicitor's lien nor was she entitled to an equitable charge in respect of the properties.

[168] In the circumstances, and with apologies for the delay in delivery of this judgment, it is proposed that the following orders be made:

(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.

PHILLIPS JA

ORDER

(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.