COMMONWEALTH OF THE BAHAMAS 2015/CLE/gen/FP/00164

IN THE SUPREME COURT

Common Law and Equity Division

BETWEEN

STEPHEN B. WILCHOMBE

(AS EXECUTOR FOR THE ESTATE OF THE LATE REVERERED RAYMOND JONES SR.)

Plaintiff

AND

RAYMOND JONES JR.

Defendant

Before: The Honourable Justice Mr. Andrew D. Forbes

Appearances: Mr. Stephen B Wilchcombe appearing Pro se

Mrs. Zia Lewis-Adams on behalf of the Defendant

Date of Hearing: 2nd June 2022

DECISION

FORBES J

INTRODUCTION

1. The Plaintiff in this action filed a Writ of Summons and Statement of Claim on the 27th May, 2015 whereby he claimed inter alia the sum of Forty Thousand Dollars ($40,000.00) for rent collected from buildings owned by the estate of the late Raymond Jones Sr. together with costs and such other relief as seemed just by the Court. The Defendant in its Defence filed on the 17th September, 2015 plead inter alia that the said properties alleged in the Writ of Summons was conveyed from the late Raymond Jones Sr. to the Defendant by virtue of two conveyances dated the 23rd July, 1986 and recorded at the Registry of Records in Volume 4559 at pages 136 to 140 and another conveyance dated the 10th August, 2004 and recorded at the Registry of Records in Volume 10242 at pages 60 to 66. Therefore, the Defendant plead that the said properties did not form part of the late Raymond Jones Sr. estate.
2. On the 6th May, 2022 the Court gave its Ruling in this action striking out the Plaintiff's Writ of Summons and Statement of Claim filed on the 27th May, 2015 as disclosing no reasonable cause of action and an abuse of the court process. The Court also dismissed the Plaintiff's application filed on the 13th January, 2022 seeking an interim injunction against the Defendant to restrain the defendant from collecting any rent from any premises, apartment or building owned by the estate of the late Reverend Doctor Raymond Jones, Sr.
3. At paragraph 27 of its Ruling on the issue of costs the Court stated:-
   "The Court can of its own volition, in its own discretion, consider all manner of costs orders when determining the issue of costs. The general principle is that costs usually follow the event and in most instances the Court will not depart from this rule. However, before the Court makes an order as to costs, I will hear the parties on the same."
4. The Court invited the parties to make submissions on the question of costs and the matter was subsequently adjourned to the 2nd June 2022. The Plaintiff filed his written submissions on the 20th May, 2022 and the Defendant laid over its written submissions on the 27th May 2022. During the hearing on the 2nd June, 2022 there was no appearance of the Plaintiff

and inquiries were made at his office. However, a few days after the hearing the Court learnt of the death of the Plaintiff. The Court in its review of the instant action considered imposing a cost sanction against the Plaintiff personally as he was Counsel from the outset of these proceedings and was well aware of the legal implications.

SUBMISSONS

5. The Plaintiff in his written submissions asserted that as the matter is a family matter therefore the family members should pay; that the merits of the case were not tried as the action was dismissed on procedural technicality and that each side ought to bear their own cost. It would be noted however that Mr. Wilchombe did not address the reason for the matter's dismissal and his potential liability therein.
6. Counsel for the Defendant in its written submissions cited Order 59 Rule 2(2) of the Rules of the Supreme Court (" RSC") noting that the discretion lies with the Court and referred to the cases of **Ritter v. Godfrey (1918-1919)** All E.R Pages 723 B-D and **Airport Workers Union v. Bahamas air Employees Provident Fund and Others** CLE/gen/295 of 2010 in support. The gravamen of Counsel for the Defendant's position is that in the Court's exercise of it discretion cost would usually follow the event. However in this case the Plaintiff as Counsel did not have the authority to file the action and furthermore the Plaintiff was well aware prior to filing the action that the subject matter of the action had been disposed of by duly stamped and registered conveyances. Thus the action was frivolous at best and as Counsel he ought to be condemned in cost either as Counsel or in his personal capacity. It is unfortunate that the Court was unable to get a full hearing on these issues due to the untimely passing of the Plaintiff.

THE LAW

7. The Rules of the Supreme Court states accordingly at Order 59 Rules 2(2), 3 & 8 et. seq.:

"…. (2) The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order……

Entitlement to Costs

3. (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceeding except under an order of the Court.

(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs…..

8. (1) Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the Court may make against any attorney whom it considers to be responsible (whether personally or through a servant or agent) an order —

(a) disallowing the costs as between the attorney and his client; and

(b) directing the attorney to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or (c) directing the attorney personally to indemnify such other parties against costs payable by them.

(2) No order under this rule shall be made against an attorney unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made, except where any proceeding in Court or in chambers cannot conveniently proceed, and fails or is adjourned without useful progress being made —

(a) because of the failure of the attorney to attend in person or by a proper representative; *or*

(b) because of the failure of the attorney to deliver any document for the use of the Court which ought to have been delivered

or to be prepared with any proper evidence or account or otherwise to proceed.

(3) Before making an order under this rule the Court may, if it thinks fit, refer the matter (except in the cases excepted from paragraph (2) or in the case of undue delay in the drawing up of, or in any proceedings under, an order or judgment as to which the Registrar has reported to the Court) to the Registrar for inquiry and report and direct the attorney in the first place to show cause before the Registrar.

(4) The Court may direct that notice of any proceedings or order against an attorney under this rule shall be given to his client in such manner as may be specified in the direction.

(5) Where in any proceedings before the Registrar the attorney representing any party is guilty of neglect or delay or puts any other party to any unnecessary expense in relation to those proceedings, the Registrar may direct the attorney to pay costs personally to any of the parties to those proceedings; and where any attorney fails to leave his bill of costs (with the documents required by this Order) for taxation within the time fixed by or under this Order or otherwise delays or impedes the taxation, then, unless the Registrar otherwise directs, the attorney shall not be allowed the fees to which he would otherwise be entitled for drawing his bill of costs and for attending the taxation.

(6) If, on the taxation of costs to be paid out of a fund, one-sixth or more of the amount of the bill for those costs is taxed off, the attorney whose bill it is shall not be allowed the fees to which he would otherwise be entitled for drawing the bill and for attending the taxation.

(7) In any proceedings in which the party by whom the fees prescribed by the Orders as to Court fees are payable is represented by an attorney, if the fees or any part of the fees payable under the said Orders are not paid as therein prescribed, the Court may order the attorney personally to pay that amount in the manner so prescribed."

(Court's emphasis)

8. The Court highlights the comments of Longley, JA (as he then was) in the case of **Freeport Licensees and Property Owners Association v. The Grand**

Bahama Port Authority Limited and others SCCivApp. No. 10 0f 2008 where he said the following:-

> "73. *Finally, it follows in the circumstances of this case that no order for costs can be made against a nonexistent plaintiff. The question I then had to decide is whether counsel for the appellant should be made to pay the respondents' costs personally. If counsel had simply acted on instructions and was unaware that the plaintiff was nonexistent at the time he commenced the action the circumstances would be different. However, the facts clearly demonstrate that counsel was intimately involved in the application for corporate status and well knew that a certificate of incorporation had not been issued when he commenced the action. In these circumstances it seemed to me that counsel must personally pay the costs of the respondents.(See Nelson v Nelson [1997] 1 W.L.R. 233 and AMB Generali Holding AG & Ors v. SEB Trygg LIV Holding AB[2005] EWCA Civ 1237 . In AMB Generali Holding AG & Ors v. SEB Trygg LIV Holding AB[2005] EWCA Civ 1237 Buxton LJ who delivered the judgment of the court said at paragraph 60:*
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> > *"The legal basis for making a solicitor liable was settled by this court in Yonge v Toynbee [1910] 1 KB 215. In that case, unknown to his solicitors, the client was of unsound mind and therefore lacked capacity to instruct the solicitors to defend proceedings on his behalf. The court held that the solicitors were liable to pay the plaintiff's costs on the basis of an implied warranty or contract that they had authority. This contractual theory had been developed in earlier cases involving agents other than solicitors, notably Collen v Wright (1857) 8 E & B 647 where at 656 Willes J said:*
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> > > *'The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for a another, impliedly, if not expressly, undertakes to or promises the person who enters into such a contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of entering into the*

transaction with the professed agent, as such, is good consideration for the promise.'

In other words he was describing what we would now call a collateral contract. Although this contractual theory presents some conceptual problems in the case of a solicitor conducting litigation, this is nevertheless the established basis for the liability. It is clear, as with any warranty, that liability for its breach is strict. Making the solicitor liable in such circumstances avoids the injustice which would otherwise be caused by the fact that the person for whom the unauthorised solicitor was purporting to act could not himself be made responsible for the 38 opposing party's costs.

61 In Nelson solicitors started proceedings on behalf of a plaintiff who was (unknown to them) an undischarged bankrupt and whose claim had vested in his trustee in bankruptcy. The judge ordered the solicitors to pay the defendant's costs on the basis that the solicitors had behaved in a manner analogous to breach of warranty of authority. This court (McCowan, Peter Gibson and Waller L JJ) allowed the solicitors' appeal.

62 After referring to a number of authorities including Yonge v Toynbee McCowan LJ at 235G-H said: 'I see nothing in these authorities to contradict the contention of [counsel] for the solicitors, that a solicitor who lends his name to the commencement of proceedings is saying, (1) that he has a client, (2) that the client bears the name of the party to the proceedings and (3) that the client has authorised the proceedings. He does not represent that the client has a good cause of action. What the plaintiff in the present case was lacking was a good cause of action since any action in respect of [the] claim ... was vested in his trustee in bankruptcy.

In my judgment in commencing these proceedings the solicitors had authority from the plaintiff to do so and warranted no more than that. In particular they are not to be taken to be warranting that the plaintiff had a good cause of action vested in him.'

The judge obviously thought (2), albeit obiter, supported SEB's case. But none of the authorities to which McCowan 39 LJ referred say anything about a warranty as to name. It may therefore be, as Mr. Nash for Manches and SGH suggested, that all McCowan LJ, and counsel whose submissions he accepted, meant was that the solicitor represents that the client who instructs him and the party named in the proceedings are the same person. In other words the warranty of authority given by a solicitor is made up of statements (1) (2) and (3). If so, McCowan LJ was saying nothing about whether, additionally, the solicitor warrants that he has correctly named his client. 63 Peter Gibson LJ at 237E said:

> *'Prima facie [the solicitors'] authority is to bring the proceedings in the name of the client and I do not see that he warrants more than that he has a retainer from the client who exists and has authorised proceedings and against whom a costs order can be made. He does not warrant that the client has a good cause of action or that the client is solvent.' Waller LJ at page 240E-H and 250F said:*
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> > *'There is no question that if the person for whom the solicitor purports to act does not exist, e.g. a defunct corporation, the solicitor is on the analogy of breach of authority, held liable to pay the costs. Similarly, if the capacity of the would-be client is such that the client is simply not able to instruct a solicitor ... But, in such cases, it is I think of some importance, (1) that the persons or entities simply have no power to retain solicitors at all and thus, (2) applying the analogy of want of authority it need 40 go no further than warranting that the solicitors have a principal who has authorised them...*

I would have thought that the court is not concerned to make a solicitor strictly liable simply because the person who instructs

him turns out not to be the right plaintiff, as opposed to ensuring that there is a party against whom the opposing party can obtain an order for costs... The warranty ... is not a warranty of solvency or that the costs will be recovered; it is that the plaintiff exists and has authorised the proceedings and no more.' 26. It is for that reason counsel for the appellant was ordered to pay the costs of the respondents."

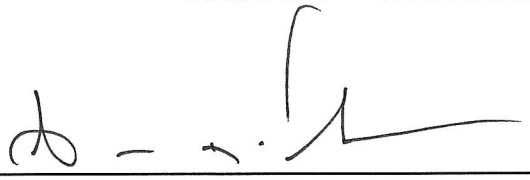
DISCUSSION

9. The Plaintiff was unable to orally make the representations contained in his written submissions. However, the Court makes the following comments and provides its overall view as to the conduct of the instant case by the Plaintiff.
10. The Plaintiff asserted that he was made Executor of the estate of the deceased and that he acted as the Attorney who settled the deceased's Will. Therefore, in the circumstances the Plaintiff as the Attorney who settled the deceased's Will and as a part of any due diligence should have ensured that the testator provided the title documents to support the intended gifts. Additionally, the Court in its Ruling striking out the instant action concluded that the Plaintiff had notice prior to the filing of the action that the said property had been conveyed to another party. Moreover, the Plaintiff when notified by Counsel for the Defendant in writing that recorded conveyances existed, as Counsel he was under an obligation to review the bona fides of the assertions however he continued to maintain the instant action in the absence of any verification of the same.
11. Therefore, had circumstances been different this Court would have seriously considered potentially imposing costs against the Plaintiff in his personal capacity.
12. The Court once again refers to Order 59 Rule 8 (2) of the RSC which states in summary that no order for costs shall be made against an attorney unless he has been given a reasonable opportunity to appear and show cause why the order should not be made. In the instant case the Plaintiff never had an opportunity to appear and show cause as he was hospitalized on the hearing date and subsequently passed away a few days later.

DISPOSITION

13. Therefore, the Court takes the view that given the discussions above in exercising its discretion it would be in the interest of all concerned order that each side bears their own costs in respect of these proceedings.

Dated the November, 2022



Justice Andrew Forbes