BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1772 of 2011

BETWEEN:

CLOVIS DOREEN COLLYMORE **CLAIMANT**

AND

SANDRA MARCELLE COLLYMORE **DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Date of Decision: 2018 December 18

Appearances:

Ms. Nailah Robinson Attorney-at-Law for the Claimant
Mr. Alvin Bryan Attorney-at-Law for the Defendant

REASONS FOR DECISION

Introduction

[1] In this matter, having indicated my decision to refuse the subject application for 'wasted costs', I now give my reasons hereunder.

History and Procedural Background

[2] I have set out the factual and procedural background in some detail in order to contextualize the issues which arise.

[3] The Claimant in this action purported to be the executrix named in the Last Will dated 19 February 1997 of one George Weston Collymore late of Welchman Hall in the parish of St. Thomas in this Island.

[4] The Claimant was the spouse of the deceased and in the Will of 19 February 1997, is named as the sole Executrix and Beneficiary.

[5] He died on 23 January 2011 and on 29 March 2011 the Claimant sought to prove the will by applying for a Grant of Probate.

[6] On 18 June 2011 the Defendant, the daughter of the deceased, entered a Caveat at the Registration Office. At all times, the Defendant appears to be a resident of the United States, Brooklyn, New York, acting locally through her attorney-at-law.

[7] We are informed by the affidavit of Ms. Nailah Robinson attorney-at-law of 15 October 2012, that attorney-at-law Mr. King QC issued a Warning on 6 July 2011, to which counsel for the Defendant entered an Appearance on 2 September 2011.

[8] The Claimant filed her Fixed Date Claim Form on 1 November 2011, seeking an Order of the Court to probate the Will.

[9] In January 2012 the Defendant's attorney-at-law filed an Acknowledgment of Service of the Fixed Date Claim Form.

[10] On 17 January 2012 the Defendant applied to the Court for an Order extending the time for filing a defence and this Order was granted by consent. In addition to the leave granted to the Defendant, both parties were ordered to file an Affidavit of Testamentary Scripts in compliance with **Rule 68.5** of the **CPR** by 31 January 2012.

[11] On 31 January 2012 the Defendant's Defence was filed. This document reveals the Defendant's objections, set out in her Particulars as follows:

> "Particulars
>
> (i) The deceased was at the time of the execution of the Will was not of sound mind, memory and understanding to know and approve of the contents thereof, thereby excluding the Defendant from any proprietary interest in the First Defendant's property situate at Welchman Hall, in the parish of St. Thomas, Barbados.
> (ii) The Claimant obtained the executorship and became a beneficiary in the said will by undue influence on the First Defendant.
> (iii) The deceased did not know and approve of the contents of the will since it was not properly explained to him before it was executed."

[12] At para [7] of the Defence, the Defendant urged the Court to deny the Claimant probate until the Defendant's proprietary interest in the deceased's property at Welchman Hall is settled.

[13] The Defendant counterclaims for:

> "a. A proprietary interest in the deceased estate namely the property situate at Welchman Hall, in the parish of St. Thomas, Barbados.

b. An account for payment of all sums to the Defendant found due upon taking such inquiry or account in the Estate of the deceased, together with interest pursuant to the rate prescribed to the Supreme Court of Judicature Act Cap 117A of the Laws of Barbados."

[14] Thereafter, the Claimant on 31 January 2012 filed an Affidavit of Testamentary Scripts exhibiting the Will with respect to which she was seeking a Grant of Probate.

[15] Counsel for the Defendant, on the same date, also filed a document titled 'Affidavit of Testamentary Scripts', the content of which is somewhat ambiguous.

[16] It is stated by counsel for the Claimant, that on appearance before the Court on 26 March 2012, defence counsel indicated to the Court that he had not been properly instructed, and that subsequently, by letter dated 16 May 2012 (exhibited to the affidavit of Nailah Robinson filed 15 October 2012), he indicated his client's intention to discontinue the matter under **Rule 68.9** of the **CPR**.

[17] On 17 July 2012 counsel for the Claimant filed an application seeking an order for 'wasted costs', among other things. The other relief sought was not pursued as it was clear from the "grounds" enumerated that "the Defendant gave the Claimant notice that he had been instructed to discontinue the matter, but he has to date failed, neglected or refused to do so." (Ground 2).

[18] Ground 5 made an allegation which potentially raises issues of client confidentiality. It states as follows:

> "The Defendant's Counsel has failed to provide any evidence that he was properly instructed by his client or that he acted with due diligence in preparing his case."

[19] The Affidavit in Support indicates that by letter dated 16 May 2012, counsel for the Defendant had signalled his client's intention to discontinue the matter under **Rule 68.9**, but had not done so up to the time of the filing in July. This affidavit alleges that some seven months after filing his Caveat, counsel has failed to investigate his client's case and has incurred needless delay and expense as a result of his negligent acts. Counsel for the Claimant therefore applies for an order that counsel for the Defendant pay part or all of the costs in this matter.

The Submissions

The Claimant's Case

[20] The Claimant referred the Court to **Rule 64.8 (2)** of the **CPR** where "wasted costs" are defined as:-

> "costs incurred by a party
>
> (a) As a result of an improper, unreasonable or negligent act or omission on the part of any attorney-at-law or an employee of an attorney-at-law; or
> (b) Which, in light of any act or omission occurring before or after they were incurred, the court considers it unreasonable to expect that party to pay."

[21] Counsel made mention of the English authority of **Ridehalgh v Horsefield [1994] Ch. 205 (Ridehalgh)**, where the Court of Appeal of England and Wales enumerated the applicable principles in applications for 'wasted costs' orders. It was her submission, on the authority of **Ridehalgh** that, the jurisdiction to impose 'wasted costs' was to be exercised with great care and only where the advocate's conduct of proceedings had been "with all allowances made - quite plainly unjustifiable". She further submitted that counsel's conduct had to be "improper, unreasonable or negligent" and **Ridehalgh** defined such conduct as being "regarded improper according to the consensus of professional (including judicial) opinion."

[22] On the facts of this case, counsel submitted that by the time the Appearance to the Warning had been filed, the Will had already been opened and made public. Counsel's submission was that a reasonably competent attorney would have inspected the Will to establish the veracity of his client's statement. Counsel argued further that by the time the matter came on for hearing before **Alleyne J**, defence counsel would have had enough time to investigate his client's case. She argued that the estate incurred needless delay and expense as a result of the defendant's actions, but also as a result of the negligence of defence counsel. Particular emphasis was laid by counsel for the Claimant on the fact that in defence counsel's Appearance to the Warning, he stated that

the deceased signed his name with an "X", a claim which counsel stated turned out to be false. Further, counsel contends that the Defence as filed does not comply with **Rule 68.8(3)** of the **CPR**.

[23] Counsel quantified her costs under **CPR 65.3**, which provides that where fixed costs do not apply, costs of proceedings are to be quantified in accordance with **Rule 65.5**. Counsel placed a value on the claim of $50,000 in accordance with **Rule 65.5(2)**. Counsel observed that under **Rule 65.5(4)**, the Court has a discretion as to whether to order all or a portion of the full amount of costs, having regard to the factors in **Rule 64.6(4)** and **(5)**. Counsel submits that costs in the sum of $7700 would be fair and reasonable.

The Case of Counsel for the Defence

[24] Counsel opened by outlining the two-stage process of a court evaluating an application for 'wasted costs'. He did so by reference to **Halsbury's Laws of England (5th Ed) Vol. 12 2009** at **para [624-625]**, where it states as follows:

> "As a general rule the court will consider whether to make a wasted costs order in two stages. In the first stage, the court must be satisfied that it has before it evidence or other material which, if unanswered, would be likely to lead to wasted costs order being made, and that the wasted costs proceedings are justified notwithstanding the likely costs involved. At the second stage, even if the court is satisfied as set out above, the court will consider, after giving the legal representative an opportunity to give reasons why the court should not make a wasted costs order, whether it is appropriate to make a wasted costs order."

[25] In the premises, counsel for the Defendant submitted (without applying the principles outlined to the facts of his case) that he neither acted improperly,

unreasonably or negligently and that he did not cause the Claimant to incur unnecessary costs. In his submission, there was no justification based on the evidence to make an order of wasted costs, and even if there was justification, it was not appropriate to so order given that the discontinuance was agreed to by counsel for both parties.

[26] I agree with counsel for the defence that this two-stage procedure is the correct approach to this process: see also **Civil Litigation**: **O'Hare and Browne, 18th ed 39-003 (O'Hare and Browne)**. I would state further however, that this is meant to be a summary procedure for use in simple and obvious cases only. Further proceedings would be inappropriate if they would result in complex proceedings involving detailed investigation of the facts or where the time likely to be spent upon them is disproportionate to the time spent on the substantive proceedings.

Discussion

[27] The legislative foundation of the Court's power and authority to make orders as to costs, and specifically 'wasted costs orders', can be found at **sections 85** and **85A** of **the Supreme Court of Judicature Act, Cap. 117A** of the **Laws of Barbados**. These two sections provide as follows:

> "85(1) Subject to rules of court, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, are in the discretion of the Court and

each court has power to determine by whom and to what extent the costs are to be paid.
(2) Where any enactment passed before or after 4th November, 1991 confers jurisdiction on the High Court or any judge thereof in regard to any matter without expressly conferring jurisdiction to award or deal otherwise with the costs of the proceedings connected with that matter, subsection (1) applies to authorise the court or judge, in its or his discretion, to award and deal with those costs.

…"

"85A. (1) In any proceedings in the High Court or the Court of Appeal, the court may

(a) disallow; or

(b) order an attorney-at-law to meet,

the whole or any part of wasted costs.

(2) In this section, "wasted costs" means any costs incurred by a party

(a) as a result of any improper, unreasonable or negligent act or omission on the part of an attorney-at-law or an employee of an attorney-at-law; or

(b) which, in the light of any improper, unreasonable or negligent act or omission on the part of an attorney-at-law or an employee of an attorney-at-law (being an act or omission occurring after the costs were incurred), the court considers it unreasonable to expect that party to pay."

[28] The procedure in relation to this process is provided for in **Part 64** of the **CPR**, which deals with Costs generally, but more particularly at **Rule 64.8** which deals with 'wasted costs orders' and **Rule 64.9**, which sets out the procedure for dealing with the same. These provide as follows:

"Wasted costs orders

64.8 (1) In any proceedings, the court may by order

(a) disallow as against an attorney-at-law's client; or

(b) direct the attorney-at-law to pay the whole or part of any wasted costs.

(2) "Wasted costs" means any costs incurred by a party

(a) as a result of an improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of an attorney-at-law; or

(b) which, in the light of any act or omission occurring before or after they were incurred, the court considers it unreasonable to expect that party to pay."

"Wasted costs orders - procedure

64.9 (1) This rule applies where
(a) an application is made for; or
(b) the court is considering whether to make
an order under rule 64.8(1) except where rule 27.9(6)(b) applies.
(2) Any application by a party must be on notice to the attorney-at-law against whom the costs order is sought and must be supported by evidence on affidavit setting out the grounds on which the order is sought.
(3) Where the court is considering whether to make such an order, the court must give the attorney-at-law notice of the fact that it is considering whether to do so.
(4) Notice under sub-rule (3) must state the grounds on which the court is minded to consider making the order.
(5) A notice under sub-rule (2) or (3) must state a date, time and place at which the attorney-at-law may attend to show cause why the order should not be made.
(6) At least 7 days notice of the hearing must be given to the attorney-at-law against whom the costs order is sought, or is being considered and all parties to the proceedings."

[29] The leading English authority on the principles to be applied in a court's consideration of such an application is deemed to be **Ridehalgh v Horsefield [1994] Ch. 205 (Horsefield),** a pre-**CPR** case, in which Sir Thomas Bingham's analysis of the law and procedure can be found. This approach has been repeatedly approved in later cases, including the House of Lords' decision in **Medcalf v Mardell [2002] UKHL 27** and **Holden & Co. LLP v Eastbourne Borough Council [2014] 1322** see [41], [48], both cited by counsel for the Claimant in her submissions.

[30] These authorities, as far as relevant, have been accepted and applied in the Commonwealth Caribbean, and for these purposes, Barbados also: see in this regard **Henry J** in **Patricia Huggins v Lloyd Browne SVGH 2018/0001 (delivered 30 July 2018)**; **Sykes J** (as he then was) in **The Pear Tree Bottom Land Owners Association Ltd v Grand Bahai Principe Hotel [2015] JMSC Civ 133** and **Jevene Thomas v McIntosh Construction Company Limited [2013] JMSC 114**; **Ventose J** in **Murtland Watterton v Nigel Smith et al SKBHCV 2012/0181 (delivered 15 November 2018)**.

[31] **Horsefield** is repeatedly credited with establishing and/or confirming that the court should consider three questions when considering a "wasted costs order":

> (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
> (2) Is so, did such conduct cause the applicant to incur unnecessary costs, or did it cause costs incurred by a party prior to the improper, unreasonable or negligent act or omission to have been wasted?
> (3) If so, is it just in all circumstances to order the legal representative to compensate that party for the whole or part of those costs?

[32] **Sykes J** (as he then was) in **Jevene Thomas (An infant who sues by his mother and next friend) v McIntosh Construction Co Ltd (supra)** took a position with which I agree; and it was, that two additional questions should be asked. They were:

> (4) Can the enquiry be done without breaching legal professional privilege;

(5) Are the circumstances such that the facts necessary to establish that the attorney's conduct has caused unnecessary expense to any party to the proceedings, immediately and easily verifiable?

Burden of Proof

[33] These two latter questions speak to the standard of proof and consequently the burden of proof.

[34] **Zuckerman on Civil Procedure; Principles of Practice, 3rd ed. (Zuckerman)** states as follows under the heading "Burden of Proof" at 27.343:

> "A wasted costs order should not be made unless the applicant has satisfied the court, or the court itself is satisfied, that an order is necessary. The burden of proof lies on the applicant. A legal representative will not be called on to reply to a wasted costs application, unless an apparently strong *prima facie* case has been made against him. (Ridehalgh). The court cannot initiate wasted cost proceedings of its own motion unless it is already convinced of the gravity of the conduct in question. Where legal professional privilege prevents the court from having access to evidence that would enable it to decide whether a legal representative acted unreasonably, the burden will not have been discharged and no wasted costs order can be made."

Causation

[35] The principle to be here applied is that there must be a causal connection between the conduct of the legal representative and the costs wasted.

What constitutes Improper, Unreasonable or Negligent Acts or Omissions?

[36] The meaning of these words was explored by Lord Bingham in **Ridehalgh**, where he stated that terms such as "improper", "unreasonable" and "negligent" should be given common sense definitions. It includes conduct which is disgraceful whether or not it amounts to professional misconduct,

conduct which is vexatious, i.e. designed to harass the opponents rather than advance the resolution of the issue, conduct which is negligent, as normally understood, whether or not there exists a duty of care between the persons involved.

[37] **O'Hare and Browne** observe, that in deciding whether a legal representative has behaved improperly, unreasonable or negligently, "the court has to bear in mind that it is often reasonable for a legal representative to represent unreasonable clients. The court must also make full allowance for the fact that advocates often have to make decisions quickly, in the heat of battle".

[38] In **System Sales Ltd v Arletta Browne-Oxley et al [2015] CCJ 1**, the CCJ in an application where the Barbados Court of Appeal has exclusive jurisdiction (the appeal related to an application as of right under **rule 7** of **Caribbean Court of Justice Act, Cap. 117** and in the alternative for a discretionary appeal under section 7), and where counsel admitted during argument that there is no jurisdiction for the Court of Appeal to extend the time for applying to appeal under sections 6 and 7, the court categorised the proceedings as "improper, unreasonable and negligent." At **para [22]** their Honours stated:

> "[22] the conduct in bringing this case utilising a wrong process, and where there is not realistic prospect of success falls into the category of improper, unreasonable and negligent conduct. Counsel for the applicant conceded that the

> rules of court allow that the client be protected from bearing the costs thrown away by this type of conduct."

[39] The matter was dismissed and orders made in relation to wasted costs.

The Dangers of Wasted Costs Orders

[40] The learned authors of the text **Civil Litigation**: **O'Hare & Browne**, **18th ed.** express the view that the primary purpose of the legislation is not to punish the legal representative for wrongdoing, but to protect their client from the cost consequences of it, and to protect the other parties to the action. They state that the jurisdiction is easy to apply if the application is being made by the lawyer's dissatisfied client, but the alternative situation occurs where the application is made by the other parties to the action as in **Medcalf v Mardell [2003] 1 AC 120**. They proceed thereafter to warn against the dangers of this procedure, one of which is particularly relevant in the context, in the following terms at 39-002:

> "if such an application is made there are several dangers and cross-currents of which to be aware. Is the applicant simply attempting to circumvent an inability to obtain effective costs orders against an opponent shielded by the QOCS regime or an opponent who is funded by legal aid? Is the lawyer attacked able to present a full defence bearing in mind the legal professional privilege which their client may insist upon to the disadvantage of the lawyer? Is the application …itself an abuse of the system, seeking to intimidate or harass the opposing lawyers, or seeking to undermine their ability to give their clients' objective advice and assistance?"

[41] In short, while the wasted costs jurisdiction is seen as a way of sparing litigants unnecessary or unjustified costs, and importantly, a means by which

the court can establish and enforce adequate professional standards, it is not without its dangers.

[42] **Zuckerman** in recognising this danger, has this to say at 27.321:

> "… the court has to balance two competing public interests. One is to ensure litigants do not suffer loss as the result of the incompetence of legal representatives. The other is to avoid satellite litigation aimed at shifting the responsibility for costs from the unsuccessful party to their lawyers. Unfortunately, the exercise of the jurisdiction has proved troublesome and expensive."

See also **Hugh Evans**, **"The Wasted Costs Jurisdiction" 64 MLR 51 (January 2001)**, a commentary on the weaknesses of this jurisdiction; and the judgment of Lord Hobhouse in **Medcalf v Mardell and others**, paras [47] to [74].

Conclusion

[43] The Claimant is entitled to her costs, but I am not persuaded that the order I should make is a 'wasted costs' order.

[44] In assessing this matter I have started by considering the two further questions referenced above at para [32]. I have concluded therefrom that the Claimant has not met the burden of proof necessary to persuade this Court to make a "wasted costs order". I have therefore not considered it necessary in that context; in short, in the absence of a reasonable standard of proof, whether counsel for the defendant's actions were improper, unreasonable or negligent.

[45] In **Ridehalgh**, the Court of Appeal stressed that it is important that the wasted costs jurisdiction should not be allowed to interfere with the duties of barristers and solicitors to represent clients regardless of the merits of their cases. In **Medcalf v Mardell**, Lord Hobhouse reiterated that it is perfectly acceptable for a lawyer to represent a client even if he believes that the client is bound to fail. He stated as follows at **para [56]**:

> "… it is the duty of the advocate to present his client's case even though he may think that it is hopeless and even though he may have advised his client that it was."

[46] In similar vein, **Zuckerman** states at 27.326:

> "Therefore, the very fact that a lawyer has acted (for or without fee) in a hopeless case or even in a case struck out for abuse of process, does not of itself amount to conduct that justifies the making of a wasted costs order."

[47] The application and submissions of counsel for the Claimant ride on the assertion that the "Defendant's counsel has failed to provide any evidence that he was properly instructed by his client or that he acted with due diligence in preparing his case."

Disposal

[48] In the premises it is Ordered as follows:

1. The application for a 'wasted costs order' is denied.
2. The Claimant is awarded costs against the Defendant assessed in accordance with **CPR 65.5(2)(b)** and on the authority of **June Blackman v Elma Gittens-Blackman et al Civil Application No. 6 of 2012** in the sum of $2500.00 for Professional Fees plus Value Added Tax and Disbursements of $380.00

3. These costs are payable on or by 28 February 2019.

[49] This decision is long overdue and for that you have my unreserved apology.

MARGARET A. REIFER
Judge of the High Court