IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. HCV 1930 OF 2003

BETWEEN CATHERINE NERISSA GREGORY CLAIMANT

AND AUBREY ERLINGTON GREGORY DEFENDANT

Miss Deborah Dowding instructed by Chambers, Bunny and Steer for the claimant

Mr. Kevin Williams instructed by Grant, Stewart, Phillips and Co for the defendant

IN CHAMBERS

July 21 and 23, 2004

Sykes J (Ag)

WASTED COSTS ORDER HEARING

This is a matter in which the court on its own motion initiated an inquiry into whether a wasted costs order should be made against Mr. Kevin Williams, attorney at law for the defendant in this matter.

The Civil Procedure Rules address this issue. Rule 64.14 sets out the procedure to be used whenever the court is minded to make such an order either on its own motion or on the application of a party to the proceedings. Rule 64.13(1) permits the court to make wasted costs orders against the attorney at law personally. Rule 64.13(2) defines wasted costs. This definition is identical, except for immaterial changes,

to the definition given in section 51 (7) of the Supreme Court Act 1981 of the United Kingdom. Rule 64.14(3) states that where the court is considering making a wasted costs order without an application by any party the attorney against whom the order may be made must be given notice. The rule does not state that the notice must be in writing. The rest of 64.14 speaks to what may be called natural justice principles such as the grounds on which the court is minded to make the order (64.14(4); the date, time and place where the attorney is to appear to show why the order should not be made (64.14(5); and the period of notice that should be given to the attorney and the other parties in the case (see 64.14(6)).

In this matter Mr. Williams was given notice in writing setting out the allegations as well as the grounds on which the court contemplated that the order should be made. Notice in writing was also given to the attorney representing the claimant.

The hearing was conducted on July 21, 2004 and at the end of the matter no wasted costs order was made against Mr. Williams. He had satisfied the court that his conduct did not fall within the definition of wasted costs set out in rule 64.13(2). These are my reasons.

The facts

The issue arose in the context of a fixed date claim form under the Married Women's Property Act. It was filed on October 21, 2003. The defendant was served on November 16, 2003. The matter was fixed for hearing on February 11, 2004. It should be stated that the claimant resides in Jamaica and the defendant resides in Canada.

An acknowledgement of service was filed on February 10, 2004 one day before the hearing. When the matter came before McIntosh M J on February 11, 2004 the defendant had not filed any affidavit in response. The matter was adjourned to June 9, 2004 for the whole day. This was four months away.

On June 9, 2004 the claimant was ready to proceed but had not yet been served with the defendant's affidavits. Indeed the claimant did not know that the defendant had filed any affidavit until that fact was mentioned. The defendant was also in attendance.

On enquiry by the court as to the reason for the delay Mr. Williams stated that there was a break down of communication between his office and Mr. Gregory, the defendant. Also, Mr. Williams indicated that he was accepting responsibility for the breakdown. In these circumstances I decided to invoke rule 64.14(3) since it appeared to me that it was the tardiness of Mr. Williams that resulted in what had become a wasted day. There was no information before the court at that time that the client had contributed substantially to the delay in filing the affidavit.

On July 21, 2004 at the hearing of this matter Mr. Williams put forward additional information that was not placed before the court on June 9, 2004. He stated that his client had failed to follow instructions in having his affidavit properly notarised and returned in time for the June 9 hearing. He also stated that he did not see, interview and prepare affidavits for these two witnesses who were important to his case until two days before the June 9 hearing.

The law

In speaking of section 51(6) of the Supreme Court Act of 1981 Lord Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 205 said at 231E:

> *There can in our view be no room for doubt about the mischief against which these new provisions were aimed: this was the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their or the other side's lawyers. Where such conduct is shown, Parliament clearly intended to arm the courts with an effective remedy for the protection of those injured.*

The same can be said for the Rules Committee here in Jamaica when they included part 64 in Civil Procedure Rules, 2002.

Lord Bingham adopted the three-question test to determine whether a wasted cost order should be made. These questions, slightly rephrased, are:

(1) has the attorney acted improperly, unreasonably or negligently?
(2) If yes, did the conduct cause the applicant or any party to the proceedings to incur unnecessary costs?
(3) If yes, is it in all the circumstances just to order the attorney to compensate the party for the whole or any part of the costs?

I have adopted this three-question test and added two of my own in this hearing. This method of analysis has the virtue of helping the court

to focus its attention on the conduct in question. It telescopes the inquiry thereby reducing the risk that the court may take into account irrelevant considerations and exclude relevant ones. The three adverbs in question one are derived from the three adjectives in rule 64.13(2)(a). The definition given to them by Lord Bingham in *Ridehalgh* (see page 232D-233E) when he was interpreting section 51(7) of the Supreme Court Act, 1981 has been accepted by me.

I would make some addition to Lord Bingham's questions. This addition is derived from the passages of Lord Hope of Craighead in the case of *Harley v McDonald* [2001] 2 AC 678. Lord Bingham's questions seem to be predicated on the premise that inquiry can be conducted without (i) infringing legal professional privilege or (ii) some incursion into the relationship between the client and the attorney falling short of breaching legal professional privilege. It is only fair to point out that his Lordship did recognise that legal professional privilege may impede an attorney in his defence (see *Ridehalgh* at 236H-237D). I would therefore add these two questions:

(1) can the inquiry be conducted without breaching legal professional privilege?

(2) 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?

In exercising this power it is important to bear in mind that even though the order has the effect of compensating one party that is not the true purpose of the power. The power is invoked because of a failure of the attorney to fulfill his duty to the court. Lord Hope of Craighead on behalf the Judicial Committee of the Privy Council in the case of *Harley v McDonald* expressed it in this way at 703B:

> *49. A costs order against one of its officers is a sanction imposed by the court. The inherent jurisdiction enables the court to design its sanction for breach of duty in a way that will enable it to provide compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfil his duty to the court.*

Lord Hope spoke of the inherent power of the court. There is now no need for the court in Jamaica to find its power to make a wasted costs order in the inherent power of the court; the rules make express provision for this but the principle stated by Lord Hope is still applicable.

His Lordship also stated at page 703E-705G:

> *50 As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed. Scope for the making of a costs order that will compensate as well as penalise is then likely to be*

found in making an order against the practitioner that will indemnify the opposing litigant against costs incurred as a result of the breach of duty that would otherwise not be recoverable.

...

...

53. Their Lordships do not say that the court has no jurisdiction to make a costs order in favour of the client against his own barrister or solicitor. But in cases where an order to that effect is contemplated the court must take great care to confine its attention to the facts which are clearly before it or to facts relating to the conduct of the case that are immediately and easily verifiable. Allegations that may raise questions about duties owed to the client by the barrister or solicitor and the conduct of the case outside the courtroom are unlikely to be of that character. They are likely therefore to fall outside the proper scope of that inquiry. The court must bear in mind that it is not its function, in the exercise of this jurisdiction, to adjudicate on the position as between the client and his barrister or solicitor.

54. The court must have particular regard in cases of this kind to the factual basis upon which the jurisdiction is to be exercised. It cannot rely on its own knowledge when it is faced with issues about the nature or scope of the instructions which the client has given about the conduct of the litigation or the advice that may or may not have been tendered to the client by his barrister or solicitor. Fairness to the barrister or solicitor requires that notice should be given of allegations about breaches of duty which raise these issues and that an opportunity should be given to them to challenge the allegations, if so advised, by cross-examining witnesses and leading evidence. These procedures are inconsistent with the summary nature of the jurisdiction. Bearing in mind the extra cost which an investigation of that kind may involve, and the overriding requirement of fairness to those who are at risk of being penalised, the court may well conclude that further investigation under this procedure is not appropriate. This need not be seen as a surrender by the court of its responsibility. The client may have other remedies. A complaint may be made to the Law Society leading to disciplinary sanctions against the barrister or solicitor, or a claim may be made by the client against the solicitor in damages for negligence.

The Law Lord provided useful guidance on the scope of the inquiry and the typical circumstance in which it can be utilized. The following comments are restricted to a case like the present where the court is

initiating the process. In my view Lord Hope's directions are predicated on the need for the court to be extra careful in these enquiries, especially if the court is acting on its own motion, because in such circumstances the court is also the accuser and the judge. In this regard, where the court is acting on its own, the situation is similar to contempt proceedings. This is why Lord Hope strongly urged that unless the facts are too clear for dispute or easily verified the court ought to refrain from embarking up on a wasted costs hearing, particularly if the court is the accuser.

Conclusion

In this matter I could not pursue the matter any further since this would entail hearing from Mr. Gregory who has since returned to Canada. The cost of pursuing the matter may exceed the cost of the wasted day. I unreservedly accept Mr. Williams' explanation.