

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P-316 of 2018

CLAIM NO. 2010 - 01117

BETWEEN

RICARDO WILLIAMS

APPELLANT

AND

CRISTAL ROBERTS

ISIAH JABARI EMMANUEL ROBERTS

(by his next of kin and next friend Ronald Roberts)

RESPONDENTS

BEFORE:

The Honourable Chief Justice Ivor Archie

The Honourable Madam Justice of Appeal C. Pemberton

APPEARANCES:

For the Appellant: Mr D Mendes, S.C. leading Mr Mahabir instructed by Ms N

Maharaj

For the First Respondent: Mr G Armorer and Mr S Roberts

Mr. I Benjamin Watching Brief for the Second Defendant in Substantive Matter

DATE OF DECISION: October 18, 2019

JOINT DECISION

BACKGROUND

- [1] This matter arose out of certain proceedings involving a minor. At the heart of this appeal though, is the recovery of costs and the duties of a trial judge in assessing same. Entwined in that, is the issue of who is entitled to be heard at the hearing of an assessment of costs, whether at the directions stage or at the substantive hearing. The straight forward approach and one which accords with procedural fairness is that anyone who is directly affected and more so adversely affected by the decision of a decision maker is entitled to be heard. Of course, this is qualified by such considerations as *locus standi* and the person having a sufficient interest in the subject matter and not merely being an officious bystander. The resolution of these issues are of course part of the case management functions of a trial judicial officer.
- [2] The novel question which arises in this appeal is should an Advocate be given an opportunity to be heard at the hearing of an assessment of costs?
- [3] Both the trial judge and Counsel for the Respondent were of the view that, based on the common law which remains unchanged by the **LEGAL PROFESSION ACT¹ (LPA)**, Barristers/Advocates should not be afforded the opportunity to be heard on an assessment of costs hearing for the following reasons:
- a) That a Barrister/Advocate cannot sue a Solicitor/ Instructing Attorney-at-Law for his fees if a client does not pay them;

¹ Chap. 90:03 LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO

- b) That there is no relationship between the Barrister/Advocate and the client with respect to fees so that fees are not recoverable from or by the client;
- c) Based on **JANIN**² in the absence of a relationship, a Barrister/Advocate Attorney-at-Law cannot be called upon by his clients to answer any questions with respect to his fees;
- d) In the absence of any “evidence or suggestion of a retainer” between the client and the Barrister/Advocate Attorney-at-Law, it is the responsibility of the Instructing Attorney-at Law to pay the Barrister’s/Advocate’s fees and to ensure that the fees are reasonable;
- e) In the above premises, it was unnecessary to accede to Solicitors’/ Instructing Attorney-at-Law’s request to call the various Barristers/Advocates to be heard whether at the directions stage or at the hearing of the assessment of costs;
- f) The payment of fees to the Barristers/Advocates Attorney-at-Law directly by the client (in this case) did not and cannot derogate from the Solicitor’s/Instructing Attorney-at-Law’s duty as Attorney on record for and retained by the client to ensure that the said fees were reasonable.

[4] Counsel for the Appellant had a different view on all of the points raised. Of relevance to his client’s situation, Counsel submitted that the premise of the trial judge’s conclusion, that the common law position prevailed Trinidad and Tobago, was plainly wrong. He advanced that questions as they arise in this area, are to be determined in accordance with the **LPA**,

² **JANIN CARIBBEAN CONSTRUCTION LIMITED V WILKINSON & ANOR (AS EXECUTORS OF THE ESTATE OF ERNEST CLARENCE WILKINSON) AND ANOTHER [2016] V KPC 26 PRIVY COUNCIL APPEAL NO 0111 OF 2014 (ECSC GRENADA).** In **JANIN**, the Privy Counsel reinforced that a Barrister/Advocate cannot be sued for actions taken in the course of conduct of litigation even if those actions may amount to negligence.

more particularly **Sections 20 (1)(a) and (c), 22 (2) and 51** to a lesser extent. The effect of these sections is that there can be a retainer between the Barrister/Advocate Attorney-at-Law and the client. This retainer allowed the Barrister/Advocate Attorney-at-Law to sue for his fees so that he/she is entitled to be heard on the assessment of costs.

- [5] After due consideration we have concluded that the appeal must be allowed and the decision and orders of the trial judge be set aside for the reasons that follow.

RELATIONSHIP BETWEEN ADVOCATE AND CLIENT – CONTENTIOUS MATTERS AND THE RECOVERY OF ATTORNEY-AT-LAW FEES

- [6] Historically the approach to providing legal services in the Commonwealth Caribbean has been through a bifurcation of service providers, Barristers and Solicitors. For various reasons mostly the high costs, the profession is now unified and legal services are provided by an Attorney-at-Law. This finds legislative expression in the **LPA**. In Trinidad and Tobago, however, the dispensation of legal services is still coloured by tradition, in that legal services can be dispensed in reality, by Advocate Attorneys (Barristers) and Instructing Attorneys, (Solicitors). This division in the “unfused” profession is sanctioned in part by the **LPA**’s recognising that there is still room for an Attorney-at-Law to function as an Instructing Attorney³.
- [7] As a matter of law, Mr. Armorer’s position was that the common law as set out in **RONDEL V WORSLEY**⁴ mandates that a Barrister (Advocate Attorney-at-Law) did not and could not form direct relationships with his/her clients and sue for fees. This position Counsel proffers is unchanged

³ **Part 29 (1) of the CODE OF ETRHICS Part A, Third Schedule LPA**

An Attorney-at Law on the record may instruct one or more Attorneys-at-Law to appear as Advocates in the same way as a Solicitor on record prior to the commencement of the Act, instructed Counsel.

⁴ [1969] 1 A.C. 191

by the **LPA** and legislative change is necessary to enable a Barrister/Advocate to sue his client for his fees.

- [8] Counsel for the Respondent did not agree with this position. The **LPA** is clear. Legal services can be provided by an Attorney-at-Law whose name appears on the Roll. That Attorney-at-Law can form a direct relationship with a client and can sue for fees for legal services rendered in furtherance of a retainer.

ANALYSIS AND CONCLUSIONS

WHO IS AN ATTORNEY-AT-LAW ACCORDING TO THE LPA?

- [9] The **LPA** is clear as to who is an Attorney-at-Law. **Section 2** states that an Attorney-at-Law is *“anyone whose name is entered on the Roll in accordance with the Act”*. No mention is made of any division and/or branches of the profession. All qualified providers of legal services are Attorneys-at-Law.

WHO IS THE CLIENT?

- [10] According to the **LPA** at section 2, in relation to contentious business, a client *“include any person who, as a principal ... retains and employs an Attorney-at-Law for such business”*. This gives the client as principal the ability and I daresay the right to retain directly anyone whose name appears on the Roll to conduct contentious business, whether as Instructing Attorney-at-Law or Advocate Attorney-at-Law.

EXISTENCE AND EFFECT OF A RETAINER

- [11] A retainer is a contract entered into by an Attorney-at-Law and his client for the provision of legal services. It is a species of contract, like any other contract. Parties will be bound by the terms of the retainer unless that

retainer is set aside on grounds of illegality, fraud, duress or any other means available to set aside rights and responsibilities under a contract.

- [12] Given the provisions of **Section 2** of the **LPA**, it is clear that there is no express barrier to a person who appears as an Advocate being retained directly by a client for the conduct of contentious business. This is in direct contradiction to the trial judge's and the respondent's positions who both expounded and relied on the common law learning in **RONDEL V WORSLEY**⁵. In that regard, the positions under the **LPA** and common law are no longer in concert in our jurisdiction.

CAN ADVOCATES SUE AND RECOVER SUMS FOR FEES CHARGED PURSUANT TO A RETAINER?

- [13] According to the trial judge and Counsel for the respondent, the answer is no. The authorities used to support this position are **RONDEL V WORSLEY** and **JANIN**. They did not think that the **LPA** affected this position.
- [14] The question is therefore, have **Sections 20(1)(a)** of the **LPA** altered the common law position to allow Advocates to sue for fees charged? **Section 20 (1)(a)**⁶ provides in the clearest terms that an Attorney-at-Law is entitled to sue and recover his fees for services rendered.

Our view is therefore, yes the **LPA** has changed the common law enabling Advocates to file suit or sue client for fees.

- [15] It is noted that, the only effect of the learning in **RONDEL V WORSLEY** which was specifically retained under the **LPA** was the inability to sue an

⁵ See para. 3 *infra* where the arguments are set out.

⁶ **20. (1)** Every Person whose name is entered on the Roll in accordance with this Act shall be known as an attorney-at-law and –

(a) subject to subsection (2), is entitled to practice law and to sue for and recover his fees for services rendered in that respect;

(b) ...

Attorney-at-Law for negligence in the conduct of litigation only when he is in any court⁷. This did not and does not and cannot interfere with Attorney's right to sue for his fees whether he is acting as Advocate or Instructing Attorney. Further, we think that the trial judge conflated the continued protection from suit for negligence when providing advocacy services in court, with the ability of the Advocate to sue for fees. We say that was plainly wrong.

EVIDENCE OF RETAINER

EXHIBIT "R.W. 16"

[16] It is accepted that the trial judge did not treat with the document "*R.W. 16*." In our view, since the document was before the court the trial judge ought to have considered it to ascertain its effect on the case before her. If a retainer is called into question, the trial judge must first deal with the issue – is there a valid retainer, which question may be treated as one of mixed law and fact. Therefore the court must pronounce on the validity and in this case, ought to have had regard to "*R.W.16*". Once the retainer's validity is determined then the question whether there is the right to sue for fees and by whom that right can be exercised can be answered.

ADVOCATE'S PARTICIPATION IN PROCEEDINGS

⁷ **Sec. 20(1) as per f.n. 6**

(c) subject to section 22 except where engaged as an advocate in any Court, is subject to liability in respect of negligence in a professional capacity;

21...

22. (1) Subject to subsection (2) an attorney-at-law shall enjoy no special immunity from action for any loss or damage caused by his negligence or lack of skill in the performance of his function.

(2) An attorney-at-law is immune from suit in negligence in respect of his conduct of litigation only.

[17] In order to determine the first issue (i.e. the existence of validity of a retainer), all relevant parties must be heard. Once that is determined then the provision of **Section 51** will become relevant regarding enforcement of rights under the valid and subsisting contract. In other words **Section 51** gives the procedure and sets out the conditions under which the Attorney-at-law's right to sue for fees can be exercised. **Section 51(3)**⁸ empowers the court to decide, *inter alia*, the reasonableness of the fees claimed. Procedural fairness demands that all sides be heard. The trial Judge therefore must receive input from all concerned parties, clients and advocates and their witnesses in order to arrive at a fair and just decision. To the extent that this opportunity was denied, we say that the trial judge was plainly wrong.

INSTRUCTING ATTORNEY-AT-LAW'S RESPONSIBILITY

[18] If parties enter into a contract freely and in good faith, the law presumes that they negotiate the terms and agree on them without recourse to a third party who could be fixed with responsibility unless they all expressly so agree. In order to make any finding on the Instructing Attorney-at-Law's responsibilities in this regard, the trial judge ought to have undertaken a thorough examination of "R.W. 16". Since this was not done, no conclusions or findings in this regard can stand. Further and in any event the trial judge's opinion of the effect on an Attorney-at-Law being placed on record, without more to our minds cannot be substantiated. The Notice

⁸ **Section 51 (3)** If in any proceedings before a Court –

(a) the amount set out in a bill of costs is –

(i) sought to be recovered, or

(ii) disputed, and

(b) the bill or part hereof relates to matters in respect of which no scale of fees is prescribed,

the Court shall decide whether the fees set out in respect of those matters are fair and reasonable having regard to the work done or excessive and shall allow or reduce them accordingly.

informing the court of who is representing a client has no place in determining rights and obligations of the parties to a retainer contract.

THE JANIN CASE

[19] Both the Respondent and the trial Judge made much of the **JANIN CASE**. We find that the **JANIN CASE** is not determinative of the issues. We make no further comment on this.

[20] In the premises we make the following order:

ORDER

1. **The appeal is allowed and the orders sought granted in part in that the matter be remitted to Trial Judge for further hearing and determination.**
2. **The Trial Judge's Order for costs be reversed and we now order**
 - (a) Both costs in the action below and in this court to be assessed by a Registrar.**
 - (b) That the appellant's costs in this court to be 2/3 of the costs assessed in the court below.**

/s/ IVOR ARCHIE
CHIEF JUSTICE

/s/ CHARMAINE PEMBERTON
JUSTICE OF APPEAL

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P-316 of 2018_ERR1

CLAIM NO. 2010 - 01117

BETWEEN

RICARDO WILLIAMS

APPELLANT

AND

CRISTAL ROBERTS

ISIAH JABARI EMMANUEL ROBERTS

(by his next of kin and next friend Ronald Roberts)

RESPONDENTS

BEFORE:

The Honourable Chief Justice Ivor Archie

The Honourable Madam Justice of Appeal C. Pemberton

APPEARANCES:

~~**For the Appellant: Mr D Mendes, S.C. leading Mr Mahabir instructed by Ms N**~~

~~**Maharaj**~~

**For the Appellant: Mr D Mendes S.C. and Mr. A Mahabir holding for Mr D Allahar
instructed by Ms N Narine**

~~[8] Counsel for the Respondent did not agree with this position. The **LPA** is clear. Legal services can be provided by an Attorney-at-Law whose name appears on the Roll. That Attorney-at-Law can form a direct relationship with a client and can sue for fees for legal services rendered in furtherance of a retainer.~~

[8] Mr Mendes did not agree with this position. Counsel stated that the **LPA** is clear. Legal services can be provided by an Attorney-at-Law whose name appears on the Roll. That Attorney-at-Law can form a direct relationship with a client and can sue for fees for legal services rendered in furtherance of a retainer.

/s/ IVOR ARCHIE
CHIEF JUSTICE

/s/ CHARMAINE PEMBERTON
JUSTICE OF APPEAL