

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00001

APPLICATION NO COA2020APP00004

BETWEEN	DIAN WATSON	APPLICANT
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 applicant

Clive Munroe Jr instructed by Munroe & Munroe for the respondents

16 and 23 January 2020

IN CHAMBERS

BROOKS JA

[1] Ms Dian Watson is an attorney-at-law. She was retained by Dr Camille Feanny, Ms Anna Aguilar, Mr Headley Feanny Jr and Mr Headley Feanny (the respondents) to obtain probate in the estate of Headley Feanny, deceased, and to represent that estate in certain litigation and conveyancing matters. The respondents are all personal representatives of the deceased.

[2] Ms Watson secured the grant of the probate in favour of the respondents, and had at least one property sold. The respondents later terminated her retainer, and secured the services of other attorneys-at-law.

[3] She asserts that all the work for the estate has not yet been completed, but the respondents owe her for the work that she has done for the estate and for their benefit. She took two significant steps in an effort to secure payment of the outstanding fees. Firstly, she lodged a caveat against the registered titles for several parcels of the real property, which form part of the estate. Secondly, she filed a bill of costs in the Supreme Court of Judicature of Jamaica.

[4] The respondents have resisted her efforts. They deny owing her anything and say that, in fact, she has been overpaid. They also took steps to secure their position. Some of those steps are the subject of other litigation in this court. The step that is relevant for these purposes is that they filed a fixed date claim form asking for Ms Watson's caveat, against the several registered titles, to be removed and any other caveat lodged by her for the recovery of fees among other relief.

[5] It is important to note that although the respondents did not file any points of dispute to Ms Watson's bill of costs, and she, accordingly, secured a default costs certificate, the respondents are contesting the validity of the default costs certificate. They argue that the bill of costs was not served personally on them and therefore the default costs certificate is invalid.

[6] D Fraser J heard the respondents' claim in the court below and, on 6 January 2020, granted it. Ms Watson has filed an appeal from that decision, but in the present application, asks that D Fraser J's judgment be stayed pending the outcome of the appeal, or in the alternative that this court orders that the respondents pay into court any proceeds of sale of any of the real property in the estate. Failing those steps, she asserts, the respondents may dissipate the estate and she will not be able to recover her fees.

The application

[7] The relevant portion of the application seeks three main orders:

- "1) Stay of Execution of the orders [of D Fraser J ordering the removal of the caveats etc].
- 2) In the event that this application is not heard in time to grant the Stay of Execution, that The [sic] Respondents and their Servants/ [sic] or Agents be restrained in dealing with the subject properties until further determined by the Court.
- 3) In the event that a Stay of Execution or an Injunction is not granted, then an order that the Respondents pay into Court the net proceeds of any sale of the properties in the Estate."

It is also important to note that prior to the hearing of the application, a signed copy of D Fraser J's order was served on the registrar of titles. That would have effectively prevented the stay of the removal of the caveats, since the judgment has already been executed.

The submissions

[8] Dr Anderson, appearing for Ms Watson, submitted that she had a sufficient interest to enable her to lodge a caveat, as she did. Mr Monroe, for the respondents, contended that an alleged debt by the estate cannot create either a legal or equitable interest to warrant the lodging of a caveat against registered property. Both counsel cited a number of decided cases in support of their respective positions.

The relevant law

[9] The principles that guide applications for stays of execution of court orders have been well settled since the decisions in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited** [1997] EWCA Civ 2164 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, and have been applied in a number of decisions of this court.

[10] Phillips JA in **Peter Hargitay v Ricco Gartmann** [2015] JMCA App 44, at paragraph [60], adopted the principles set out in **Hammond Suddard**. The learned judge of appeal confirmed that the relevant principles to be extracted from the cases are that two main tests should be applied in determining whether to grant a stay of execution. The applicant must prove that:

- (i) the appeal has a real prospect of success; and
- (ii) there is a minimal risk of injustice to one or both parties if the court grants or refuses the application for stay of execution.

[11] In determining whether or not a stay of execution should be granted, the starting point is a consideration of the prospect of success of the appeal. **Combi (Singapore) Pte Limited** is authority for stating that an appeal with a real prospect of success is a precondition to assessing the issue of the balance of injustice.

The analysis

[12] The issue of merit is strongly against Ms Watson. She has neither a legal nor an equitable interest in any of the registered properties forming part of the estate. Section 139 of the Registration of Titles Act stipulates the parties who may properly lodge a caveat with the registrar of titles to prevent any dealings with the property that may adversely affect the caveator's interest. The relevant portion of the section states:

"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 in the Form in the Thirteenth Schedule, or as near thereto as circumstances will permit, 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."

[13] 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.

[14] Dr Anderson's submission that Ms Watson holds a solicitor's lien against the real property, forming part of the estate, is misplaced. A solicitor may exercise a lien on documents and property in his or her possession. A solicitor does not obtain a right to charge real property in respect of which the solicitor has done work. The general right of a solicitor to a lien is set out in paragraph 768 of Volume 66 (2015) Halsbury's Laws of England:

"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...."

The learned editors further state at paragraph 771 of that work:

"A solicitor having a retaining lien over property in his possession is entitled to retain the property as against the client and all persons claiming through him and having no better right than the client, until the full amount of the solicitor's assessed costs payable by the client is paid. The client has no right to inspect the documents or to take copies of them, but delivery of documents which the client requires will be ordered upon payment of the solicitor's costs being secured, as by payment into court, or delivery may be ordered to enable property to which the documents relate to be preserved."

Ms Watson does not claim to have any estate property in her possession. Dr Anderson also submitted that the lien may be as a result of obtaining property for the estate.

That submission cannot be accepted either. The learned editors of Halsbury's Laws of England, cited above, correctly state at paragraph 779:

"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)

[15] Dr Anderson's second submission is equally misplaced. Learned counsel argued that the term in a will, which authorises an executor to pay all debts and testamentary expenses, including the attorney's fees for securing probate, creates a charge on the assets of the estate. The difficulty with that submission is that the obligation to pay debts and testamentary expenses do not bind the assets of the estate. The personal representatives are at liberty to deal with the assets by way of sale or otherwise at any time prior to satisfy that obligation. The personal representatives would, however, be well advised to make those payments before distributing the assets of the estate to the beneficiaries.

[16] The appeal therefore, has no real prospects of success. On that basis, there is no need to consider the issue of the balance of injustice. The application should be refused. Ms Watson should pursue her claim filed in the court below, to prove that the respondents are indebted to her.

Conclusion

[17] Ms Watson's appeal has no real prospect of success. The debt that she claims that the estate owes to her does not constitute a charge on the real property of the estate. D Fraser J was correct in so finding and in ordering the discharge of the caveat binding that property. There is no basis for granting a stay of execution pending appeal.

[18] Ms Watson also requested that the appeal in this matter be heard on 24 February 2020, when a related appeal is scheduled to be heard. Given the proximity of that date, it is unlikely that all the requisite preparation may reasonably be achieved in that time, but the request may be considered by the registrar of this court.

[19] The orders therefore are:

1. The application for stay of execution filed herein on 9 January 2020 is refused.
2. Costs to the respondents to be agreed or taxed.