THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2006

CLAIM NO. AXAHCV/1996/0089

In the Estate of Cheryl Maxine Herbert, Deceased

BETWEEN:

MAXINE ANELTA HERBERT- WEBSTER

WILLIAM VALENTINE LEONARD HERBERT

(Administrators of the Estate of Cheryl Maxine Herbert, deceased)

Claimants

AND

VERNON S. VIERA
KEITHLEY F.T. LAKE

Defendants

CLAIM NO. AXA HCV 1996/0090

In the Estate of William Valentine Herbert, Deceased

BETWEEN:

MAXINE ANELTA HERBERT- WEBSTER

WILLIAM VALENTINE LEONARD HERBERT

(Administrators of the Estate of William Valentine Herbert, deceased)

Claimants

AND

VERNON S. VIERA
KEITHLEY F.T. LAKE

Defendants

APPEARANCES:

Mr. Terence Byron and Mr. Larkland Richards for the Claimants
Ms. Denise Lee instructed by Daniel, Brantley & Associates for the 1st and 2nd Defendants.

Date: 20th September, 2005
10th February, 2006

JUDGMENT

[1] GEORGE-CREQUE, J.: These two matters were consolidated as they in essence deal with the same estate, namely the estates of William Valentine Herbert and his wife Cheryl Maxine Herbert,('the Deceased") both of whom were last seen when they set out together on a boating expedition on 19th June, 1994, never to be seen or heard from since and thus presumed by the Court to be deceased. Leave was granted to swear to their deaths on 20th June 1995. Their combined estates ("the Estate") being relatively large, were thrown, it appears, into a state of chaos as the five (5) surviving children, ("the Children") two of whom are the Claimants herein, were all fairly young, the eldest being the 1st Claimant ("Maxine") who at that time was 21 years old, and the youngest being age 7. The assets of the Estate were situate mainly in the islands of St. Kitts and Anguilla.

[2] Both actions were commenced by Originating Summons seeking relief in similar terms as against the Defendants, both attorneys-at-law, sued in their capacity as the then Attorney Administrators of the estates of the Deceased, seeking, inter alia, an inventory and account of the estates of the Deceased and for delivery up of all assets, documents, records, papers and things of the Estate.

[3] On 17th December, 1996, a consent order was entered in the terms, in essence, directing the Defendants exhibit and deliver an inventory as well as an account of their administration of the Estate. By the terms of paragraph 3 of the Consent Order, the Defendants were required to exhibit upon oath and deliver a just and true account of monies in their possession upon which they sought to exercise a lien and under Paragraph 4 they were required (their offices as Attorney Administrators having been vacated) to deliver to the Claimants as their principals and as Cessate Administrators of the Estate, all of the assets of the Estate, including all files, documents, papers, records or things coming into their hands as Attorney Administrators save and except for monies in respect of which

they sought to exercise a lien. Either party was given liberty to apply. Arising out of this Consent Order the Claimants have raised various issues by way of determining whether or not the Defendants have duly complied in particular with paragraph 4 of the Consent Order. At the heart of the issues which have arisen is whether or not the Defendants are entitled to retain monies paid to them as fees in their capacity as Attorney Administrators and the enforceability of a so-called retainer agreement dated 4th March, 1996, ("the Retainer Agreement") purportedly executed between the Claimants and the Defendants in their capacity as Attorney Administrators or their simultaneous capacity as solicitors for themselves in the capacity as attorney administrators pursuant to which agreement they paid out to themselves substantial sums. Also in issue is whether or not the Defendants are entitled to exercise a lien over monies coming into their hands as Attorney Administrators. It is accepted that the Defendants at no time made application to the court for payment of reasonable remuneration acting in any capacity whatsoever out of or in respect of the Estate.

[4] On 27th May, 2005, the Court ordered and directed that these issues having been raised, be tried as preliminary issues. These issues were stated as follows:

(1) Whether Vernon S. Veira, Esq.,("VV") and Keithley F.T. Lake Esq., ("KL") as Attorney Administrators are entitled to exercise a lien over monies which have come into their hands, custody and possession or into the hands, custody and possession of any persons for them in their capacity as Attorney Administrators.

(2) Whether the so-called retainer agreement dated 24th March, 1996, for fees due to VV and KL is enforceable by them either in their capacity as Attorney Administrators or in their simultaneous capacity as solicitors for themselves in the capacity as Attorney Administrators.

(3) Whether and if so, for what work VV and KL are entitled to charge the Estate, apart from the said retainer agreement, for work done on behalf of the Estate.

(4) Whether in light of the aforesaid determination of the aforesaid questions, VV and KL ought not to disgorge all and any monies misappropriated by them from the Estate for fees whether as Attorney Administrators or as solicitors for themselves as Attorney Administrators.

[5] In order to gain an appreciation of how these issues have arisen and to arrive at a determination, it is necessary to set out a chronology of the relevant events which are not in dispute:

June 19th 1994	William and Cheryl Herbert disappeared at sea.
Nov. 01st , 1994 – Jul. 95	Various letters and steps taken by Keithley Lake and Associates ("KLA") on behalf of William and Winston, two of the children of the deceased, in respect of Application for grant of administration ad colligenda bona to the Estate of Deceased. During this period KLA instructed Inniss & Inniss in St. Kitts to apply for the said grant.
Jul 14th 1995	Power of Attorney given to Sir P. Inniss, KL and Elson Gaskin
Jul. 21st 1995	Grant of Administration ad colligenda bona to Maxine, William & Winston Herbert out of St. Kitts.
Jul 28th 1995	Resealing in Anguilla of grant issued in St. Kitts.
Aug 4th 1995	Power of Attorney given to VV by Maxine Herbert.
Aug. 28th 1995	Letter from KLA to Caribbean Commercial Bank, Anguilla, changing signatories for accounts of the Estate to be VV, KL and Elson Gaskin in trust for the Children.
Dec. 7th 1995	Grant of Letters of Administration issued to KL and VV in the Estate.
Dec. 16th 1995	Grant of Letters of Administration to KL and VV made in St. Kitts resealed in Anguilla
Mar. 4th 1996	Letter from VV to Maxine, William and Winston setting out percentage charging rates to VV and KL signed by the Claimants.
Jul 29th 1996	Revocation of powers of attorney given by Maxine, William and Winston Herbert
Sept. 18th 1996	Cessate grants in the Estate given to Maxine and William Herbert in St. Kitts.

Nov 7th 1996	Cessate grants made in St. Kitts resealed in Anguilla
Nov 8th 1996	Actions against the Defendants commenced by Originating Summons

[6] The Grant of Letters of Administration dated 7th December, 1995, given to KL and VV as Attorney Administrators by the Court in St. Kitts, certified the gross value of the Estate verified on oath as $57,900,940.95. The so-called Retainer Agreement is on the letterhead of Veira, Grant & Associates, Barristers and Solicitors, (in which VV is a partner) is dated 4th March, 1996, and sets out a schedule of fees payable to VV and KL chargeable to the Estate. The opening paragraph of the Retainer Agreement states as follows:

"*It is agreed that the following shall be fees chargeable to... the Estate having regard to the fact that this is not a normal application for Letters of Administration and the further fact that there are minority interests to be protected."* The fees schedule set out as follows:

1. *To drafting all documents; for... obtaining Order for Presumption of Death..; for investigations and finding the Estate; for the filing purpose of a true declaration of assets .... And for obtaining Letters of Administration... resealing of same in Anguilla.... 2.5% of the Estate is charged.*
2. *For VV ..... and KL to act as joint administrators of the Estate .... Inclusive of all transfers of property to the beneficiaries when.... age of majority, ... 3.5% of the value of the Estate..... .*
3. *To manage the Estate……. the sum of 3% of the value of the Estate.*

The penultimate paragraph of the Retainer Agreement stipulated that the same be confidential as between the parties with the threat of legal proceedings for disclosure. Interestingly, that same date a faxed communication was sent from KLA to VV of what appeared to be an excerpt of a scale of fees usually endorsed or fixed by associations of practicing barristers and solicitors within a jurisdiction highlighting fees chargeable in respect of Estate practice.

[7] On 11th December, 1996, Veira, Grant & Associates produced a 'Statement of Account' stated as being "In account with the Administrators VV and KL" with reference to the

Estate addressed to the Claimants. This Statement of Account appears to bear reference to the Retainer Agreement in that a fee of EC$1,425,000.00 was charged in reference to matters referred to in item 1 of the chargeable fees set out thereunder. It is to be noted however, that Messrs. Inniss & Inniss, who were appointed to act in St. Kitts on behalf of KLA, had also produced an invoice to KLA dated 29th August, 1995 covering the same work as set out in item 1 of the Retainer Agreement and the Statement of Account in the sum of US$3095.00 and EC$116.50. This invoice is accounted for in the Analysis of Legal Fees paid to KLA appearing at pages 86- 98 of the Trial Bundle recorded therein under the heading "disbursements". Inniss's invoice must therefore be taken to have been paid. A further fee of EC$1,995,000.00 was charged in respect of VV and KL acting as joint Administrators of the Estate which bear reference to item 2 in the Retainer Agreement. The sum total of these two figures is EC$3,420,000.00. Against this total the sum of $1,253,316.27 was said to be drawn down by the Administrators leaving a balance due of $2,166,683.73. The Statement of account contained a note to the effect that there was no charge for item 2 of the schedule as item 3 of the schedule adequately covered the work and no transfers of property had been effected. In the Accountants' Report prepared by Hope-Ross & Co dated December 18, 1996, appears Schedule 1 - "fees Veira & Grant" which shows that between November 01, 1995, and February 16, 1996, and thus prior to the Retainer Agreement, the sum of presumably US$380,000.00 had been drawn down from the Estate. Between the periods March 13th, 1996, to August 30th, 1996, (after the Retainer Agreement) a further US$595,190.00 was drawn down making a total of US$975,190.00 drawn down against the Estate.

[8] A further sum of EC$313, 919.00 standing in an account at Caribbean Commercial Bank ("CCB") is subject to a lien which the Defendants purport to exercise over the said sum said to be with reference to services rendered by them to the Estate pursuant to the Retainer Agreement. I propose to deal with this issue later in this judgment.

[9] Mr. Byron, Counsel for the Claimants, contends that the Statement of Account clearly showed that it is an account by the Administrators of the Estate and that the fees claimed therein are not legitimate for these reasons:

(a) That Inniss & Inniss charged for and was paid in full for carrying out the same work as billed in the Statement of Account in reference to item 1 in respect of which the Defendants have charged approximately 1.4 million dollars.

(b) Further, that the Defendants, as Attorney Administrators of the Estate, could not lawfully charge for fees, the office of the Administrator being in law a gratuitous office, unless so sanctioned by order of the court.

(c) For the same reason, as set out in subparagraph (b) above, they could not legitimately charge the Estate the fees charged at item 2 in the sum of $1,995,000.00 for acting as Administrators.

The Claimants rely on the following authorities:

(i) Halsbury's Laws of England 3rd Ed. Vol. 16 Paras. 210 and 211

(ii) Re Worthington *(deceased) Ex parte* ***Leighton & Anr.-v- Macleod*** [1954] 1 AER 677

(iii) News -v- Jones (1850) CH. 1 MAC. & G 683-685 pg. 244

(iv) Bainbridge -v- Blair (1845) CH. 8 BEAV. 579 – 580 pg.208

(v) Todd -v- Wilson (1846) CH. 9 BEAV. 479 pg 408

(vi) Broughton -v- Broughton (1854) CH. 5 D.M.& G 159-160

all of which state the well settled principle of law as being that "unless provision is made in the will for remuneration, the personal representative is not entitled to any allowance for his time and trouble in transacting business as a personal representative. He is entitled to his out of pocket expenses only"[1] In short, the office of Administrator is a gratuitous office. This rule applies with even greater force to a solicitor- representative. "*In the absence of a special clause in the will authorizing him to charge for his professional services he is only entitled to out of pocket expenses and not to profit costs for work done out of court whether acting for himself or for the body of executors. Should the solicitor-representative in disregard of this rule shall have received any profit costs he must account for them to the estate, even though they were not earned at his expense.[2]"*

The rationale for this rule was clearly stated by The Lord Chief Baron in News -V- Jones at pg. 245 thus: *"it is the duty of an executor and a trustee to be the guardian of an estate, and to watch over the interests of the estate committed to his charge; if he be allowed to*

[1] Halsbury's Laws 3rd Ed. Vol.16 Para. 210.
[2] Halsbury's Laws 3rd Ed Vol.16Para. 211

perform the duties of the estate, and to claim compensation for his services his interest would then be opposed to his duty; and as a matter of prudence the court did not allow the executor or trustee to place himself in that situation." This principle applies with equal strength to an attorney. The Lord Chief Baron went on to say that *"if an attorney who is an executor performs business that was necessary to be transacted performs those duties himself ....he is not entitled to be paid for the performance of those duties: it would be placing his interests at variance with the duties he had to discharge."*

[10] Of course it is not being said that this rule, save for the exception admitted of above, is absolute. Worthington's case, in which many of the earlier cases involving this principle were reviewed and confirmed, makes it clear that the court has an inherent jurisdiction to allow remuneration to an administrator in a proper case but that such jurisdiction should be exercised sparingly and only in exceptional cases.

[11] Ms. Lee, counsel for the Defendants, addressed at length on the considerable amount of work done by VV and KL some of which she said was above and beyond the usual work undertaken by solicitors, including additional work which did not bear reference to the administration of the Estate for which, she says, they are to be remunerated. VV was placed on the board of directors of CBB in protecting the interest of the Estate which was then the single largest shareholder in CCB. As such, he attended regular board meetings. She says the Estate benefited extensively from the work and efforts of the Defendants and that they acted speedily in the steps taken to administer the Estate. It is not seriously disputed that VV and KL undertook and did work in their capacity as solicitors prior to the issuance of the grant of Administration to them. No issue has been taken that in relation to such work done in their capacity solely as solicitors and for which they were retained, that they ought not to be properly compensated. In this regard, KL duly submitted a well itemized invoice (no.95057) dated September 27th, 1995, to William and Winston for whom he then acted, spanning the period November 30th, 1994, to August 28th, 1995, in the total sum of US$20,451.94. This sum is not challenged, and rightly so, by the Claimants. They challenge, however, the remaining six (6) together totaling US$38, 237.59 which relate to fees charged between April and June 1996 as sums being charged when KL was an Attorney Administrator. Interestingly, the first two invoices during that six month

period bear the same date, (26/4/96), and are stated to be legal services in respect of the same subject matter but their amounts vary - one being for the sum of US$9,800.00, the other for US$11,000.00. The other four (one of which is also dated 26/4/96) are all said to be "draw down on grant of Letters of Administration" I have not seen nor has counsel drawn my attention to any invoice relating to charges in respect of VV in respect of his work solely as solicitor. I am satisfied however, that such work was undertaken by him on behalf of Maxine, given the mirror applications which were before the courts (one in respect of Maxine and the other in respect of William and Winston) and eventually consolidated. I would be minded to allow to VV a similar sum as billed by KL in respect of his fees and and disbursements (save for the amount representing Inniss's invoice).

[12] Counsel for the Defendants also contended that the positions of conflict in which the Defendants found themselves were created by the court who appointed them Administrators, notwithstanding their capacity as attorneys for the persons who had first applied. Reliance was placed on the case of The Attorney General of St. Christopher & Nevis -v- Constance Mitchum[3] and in particular to the dictum of Gordon, JA at paragraph 14 of the Judgment of the Court wherein he stated thus: *"The statement of the rule in terms that a trustee must not put himself/herself in a position where fiduciary duty conflicts with personal interest acknowledges that the rule does not apply where the conflict is created deliberately by the person in the position of the settlor or testator"* and cited with approval the case of Sergeant -v- National Westminster Bank[4]

[13] I do not consider that the case at bar holds similar appeal. Firstly, the court cannot be regarded in similar vein as a settler or a testator where a person may be appointed in conflicting roles, as may be the case with a settlement or a Will where the person's consent may not necessarily be obtained prior to so doing. In the case at bar, the Defendants had to consent to being so appointed and knowing the positions of conflict which they faced could have (a) either declined to accept the office or (b) accept the office and appoint lawyers independent of themselves to advise them in respect of the Estate. Secondly, the Defendants are both learned and experienced practitioners and ought to

[3] Civil Appeal No.5/2004 (ECSC – Court of Appeal, St. Christopher & Nevis)

have appreciated the conflict and point this out to the court if they were not prepared to carry out the services of the office gratis. Further, it is noted that at the time at least two of the Children had reached the age of majority and thus was in a position as a matter law and legal entitlement to take the grant which they sought. It is also noted that Maxine had been appointed as legal guardian of the two minor children.

[14] Counsel for the Defendants, whilst accepting that as a general rule administrators are not entitled to remuneration, sought to differentiate the case at bar to the News -v- Jones line of cases relied on by counsel for the Claimants in that, she says, the Defendants were first attorneys who later became trustees (as Administrators) rather than being first trustees who then undertook solicitors' work in relation to a trust. She has cited no authority in respect of this statement. I, for myself, am unable to see any distinction to be drawn in this manner as, in my view, what matters is the end result in the fusion of conflicting capacities into one person irrespective of which one was firstly held.

[15] Counsel for the Defendants also sought to bring this case within the 'exceptional' umbrella as enunciated in Worthington's case. She relied upon Re Masters[5], Re Macadam[6] and Forster –v- Ridley[7]. She refers to the circumstances giving rise to the administration, the size of the Estate, the fact that same had to be determined as between St. Kitts and Anguilla, VV's directorship to the board of CCB, the steps taken to ameliorate certain properties comprising the Estate and the fact that the Estate benefited from the work done by the Defendants, as being matters which put it within the exception. Counsel for the Claimants conceded that directors fees paid to VV are not being challenged. I do not consider that these matters urged on behalf of the Defendants reach the bar of what may be considered as being exceptional such as to warrant the exercise of the court's jurisdiction in awarding remuneration as is now being urged rather belatedly. Nothing has been placed before me which suggests that the administration involved complex or novel issues which required specialized knowledge or skill in respect of its administration. The

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[4] (1990) 61 P.&CR 518
[5] (1953) 1 All ER 19
[6] (1945) 2 All ER 664
[7] 46 E.R. 993

fact that an Estate is large and spans more than one locus does not, in my view, in and of itself make the circumstances exceptional.

The Retainer Agreement

[16] The Retainer Agreement of 4th March, 1996, formed the basis of the Statement of Account and the percentage bases used therein. However, as already referenced, some $380,000.00 had been drawn down prior to its signing with a further $270,000.00 drawn down shortly thereafter. Counsel for the Defendants says that this Agreement merely reflected charges retroactively in respect of work already done; that all parties thereto were fully informed and that the Claimants knew and fully understood its terms and therefore ought not to be impugned. Counsel for the Claimant, on the other hand, submits that the Retainer Agreement ought not to be enforced as against the Claimants, in that the Defendants themselves as the Administrators, in essence, were the client charged with the duty of safeguarding and protecting the Estate and thus the retainer Agreement is no more than an agreement with themselves on the one hand as solicitors, and on the other as the Administrators. This evidenced a situation of clear conflict in respect of which the Estate ought not to be bound. In Todd –v- Wilson where a release had been executed by the cestui que trust on a settlement of account between the cestui que trust and the trustee (a solicitor) the court relieved him (the cestui que trust) from the professional charges as he had not received independent professional assistance. In the case at bar there is no assertion to the effect that the Claimants had independent professional advice prior to signing the Retainer Agreement. Further, it bears note that this Agreement also contained a strict confidentiality provision.

[17] I am persuaded by the force of the argument of counsel for the Claimants. The Defendants were in an untenable position where their duties to the Estate as Administrators were in clear conflict with their personal interests as solicitors and the mere endorsement by the Claimants of the Retainer Agreement does not relieve them of that conflict. It does not appear that the Defendants at any time advised the Claimants that they, as Administrators of the Estate, were not entitled without more, to charge professional fees in respect of their services as administrators. For this reason alone, I

am of the view that the Claimants ought to be relieved from the payment of the fees charged pursuant thereto. Furthermore, the percentage fees charged were shown to be considerably out of proportion to the scale of fees then appertaining and of which they, presumably, were fully cognizant given the fax of 4th March, 1996, from KL to VV.

The lien over monies

[18] The law is well settled regarding a solicitor's lien in respect of costs due to him. Thus a solicitor has the right to retain property already in his possession until he shall have been paid costs due to him in his professional capacity. He may also apply to the court for an order directing that personal property recovered under a judgment obtained by his exertions stands as security for his costs of such recovery. Accordingly, money, including money in a solicitor's client account for his client, may also be subject to a lien[8]. The lien extends only to the solicitor's taxable costs, charges and expenses incurred on the instructions of the client against whom the lien is claimed. The lien therefore does not extend to costs which are due to him in a capacity other than that of a solicitor. It is on this issue that the difficulty arises. Firstly, the origin of this sum over which the lien has been exercised has not been disclosed. Secondly, the Defendants acted in more than one capacity; they were also the Administrators of the Estate. Counsel for the Defendant says that KL is exercising the lien. I am unable to say in what capacity the monies came into the Defendants' hands. Further, it is said by the Defendants to be with reference to services rendered by them to the Estate pursuant to the Retainer Agreement. The Law, as I have already discussed above, with regard to an Attorney Administrator is quite clear. He is not entitled to such fees where he acts as such, save with the sanction of the court, and then only in exceptional circumstances. In the circumstances, I am constrained to hold that as a matter of law no basis for exercising a lien has been established.

[8] See: Halsbury's Laws 3rd Ed. Para. 237- 240
Loescher –v- Dean (1950) 1 Ch. 491
Miller –v- Atlee (1849) 3 Ex Ch 799
Phoenix Life Assurance Co., Howard & Dolman's Case (1863) 1 Hem & M 433

The consent Order

[19] Counsel for the Defendants has sought to suggest that the Claimants have sought by the raising of the issues herein to impugn the Consent Order. I do not consider that there is any merit in this argument as the matters clearly arise out of the Consent Order and not in any way as a challenge thereto. How else is it to be determined as to whether there has been due compliance with the terms thereof by the Defendants unless the terms thereof are duly interpreted. In my view, the Claimants have sought to do no more than this.

Conclusion

[20] Based upon the foregoing, I determine the preliminary issues as follows:

(1) VV and KL are not entitled to exercise a lien over monies which have come into their hands, custody or possession or into the hands, custody or possession of any persons for them in their capacity as Attorney Administrators.

(2) The so-called Retainer Agreement dated 4th March1996 for fees due to VV and KL is not enforceable by them either in their capacity as Attorney Administrators or in their simultaneous capacity as solicitors for themselves in the capacity as Attorney Administrators.

(3) VV and KL are entitled to charge the Estate for work done on behalf of the Estate in respect of their services rendered prior to their appointment as Administrators.

(4) In light of aforesaid determinations, KL and VV ought to disgorge themselves of all monies retained by them out of the Estate as fees, whether as Attorney Administrators or as solicitors for themselves as Attorney Administrators, save for monies charged for fees pursuant to paragraph (3) hereof and all out of pocket expenses.

[21] Finally, as neither counsel has raised the question of costs, and taking into account all the circumstances giving rise to these issues I think it appropriate to make no order as to costs. I am grateful to counsel on both sides for their able assistance.

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Janice M. George-Creque
High Court Judge