COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2008/CLE/gen/00929

BETWEEN

WESTERN AIR LIMITED

Plaintiff

AND

AIRPORT AUTHORITY

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Harvey Tynes QC with Tanisha Tynes-Cambridge for the Plaintiff

Janet Fountain for the Defendant

Jacy Whittaker for Commonwealth Law Advocates, Amicus Curae

29 December 2021 and 5 January 2022

RULING

WINDER, J

This is the application of the Defendant for directions as to the proper payment of the costs arising out of the Plaintiff's (Western's) success in the action.

[1.] By a judgment dated 23 November 2012 the Western was given judgement in its favor against the Defendant. The judgment also included an award of costs in favor of Western. The costs were ordered to be taxed if not agreed.

[2.] Subsequent appeals to the Court of Appeal and the Privy Council resulted in a confirmation of the costs order in favor of Western. The Privy Council decision was handed down on 9 November 2020.

[3.] The costs in the Supreme Court were taxed in the amount of $112,777 as reflected in the Certificate of Taxation dated 16 November 2016. Commonwealth Law Advocates (Commonwealth) acted for Western in the Supreme Court from the commencement of the action through to the taxing of the costs. Tynes & Tynes (Tynes) filed a Notice of Change of Attorney on behalf of Western in the Supreme Court action in July of 2021, sometime after the decision of the Privy Council.

[4.] When the Defendant was preparing to pay the judgment sum and the costs of the action, formal demands for the payment of the costs were received from Tynes and from Commonwealth Law Advocates, both firms claiming to be entitled to be paid the costs arising from the Supreme Court action.

[5.] On 3 December 2021 the Defendant paid Western the sum of $1,528,085.70 in respect of the judgment sum but has not paid the costs order due to the competing demands of the law firms of Tynes and Commonwealth. Western has commenced a fresh action on 8 December 2021 against the Defendant's attorneys, Cash Fountain, in support of their demand for the payment of the taxed costs.

[6.] In the face of these competing claims the Defendant has applied, by Summons, for directions as to the proper party to pay the costs to. The Defendant takes a neutral position on the application, merely seeking to ensure payment of the costs to the appropriate party.

[7.] Western's case as set out in its submissions are as follows:

3. Commonwealth Law Advocates has not filed an application seeking relief. However, on the 4th January, 2022 Commonwealth Law Advocates delivered written submissions on its own behalf.
4. At paragraph 9 of its written submissions Commonwealth Law Advocates makes the following assertion:

> "CLA maintains the position that they are entitled to the costs that are a result of the "fruits of [its] exertions as [an attorney] as against [its] costs incurred in recovering those fruits"."

5. The assertion by Commonwealth Law Advocates is contradicted by the statement made at paragraph 2 of its Submissions as follows:

> "At the conclusion of the litigation and numerous appeals, Airport was ordered to pay damages and costs to Western in the Appeal Court and the Supreme Court."

6. Commonwealth Law Advocates has not made an application to the Court seeking relief. No Affidavit has been filed on behalf of Commonwealth Law Advocates asserting facts which would confer an entitlement to costs which were ordered to be paid to Western Air Limited by the Supreme Court.
7. Western Air Limited cannot reasonably be expected to reply to an application for relief which has not been made by Commonwealth Law Advocates.

[8.] Commonwealth has not filed any formal application but has filed an Affidavit of its principal, Ruth Bowe-Darville. The Affidavit of Bowe-Darville provides in part as follows:

...

4) I crave the Court's leave to refer to the affidavit of Shandika Parks Rahming (the "said affidavit") filed herein on 17th December 2021 and depose hereto in support of the Defendant's Summons filed herein on 17th December 2021. The Judgment of Mr. Justice Neville Adderley (23rd November 2012) and the Certificate of Taxation (16th November 2016) have been referred to in the said affidavit.
5) By email dated 22nd November 2020, post the Privy Council's decision in this matter and the awarding of costs therein, I wrote to counsel for the Defendant enquiring after the payment of the costs in the action at first instance. On 23rd November 2020 counsel responded "I am just waiting for instructions from my client re settlement of costs and then I will revert."
6) Thereafter, I was advised that present Plaintiff's counsel had also enquired after the costs in this matter as it related to the proceedings before the Court of

Appeal and Privy Council. I was informed that there was a Certificate of Taxation for the Appeal in hand. I was then directed to present my taxed Bill together with interest thereon so that there could be a whole settlement of all the costs occasioned in the action.

7) On 30th November, 2021 I was advised by Defendant's counsel that the Defendant was in a position to settle all the costs in the matter and wished me to confirm my costs. At this point reference was made to the Certificate of Taxation obtained earlier and a calculation as to interest was made.

8) The taxed costs in the matter were certified at $112,777.00.

...

15) By mid-afternoon of 7th December 2021 the Plaintiff's principal was trying to contact me and sent me a WhatsApp message to call him. He apologized for having to deal with me on this matter in this manner citing that we had a long history and that his respect for me warranted his speaking with me and being up front on his position. After a half hour's conversation with him about his difficulties trying to settle the matter otherwise, we agreed that I was to confirm all sums paid by him in the matter together with interest. He too, offered to send me proof of payment. There were other matters that caused him concern but he was firm that he wished no publicity on the matter and no more litigation. He indicated that there were other costs being incurred subsequent thereto and that present counsel was insisting that the Defendant also pay those costs. He assured me that that had nothing to do with me or my firm's representation of him in the Supreme Court Action.

16) I confirmed to him and he to me that he paid the sum of $40,017 in respect of the trial of the matter. When interest was calculated the sum was $62,126.39. This final sum was sent to Mr. Rolle by WhatsApp on 10th December 2021. He received the same and offered no objection or comment otherwise.

17) On a query of Mr. Rolle on 15th of December, 2021 he advised via WhatsApp that (i) Tynes had spoken with Fountain on several occasions; (ii) Tynes advised Mr. Rolle that fees and costs are two different thing[s]; (iii) that does not prohibit WAL from giving my firm something; (iv) Tynes said the cost was awarded to WAL; and (v) Tynes was standing on the principle of the issue. Mr. Rolle assured me he was to speak with Tynes on his return to The Bahamas.

18) At our last exchange, on or around the holidays, Mr. Rolle advised that he had tried to reach his counsel but had not been able to speak with him. However, he suggested that I call Tynes but I refused given the approach taken by Tynes.

19) It is a fact that at the time of the 2016 Certificate of Taxation Tynes was not counsel of record. I am informed by counsel for the Defendant and verily believe that her firm was only served with the Notice of Change of Attorney in July 2021. I have no recollection of ever being served with a Notice.

20) The difference between the amount invoiced to the Plaintiff and the amount provided to the Plaintiff on credit is evidenced by the Certificate of Taxation. While I fully appreciate that the cost award was that of the Plaintiff, the amount provided on credit still remains outstanding and should be distributed directly to my firm.

21) Of course, the Plaintiff is entitled to have all sums paid by it refunded together with interest. It was always and still is my intention to do so and Mr. Rolle

is agreeable with that position and stated to me that he understood the position and that he was willing to accept that.
22) As matters have progressed thus far, I fear that if the Court does not give a direction for payment, I shall have to institute further proceedings to recover any sums due me. This would mean that it will be ten (10) years and more since the judgment and the award of costs therein.

[9.] Western has not responded to the Affidavit of Bowe-Darville and says that there is no application by Commonwealth for any relief.

[10.] Commonwealth has filed submissions to the Court and has advanced a position that the Court should make an order allocating the costs as between Western and Commonwealth or alternatively for the sums to be paid into Court.

Law, Analysis and Disposition

[11.] In the case of ***Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* - [2018] 3 All ER 273** the UK Supreme Court provides a useful discussion on the development of the right of the solicitor to recover his costs from his client and the protection which equity will afford. Lord Briggs, writing for the Court, stated:

> [1] This appeal tests the limits, in a modern context, of the long-established remedy known as the solicitor's equitable lien. In its traditional form it is the means whereby equity provides a form of security for the recovery by solicitors of their agreed charges for the successful conduct of litigation, out of the fruits of that litigation. It is a judge-made remedy, motivated not by any fondness for solicitors as fellow lawyers or even as officers of the court, but rather because it promotes access to justice. Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit. It is called a solicitor's lien because solicitors used to have a virtual monopoly on the pursuit of litigation in the higher courts. Nothing in this judgment should be read as deciding whether the relaxation of that monopoly means that the lien is still limited only to solicitors.
> [2] Solicitors have, since time immemorial, been entitled to a common law retaining lien for payment of their costs and disbursements. That is an essentially defensive remedy, which merely enables them to hold on to their clients' papers and other property in their actual possession, pending payment. It affords no assistance where there is nothing of value in the solicitor's possession, and is powerless where, in a litigation context, the defendant to the claim pays the judgment debt or agreed settlement amount direct to the solicitor's client, the claimant. But equity deals with that

deficiency in the common law by first recognising, and then enforcing, an equitable interest of the solicitor in the fruits of the litigation, against anyone who, with notice of it, deals with the fruits in a manner which would otherwise defeat that interest.

[3] Originally the fruits of the litigation were first identified in the judgment debt. Later this was extended to the debt due under an arbitration award and, later still, to the debt due to the claimant under an agreement to settle the claim. Each of those types of debt was identified as a form of property, a chose in action, in which equity could recognise and enforce an equitable interest in favour of the solicitor. It was called a lien because the chose in action represented the fruits of the solicitor's work. But it is better analysed as a form of equitable charge. Traditionally, the solicitor's interest could not be identified as a beneficial share in the chose, because that would have offended the laws against maintenance and champerty. Rather it was, from the earliest times, recognised as a security interest, enforceable against the fruits of the litigation up to the amount contractually due to the solicitor, in priority to the interest of the successful client, or anyone claiming through him. It did not depend upon the fruits of the litigation including a specific amount for party and party costs, such as a judgment for costs, or an element in a settlement sum on account of costs.

[4] In the ordinary course of traditional litigation, with solicitors acting on both sides, the amount due under a judgment, award or settlement agreement would be paid by the defendant's solicitor to the claimant's solicitor. Or the claimant's solicitor might recover the sum due to his client by processes of execution. In either case the equitable lien would entitle the solicitor not merely to hold on to the money received, but to deduct his charges from it before accounting to his client for the balance. But equity would also enforce the security where the defendant (or his agent or insurer) paid the debt direct to the claimant, if the payer had either colluded with the claimant to cheat the solicitor out of his charges, or dealt with the debt inconsistently with the solicitor's equitable interest in it, after having notice of that interest. In an appropriate case the court would require the payer to pay the solicitor's charges again, direct to the solicitor, leaving the payer to such remedy as he might have against the claimant. This form of remedy, or intervention as it is sometimes called, arose naturally from the application of equitable principles, in which equitable interests may be enforced in personam against anyone whose conscience is affected by having notice of them, either to prevent him dealing inconsistently with them, or by holding him to account if he does.

[12.] In ***Bott & Co Solicitors Ltd v Ryanair DAC*** **[2019] EWCA Civ 143** the English Court of Appeal distinguished between a solicitor's lien and an equitable right. In that case, Lord Justice Lewinson, delivering the decision of the court, stated at paragraphs 31-33 as follows:

[31.] It is necessary at the outset to distinguish between a lien at common law (often called a retaining or possessory lien) and the equitable right at issue on this appeal.

[32] The former is a right to retain possession of things (including things in action) which have come into the hands of a solicitor until his fees are paid. The existence of such a right is not peculiar to solicitors. It is a right given to many different kinds of agent, as well as to others such as a craftsman asked to make repairs to a chattel. That kind of lien extends to costs due to the solicitor in his professional capacity as such (as opposed to other debts due to him); and only to the extent that the client is personally liable to pay him. We are not concerned with that kind of lien, although its nature is relevant to understanding some of the cases.

[33] The latter, although described as a lien in some cases, is not really a lien at all. It has been described on more than one occasion as a right to ask the court to intervene in order to protect the solicitor's entitlement to fees as against his client. In this respect it is no more than a right to ask the court to exercise a discretion in his favour: *Mercer v Graves* (1872) LR 7 QB 499, 503; *Mason v Mason* [1933] P 199, 214; *James Bibby Ltd v Woods* [1949] 2 KB 449, 453; *Re Fuld (No 4)* [1967] P 727, 737. Although in *Gavin Edmondson (SC)* at [3] Lord Briggs said that the right was "better analysed as a form of equitable charge," I do not consider that he intended to cast doubt on the well-established principle that the right is a right to ask the court to exercise a discretionary power. That right is one that historically has been peculiar to solicitors.

(Emphasis added)

[13.] In ***Khans Solicitors v Chifuntwe*** **[2013] EWCA Civ 481**, the English Court of Appeal stated at paragraph [33] as follows:

> In our judgment, the law is today (and, in our view, has been for fully two centuries) that the court will intervene to protect a solicitor's claim on funds recovered or due to be recovered by a client or former client if (a) the paying party is colluding with the client to cheat the solicitor of his fees, or (b) the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees. The form of protection ought to be preventive but *may* in a proper case take the form of dual payment.
>
> (Emphasis added)

[14.] ***Khans*** was confirmed by the UK Supreme Court in **Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd.**

[15.] In the instant case the Defendant, as the paying party to the judgment is on notice that Commonwealth has a claim for outstanding fees. The letter of 6 December 2021 was clear and unequivocal in its demand. The second limb, as set out in ***Khans,*** therefore triggers need for the court to intervene to protect Commonwealth's claim on funds due to be recovered by Western.

[16.] Unlike in ***Khans***, where an allocation was indeed made by the Court between the client and his solicitors, Commonwealth has made no formal application for any relief. In the circumstances of this case, where the Defendant seeks directions as to who should be paid the costs, equitable considerations suggests that the appropriate direction should be that the Defendant pay the costs into court to abide allocation by the court. Should Commonwealth not make any formal application for the allocation of these costs as between it and Western within 30 days, Western may move to have the funds paid out to it.

[17.] I so Order.

Dated this 4th day of February AD 2022

Ian R. Winder

Justice