



[2019] IEHC 927

THE HIGH COURT

[2019 No. 25 SA]

BETWEEN

ADERONKE ADENEKAN AND J.B.S. (A MINOR)

APPLICANTS

AND

ASHIMEDUA OKONKNOWO/CYRIL & CO. SOLICITOR

RESPONDENT

Extempore Ruling of Mr. Justice Kelly, President of the High Court delivered on 2nd May, 2019

Introduction

1. There are two applicants before the court. The first is Aderonke Adenekan who is an adult. The second applicant, J.B.S. is a minor who is suing by her mother who is the first applicant.
2. The principal relief which is sought in this motion is an order directing the respondent to return three Nigerian passports which are in her possession. The first is an expired passport of the adult applicant. The second is a current passport of the adult applicant. The third passport is that of the minor. Whilst other reliefs are identified in the notice of motion, the principal order being sought is that relating to these passports.

The Respondent

3. The respondent is a solicitor. She has declined to hand over the passports because she asserts that she is entitled to exercise a retaining lien over them in respect of fees allegedly outstanding to her.

The application

4. This is an unusual application. Rarely is the court asked to make an order of this sort. It is even more unusual because in this case there has been an involvement by the relevant committee of the Law Society of Ireland, namely the Complaints and Client Relations Committee. That committee, having considered the matter, has recommended to the respondent that she ought indeed to hand over the passports. That recommendation is not a binding one but most solicitors, having received such a recommendation, would comply with it. That is not so in the case of the respondent.
5. What makes the case even more unusual is that the matter has had to be brought to this court in circumstances where the fee allegedly outstanding is one of €1,500 plus VAT.

Liens

6. A general retaining lien arises in circumstances where any deed or paper or personal chattel comes into a solicitor's possession in the course of a professional engagement as a solicitor. When such property comes into the possession of the solicitor with the client's sanction and is the client's property, a lien may be asserted over it where there is a fee outstanding to the solicitor.

The minor applicant

7. There is no dispute but that the minor applicant, J.B.S. was not and could not have been a client of the respondent solicitor. On that basis alone, there can be no valid assertion of a retaining lien over the child's passport. The child has no liability to the respondent for the alleged fee and thus there can be no valid assertion of a lien over the minor's passport. Notwithstanding that, I will consider the position of the minor in the same way as I will consider the position of her mother, the first applicant, in the course of this ruling.

Assumptions

8. For the purpose of this ruling I am going to make a number of assumptions in favour of the respondent. I do so notwithstanding the strange circumstances of the respondent's involvement which is apparent from the affidavit evidence.
9. During the course of discussion with counsel, I indicated the importance for any solicitor to clearly distinguish between a professional relationship and a personal relationship of friendship where assistance might be tendered to somebody on a voluntary basis. I am going to assume in the respondent's favour that the relationship of solicitor and client did in fact exist between the first applicant and the respondent. I am also, for the purposes of this ruling, going to assume, although it is very much disputed, that there is in fact a fee of €1,500 due by the first applicant to the respondent. I wish to make it clear that I am by no means deciding that this is in fact so. I merely assume it for the purposes of this ruling.
10. That the respondent solicitor is in possession of these passports is not in dispute.

Passports

11. An interesting question arises as to whether a passport can ever be the subject of a retaining lien of the type asserted here. The law in this country is that a passport is not the property of its holder. Rather it belongs to the Minister for Foreign Affairs and Trade. In other words, it is the property of the State. From such research as I have been able to carry out in a very short period of time available to me, that appears to be the position in most common law countries. There has been no evidence put before me to suggest that Nigerian law on this topic is any different to the law in this jurisdiction and so, as a matter of private international law, I assume that the law in that country is not any different.
12. There may be a question as to whether a passport can be the subject of a retaining lien but I do not have to decide it in this case. I will instead assume, in favour of the respondent, that a passport can indeed be the subject of a retaining lien.
13. It is also clear that a lien may not apply in respect of all client documents which happen to be in a solicitor's possession. There may well be circumstances where documents, although handed over to the solicitor, may exclude the possibility of a lien arising. That is a strong assertion which is made by the applicants here. It is disputed by the solicitor. Again, I am going to assume in favour of the respondent that there is an entitlement to assert the lien in this case, although as I say it is strongly in dispute.

14. Having assumed the existence of the relationship of solicitor and client, that a passport can be the subject of a lien, that the fee alleged is due and that the circumstances in which the passports were given to the respondent are those which would admit of the existence of a lien, I turn to a consideration of the legal position.

Reasonableness

15. Notwithstanding all of the assumptions which I have made, it may still be unlawful for a solicitor to assert the existence of a lien. A solicitor cannot in all circumstances validly assert and maintain a lien. The exercise of the lien must be reasonable.
16. I have come to that conclusion having regard, in particular, to a decision of the High Court of England and Wales called *R (on the application of) Malik Law Chambers (Solicitors) v. Legal Complaints Service (The Law Society)* [2010] EWHC 981. That is a decision of Saunders J.
17. I cite from paragraph 15 of his judgment to demonstrate the concept which I have just articulated. This is what he said: -

"In my judgment, there may well be circumstances where it would be unreasonable to exercise a lien, even bearing in mind that the more valuable the property withheld then the more likely it is that payment would be obtained. The mere fact that it is legal for the solicitor to exercise a lien does not mean that it cannot be unreasonable to do so nor is there any reason why the defendant should not regulate those occasions. That is in my judgment encompassed in the power given to the defendant in the Solicitors Act. It does not make sense to me to read the Law Society Guidance in the way which is suggested by the claimant. If the exercise of a lien may, in certain circumstances, be unreasonable, then there is no reason why the defendants should not have the power to direct the solicitor to return those items which it was unreasonable to retain."

18. There is no doubt but that passports are extremely valuable documents. In many instances they are essential documents. I turn to the affidavit evidence which has been placed before me as to the consequences for these applicants if these passports continue to be withheld from them.
19. At para. 23 of the principal grounding affidavit the deponent says this: -

"I say and believe that not having access to my passport and my daughter's passport is having significant and serious consequences for my family. My youngest daughter is due to sit her Junior Certificate examination in June. I have been advised by the school that my daughter cannot be registered for the state examinations without a PPS number. My daughter has been personally affected by the uncertainty and stress arising from the situation. I say that such has been the impact that my daughter became upset in school and I was asked to attend the school where I explained the situation. While the school has been very supportive, my daughter remains worried and upset and is trying to prepare for exams while

not knowing if she will be able to register and sit the exams in June 2019. I say and believe that as I have not been able to access my passport, I have been unable to obtain a public services card and to lawfully work in the State. I am at present a student undertaking a healthcare assistants course and I am eager to gain employment. I am very anxious to comply with the terms of my residency and to contribute to the State. I further say that my daughter and I have suffered extreme financial hardship as a result of being unable to access social welfare for an extended period. During this time, I was reliant on the goodwill of friends and charitable donations for housing and supporting. Following interventions by my local public representative, on my behalf, I have been granted a supplementary welfare payment being an emergency payment. I am at present in receipt of a social welfare payment of in or around €227 per week. An application for a social welfare payment for my eldest daughter has not yet been processed. I say and believe and am advised that an application for child benefit for my youngest daughter will not be accepted or processed until she has a PPS number and she cannot get a PPS number without producing her passport.

Having lived with my friend and her family in rental accommodation for a time, the landlord required that we move out of the property. My daughters and I are at present living in emergency bed and breakfast accommodation in Drogheda where we share a bedroom. I have attended with a local housing and homeless service. I have been assessed as eligible for council housing and have been assessed as entitled to apply for a housing assistance payment but am at present assessed as a two-person household only. As my youngest daughter has no PPS number, she is not recognised as part of the household. The immediate practical impact of the position is that my family at present will qualify for a HAP payment of €975 based on being a two-person household with no provision being made for my youngest daughter. If I have access to my daughter's passport and a PPS number for her, I will be eligible for an increased HAP payment which would be of great assistance in trying to secure accommodation for my family. I say and believe that given the cost of renting it is extremely unlikely that I would be able to secure private rental accommodation for €975 per month."

20. The affidavit goes on:-

"In addition to holding three passports, the respondent retains the file and documentation in relation to myself and my daughters in relation to our applications to the Department of Justice. I further say and believe that the respondent holds important original documents, including my daughter's birth certificate and my divorce certificate. I say that over the past months my primary concern has been to secure the release of the passports. While I dispute that any fees are due and owing to the respondent, I am advised that while a dispute is ongoing, a solicitor may assert a lien over a file or certain documents pending resolution of the dispute in relation to fees or until otherwise directed by a court. While I was concerned to access the full file and documents held by the respondent

my focus has been only on securing the passports. I say and believe, however, that in recent months my daughter and I received communications from a third party which has led me to believe that the respondent has disclosed documents and personal information regarding me and my children to a third party."

21. It is perfectly clear that in refusing to hand over the passports in support of a claim for a fee of €1,500 plus VAT there has been extraordinary inconvenience and distress caused to the two applicants. The withholding of the passports has had profound consequences in particular for the minor applicant and her ability to sit public examinations in June. The housing and social welfare entitlements of the first applicant and her children have also been adversely affected. On any view, the respondent has behaved in a wholly unreasonable fashion in holding onto these passports and refusing to hand them over to the erstwhile client. To do so for a fee as little as €1,500 plus VAT is entirely disproportionate and something that the court could not condone or stand over. In any event, in my view, there never was any entitlement whatsoever to hold onto the passport of the minor and thus there has been a wrongful assertion of a lien from the outset by the solicitor in that regard. In these circumstances, I have no hesitation in making the order which is sought in respect of the passports and I direct that they be handed over forthwith.
22. It is very much to be regretted that the solicitor in this case did not follow the wise recommendation made by the Client Relations Committee of the Law Society. Instead, by continuing to assert the lien, these proceedings had to be brought with a view to these passports being secured. I am satisfied that there was nothing unreasonable in the bringing of the application because if the matter were further pursued before the relevant committee of the Law Society further delay would result. A question exists as to whether such committee could ever make a binding determination or whether it is confined to a non-binding recommendation. But even if there is jurisdiction to make a binding order on the part of the committee it would not be able to make such in sufficient time to enable the minor applicant know whether or not she can sit the State examinations which are to take place next month.
23. I direct the respondent solicitor to forthwith hand over to the solicitors for the applicants the passports of the first applicant (both the expired and current passport) and also the passport in respect of the minor applicant.