REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-04358

BETWEEN

YETUNDE TEMILOLA ADE-JOHN
(also known as TEMILOLA ADE-JOHN)

Claimant

AND

MARK SHERLOCK BERNADOTTE WALKER
(also known as MARK WALKER)

First Defendant

AND

DRUKER DEVELOPMENT COMPANY LIMITED

Second Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Ms Jacqueline Chang for the Claimant/Judgment Creditor
No Appearances by the Defendants/Judgment Debtors - Unrepresented

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DECISION ON CPR PART 53 APPLICATION FILED ON THE 16TH MARCH, 2017

I. Background:

[1] This is an action brought by the Claimant for the recovery of unpaid fees under a Legal Services Agreement dated the 22nd September, 2015 (the "Agreement"). Pursuant to this

Agreement, which was signed by both parties, the Second Defendant, being the company to which the First Defendant is a Director, agreed to pay to Ms Ade-John, in her capacity as a legal consultant, a monthly retainer of **$7,500.00** inclusive of VAT for legal services. Ms Ade-John also contracted to submit to the Defendant Company at the end of each month, an invoice detailing all work done. It was also a term of the Agreement that Ms Ade-John would receive a fee of **15%** of any profit share received from either of the Defendants. None of the clauses in the Agreement, however, prescribed a timeframe within which the Defendants were to settle the invoices.

[2] The Claimant immediately commenced work on behalf of the Defendants in relation to the acquisition of the Aboutique Mall and No. 74 Long Circular Road properties. An agreement for sale for the former was executed by both parties on the 30th October, 2015. Significant work was also done with respect to the purchase of the latter.

[3] In due course, invoices for work rendered in the months of October and November, 2015 were sent to the Defendants as per the Agreement.

[4] In January 2016 the Claimant drafted and prepared nine (9) Deeds of conveyance in relation to the Defendants' purchase of ten acres of land in Gran Couva, Trinidad from Mr Hardeo Dookharan in the sum of $25,200,000.00. The final draft of these Deeds were executed by Mr Dookharan on the 9th January 2016 in the presence of both parties to this action.

[5] Thereafter, the Claimant, having not yet been paid on her invoices for the months October 2015 to February 2016 made numerous verbal and written requests for same.

[6] The contention between the parties was amplified on the 3rd June 2016 when the Claimant's clerk attended the Port of Spain Magistrate's Court and discovered that the First Defendant was also a defendant in another fraud matter. The Claimant along with her clerk, Mr Dipnarine, then attended the Fraud Squad, Port of Spain branch, where she was informed that the First Defendant is "*well known to the police and that he is required to sign at the Fraud Squad station three times per week."* Mr Walker's involvement in the fraud case was also confirmed.

[7] Thereafter, the parties engaged in several correspondences concerning the payment of the outstanding invoices culminating in a second agreement that required Mr Walker to pay the sum of **$80,000.00** in fees for the preparation and execution of the said nine (9) Deeds upon their registration (the 2nd Agreement").

[8] Having received neither a further response nor a payment from the Defendants, the Claimant's attorney-at-law, Ms Jacqueline Chang, issued a pre-action letter on the 16th August 2016 requesting payment of the sum of **$37,500.00** for unpaid retainer invoices plus **$80,000.00** in fees for the 9 Deeds. Despite these stated figures, it was stated in the letter that the Defendants were required to either pay the outstanding sum of **$117,000.00** (incorrect figure) plus legal costs or, in the alternative, state why the outstanding sum is disputed.

[9] Personal service of the pre-action letter was attempted on the First Defendant on the 2nd September 2016 but Mr Walker refused to accept service and indicated that service was to be made at his attorney's office situate at Queens Street, Arima. Service at this address was attempted three days later on the 5th September 2016, however, the office was found, not at the address as given by Mr Walker, but at the corner of Prince and Cezano Streets, Arima. Mr Walker's purported attorney, Mr Augustine, however, informed the Claimant's clerk that he was not instructed to accept service on behalf of Mr Walker. It was also stated that Mr Walker owed Mr Augustine money from previous matters.

[10] It was not until the 11th October 2016 that the first payment in settlement of the outstanding sum was made by Mr Walker in the amount of **$1,000.00** cash. This was followed by another payment of equal value made on the 27th October 2016. However, to date, no further payments have been made and the last correspondence received from the Defendants was dated the 21st November 2016.

[11] Thus, the Claimant instituted these proceedings on the 5th December 2015 claiming that she is entitled to the outstanding sum of **$115,500.00,** which accounts for the $2,000.00 paid, in settlement of the debt. Interest on the said sum was also claimed.

[12] Having failed to enter an Appearance within the stipulated 8 days from the date of service of the Claim, the Claimant duly requested entry of judgment against the Defendants in

default of appearance on the 18th January 2017. Such request was granted by Judgment entered on even date in the sum of **$113,441.24** inclusive of interest at the rate of **5%** (the "Judgment Sum").

[13] Ms Ade-John, as judgment creditor, then applied by **Notice of Application filed on the 16th March, 2017** for the following Orders under **CPR Part 53** (the **"Application"**):

i. *That the Court specify a time and date within which the Second Judgment Debtor must pay to the Judgment Creditor the Default Judgment debt in the sum of TT$113,441.24 inclusive of interest and costs within 28 days from the date of the order appearing in a daily newspaper;*

ii. *That should the Second Judgment Debtor fail to pay the judgment debt inclusive of interests and costs within the time specified in the said order that the court make a committal order against the First Judgment Debtor for a period deemed fit by the Honourable Court;*

iii. *That permission to apply for the committal order be granted without notice to the First Judgment Debtor;*

iv. *That notice be given to the First Judgment Debtor of the said order by substituted service by advertisement in a daily newspaper once per week for 2 consecutive weeks;*

v. *That costs of and incidental to this application be paid by the First Judgment Debtor to the Judgment Creditor.*

[14] The main ground for this application was the continued failure of the Judgment Debtors to pay the Judgment debt with its attendant costs coupled with the fact that the First Judgment Debtor could not be located so as to serve the proceedings.

[15] Notice of the first case management conference (CMC) was served on the parties by this Court on the 23rd May 2017. However, on the 17th October 2017 the Judgment Debtors did not appear before the Court. Accordingly, directions were given for the Judgment Creditor to file written submissions with respect to its Application, the Court wanting to be satisfied that the case at bar was not caught by the provisions of section 51 of the Legal

Profession Act and that the judgment creditor had engaged the correct statutory provision and procedure.

II. Submissions & Analysis:

[16] The first issue dealt with by Ms Chang in her submissions of the 20th November 2017 was, whether the instant Application was the correct procedure to seek to enforce the default judgment.

CPR Part 53 deals with the power of the court to commit a person to prison or to make an order confiscating assets for failure to comply with an order requiring him to do or an undertaking to do an act within a specified time or not to do an act. The relevant provisions of **Part 53** are as follows:

Part 53.2 states:

1) *Where a judgment or order specifies the time or date by which an act must be done the court may be order specify another time or date by which the act must be done.*

2) ***Where a judgment or order does not specify the time or date by which an act must be done the court may by order specify a time or date by which the act must be done***.

3) *...*

Ms Chang also relied on **Part 53.3**, which deals with committal orders or the confiscation of assets and states that neither a committal order nor a confiscation of assets order may be made unless—

a. *the order requiring the judgment debtor to do an act within a specified time or not to do an act has been served personally on the judgment debtor;*

b. *at the time that order was served it was endorsed with a notice in the following terms:*

"NOTICE: If you fail to comply with the terms of this order you will be in contempt of court and may be liable to be imprisoned or to have your assets confiscated.",

or in the case of an order served on a body corporate in the following terms:

"NOTICE: If you fail to comply with the terms of this order you will be in contempt of court and may be liable to have your assets confiscated."; and

c. *where the order required the judgment debtor to do an act within a specified time or by a specified date, it was served on the judgment debtor in sufficient time to give him a reasonable opportunity to do the act before the expiration of that time or before that date.*

[17] The **Judgment in Default of Appearance entered on the 18th January 2017** states as follows:

*"**IT IS THEREFORE ORDERED** that you must pay the Claimant the sum of **One Hundred and Thirteen Thousand, Four Hundred and Forty-One Dollars and Twenty-Four Cents ($13,441.24)** for debt, interest and costs to date of this judgment together with interest at the statutory rate of **five percent (5%)** per annum after the date of this judgment to the date of payment."*

WARNING

"If you ignore this order your goods may be removed and sold or other enforcement proceedings may be taken against you. If this happens further costs will be added."

It is therefore apparent that the Judgment in Default did not specify a time by which the Defendants were required to pay the Judgment Sum to the Claimant. Thus, prior to making an order for the confiscation of assets under **Part 53.3 or 53.4**, the Court must specify a time or date by which the Judgment debtors are to pay the Judgment Sum to the Claimant (**Part 53.2(2)).**

Given the fact that default judgment had been rendered since the beginning of this year and that, to date, no attempts had been made by the Defendants to pay or to communicate

their intention to pay the debt, the Court is inclined to make an order requiring **payment of the entire Judgment Sum inclusive of interest (to be calculated) by the 31st January 2018**.

Upon making such an order, the Court will then, pursuant to **Part 53.3** and/or **Part 53.4**, considering that Mr Walker is being sued in his personal capacity as well as an officer of a body corporate (the second Defendant/Judgment Debtor), serve a copy of the Order herein personally on Mr Walker endorsed with a penal notice as stated in Part 53.3 (b) and/or as stipulated in Part 53.4 (b) as follows:

> **"NOTICE: If DRUKER DEVELOPMENT COMPANY LIMITED fails to comply with the terms of this order it will be in contempt of court and you MARK SHERLOCK BERNADOTTE WALKER may be liable to be imprisoned or have your assets confiscated."**

[18] However, the entering of the above order is subject to a more important issue to be determined. As submitted by Ms Chang, this Court must first ascertain whether the **Part 53 Application** is proper in light of the provision in **section 51 of the Legal Profession Act, Chap 90:03 (the "Act")**.

Section 51(1) of the Act stipulates that a bill of costs be first taxed before an attorney can sue his/her client for any unpaid legal fees:

> *"Subject to this section an Attorney-at-law may not commence any suit for the recovery from his client of the amount of any bill of costs for any legal business done by him* ***unless the bill of costs is taxed and a copy thereof so taxed is served on the client with a demand in writing for payment fifteen days before the filing of the suit****."*

This section is indeed applicable as Ms Ade-John filed her claim on the 5th December 2016 seeking to recover unpaid fees for legal services rendered on behalf of Mr Walker and the Defendant Company under their Agreement. Ms Chang has admitted non-compliance with **section 51(1)** as no bill of costs in relation to the unpaid fees has been taxed or served on the Defendants prior to initiating this claim.

[19] Thus, the material issue to consider is: **Whether such non-compliance is fatal to the claim and thus, bars the Application for confiscation of assets herein?**

Ms Chang sought to rely on the provisions in **section 53 of the Act** to submit that the parties were well within their rights to enter into the Agreement, which purportedly prescribed the remuneration, i.e. legal costs between them. **Section 53 subsections (1) – (3)** of the Act state:

1) *"Whether or not any rules are in force under section 52, an Attorney-at-law and his client may either before or after or in the course of the transaction of any non-contentious business by the Attorney-at-law, make an agreement as to the remuneration of the Attorney-at-law in respect thereof."*

2) ***The agreement may provide for the remuneration of the Attorney-at-law by a gross sum, or by commission or by percentage, or by salary, or otherwise, and it may be made on the terms that the amount of the remuneration stipulated in the agreement shall not include all or any disbursements made by the Attorney-at-law in respect of searches, plans, travelling, stamps, fees or other matters.***

3) ***The agreement shall be in writing and signed by the person to be bound or his agent."***

[20] Thus, considering that the Agreement (i) provided for remuneration by way of commission in the amount of **$7,500.00** per month; (ii) provided for remuneration by a percentage of the profits shared; and (iii) was signed by both parties, Ms Chang submitted that pursuant to **section 53(4),** her client was entitled to initiate the claim for recovery under the Agreement. **Section 53(4) of the Act** states:

4) *"The agreement may be sued and recovered on or set aside in the same manner and on the same grounds as an agreement not relating to the remuneration of an Attorney-at-law;* ***but if on any taxation of costs the agreement is relied on by the Attorney-at-law and objected to by the client as unfair or unreasonable, the taxing officer may inquire into the facts and certify them to the Court, and if on that certificate it appears just to the Court that agreement should be cancelled, or the amount***

payable under it reduced, the Court may order the agreement to be cancelled, or the amount payable under it to be reduced, and may give consequential directions as the Court may think fit*."*

The Court, however, is concerned with the interpretation to be placed on the highlighted portion above especially when read conjunctly with **section 51(1)**. Both provisions, read together, suggest that the first step, whether it be in contentious or non-contentious matters, is to have a bill of costs taxed and served on the other party before bringing the claim.

In fact, on a prima facie reading of both provisions, the Act seems to suggest that even in non-contentious matters, where the parties are permitted to agree to their own remuneration in contract, the remuneration agreed between the parties may still be assessed prior to filing a claim. Such an interpretation, however, does not quite accord with the common law principles of freedom of contract. It would seem contradictory to permit parties to contract to their own terms of remuneration only to have the Court intervene to determine whether such agreement was fair. Indeed, that is exactly what **section 53(4)** attempts to do by allowing a defendant to object to the taxation based on the Agreement, which would then cause the matter to be referred to a Judge to determine a reasonable amount of costs to be recovered.

[21] However, the Court must also consider **section 52 of the Act**, which states that the **CPR** must govern the remuneration of attorneys in non-contentious matters:

1) *"The Association may, with the approval of the Chief Justice and the minister, make Rules prescribing and regulating the remuneration of Attorneys-at-law in respect of non-contentious business."*

Section 52(3) in particular, specifically arrogates power to the CPR to provide rules for the taxation of bills of costs:

3) "So long as Rules made under this section are in force taxation of bills of costs of Attorneys-at-law in respect of non-contentious business shall be regulated by those rules."

Thus, it still seems that the Act envisioned that taxation of the costs will occur prior to the filing of the suit for recovery of unpaid legal fees even in non- contentious matters *as prescribed by the CPR*. This principle seems to be reinforced in the provisions in **Parts 66 & 67 of the CPR**.

CPR Part 66 contains general rules about costs and entitlement to costs. Costs are defined in **Part 66.2** to include attorney's charges and disbursements, fixed costs, prescribed costs, budgeted costs or assessed costs. **CPR Part 66.2(3)** ***states that where there is any reference in any enactment to the taxation of costs, it is to be construed as referring to the assessment of such costs in accordance with Rule 67.2*****.** Thus, **CPR Part 67.2** appears to be the governing provision on the issue.

[22] **Part 67.2** states:

1) *"where the court has any discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount that the court deems to be reasonable were the work to be carried by an attorney-at-law of reasonable competence and which appears to the court to be fair both to the person paying and he person receiving such costs."*

2) ***"Where the court has any discretion as to the amount of costs to be paid to an attorney to his client, the sum allowed is the amount that the court deems to be reasonable and which appears to be fair both to the attorney-at-law and the client concerned."***

Part 67.2(3) proceeds to list the factors which the Court must take into account when deciding what is reasonable. As it relates to costs charged by an attorney to his client, which is the case at bar, **Part 67.2(3)(h)** requires the Court to consider the Agreement.

[23] As helpful as these provisions are, they only apply in a situation *where the court has a discretion to determine the amount of costs to be paid*. Under **sections 51 – 53 of the Act,** such a discretion only comes into play if, during taxation/assessment by a taxing/assessment officer, the other party objects to the amount of costs. As such, taxing/assessing the bill of costs is a condition precedent to the Court's involvement under **Part 67.2**.

[24] Thus, Ms Chang cited the decision of **Vincent Nelson QC v The Attorney General of Trinidad and Tobago**[1] to submit that the failure to comply with the provision in section 51(1) of the Act did not jeopardise the validity of her claim and by extension, the validity of the Application herein. In ***Vincent Nelson*** supra, Rahim J found that, in light of the provision in **CPR Part 67.2**, a failure to comply with **section 51(1)** was not fatal to the claim.[2] To ascertain the applicability of this decision to the instant case, a comparative analysis must be done.

In ***Vincent Nelson*** supra, the Claimant, a Queen's Counsel, was similarly suing for unpaid fees pursuant, however, to a retainer agreement. Unlike the case at bar, however, the attorney was to be involved in contentious matters i.e. defending tax appeals. Further, the Application to be considered in ***Vincent Nelson*** was not a **Part 53** application. Rather, it was an application to strike out the claim on the proposition that it disclosed no reasonable grounds for bringing same. The basis of this application was that the Claimant had failed to comply with **section 51(1) of the Act** prior to the filing the claim seeking recovery of unpaid legal fees. Thus, Rahim J had to determine whether, by this failure, the claim had no chance of success.

In understanding the learned judge's conclusion, it is essential to understand the arguments and issues before him:

> *"…The two issues are not inconsistent* ***having regard to the claimant's argument that the defendant contracted with the specific intention that a Bill not be taxed in compliance with section 51(1). Whether in this case the parties should have contracted outside the terms of section 51(1) is both a matter of law and evidence. The matter required full argument on trial. The court must ask itself at this stage, whether the case as pleaded has no chance of success*** *and, with respect to an abuse of the process, whether the claimant is guilty of using the process for a purpose or in a way significantly different from its ordinary and proper use or in*

[1] CV 2016-04386
[2] Se para 45 of his judgment

circumstances where the process of the court is misused and employed not in good faith or for proper purposes…"[3]

[25] Ms Chang did not specifically submit or plead that the parties intended to contract outside of **section 51(1)** when they entered into the Agreement. However, such an argument could be construed as being implicit in the Agreement.

What was more persuasive, however, was Rahim J's view that the provision in **section 51(1)** was not mandatory considering that **CPR Part 67.2** permitted the Court to conduct its own assessment of the costs[4].

Indeed, the purpose of taxing a bill of costs in a suit for unpaid legal fees is really to assess whether the quantum of costs in the bill as stated by the attorney is fair and reasonable for the work done. However, in the case where the parties have written into an agreement, what a fair wage is, in their opinion, for work done, the question becomes twofold: (i) whether an enactment can go against the parties' freedom to contract to their own terms; and (ii) whether that was the intention of Parliament in drafting **section 51(1) of the Act**. In Rahim J's opinion, **section 51(1)** was to be construed as "…*merely a procedural requirement in substance"*.[5] I am inclined to agree.

[26] To reinforce this point of view, I think the learning from our Court of Appeal in **Matthews v The State**[6], becomes material.

In ***Matthews*** *supra*, the panel comprising de la Bastide CJ, Hamel-Smith JA and Warner JA distinguished ***mandatory*** provisions from ***directory*** provisions and found that to differentiate one from the other, one has to look at the consequences of the breach:

"*It is no longer accepted that it is possible, merely by looking at the language of a legislative provision, to* ***distinguish between mandatory provisions, the penalty for breach of which is nullification, and directory provisions, for breach of which the legislation is deemed to have intended a less drastic consequence***. ***Most directions given by the***

[3] See para 42
[4] See paras 40 & 45
[5] See para 40
[6] (2000) 60 WIR

***legislature in statutes are in a mandatory form, but in order to determine what is the result of a failure to comply with something prescribed by a statute, it is necessary to look beyond the language and consider such matters as the consequences of the breach and the implications of nullification in the circumstances of the particular case.*"**

[27] In my considered opinion, failure to comply with **section 51(1)** to tax/assess a bill of costs prior to the institution of proceedings does not result in nullification in circumstances where the parties have already agreed in contract the remuneration for the work to be completed. As a safeguard, I find that by virtue of **CPR Part 67.2**, the Judge has the discretion to look into the Agreement, if necessary, or if there is some objection, to assess whether the fees charged therein are reasonable having considered all the factors set out in **CPR Part 67.2 (3) (a) – (h)**.

[28] Thus, the Claimant's failure to comply with **section 51(1) of the Act** is no bar to the **Application** herein.

III. Disposition:

[29] Accordingly, in light of the foregoing analyses, the order of the Court is follows:

ORDER:

1. **That pursuant to CPR Part 53.2(2), the Judgment Debtors shall pay the Judgment Sum of $113,441.24 together with interest at the statutory rate of 5% per annum from 18th January 2017 to date of payment to the Judgment Creditor on or before the 31st January, 2018.**

2. **Permission is granted to the Judgment Creditor to dispense with personal service of this Order and to effect service on the Judgment Debtors by notice of advertisement of this Order in a daily newspaper of general circulation in Trinidad and Tobago once per week for two consecutive weeks.**

3. **That the Order directed to the First Judgment Debtor (Mark Sherlock Bernadotte Walker) be endorsed with a penal notice in the form prescribed in CPR Part 53.3 (b).**

4. **That the Order directed to the Second Judgment Debtor (Druker Development Company Limited) be endorsed with a penal notice in the form prescribed in CPR Part 53.4 (b).**

5. **In default of the Judgment Debtors complying with Clause 1 of this Order, the Judgment Creditor shall be at liberty to apply for a committal order or a confiscation of assets order against the Judgment Debtors subject to satisfying the Court of due service of this Order.**

6. **Costs of this CPR Part 53 Application to be paid by the Judgment Debtors to the Judgment Creditor.**

7. **That pursuant to CPR Part 67.4 (2), the Court exercises its discretion to direct that the Fixed Costs under CPR Part 67 Part 2 of Appendix A attributable to the Judgment Creditor in pursuing the Part 53 Application to enforce the Default Judgment herein are to be quantified as assessed costs in accordance with CPR Part 67.11.**

8. **Such costs of the Part 53 Application have been assessed in the sum of $16,100.00 to be paid by the Judgment Debtors to the Judgment Creditor on or before 31st January, 2018.**

Dated this 14th day of December, 2017

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Robin N. Mohammed
Judge