REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-02379

BETWEEN

GEETA MAHARAJ

Claimant

AND

RANGE RESOURCES TRINIDAD LIMITED

First Defendant

AND

RANGE RESOURCES LIMITED

Second Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Thursday 11 February 2021

Appearances:

Mr Prem Persad Maharaj for the Claimant instructed by Ms Geeta Maharaj (Claimant)

Mr Jonathan Walker instructed by Ms Krystal Richardson for the Defendants

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DECISION ON NOTICE OF APPLICATION TO STRIKE OUT CLAIM

I. Background:

[1] This action seeks the recovery of unpaid fees for non-contentious legal work done by the Claimant for the Defendants. The Claimant, Ms Geeta Maharaj, an attorney-at-law, pleads that the parties' relations began via a verbal request made by Mr Nicholas Beattie

in his capacity as a Director of the Defendant Companies, that she provide legal services involving, inter alia, the review of certain intercompany loan agreements. In pursuance of this "oral agreement", Ms Maharaj avers that she performed the services and submitted an invoice dated the 22nd September, 2015 in the whopping sum of **TT$12,010,600.00 (1st Invoice)**. This invoice was never liquidated by the Defendants. Instead, they offered the sum of **$12,000.00** as settlement in response, which was not accepted. To date, the 1st Invoice remains unsettled.

[2] Despite this outstanding balance, Ms Maharaj engaged in another verbal agreement to perform services for the First Defendant through its Chief Financial Officer, Ms Harford, who, in similar fashion to the 1st Invoice, orally requested Ms Maharaj's corporate secretarial services. However, Ms Maharaj maintains that this second request was for services to be rendered to the Defendant's three affiliate companies in Barbados. Again, Ms Maharaj claims that she upheld her end of the deal and performed the services and issued a **second invoice** in the sum of **TT$50,973.00**. Eventually, after several correspondences including a pre-action letter, a part payment in the sum of **$42,000.00** was received from the First Defendant and thus, she claims that the sum of **$8,973.00** remains outstanding.

In total therefore, the Claimant sues for an outstanding debt of **TT$12,019,573.00**.

[3] Within a month of the filing of the Claim and the subsequent Appearances, the Defendants applied, under **Part 26.2(1) of the CPR 1998**, to have the Statement of Case struck out with an attendant order for costs in their favour. They also sought a stay on the filing of the Defence until determination of this Application.

Their affidavit in support was deposed and filed by Ms Richardson. It was clear that the primary grounds for their Application was the Claimant's failure to have her bill of costs assessed and served on the Defendants with a written demand for payment within 15 days prior to the institution of this Claim. Having failed to do so in accordance with **section 51(1) of the Legal Profession Act, Chap 90:03 (LPA)**, it was deposed that the Claim be struck out as it disclosed no realistic prospect of success and/or was an abuse of process.

[4] In her affidavit in response, Ms Maharaj introduced some additional background facts to the oral agreements as a foundation for her opinion on the reason the Defendants have sought to avoid the invoices. Much of this evidence, however, was irrelevant to the Defendants' Application and in any event, should have been pleaded.

On the material issue, that is, whether she is barred from bringing this Claim, due to non-compliance with **section 51 of the LPA,** Ms Maharaj's evidence was as follows: (i) that Section 51 does not apply to the case at bar, which deals with a commercial transaction and/or (ii) that Section 51 does not contain any guidelines for fees chargeable for commercial transactions. In essence, she deposed that no bill of costs was ever assessed because *"it was not necessary to do so"* due to the inapplicability of Section 51 to the instant facts.

Alternatively, she deposed that if the Court is minded to find that Section 51 applied and as a result, a bill of costs should have been first assessed, then the reasons for her non-compliance are contained in the Statement of Case to the related proceedings, brought against the Defendants at **CV2017-02381**.

She also challenged the fact that the Defendants' affidavit in support was deposed by their instructing attorney, Ms Richardson, and not by the Defendants' Directors, Ms Harford or Mr Beattie. As a result, Ms Maharaj was of the opinion that the affidavit was improper and/or based on hearsay evidence.

[5] This latter "submission" shall be disposed of summarily. **Part 31.3 of the CPR 1998** provides that the general rule is that an affidavit may contain only such facts as the deponent is able to prove from his own knowledge. It was clear from the Defendants' Application that the sole issue is one of pure law, being, whether the Claimant's non-compliance with **section 51(1) of the LPA** is fatal to her Claim. In this light, the affidavit in support did not require any evidence of the facts surrounding the oral agreements and/or invoices. Rather, what was needed, were facts that proved that (i) it is a condition precedent to the bringing of this claim that a bill of costs be first assessed as per Section 51 of the LPA and (ii) that the Claimant failed to comply with this requirement, which proves fatal to the Claim.

In those circumstances, the Defendants, as lay persons, were neither required nor competent to depose the necessary facts in support of the Application as such facts are beyond their remit. It was therefore necessary for their attorney to give such evidence as those facts would be within her own knowledge.

[6] A Defence was nevertheless filed prior to the determination of the Application whereby the Defendants denied that the 2nd Defendant was in any way involved, concerned or party to any oral agreements with the Claimant for the provision of the legal services. As to the First Defendant's involvement, it was pleaded that some of the corporate secretarial services described in the Claim were rendered to the Barbadian subsidiary companies only.

All allegations of conspiracy against and/or accusations that the Defendants attempted to make the Claimant look incompetent so as to terminate the oral agreements were denied. Rather, the reason for the First Defendant's termination of the Claimant's services was pleaded as being due to their unhappiness with her performance, in particular, with her lack of urgency in dealing with their requests.

As it pertained to the invoices, it is the Defendants' case that the 1st Invoice was received 9 – 10 months after Ms Maharaj's services were terminated and thus, could not be viewed as a reason for her termination.

Thus, the main dispute between the parties was the issue of quantum as opposed to liability. In this regard, the Defendants maintain that the balance sought is wholly exorbitant especially given that, as there was no prior agreement as to the fee for the services, such fee had to be fair and reasonable taking into account the factors in **Part B section 10 (1) of the LPA**. As to the other purported losses to the Claimant's reputation and/or business resulting from the Defendants' termination of her services, these were also categorically denied.

[7] At the first hearing, the parties were given directions for the filing of written submissions in support of and in rebuttal to the Defendants' Application.

As would be expected, the submissions revolved around the parties' interpretation of the provisions in **sections 51 – 53 of the LPA** and attendant case law, most notably, the recent decision of Rahim J in **Vincent Nelson QC v The A.G. of T & T CV2016-04386**.

II. Law & Analysis:

[9] Ms Maharaj, in her affidavit in response expressly conceded that she did not assess and/or present a bill of costs prior to initiating this action.[1] Given this undisputed fact, the sole issue to be decided is whether such a failure is fatal to the Claim. Resolving this issue requires an interpretation of the relevant provisions of the LPA.

[10] Prior to engaging in the interpretation process, the Claimant, in her written submissions, contended that the Defendant's Application was premature because it was served prior to the first Case Management Conference and before the pleadings were closed. She relied on an authority which expressly stated that such application *should normally be heard* at the case management conference. Ms Maharaj seems to have misconstrued the meaning of the words *"should be heard"*. Hearing the Application is not the same as its filing or service. Thus, the authority correctly did not, in any way, state or suggest that the Application ought not to be filed and served before the first CMC. In any event, we are guided primarily by the **CPR 1998** on such issues. In this regard, nowhere in **Part 26 of the CPR 1998** does it state that Applications to strike out of a Statement of Case are not to be made before the first CMC. In fact, the basis on which a Statement of Case may be struck out, as provided for in **Part 26.2 (1) (a) – (d)**, is evidence that such applications may even be entertained prior to the filing of the Defence. For example, the Court need not have sight of a Defence to determine whether the Statement of Case is non-compliant with a specific Rule, Practice Direction or Court Order (Part 26.2 (1) (a)) and as a result, should be struck out. This submission was therefore meritless.

[11] With respect to the more pressing issue, i.e. the Claimant's non-compliance with **section 51 of the LPA** and the effect on her Claim, Ms Maharaj rightly conceded in her submissions that the language of this provision presupposes that a bill of costs has already

[1] Para 24

been taxed and thus, the commencement of this action is for the recovery of taxed/assessed costs.

Section 51(1) of the LPA states as much:

> *"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****."*

Ms Maharaj however proceeds to place an unusual interpretation on this provision. She is of the opinion, that it applies strictly to contentious matters based on two grounds: (i) that the term "Bill of Costs" is used and (ii) that there is no provision for Counsel's and Instructing Attorney's fees in a Bill of Costs.

To my mind, there is nothing in the wording of this Section that limits its application to contentious matters only. As she correctly identified, "Costs", as defined in the CPR includes attorney's charges. There is no different term used to describe attorney's fees in non-contentious matters. Secondly, I agree with the Defendants that a bill of costs does include the fees of both advocate and instructing attorneys. This submission was also baseless.

[12] Thus, the material issue to consider is: **Whether the Claimant's non-compliance with Section 51 (1) of the LPA is fatal to the claim?**

In resolving this issue, **Section 51** should not be looked at in isolation. **Section 53 subsections (1) – (3) of the LPA** permits the parties to come to an agreement as to the terms of remuneration of the attorney's fees for non-contentious matters: **Sub-sections (1) – (3)** state as follows:

> ***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."***

[13] In the Claimant's pleaded case, no mention was made of any such *"remuneration agreement"*. Further, it is undisputed that all arrangements between the parties for the provision of legal services were done orally and therefore, not in writing. Thus, **section 53** does not apply to the case at bar.

[14] Ms Maharaj however, asked us to focus on the provision in **section 52 of the LPA**, which to her mind, does not make it mandatory for a bill of costs to be first taxed before seeking recovery of unpaid legal fees. **Section 52**, allows for other Rules to be made that govern the remuneration of attorney's fees in non-contentious matters. **Section 52(1)** states:

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 Rules of Court 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."***

Ms Maharaj, was incorrect in her submission that *"there appears to be no rules made by the Rules Committee that are in force to justify the taxation of a bill of costs."* To my mind, **Parts 66 & 67 of the CPR 1998** deal with the assessment of bills of costs of attorneys-at-law for both contentious and non-contentious matters.

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 67.12.*** Thus, **CPR Part 67.2** appears to be the governing provision on the issue.

[15] **Part 67.2** provides :

> ***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 out by an attorney-at-law of reasonable competence and which appears to the court to be fair both to the person paying and the person receiving such costs."*
>
> ***2) "Where the court has any discretion as to the amount of costs to be paid to an attorney-at-law by 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 (known as the "pillars of wisdom") 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)(a) - (h)(i) – (iii)** are the relevant provisions.

[16] 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***[2]. However, such a discretion only arises in two situations in the **LPA**, namely (i) in non-contentious matters where an agreement as to remuneration is made (under Section 53) but the costs stated in that agreement, when being taxed/assessed are objected to by the client. **Section 53(4)** 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*

[2] Part 67.2(2) of the CPR 1998

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 the 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.***

[17] And (ii) in a suit for the recovery of costs under **section 51**, whether it be contentious or non-contentious, and the amount set out in the bill of costs is sought to be recovered or disputed and **where no scale of fees is prescribed**. **Section 51 (3)** states:

3) "If in any proceedings before a Court—

a) the amount set out in a bill of costs is—

(i) ***sought to be recovered****; or*

(ii) ***disputed; and***

b) ***the bill or part thereof relates to matters in respect of which no scale of fees is prescribed****,*

the court shall decide whether the fees set out in respect of those matters are fair and reasonable having regard to the work done or are excessive and shall allow or reduce them accordingly."

Thus, on a conjoint reading of the relevant provisions of the **LPA** and the **CPR 1998**, it appears that a ***bill of costs must first be presented for assessment*** before the court is permitted, whether in a contentious or non-contentious matter, any discretion to determine the reasonableness of the fees stated in the bill and/or agreement. However, **section 51 (3)** seems to suggest that in matters where there is no scale of fees prescribed and one party either disputes or seeks to recover the bill of costs, then the discretion is placed with the Court to assess the bill.

This provision is material considering that Ms Maharaj submits that no scale of fees for commercial matters is prescribed in the **LPA**.

[18] Based on my perusal of the **LPA**, I am inclined to agree with the Claimant. In the **Attorneys-at-law (Remuneration) (Non-Contentious Business) Rules** made pursuant to **section 52 of the LPA**, the maximum fees are set out for the following areas of practice: (i) for Common Law conveyancing transactions; (ii) conveyancing transactions under the Real Property Act; any other conveyancing transactions not specifically provided for in Schedules 1 and 2; and (iii) work done in connection with applications for Probate or Letters of Administration.

Thus, the fees for commercial transactions such as the review of loan agreements etc., are not prescribed for in the **LPA**. Further, the Claimant is indeed suing for recovery of her fees which the Defendants dispute. Given these circumstances, it appears that the *"tail-piece"* provision in **section 51(3)** is activated thereby placing discretion in the Court to assess the bill of costs. The burning question to be addressed, however, is: at what stage must the bill of costs be presented for the Court to exercise this discretion?

[19] Ms Maharaj relied on the case of **Vincent Nelson QC v The Attorney General of Trinidad and Tobago**[3] to submit that the failure to comply with the provision in **section 51(1) of the LPA** did not jeopardise the validity of her claim. In **Vincent Nelson**, 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.[4] 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 but pursuant to a retainer agreement. Unlike the case at bar, however, the attorney was to be involved in contentious matters i.e. defending tax appeals. Similarly, however, it was also 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 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.

[3] CV 2016-04386
[4] Se para 45 of his judgment

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 circumstances where the process of the court is misused and employed not in good faith or for proper purposes…"*[5]

[20] In this Court's view, the facts are distinguishable on the basis that no remuneration agreement was made between the parties in the case at bar. Rahim J was of the 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[6]. Rahim J, it appears, asked whether **section 51(1)** was to be construed as "…*merely a procedural requirement in substance".*[7]

Indeed, the purpose of taxing/assessing 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, even if indeed the Court has the discretion to conduct its own assessment under **section 51 (3)** and **Part 67.2 of the CPR 1998**, the Court must determine the supremacy of the two sources of law, before exercising any discretion.

[5] See para 42
[6] See paras 40 & 45
[7] See para 40

Ms. Maharaj and her counsel, Mr Prem Persad Maharaj, relied on the authority of **Commonwealth Caribbean Administrative Law,**[8] which distinguished between directory and mandatory provisions in legislation. I prefer to use the dicta given by our Court of Appeal in **Matthews v The State**[9], which said the same thing for all practical purposes.

> 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 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.*****"**
>
> Thus, the fact that **section 51(3)** applies and permits the Court to conduct its own taxation/assessment of the bill of costs in this matter, does not make Section 51(1) inoperable or inapplicable. In fact, Section 51(1) is still the governing provision for the procedure to be followed for an attorney-at-law seeking to recover costs (fees) from clients. Section 51(3) merely, in my opinion, presumes that section 51(1) has been activated in that the attorney-at-law has presented a bill of costs seeking permission to tax/assess the costs in order to comply with the full requirements of Section 51(1), that is, to determine, post taxation/assessment, the amount the attorney may recover from the client. It is going through this process of taxation/assessment at the permission stage that the Court will now exercise its discretion in accordance with Rules of Court whether under the RSC (for Old Rules matters) or the CPR (whichever is applicable): **CPR Part**

[8] Eddy Ventose, Chap 6 at page 143
[9] (2000) 60 WIR

67.2 (2) and (3) (a) – (h) (i)–(iii). The amount computed at the end of taxation (old rules, RSC) or quantified after assessment (new rules, CPR) will constitute the outstanding costs for which the attorney can now initiate an action to recover from the client in the event the costs are not paid. However, the attorney must serve an office copy of the allocatur (the Registrar's Certificate under old rules, RSC) showing the taxed costs, or the Order quantifying the costs (under the CPR) showing the assessed costs on the client and must allow at least 15 days to elapse before initiating such action in the event the costs are not satisfied.

[21] The **LPA** being primary legislation cannot be abrogated by the provisions of the **CPR**, and so even if the provisions of both were in conflict, (which this Court does not accept), the Court would be required to give precedence to the provisions of the LPA. It was further submitted that the provisions of the **LPA** are unambiguous.

[22] Regard must be had to the Foreword of the **CPR** by Sharma CJ:

> *"**The power to make rules of court is vested in the Rules Committee under the provisions of section 77 of the Supreme Court of Judicature Act.** These rules govern the practice and procedure to be followed in the civil division of the Court of Appeal and the High Court of Justice. **Rules of court must be distinguished from substantive law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties.** Substantive law therefore permeates into every facet of social infrastructure. Intrinsically, it governs the establishment of the institutions, processes, laws and personnel that provide the apparatus through which law works.*
>
> ***On the other hand, rules of court are a source of procedural law the function of which is to prescribe and regulate the machinery or manner in which legal rights or status and legal duties may be enforced or recognized by a court of law. Since they are procedural in character and effect, they cannot confer, take away, alter or diminish any existing jurisdiction, rights or duties created or conferred by substantive law: Everett v Griffiths (1924) 1 K.B. @ p. 957. Being made under powers given by statute, however, rules***

of court have themselves the force of statute: <u>Donald Campbell & Co. v Pollak (1927) A.C. @ p. 804</u>.

The two branches are complementary and interdependent, and the interplay between them often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into the substantive law, gives it its effectiveness and brings it into being. Rules of court, therefore, are of fundamental importance to the good administration of justice and must accord with the cultural climate pervading society at any particular time."

[23] This is supported by **<u>Halsbury's Laws of England</u>**[10]:

*"**The Civil Procedure Rules are a form of delegated or subordinate legislation, and the Civil Procedure Rules Committee is empowered to make rules only within the strict limits defined by statute**, whether contained in the <u>Civil Procedure Act 1997</u> or any other Act. Like the Rules of the Supreme Court and the County Court Rules before them, the rules are mere rules of practice and procedure, and their function is to regulate the machinery of litigation; they cannot, unless authorised by specific legislation, confer or take away or alter or diminish any existing jurisdiction or any existing rights or duties. **Since they are procedural in character and effect, they cannot enable a claim to be brought which could not otherwise have been brought."***[Emphasis mine]

[24] It is clear from the words of Sharma CJ supported by Halsbury's that the **CPR** was meant to complement and not supersede substantive law. The **LPA** is an Act of Parliament. The **CPR** was given authority by virtue of another Act of Parliament, **<u>section 77 of the Supreme Court of Judicature Act</u>.** Therefore, both the **LPA** and the **Supreme Court of Judicature Act** are substantive legislation, while the C**PR** is a procedural law, given effect only by virtue of a substantive piece of legislation.

[10] Volume 11 (2020)

[25] **Section 51(1) LPA** is clear and unambiguous in stating, *"…an Attorney-at-Law may not commence any suit for the recovery from his client…unless the bill of costs is taxed…"* It is therefore explicitly provided for in the **LPA** the pre-condition for an attorney-at-law to bring a suit such as the case at bar. Without a taxed/assessed bill of costs, no suit is to be brought. Therefore, even if a judge under the **CPR** has the power to assess costs, the **LPA** being primary legislation, supersedes the **CPR**.

[26] On an ordinary interpretation of **section 51(1),** there must be a taxed bill of costs prior to commencing suit. In fact taxation (now assessment) and serving the client with the appropriate document showing the amount taxed/assessed at least 15 days before, are conditions precedent to initiating any action for the recovery of such costs. There is no provision in the **LPA,** which grants any power or discretion to the Court to do so after suit has been commenced.

[27] Further, it must be recognised that the **LPA** being an Act of Parliament would have undergone scrutiny by the relevant legislative arms of government. While this does not take away from the effect and authority of the **CPR** itself, one must have regard to this fact. The 15-day period before initiating any action is both necessary and vital to good ethical practices amongst the Legal Profession as this period presents the client with the opportunity to settle the costs to avoid litigation. This is what the legislature would have contemplated in providing for these conditions before action. It is highly undesirable to have legal practitioners frequently before the Courts filing claims to recover costs before first ascertaining: (i) whether costs are outstanding; (ii) the amount due; (iii) whether there are any agreements governing the relationship; and so on. An application for permission to tax or assess a bill of costs is not an action or claim instituted by the attorney. But the filing of a Claim to recover costs without first complying with Section 51(1) is litigation which the legislation seeks to avoid.

[28] I note that when the first invoice was issued for fees in the sum of $12,000,010,600.00, the Defendants offered the sum of $12,000.00 on the basis that the requested sum was unreasonable and exorbitant. I also note that in relation to the second invoice issued in the sum of $50,973.00, the Defendants made a payment of $42,000.00. This course of conduct, to me, signifies that the Defendants accepted that fees were outstanding but were

dissatisfied with the amounts invoiced. The questions must therefore be asked: (i) Could it be that the Defendants merely wanted justification for the amounts claimed in the invoices? (ii) Who is to say that the Defendants would not have been willing to pay the amounts quantified by the Court on the presentation of a Bill of Costs for assessment? This may have avoided the litigation which Ms Maharaj had embarked upon without first presenting a Bill of Costs for assessment. And this is precisely what the legislation seeks to address. Hence the value of Section 51(1) LPA on its proper construction.

[29] Further, in interpreting legislation, as stated in **Smith v. Selby**[11] the Caribbean Court of Justice noted:

> *"[9] The principles which the judges must apply include respect for the language of Parliament, the context of the legislation, the primacy of the obligation to give effect to the intention of Parliament, coupled with the restraint to avoid imposing changes to conform with the judge's view of what is just and expedient. The courts must give effect to the intention of Parliament……"*

[30] It must also be noted that the **LPA** was an Act of 1986. At that time, the **Rules of the Supreme Court 1975 ("RSC")** would have been in effect. Pursuant to **Order 62 Rule 9 (3)(b) RSC**, the Court had the power to assess costs and grant a gross sum in lieu of taxation. So that the introduction in the CPR of the provision for Judges to assess costs is not entirely new. However, despite this, Parliament thought it appropriate to explicitly provide that a taxed bill of costs under **section 51(1) LPA** was a pre-condition to the filing of suit for recovery. As I have mentioned earlier, where in any enactment there is a ***reference to the taxation*** of costs this is to be construed as ***referring to the assessment*** of such costs in accordance with Part 67.12: [see **CPR Part 66.2(3)**].

[31] Having regard to the uncertainty which has surfaced, in this case and others before, regarding the procedure to be followed by attorneys-at-law seeking to recover outstanding fees in matters or transactions which are not the subject of an existing court matter, I feel compelled to set out the steps which must be taken in order to comply with the conditions precedent contemplated in **section 51(1) LPA**.

[11] [2017] CCJ 28 (AJ) 40

[32] Under the CPR, the attorney-at-law must file an application supported by affidavit for permission to assess a bill of costs pursuant to **section 51(1) LPA** with the Bill of Costs annexed to the application or affidavit. This procedure applies for both contentious and non-contentious matters. Since notice of this application must be given to the client, the application must be by way of **Fixed Date Claim** in accordance with **CPR Part 62.2(1)(b)**. [**Under the RSC 1975**, the process would have been an Originating Summons supported by affidavit in accordance with **Order 7**]. **It is to be noted that although the application is by Fixed Date Claim, it is not a Claim in the real sense**: it is only commenced by this process because **notice is required** to be given to the client. If notice had not been required, then **CPR Part 62.2(1)(a)** would have been applicable in which case an Application under **CPR Part 11** would have been the process to initiate the proceedings.

[33] After filing, service must be effected on the client who is entitled to respond to the application and appear at the hearing to object to the bill of costs or items therein. Since it is not a Claim per se, neither an appearance nor a defence is required to be put in by the client; he simply has to respond to the application/affidavit, if he should so desire. In the event that the Court determines that the bill should be assessed, the Court may proceed to assess the bill or give directions as to how the assessment is to be carried out in accordance with **CPR Part 67.12(2)**.

[34] In carrying out the detailed assessment, the Court must apply the **test** set out in **CPR Part 67.2(2)**, and in deciding what is reasonable, apply the ***"seven pillars of wisdom"*** encapsulated by the factors set out in **CPR Part 67.2(3)(a)-(g) as well as (h)(i)-(iii)**. **[Under the RSC 1975**, the applicable provisions would have been **Order 62 Appendix 1 Part X Paragraph 1(2)(a-(g)]**.

[35] After costs have been assessed by the Court, an **order** must be issued showing the amount which has been quantified as recoverable. [Under the **RSC 1975**, the Registrar would have had to issue an **"Allocatur" (Registrar's Certificate)].** An office copy of this order must be served on the client together with a demand for payment. If at least 15 days would have elapsed and the demand for payment has not been satisfied, then, and only then, can

the attorney-at-law initiate a Claim for outstanding fees which have been assessed and quantified by the Court.

[36] Failure to follow the procedure set out above is failure to comply with the mandatory provisions of **section 51(1) LPA**.

[37] I therefore rule that the failure by Ms. Maharaj to comply with **section 51(1) LPA** is detrimental to her Claim and leads to a nullification of her suit. This Court does not have any discretion to fix her claim after the fact. Consequently, the Claim and Statement of Case shall be struck out on the ground of being an abuse of the process of the Court pursuant to **CPR Part 26.2(1)(b)** and the on ground of disclosing no grounds for bringing the Claim pursuant to **CPR Part 26.2(1)(c)**.

Costs of the Application

[38] Having ruled against the Claimant, the logical order on the entitlement of costs for the application before the Court would be that the Claimant pay the Defendants' costs: the general rule of costs follow the event (**Rule 66.6(1) CPR)**. I can find no special circumstances to justify the Court from departing from such an order. For one, considering the general uncertainty surrounding the applicability of **Sections 51 of the LPA** when considered with **Part 67.2 of the CPR 1998**, I take into account that it was reasonable for the Defendants to pursue its Application (see **Part 66.6 (5) (c)**). I also note that while it was Ms Maharaj's right to oppose the Application, she was guilty of pursuing some other unreasonable issues/arguments in her affidavit in response and in her written submissions.

III. Disposition:

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

ORDER:

1. **That judgment be and is hereby granted in favour of the Defendants on the Defendants' Notice of Application filed on 14 July 2017.**

2. **Accordingly, the Claimant's Claim Form and Statement of Case filed on 29 June 2017 be and are hereby struck out pursuant to Part 26.2(1) (b) and (c) of the CPR 1998.**

3. **That the Claimant shall pay to the Defendants costs of this Application to be assessed in accordance with Part 67.11 CPR 1998, in default of agreement.**

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Robin N. Mohammed
Judge