THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Sub Registry, San Fernando

Claim No. C.V. 2016-04386

BETWEEN

VINCENT NELSON Q.C.

Claimant

And

THE HONOURABLE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances;

Mr. R. Kawalsingh instructed by Mr. J. Mohammed for the claimant
Mrs. Z. Haynes-Soo Hon instructed by Mr. R. Grant for the defendant

DECISION ON APPLICATION TO STRIKE OUT THE CLAIM

1. The defendant applies by application of the 7th April 2017, to have the claim struck out as an abuse of the court's process and /or on the basis that the statement of claim discloses no ground for bringing the claim pursuant to **Part 26.2(1)(b)** and **(c) CPR** respectively or alternatively that he be granted an extension of time to serve his defence. It is the argument of the defendant that the claimant, an attorney at law, was bound as a matter of law to comply with section **51(1)** of the **Legal Profession Act** Chapter 90:03 (LPA) prior to the institution of the claim for fees due and owing by his client the defendant. He submits that the claimant having failed so to do, the institution of claim is an abuse of the court's process. In relation to the application pursuant to **Part 26.2(1)(c)** CPR, the Notice of Application filed on the 7th April 2017 by the defendant contained no specific grounds in support of this limb of the application. The court therefore understood the defendant's argument to be that in the absence of a taxed bill of costs, an attorney at law could not maintain an action for the recovery of fees and therefore a statement of case could disclose no ground for bringing such a claim in the absence of compliance with the requirement to tax a bill of costs. To that end the submissions under both limbs are intricately interwoven.

2. Further, it was only during his submissions in reply, that the defendant submitted that the retainer entered into was not performed. The court shall return to this aspect of the application later on in this decision.

Background

3. The court is well aware that the affidavits filed are not evidence in respect of which it must make findings of fact at this stage suffice it to say that they provide important background information for the purpose of understanding the claim and the competing arguments.

4. The claimant is Queen's Counsel, having practiced as a Barrister in the United Kingdom and elsewhere for some thirty-five years prior to March 2016. He specialises in commercial law including taxation law. He has during his practice represented the government of the United Kingdom in the High Court and commercial organisations up to the level of the Privy Council. By Legal Notice No.11 of 2015, he was admitted to practice at the bar of the Republic of Trinidad and Tobago as an Attorney-at-Law specifically in relation to several tax appeals between BPTT Trinidad and Tobago (BPTT) and the Board of Inland Revenue (BIR). In those matters he was retained to represent the BIR by way of letter of retainer dated the 21st November 2014, under the hand of the then Attorney General (AG). The terms of the retainer clearly set out at paragraphs three and four thereof that the retainer fee of One Million, Five Hundred Thousand British Pounds sterling (£1.5 M) was for the purpose of defending all appeals and included all expenses associated with the representation of the BIR, the fee on brief and all other work consequential to defending the appeal. His acceptance in toto was communicated by way of letter dated the 24th November 2014, addressed and delivered to the defendant.

5. The circumstances prior to retainer were that the claimant had been written to by the Deputy Solicitor General (DSG) by way of letter of the 14th November 2014, under the letterhead of the Ministry of the Attorney General, Solicitor General's chambers upon directions of the then Attorney General. In this letter the DSG indicated that she had been directed by the AG to retain the services of the claimant to represent the BIR in the appeals as lead counsel and an enquiry was made of his availability so to do. The letter also set out that should he be available and willing, reasonable fees were to be agreed. It was also disclosed that another Senior Counsel and two attorneys were also retained.

6. The letter of the 14th November however, according to the affidavit of claimant of the 26th May 2017 filed in support of his application, came after a discussion which the claimant had with the AG on the 10th November 2014. In that discussion, the claimant and the AG discussed the risk of not being paid should a new government be elected. The AG and the claimant then agreed according to the claimant that "a written retainer agreement should be obtained for a lump sum fee on which I could sue, if necessary, otherwise the brief

should not be accepted" and that "for the sake of clarity and to preclude the fees being subject to taxation, the retainer would be in writing for a fixed sum for the totality of the work to be carried out and that his Ministry would be responsible for payment of fees." See paragraph 10 of the affidavit of the claimant.

7. According to the claimant it was also agreed in the discussion that the fee would be paid by way of ten monthly instalments in the sum of One Hundred and Fifty Thousand Pounds (£150,000), commencing 30th November 2014. It was expressly stated by the claimant that the method of payment by way of instalments was to ensure that payment would be complete by the end of August 2015, the last date for the calling of an election. The claimant also averred that the AG was of the view that the fee was reasonable in all of the circumstances.

8. There has been no reply by the defendant to these matters by way of affidavit in reply. The defendant has however objected to the evidence and has applied to the court to have the evidence struck out on the ground of non-relevance to the application. The court does not agree that these matters ought to be struck out as they provide important context and background on matters raised by the claimant in relation to the issue of contracting outside of the provisions of section **51** of the **LPA**.

9. The claimant subsequently acted for the BIR pursuant to the terms of his retainer and did all that was necessary in fulfilment of his duty save and except that the matters were settled immediately prior to the hearings of the appeals. The work done by the claimant has been set out in general terms in his affidavit and the court does not propose to repeat it. Suffice it to say that on any view, the work involved would have been substantial. The claimant and his team were ready for trial when the matter was settled. By way of response to request for information filed by the defendant, the claimant has answered that he could best recall that he first became aware that BPTT and BIR were attempting to settle on the 29th March 2015. The claimant attended the Tax Appeal Tribunal in May 2015 to seek the approval of the court for the settlement. In that settlement BPTT agreed to pay the sum of Two Billion

TT dollars. According to the claimant therefore, he completed the terms of his retainer the "essence" of which was to obtain the best possible outcome for the BIR.

10. When the dust settled, the claimant had been paid on three invoices in the sum of £150,000 each leaving a balance of £1,050,000 outstanding. He avers that by the time of the second payment the office holder of AG had changed and his payments therefore continued under the new AG. Subsequently, payments ceased and despite his call up on the balance by way of invoice, he was not paid the balance.

11. There was a change of government in Trinidad and Tobago in September 2015 and so once again there was a new office holder in the office of AG. The claimant avers that he met with the new AG in relation to another matter on the 16th February 2016 and was informed by the AG that in respect of the fees arising on the retainer, he was aware that a balance of fees was due, that the Ministry was short of funds so that there would be delay in payment. According to the claimant the AG also agreed to meet with the claimant at the end of February 2016 to discuss the payment of the balance. At no time was it indicated to the claimant that the retainer was being repudiated or that payment would not be made. It is to be noted that there is no reply to these matters by way of affidavit by the defendant even though the defendant did have an opportunity to so reply. The defendant has sought to have the evidence excluded but the court is of the view that it should not be excluded once again because it provides important context and factual background to the claim. More importantly it supports the issue of estoppel being raised by the defendant to which the court shall return later.

12. Following the pre-action protocol procedure, the claim was filed.

Law on striking out the claim

13. The law on this area is well established and there is no dispute between the parties on the applicable principles. ***Part 26.2(1) (b) and (c) of the CPR*** provide as follows;

"26.2 (1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –
(b) that the statement of case or the part to be struck out is an abuse of the process of the Court;
(c) that the statement of case or the part to be struck out disclose no grounds for bringing or defending a claim…"

14. In ***Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and others H.C.387/2007,*** my brother Kokaram J at paragraph 4.7 and 4.8 stated as follows;

"4.7 Of course, the power to strike out is one to be used sparingly and is not to be used to dispense with a trial where there are live issues to be tried. A. Zuckerman observed:
"The most straightforward case for striking out is a claim that on its face fails to establish a recognisable cause of action… (Eg. A claim for damages for breach of contract which does not allege a breach). A statement of case may be hopeless not only where it is lacking a necessary factual ingredient but also where it advances an unsustainable point of law"
4.8 Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ 594 surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bring a claim include:
"(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides Harris v Bolt Burden [2000] CPLR 9;
(b) Where the statement of case does not raise a valid claim or defence as matter of law""

15. In ***Kelvin Field v Probhadai Bissessar CV2012-00772 at paragraph 2,*** Justice Judith Jones (now Justice of Appeal) stated as follows;

"In the circumstances I intend to treat this as an application to have the claim form and statement of case struck out as (i) disclosing no grounds for bringing the claim; and (ii) being an abuse of the process of the court. In neither case will a court employ this procedure lightly but only after being satisfied that, in the case of no grounds being shown, the case as pleaded has no chance of success and, with respect to an abuse of the process, 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 and for proper purposes but as a means of vexation or oppression or for ulterior purposes: Halsbury's Laws of England, Fourth Edition Volume 37, page 322 paragraph 434."

16. Moreover, in ***Kadir Mohammed v the Attorney General of Trinidad and Tobago CV2013-04647***, Kokaram J concisely set out the following at paragraph 13;

"The application to strike out the claim is made on two limbs. First that there is no ground for bringing the claim and second that it is an abuse of process. In CPR rule 26.2 (c) if there is a ground for making the claim then the claim ought not to be struck out. Where therefore the factual allegations are accepted the Defendant must demonstrate that the Claimant cannot succeed either on those facts or as a matter of law. The Court is not assessing the merits or strengths of the Claimant's case as it would in a summary judgment application. The exercise is confined at looking at the Claimant's case as presented and asking the simple question is this doomed to fail without any further investigation of the facts."

17. The first port of call is therefore a determination as to whether there is ground for making the claim. For the defendant to succeed on the application he must show that the claimant cannot succeed on the facts presented. The second would be whether the claim is an abuse of the process.

Brief history of the entitlement of a lawyer to sue for fees

18. Prior to the operative date of the LPA, Trinidad and Tobago's legal profession inherited a profession which recognised the two-tier distinction between Barristers and Solicitors as obtained in England and in most of the Commonwealth territories. Indeed admissions to the bar prior to the advent of the 1986 legislation saw admissions of those persons who were graduates either of the University of the West Indies Faculty of Law of those qualified in other territories of the Commonwealth as either a barrister or a solicitor, with the attendant legal consequences in relation to the recovery of fees from clients. The basis upon which a lawyer can recover his or her fees is the law of contract. Lawyers who practiced as counsel traditionally, however (namely Barristers) fell outside the realm of contract. The assumption was that Barristers could not contract with either the client or the solicitor, the relationship being merely one of honour, not debt: See ***Gino Evans Dal Pont; Lawyers' Professional Responsibility, Third Edition, page 335.***

19. Lord Hoffmann in ***Arthur J S Hall & Co (a firm) v Simons and other appeals [2000] All ER (D) 1027, paragraph 2,*** stated as follows;

"The old rule for barristers survived until 1967. The way in which it was usually explained was that barristers, unlike solicitors, had no contract with their clients. They could not sue for their fees…"

20. In ***Rondel v Worsley [1969] 1 A.C. 191 at pages 197 and 198,*** the House of Lords provided the following history;

"The rule that a barrister has no right to sue for his fees… was purely a matter of status. What was originally a rule of etiquette has hardened into a rule of law.
The rule relating to fees appears in Lord Nottingham's note on Coke on Littleton (Co.Inst. (1628), vol. 1, p. 293), "a counsellor cannot bring any action for he is not compellable to be a counsellor; his fee is honorarium, not a debt." See also Viner's Abridgment (1741-56), vol. 6, p. 478, and Blackstone's Commentaries, 17th ed. (1830), vol. 3, p. 28…

One of the earliest cases is Thornhill v. Evans, (1742) 2 Atk. 330, 332 where Lord Hardwicke L.C. said: "Can it be thought that this court will suffer a gentleman of the bar to maintain an action for fees …?" In Turner v. Philipps (1792) Peake 166 it was held that no action lay to recover a fee given to a barrister to argue a cause which he did not attend, the decision being that fees were a present by the client. Morris v. Hunt (1819) 1 Chit 544 contains the first suggestion that barristers should arrange to be prepaid, and this principle was reinforced by Lindley L.J. in In re Le Brasseur and Oakley [1896] 2 Ch 487, 493, 494. In Poucher v. Norman (1825) 3 B. & C. 744, 745 it was held that a certificated conveyancer, who was neither a barrister nor a solicitor could sue for fees, "the general rule is, that any man who bestows his labour for another, has a right of action to recover a compensation for that labour. There are two exceptions to that rule, viz. physicians and barristers. The law supposes them to act with a view to an honorary reward."

21. Further at page 200 ***Rondel*** supra the following was stated;

"The doctrine of the inability to sue for fees is a special rule based on the notion of an honorarium. The basis of that rule is the indignity of someone in such an exalted professional status suing for his fees. It is a rule shared with physicians. In early days it was not linked with the barrister's professional skill or judgment or with his duty to take care in performing his work but it was linked entirely with his status. Nearly all the textbooks base immunity on the basis of incapacity to sue for fees: see Halsbury's Laws of England, 3rd ed., vol. 3 (1953), p. 46, para. 66; Salmond on Torts, 14th ed. (1965), p. 283; Winfield on Tort, 7th ed. (1963), pp. 184, 185; Walker, Delict (1967), vol. 2, pp, 1042, 1043, 1046, 1047. None of these textbooks bases the rule on public policy as do the judgments below in the present case."

22. Almost twenty years after the position in England had radically changed, the LPA in this jurisdiction fused the profession so that all those who practiced at the bar as well as those who from 1986 were to be admitted to practice were designated "Attorneys-at Law". As an aside, the irony of fusion has been that that which was abolished still obtains in these courts as a matter of practice albeit by different nomenclature, namely Advocate Attorneys

and Instructing Attorneys. So that at first blush it would appear that the change was somewhat illusory. But this was not the case as fusion also brought with it a post-colonial recognition of a substantively local or more aptly put, West Indian legal profession with a new identity. Fundamental changes to the way the profession was expected to do business was the cornerstone of the LPA. Of material importance to the present claim was the conferment of jurisdiction to the attorney at law to sue for payment of fees whether in practice as an advocate or instructing attorney. The LPA also at the same time, conferred onto the profession a Code of Ethics so that together with the privilege or right to sue came collateral and equal responsibility for ethical conduct on the part of attorneys in many areas of practice inclusive of the setting of fees. In the court's view, the duties and responsibilities so set out, sought to embody the values of what was once and perhaps still is considered to be a noble and honourable profession. In that regard it was recognised that lawyers owe a duty to their clients to charge fees that are reasonable having regard to several factors. The LPA sets out the following provisions.

23. Section **20(a)** of the **LPA**;

"20. (1) Every person whose name is entered on the Roll in accordance with this Act shall be known as an Attorney-at-law and— (a) subject to subsection (2), is entitled to practise law and <u>to sue for and recover his fees for services rendered in that respect</u>"

24. **Rule 31** of the Third Schedule, **Part A, Code of Ethics** reads;

(1) An Attorney-at-law is entitled to reasonable compensation for his services but should avoid charges which either overestimate or undervalue the service rendered.

(2) The ability of a client to pay cannot justify a charge in excess of the value of the service rendered, though the client's indigence may require a charge that is below such value, or even no charge at all.

(3) An Attorney-at-law should avoid controversies with clients regarding compensation for his services as far as is compatible with self- respect and his right to receive reasonable compensation for his services.

25. Rule **10** of the Third Schedule, **Part B** (**Mandatory Provisions and Specific Prohibitions**) reads as follows;

10. (1) An Attorney-at-law shall not charge fees that are unfair or unreasonable. In determining the fairness and reasonableness of a fee the following factors may be taken into account:

(a) the time and labour required, the novelty and difficulty of the questions involved and the skill required to perform the legal service properly;

(b) the likelihood that the acceptance of the particular employment will preclude other employment by the Attorney-at-law;

(c) the fee customarily charged in the locality for similar legal services;

(d) the amount, if any, involved;

(e) the time limitations imposed by the client or by the circumstances;

(f) the nature and length of the professional relationship with the client;

(g) the experience, reputation and ability of the Attorney-at-law concerned;

(h)…….

A ground for bringing the claim

26. Section **51 LPA** reads;

(1) 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.

27. By section **49 LPA**, "costs" includes fees for any legal business done by an Attorney-at-law. It should also be noted that by section **3(3)** of the **Tax Appeal Board Act** Chap 4:50, the Tax Appeal Board is designated a court of superior record.

28. Section **51(3)** LPA reads;

(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. (emphasis mine)

29. Section **53** LPA;

53. (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.

(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.

30. Finally, section **52 LPA** delegates the power to make Rules for remuneration in non-contentious business. In summary therefore, the LPA provides for the promulgation of non-contentious business rules in relation to the costs payable for non-contentious business between attorneys and their clients. Section 52 provides for the making of an agreement for a gross sum or otherwise and also provides that such an agreement may exclude disbursements. The section also provides for the suit and recovery of the sum so agreed on the basis of the principles of contract but provides for objection and determination by the court of what is fair and reasonable at taxation should the attorney seek to rely on the terms of the agreement at such taxation. In the court's view section 52 is highly instructive for several reasons. Firstly, it demonstrates that any agreement to pay fees may be relied on by an attorney before the taxing officer during the process of taxation in non-contentious matters. Secondly, the section empowers the taxing officer, at that time usually the Registrar of the Supreme Court, Deputy or Assistant Registrar (prior to the coming into

force of the **Civil Proceedings Rules**, CPR), to inquire into the facts surrounding the agreement and to certify those facts *to the court* (emphasis mine). An inquiry in that context must of necessity mean that the taxing officer is empowered to ask questions and to receive evidence from parties on the issue of the agreement.

31. The certification is remitted to the court before whom the suit for fees is to be heard (a Judge of the High Court) and that court may cancel the agreement or reduce the sum payable under it. It follows that the court in the exercise of its discretion may also uphold the terms of the agreement. In this manner the section assumes that by section **51(1)** a bill of costs would have as a matter of law been taxed before the suit for recovery is brought to the court in non-contentious business.

32. In relation to the jurisdiction of Masters and Registrars, the relevant sections of the Supreme Court of Judicature Act Chap 4:01, made it clear that Masters are empowered to treat with the issue of costs and that the Registrar is likewise so empowered except that in the case of the Registrar the power lies pursuant to direction of a Judge or by Rules of Court. See sections **65B(1)**, **66(1)** and **67(1)**. So that in respect of non-contentious work, both the Master and the Registrar were empowered to tax a bill of costs.

33. But it is patently obvious that no such provisions exist in respect of agreements made between attorney and client for the payment of attorneys' fees in the conduct of contentious business. It must be noted that in the court's view, it cannot be reasonably argued that in the present case, the retainer was for non-contentious business, it being for the purpose of the defending of appeals before a superior court of record as lead advocate. As an aside, what also stands out in the relevant legislation is that no distinction is made between fee agreements in respect of criminal contentious business and civil contentious business. In fact it may be reasonably argued that criminal retainers are most often for the purpose of criminal contentious business. Equally, in the absence of legislative provision, it cannot be reasonably argued in the court's view that the object of section **51(1)** was that a bill of costs be taxed in relation to criminal contentious business.

34. The legislature in its wisdom having distinguished between contentious and non-continuous business, and having specifically sought to place non-contentious business on a separate footing it can reasonably be concluded that the position in relation to fee agreements in contentious business remains that which is set out in sections **51(1) and (3) LPA**. Those sections require that a Bill of Costs be taxed in matters in which no fee is prescribed and that **the court** determine whether such fee is reasonable should there be objection by the client. As section **53** demonstrates, even in non-contentious matters, it is for the court to decide on the reasonableness of the fee charged, once there is an inquiry and certification by the taxing officer.

The decision in Rameshar-Mc Leod v Samaroo

35. The defendant has relied on the judgment of Justice P. Jamadar in the above claim CV2006-02012 delivered on the 29th March 2006. In that case, the court held that the requirement to tax and serve a bill of costs prior to the commencement of a claim for fees owing pursuant to an agreement for fees was apposite pursuant to section **51(1)** LPA. The facts of that case were not dis-similar to the present facts in relation to one of the actions sued upon only. Attorney sued for her conduct of work on two actions. In the first action, the client had allegedly signed an agreement to pay fees in the sum of $100,000.00. She received the sum of $36,000.00 on account with the balance outstanding. Attorney estimated that the value of her work performed on that action was $70,000.00. An agreement was also alleged in the second action but it appears from the facts set out that no specific sum was agreed. Leave had previously been granted to the attorney to tax a bill of costs on an attorney client basis but before completion of taxation, the attorney filed suit. In those circumstances the court held that the action was premature.

36. In so far as the claimant relies on this decision as authority for the proposition that in contentious business, an attorney at law is duty bound to tax and serve a bill of costs within fifteen days prior to the institution of a claim, this court agrees that this authority represented the state of the law at the time, prior to the advent of the CPR. At page four of the decision Jamadar J, as he then was, found that the provisions of section **53(4) LPA**

were not applicable to the case as that section made provision for non-contentious business and not contentious business. This court agrees entirely with that finding. As set out above, one of the purposes of section **53(4)** is to vest the jurisdiction onto the taxing officer to inquire into the circumstances surrounding the fee agreement and to certify same to the court for determination. Two aspects of this must be noted.

37. Firstly, it is a jurisdiction and power which could only be vested in a taxing officer by legislation and secondly it is a jurisdiction and power which was already vested in a Judge of the High Court of Justice and a Master. Therefore in this court's view, it follows that the legislature having specifically not vested the taxing officer with such jurisdiction in contentious matters, the taxing officer could not perform such an inquiry on the fact of an agreement for fees in contentious matters and certify same to the judge. That remained a matter which could only be treated with by the judge of the high court who in any event has the power to determine the reasonableness or otherwise of the fee charged and agreed to in the context of many factors including the work done.

CPR

38. The advent of the **CPR** brought with it the virtual abolition of the system of taxation in favour of the approach of assessment based on set criteria and it is to be noted that the ***Samaroo*** case was decided prior to the coming into operation of the **CPR**. The **CPR** brought with it a major shift in the process of determination of issues of costs between client and client and attorney and client. Firstly, **Part 66.2(1)** defines costs as inclusive of attorney's charges and disbursements. Secondly, **Part 66.2(3)** sets out that wherever taxation is referred to in an enactment, same must be construed as referring to an assessment in accordance with **Part 67.12**. Finally, Part **66.2(2)** provides that the rules in part **66** and **67** also apply to costs between attorney and client which are to be "taxed" or assessed. The use of the word "taxed" in that regard seems misplaced as by the very Part 67, taxation is to be construed as assessment. It follows that in the era of the **CPR**, section

51(1) which has to date not been amended is to be construed as requiring that costs be assessed between attorney and client prior to suit for fees.

39. **Part 67** sets out the matters which a court ought to consider when assessing costs inclusive of costs between attorney and client. The court will allow that which is reasonable and fair both to the attorney at law and the client. See **Parts 67.2(2) and (3)**. **Part 67.12(2)** provides that where costs fall to be assessed in proceedings before it it must be done by either the Judge or the Master hearing the case.

40. But the matter cannot end there. There remains the competing interest of the principles of the law of contract and the common law right of an attorney to enter into and enforce a contract for fees. This is an entitlement that was not taken away by section **51**. It must therefore follow that section **51** is merely a procedural requirement in substance.

41. In the court's view, the effect of the change from **RSC** to **CPR** has made the procedural requirement of taxing or assessing a bill prior to suit somewhat otiose in the circumstance where the jurisdiction to assess costs on an attorney client basis is now vested in the judge. In that context, slavish adherence to the section in the context of the changes in the rules of court is wholly inappropriate as it is open to this court to make a suitable order for costs by way of assessment should objection be taken by the client to the quantum of costs. The substantive action in this case if breach of contract. There are several issues which touch and concern that action including but not limited to the issue of whether the terms of the retainer was fulfilled by the claimant. The defendant has sought to challenge the issue of completion of the retainer ad the quantum thereof. This of course was done by way of submissions no defence having yet been filed by the defendant. These matters can only be decided if they are raised in a defence and the issues are tried. It however appears to this court that the defendant has accepted that a retainer was entered into for the payment of fees.

42. In the present case, several other attorneys were also retained in the appeals. The terms of the retainer of the claimant however appears to be that of defending the appeal and was

inclusive of all expenses. It is clear that he was hired as the lead advocate and not as an instructing attorney. The function of assessment ought to be undertaken by the Judge hearing case in the usual course of the exercise of the discretion vested in the jurisdiction of that court and in keeping with the provisions set out in section **51(3) LPA and the CPR** in the circumstance where the main action for breach of contract is also to be heard. 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 would have contracted outside the terms of section **51(1)** is both a matter of law and of evidence. That matter requires full argument upon 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 and for proper purposes but as a means of vexation or oppression or for ulterior purposes. I am not so satisfied.

Other Authorities and submissions

43. Having regard to the findings of the court above, it is unnecessary in the court's view to traverse all of the arguments of the claimant on this application. Those submissions relate to several issues such as estoppel. These are matters which can be dealt with at the trial of the claim.

44. Finally, the defendant has also sought to rely on the case of ***T. Malcolm Milne & Co and others v Crane*** CV2006-0006, a decision by my brother Kokaram J. The court does not agree that the passage set out in the submissions of the defendant (paragraph 4 of the decision) is of assistance to this court on this issue post **CPR**. The issue discussed in that passage was not before my brother. In fact, the real issue before him was whether a subsequent agreement to pay fees was enforceable and the court found that it was. I therefore consider the contents of the paragraph relied on to be obiter dictum.

Disposition

45. The court therefore finds that the defendant has failed to demonstrate that the statement of claim discloses no ground for bringing a claim. In the context of the **CPR**, failure to comply with section **51(1)** of the **LPA** is not fatal to the claim. The claim likewise cannot be considered an abuse of the court's process. The application to strike will be dismissed, and the time limited for the filing of the defence extended.

Ricky Rahim
Judge
6th October, 2017