

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV 2015-04336

BETWEEN

CLIVE CHARLES

Claimant

AND

SHELDON GUERRA

(In his capacity as Executor of the Estate of Theodore Guerra)

First Defendant

AND

FENIBO GUERRA

(In his capacity as Executor of the Estate of Theodore Guerra)

Second Defendant

AND

THE ESTATE OF THE LATE THEODORE GUERRA

(December 28, 2012)

Third Defendant

Before the Honourable Mr. Justice Frank Seepersad

Date of Delivery: November 25, 2019.

Appearances:

1. Mr. Ravi Rajcoomar and Mr Irshaad A. Ali, Attorneys-at-law for the Claimant.
2. Mr. Sheldon D. Guerra, Attorney-at-law for the Defendant.

ORAL DECISION REDUCED INTO WRITING

1. Before the Court for its determination is the Claimant's Claim Form and Statement of Case filed on December 18, 2015 whereby the Claimant has sought Declaratory Relief that the estate of Theodore Guerra S.C. owes to him the sum of \$344,700.00 representing monies paid to Mr. Guerra, S.C. for the representation at the Criminal Assizes of the Claimant's two sons both of whom were committed to stand trial for murder.
2. There is a further claim for the Defendants in their capacity as the executors of the estate of Theodore Guerra S.C. to reimburse or pay to the Claimant the aforesaid sum of \$344,700.00. Alternatively damages for breach of agreement and interest at a rate of 6% per annum was sought together with costs.
3. Before this court the Defendant filed no witness statements. There was however, a witness statement filed on behalf of the Claimant, Mr. Clive Charles, and a witness statement on behalf of Mr. Alan Harewood.
4. On the evidence before this court, the Court finds as fact that there was an agreement between the late Theodore Guerra S.C. and the Claimant for Mr. Guerra S.C. to represent the Claimant's sons Clive Charles and Kwesi Charles in the Criminal Assizes and the fee for such representation was agreed on the figure of \$350,000.00.
5. Between the period January 22, 2010 and December 19, 2011 the Court having seen the receipts which were filed herein, finds as a fact that the Claimant did pay to Mr. Guerra S.C. the sum of \$344,700.00 by way of advanced legal fees for the criminal representation of his sons in their criminal matter.
6. The evidence before the Court demonstrates that Mr. Guerra departed this life on December 28, 2012 and was unable to represent the Claimant's sons at their trial and the

Court accepted the evidence of the Claimant that the murder trial in relation to his sons is still pending before the Courts.

7. The court also accepts the Claimant's evidence that no alternative arrangement was made by Mr. Guerra S.C. for the representation of the Claimant's sons in the event that he was unable to discharge his contractual obligations to the Claimant.
8. Ultimately therefore, the Court has to determine the issue as to whether the Claimant is entitled to the repayment of sum of \$344,700.00 from the estate of Mr. Theodore Guerra S.C.
9. The Court was guided by the learning from **Chitty on Contracts (32nd ed.)** wherein at paragraphs 20-006 to 20-008 it was stated:

"Personal Contracts

20-006

The Law Reform (Miscellaneous Provisions) Act 1934 contains no exceptions for contracts involving personal skill, taste or confidence, such as a contract of service, a contract to perform at a concert, to paint a picture, to write a book, or to act as professional jockey to the owner of racehorses. In such contracts, however, there is probably no cause of action to survive, as the contract is frustrated by the death of the party whose skill or other personal qualifications were relied upon. The personal representatives are, however, entitled to sue for any money actually earned by the deceased under his contract, which has become due during his lifetime. Further, where the contract is in such terms that the remuneration should continue after the service has ceased, the personal representatives may sue for remuneration accrued after death. And of course if a personal contract is broken by a contracting party during his lifetime, and one party subsequently dies,

the cause of action survives the death and his personal representatives can sue or be sued for breach.

20-007

It is thought that the question whether a contract is personal for this purpose is generally the same as whether the contract is personal for the purposes of the law relating to voluntary assignments and vicarious performance; that is, the benefit of a contract which can be voluntarily assigned, and the burden of a contract which can be vicariously performed, will (subject to the terms of the contract itself) be transmissible to the personal representatives of the contracting parties. It appears, however, that there are some cases in which the benefit of a contract will pass on the death of a party to his personal representatives, although it may not be assignable inter vivos, e.g. in the case of third-party road traffic insurance policies.

Personal liability of personal representatives

20-008

The general rule is that a personal representative is not personally liable on the contracts of the deceased: he is liable only to the extent of the assets of the estate. There is, however, a singular exception in the case of the covenants in a lease. Before entry and taking possession, the personal representatives of a tenant cannot be made personally liable as assignees of the term, though they are liable to the extent of assets. If they do enter, then they may be personally liable. Yet they may, by proper pleading, limit their liability for rent to the yearly value the premises might have yielded.”

10. The Court was further guided by the dicta of Denning LJ in **Shaw v Shaw [1954] 2 QB 429**.

At page 441 Denning LJ stated:

“In my judgment Shaw broke his warranty at every point. He broke it when he proposed marriage; he broke it when he married the plaintiff; and he broke it throughout their married life. The breach continued all the time. The most important breach of all was at the moment of his death, because when he died she was not his widow, as she thought she was. She was in law a stranger. That is the breach for which, in my judgment, damages can be recovered...

The same result can be reached, however, by considering this as being a claim for breach of promise of marriage. Clearly Shaw did promise to marry the plaintiff, and after his own wife had died in 1950, he was in a position to marry her and could have implemented his promise, but he did not do so. It would not lie in his mouth to say that a reasonable time had expired, because it was all due to him that the marriage had not taken place before. He ought to have married her in 1950 when he was free to do so, and there was a breach of the promise at that time for which like damages could be recovered. Although it is true that damages in an action for breach of promise, after the death of the man, are limited to special damages, I regard the damages which I have mentioned as being special damages within that rule.”

11. The Court, having relied on the propositions of law outlined above, found that there was a personal contract which existed between the Claimant and Mr. Guerra S.C. The breaking of a personal contract by a party who subsequently died does not vitiate the contract and that the surviving party is entitled to sue the personal representatives of the deceased's estate for the breach which would have occurred during the deceased's lifetime.
12. Accordingly, the Court hereby is of the view that the Claimant is entitled to the reliefs sought on the claim.

13. The Court further wishes to register its view that the situation which unfolded in this case is rather unfortunate. It demonstrates the need for more effective measures so as to regulate the issue as to the receipt and collection of advanced legal fees. It is this Court's view that that situation in fact requires some urgent attention.
14. Over the last ten years the legal profession has seen a dramatic increase in its numbers and the current legislative framework may be ill equipped to adequately monitor the profession on the one hand and protect the public on the other. Consequently a radical review of the **Legal Profession Act Ch. 90:03** should be considered.
15. The pivotal role which lawyers play in this society cannot be marginalized. However, the society also needs to be protected from unscrupulous and unethical practitioners and against the contingencies of life which may befall individual practitioners.
16. The Disciplinary Committee for example, in its current form may no longer be in a position to efficiently manage and regulate the number of complaints before it.
17. Although the Legal Profession Act has established a compensation fund which makes available to citizens compensation in circumstances where they have suffered hardship due to their lawyer's failure, there is no clarity as to how many aggrieved clients have ever been compensated and if so the quantum of the respective orders for compensation.
18. Consideration should also be given to the establishment of a permanently staffed disciplinary body to not only treat and determine complaints filed against lawyers but which can exercise a supervisory role. Such a body may be able to monitor lawyers and ensure for example, that lawyers are maintaining client accounts and that advanced fees are paid into same. The establishment of an office of a Legal Ombudsman who can also serve as a third party to resolve disputes as between members of the profession and members of the public should also be considered.

19. Ultimately the system must ensure that persons who practice law do so in a regulated, principled and professional manner. It is absolutely necessary that the system ensures that the citizens of the Republic are not taken advantage of.
20. Current circumstances may strongly favour the implementation of a mandatory requirement for all practitioners of law to have professional indemnity insurance so as to ensure that successful litigants are not thwarted in the recovery of their judgements against errant lawyers on the grounds of impecuniosity.
21. The responsibility which vest upon the shoulders of the lawyers to uphold the rule of law and to ensure that the law is applied with equality and equanimity cannot be minimized but not all in this profession, do not now discharge these noble mandates with the requisite degree of professionalism that is required.
22. There are many who may take advantage of unsuspecting clients. The court wishes to emphasise that there is no evidence before it to suggest that such a circumstance arose on the facts of this case. Mr. Guerra S.C. was a respected member of the Criminal Bar but he was essentially a sole practitioner and his ability to discharge his contractual obligation was contingent upon his health which failed. He died and was unable to discharge those obligations.
23. At the end of the day however, the Claimant did not receive the benefit of the contractual arrangement with which he entered into with Mr. Guerra S.C. and in circumstances is entitled to the relief sought .
24. Accordingly the Court hereby declares that the estate of Mr. Theodore Guerra who died on December 28, 2012 is indebted to the Claimant in the sum of \$344,700.00 representing a reimbursement of legal fees which were paid by the Claimant for the representation at the Assizes in the murder trial involving his two sons.

25. The Court hereby orders and directs that the executors of the estate of Theodore Guerra S.C. to administer his estate in such a way so as to have regard to the liability created by this order.

26. Interest is to accrue on the aforesaid sum of \$344,700.00 at a rate of 3% from the date of the filing of the claim, December 18, 2015 until the date of this judgement. Thereafter interest shall accrue at the statutory rate of interest. The Defendants are to pay to the Claimant costs calculated on a prescribed costs basis on the quantum of the judgement sum of \$344,700.00.

FRANK SEEPERSAD
JUDGE