BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 10 of 2011

BETWEEN:

PARADISE BEACH LIMITED **First Appellant**

PARADISE 88 LIMITED **Second Appellant**

AND

JOHN DAMIAN EDGHILL **First Respondent**

NAEEM AHMED EBRAHIM PATEL **Second Respondent**

Before: The Honourable Sherman R. Moore, CHB, The Honourable Sandra P. Mason and The Honourable Andrew D. Burgess, Justices of Appeal.

2012: 14 September and 12 December

Elliott D. Mottley & Co, Attorneys-at-Law for the Appellants

Mr. Randall Belgrave, Q.C. Attorney-at-Law for the Respondents

REASONS

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Introduction

[1] **MOORE JA:** On 14 September 2012 we dismissed this appeal and promised to give our reasons in writing. We now do so.

[2] This is an appeal against the order of **Master Roberts** of 30 May 2011 whereby he ordered that the "prayer of the defendant numbered 1 relating to relief under **section 34(2)** of the **Legal Profession Act** be struck from the claim, similarly the first claim in the Claim Form."

Facts

[3] The appellants are joint developers of a hotel and residential villas at Paradise Beach, Freshwater Bay, Black Rock, St. Michael. The respondents are attorneys-

at-law who were retained by the appellants for the provision of legal services. It seems that there was a falling out between the parties and the appellants terminated the respondents' services.

[4] By letter dated 19 May 2010, Mr. Randall Belgrave, Q.C., of counsel for the respondents, wrote to Clarke Gittens & Farmer, attorneys-at-law for the appellants, with reference to invoices sent to the appellants in the sum of $588,500 plus value added tax (VAT) in the amount of $52,500.

[5] On June 7, 2010 Mr. Avinash Persaud, Executive Chairman of Paradise Beach Limited, replied to Mr. Belgrave's letter as follows:

"PARADISE BEACH LTD

June 7, 2010

Mr. Naeem Patel

Old College Chambers

The Courtyard

Hastings

Christ Church

Dear Mr. Patel,

We acknowledge the existence of your invoices in the amount of BDS 621,000.00. As previously mentioned to you, we intend to settle as

follows:

BDS 200,000 will be paid on closing of the Esso Contract from Tranche C (Esso Tranche) of the Loan from Ansa Merchant Bank Limited

The remaining BDS 421,000 will be paid from Tranche D (Unsecured Creditors Tranche) of the Loan from Ansa Merchant Bank Limited

We would appreciate it if you would please forward to us all the documents and/or files relating to the Paradise Group of Companies.

Sincerely,

PARADISE BEACH LTD

Avinash Persaud

Executive Chairman."

[6] On 5 July 2010 Mr. Belgrave wrote to Mr. Persaud stating, inter alia;

"Notwithstanding the unequivocal acknowledgement of the debt due and owing to my client, as set out in the second sentence of your said letter, I am constrained to reject your proposed terms of settlement of the debt confirmed to be due", for the following reasons:

1. As regards the fees payable in respect of the Esso transaction, these had been unequivocally acknowledged in writing as far back as the summer of 2009, during the course of the Maybach Corporation due diligence process. Old College completed all of the work in

respect of that transaction and the fact that the purchase was not completed was due to no fault on its part.

2. Old College has been assured on numerous occasions in the past that all sums due and owing to it would be paid in full, and out of the first tranche of the disbursement funds, following the completion of the lending transaction involving Ansa McCal and the Government of Barbados. My client therefore fully expects that these assurances will be honoured".

Pleadings

[7] On 24 August 2010 the claimants issued a Claim Form and Statement of Claim for permission to commence an action under **section 34(2)** of the **Legal Profession Act, Cap. 370A (LPA)** to recover the amount of $588,500 plus VAT in the amount of $52,500 from the appellants together with interest and costs.

[8] By paragraph 10 of their Statement of Claim the respondents plead as follows:

"By letter dated 7 June 2010 the First Claimant acknowledged, admitted and agreed as being due and owing the said sum of $588,500.00 plus Value Added Tax thereon in the sum of $52,500.00 giving a total value of $641,000.00 but proposed terms of settlement which are not acceptable to the Claimant in that, inter alia, such terms would result in undue and unreasonable delay in the Claimants obtaining payment. A true copy of the said letter is appended hereto as Appendix "B".

Clearly the words "First Claimant" appearing in paragraph 10 of the respondents (then Claimants) Statement of Claim are erroneous and should be "First Defendant".

[9] On 22 September 2010 the defendants filed a defence pleading, inter alia,

"2. The Defendants state that the Statement of Claim filed in this action by the Claimants is barred by virtue of section 34(1) of the Legal Profession Act Cap. 370 of the Laws of Barbados.

3. ... The Defendants have put in place or are about to put in place loan financing guaranteed by the Government of Barbados and shall liquidate all liabilities due and owing. The Claimants are aware of this facility being put in place.

7. The Defendant deny that they agreed and admitted to owing the amount claimed by the Claimants as alleged in paragraph 10, of the Statement of Claim. The Defendants aver that they acknowledged receipt of the invoices".

Paragraph 5 of the said defence admits that the respondents carried out legal services for the appellants but states that the fees charged were exorbitant and paragraph 9 denies that the claimants (respondents) are entitled to the sums claimed or any part thereof.

[10] On 9 May 2011 the respondents filed a joint witness statement comprising twenty-five pages with seventeen pages of exhibits appended thereto.

[11] On 24 March 2011 the appellants also filed a Notice of Application to strike out or stay the claimants' Statement of Claim. The Notice was accompanied by an affidavit in support sworn to by Colin Scaife, the Chief Operations Officer of the first and second appellants.

Appeal

[12] The appellants have appealed the Master's order on the following grounds:

"(a) the Master erred in law in holding that there was a concluded agreement as to the amount of payment of remuneration for the legal business performed by the Claimants pursuant to section 36(1) of the Legal Profession Act;

(b) The Master erred in law by not holding that the letter dated June 7, 2010 signed by Avinash Persaud was in fact a counter offer which was subsequently rejected by the Claimants in a letter dated July 5, 2010 and that, in the circumstances, there was no

concluded agreement as required under section 36(1) of the Legal Profession Act.

(c) The Master erred in law by holding that an agreement as to the amount of payment of remuneration for the legal business performed by the Claimants, without an agreement as to the manner of payment, satisfied the requirements of section 36(1) of the Legal Profession Act."

[13] In summary, Mr. Mottley, Q.C., submitted that:

(a) the respondents having not had their costs taxed and served on the appellants pursuant to s**ection 34(1)** of the **LPA** are barred from bringing a claim under **section 34(2)** thereof**;**

(b) there was no agreement between the parties as to the amount and manner of payment as required by **section 36** of the **LPA** because the respondents' letter written by Mr. Belgrave, Q.C., and dated 5 July 2010 whilst agreeing the amount, rejected the manner of payment.

[14] In summary, Mr. Belgrave, Q.C., submitted that Mr. Persaud's letter constitutes an agreement as regards the amount and is "capable of and does amount to a promissory note and the respondents' claim is "outside the whole regime of 34 to 36". **(Section 34 to 36 of the LPA)**

[15] Both counsel cited a number of cases none of which we consider relevant.

Discussion

[16] The appellants' notice of application to strike out does not disclose the rule under which the application was brought. In part the application is as follows:

> "The First and Second Defendants apply for the following orders:
>
> 1. That the Statement of Claim filed in this action by the Claimants herein be struck out on the ground that it is barred by section 34(1) of the Legal Profession Act, Cap. 370 of the Laws of Barbados or in the alternative that the said action be stayed."

[17] **Master Roberts** clearly dealt with the application under rule **26.3 (3) (b) and (c)**, of **The Supreme Court of Barbados (Civil Procedure) Rules 2008**, **(CPR)** for at paragraph [19] of his reasons he said:

> "**CPR 26.3(3)** allows me to strike out the statement of case or a part of the statement of case where it discloses no ground or reasonable ground for bringing or defending a claim or for being prolix. For that reason I order the prayer of the Defendant numbered I relating to relief under **section 34(2)** of the **Legal Profession Act** be struck from the claim, similarly the first claim in the Claim Form".

CPR rule 26.3(3)(b) and **(c)** provides:

> "The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court
>
> (a) " .....

(b) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(c) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10".

[18] Examination of the appellants' defence shows some measure of internal discord. Paragraph 3 seems to acknowledge the respondents' claim and credits them with knowledge of the appellants' efforts to secure financing to pay that claim, whereas paragraph 7 denies the claim. Paragraph 5 admits that the respondents carried out legal services for the appellants while claiming that the fees charged were exorbitant whereas paragraph 9 denies the respondents' entitlement to any fees.

[19] In their defence the appellants seem to be confessing the claim and avoiding it, and yet denying it.

Conclusion

[20] Comparison of the parties' pleadings, affidavits and correspondence reveals disputes on facts and law. On the one hand Mr. Mottley, Q.C. contended that (a) there was no agreement between the parties; (b) Mr Persaud's letter acknowledged only the respondents' invoices and not the amount of the invoices and (c) Mr. Belgrave, Q.C.'s letter rejected the manner of payment set out in Mr. Persaud's letter. On the other hand Mr. Belgrave contended that (a) there was an agreement; (b) the respondents were not relying on **section 34 or 36** of the **LPA** and (c) Mr. Persaud's letter constituted a promissory note. It was a case management hearing before **Master Roberts** and in our opinion those disputed issues of fact and law were eminently suitable for resolution at a full blown trial before a judge.

[21] In **Wenlock v Moloney and Others [1965] 2 All E.R 871, Danckwerts LJ** said in relation to the inherent power of the court to strike out a claim:

> "... This summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

[22] **Wenlock** preceded the **CPR** but its principle was affirmed in **Chan Seek v Alvis Vehicles Ltd [2003] EWHC 1238 (ch).**

[23] It is not appropriate to strike out a claim where the central issues are in dispute: **King v Telegraph Group Ltd [2003] EWHC 1312 (QB).**

[24] In addition to what we have said above, in order to arrive at a just result it is necessary to bear in mind that the **Master** or **Judge** exercising his discretion to strike out a claim of this nature before trial must pay regard to the overriding objective in **Rule 1.1** of the **CPR,** that is to say, the need to deal with cases justly. Dealing with a case justly includes, so far as practicable, saving expense; dealing with a case in a way which is proportionate to the amount of money involved, ensuring that it is dealt with expeditiously and fairly; and, importantly, allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases. (See **Christofi v Barclays Bank plc [2000] 1 WLR 937** at page 949).

[25] It is our view that the **Master** would have acted quite unjustly had he summarily struck out the claim in circumstances in which on the documents there were clearly issues to be tried.

Disposal

[26] For the reasons given above we dismiss this appeal with costs to the respondents.

Justice of Appeal

Justice of Appeal

Justice of Appeal