

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

Civil Suit No: 938 of 2019

BETWEEN

MICHAEL YEARWOOD

CLAIMANT

AND

**BARBADOS NATIONAL OIL
COMPANY LIMITED**

DEFENDANT

Before: The Hon. Madam Justice Shona Griffith, Judge of the High Court

**Dates of Hearing: 2020: 27th July
24th August**

**Date of Decision: 2020: 27th October (Oral)
06th November (Written)**

Appearances:

**Ms. Margot Greene QC in association with Ms. Nicole Roachford for the
Claimant**

**Mr. Barry L.V. Gale QC in association with Mrs. Laura Harvey-Read for the
Defendant**

RULING

*Application for Stay of Proceedings – Legal Profession Act, Cap. 370A –
Application of sections 34 & 36 –Action for Recovery of Fees – Agreement for
Remuneration, non-contentious business – Whether Delivery and Taxation of Bill
of Costs required before Action for Recovery.*

Introduction

- [1] The Claimant Michael Yearwood Q.C., an Attorney-at-Law, filed a claim for US\$1.25 million dollars against the Defendant, the Barbados National Oil Company Limited, on the 19th July, 2019. The claim was expressed to be ‘...*for work done services rendered for and behalf of the defendant.*’ It suffices to identify the underlying transaction for which the services were rendered as non-contentious legal business, namely, negotiations and conclusion of an agreement for sale of certain undertakings, on behalf of the Defendant company. The agreement for sale was concluded in January, 2017. The Claimant’s legal fees were calculated in accordance with the Legal Profession (Attorneys-at-Law) (Remuneration for Non-Contentious Business) Rules, 1997 based upon the subject matter of the agreement.
- [2] The Claimant pleads that the amount charged was initially agreed, however, he was requested by the Defendant to and did reduce his fees, after obtaining permission, as obliged to do, from the Barbados Bar Association. A portion of the reduced fees as agreed was paid, but the Claim alleges that the balance due – of US\$1.25 million dollars remains outstanding, hence the institution of proceedings for recovery. In lieu of filing a defence, the Defendant has filed an Application for the Claim to be stayed, until the Claimant files a bill of costs that is taxed by the Registrar.

The Claimant of course, resists the Application for the stay. The Application is based on the Defendant's view that being a claim for recovery for costs for non-contentious legal business, the claim is governed by section 34(1) of the Legal Profession Act, (Cap. 370A) of the Laws of Barbados ('the LPA/the Act').

- [3] Section 34(1) of the Act provides that an attorney-at-law may not commence a suit for recovery of costs for legal work done, unless the bill of costs is first taxed and a copy thereof served on the client with a demand for payment. The service of the demand for payment and bill of costs must be made at least 15 days prior to the filing of the suit. The Defendant says that the Claim has been filed without complying with section 34(1) of the LPA and for that reason, the Claim ought to be stayed until the Claimant complies as required by the section.

Issues

- [4] The issues for determination on this Application are brief stated as follows:-
- (i) Is section 34(1) of the Legal Profession Act, Cap. 370A applicable to the claim herein?
 - (ii) If section 34(1) does apply, should the claim be stayed as requested by the Defendants?

Submissions of Counsel

[5] By affidavit in support of the Application, the Defendant averred that no bill of costs had been served on them prior to receipt of service of the Claim. The application for the stay of the claim is made pursuant to the Court's general powers on case management pursuant to CPR Rules 26.1(2), 26.1(2)(d) as well as Rule 10.3(4). Counsel for the Defendant, submits to effect as follows:-

- (i) Section 34 of the LPA establishes a mandatory requirement for an attorney-at-law to commence an action for recovery of legal fees – namely – the taxation of a bill of costs and service of said bill, 15 days prior to the filing of any suit for recovery. Failure to comply is an absolute bar to commencement of the suit for recovery;
- (ii) Section 34 does not differentiate between contentious and non-contentious legal business therefore the bar to recovery applies in relation to recovery for either class of legal services;
- (iii) Section 34 must be read along with sections 35 and 36, the added effect of which in the instant case is that, being non-contentious business, the Claimant's bill of costs was required to be taxed in accordance with the Legal Profession (Attorneys-at-Law) (Remuneration for Non-Contentious Business) Rules ('the Non-Contentious Business Rules').

- (iv) Further, that unless the Claimant was relying on a written agreement (of which none had been pleaded), section 36 did not apply as asserted by the Claimant in answer to the application for a stay of the claim.
- (v) Finally, even if the Claimant were seeking to rely on a written agreement, he would still be required to base his claim on a taxed bill of costs, having regard to the provisions of section 36(7) of the LPA.

[6] The Claimant filed an affidavit in response to the Application to stay the claim which asserted that he had received and accepted legal advice that section 34 of the LPA did not apply to his claim, but rather section 36. The latter applied on the basis that the claim is for services charged for non-contentious business, governed therefore by the Non-Contentious Business Rules. The Claimant also in this affidavit referred to the existence of Claim No. CV1364 of 2019, instituted by the Defendant against him, for fraud, arising from the same factual circumstances. Exhibited to the Claimant's affidavit, was a pre-action letter in relation to that claim, as well as the claim form and statement of claim therein. Counsel for the Claimant's answer to the Application was as follows:-

- (i) The Application to stay was an attempt to have the Court determine the substantive issue of the claim – namely - whether or not there was a

binding agreement between the two parties. In this regard, such an issue is one to be determined at trial;

- (ii) The Defendant's contention that no agreement has been pleaded is untrue in light of paragraphs 13-15 of the statement of claim;
- (iii) Upon the Defendant's Application to stay the Claim, the Claimant has no burden to prove the existence of an agreement; further, that at this stage of the proceedings, the Court has no evidence before it to determine whether or not there exists an agreement to which section 36 of the LPA applies, or whether there ought to have been a taxation to which section 34(1) applies.

[7] In addition to the submissions outlined in brief as set out above, Counsel for the Claimant commended unto the Court the application of the overriding objective to deal with cases justly, and factors generally to be considered in the court's exercise of its discretion to grant a stay of proceedings. Finally, Counsel for the Claimant disagreed with opposing Counsel's interpretation of sections 34 and 36 of the LPA. It was submitted that Counsel for the Defendant's interpretation 'ignores the proviso at the commencement of section 34' and similarly 'fails to take into consideration section 36(6) of the LPA.'

A ‘proper and correct interpretation’ of the sections was submitted as ‘where there is no agreement to which section 36 applies, then the Bill of Costs must be subject to a taxation before the commencement of an action for those costs/fees.’

- [8] Counsel for the Claimant further submitted with reference to section 36(6) – that it ‘specifically allows for an agreement under [section 36] to be sued and recovered on or set aside in a like manner on the like grounds as an agreement not relating to the remuneration of an attorney-at-law.’ Counsel’s submission continued – ‘thus in the same way that a contract does not have to be subject to taxation or any form of approval prior to the commencement of action, likewise, an agreement to which section 36 applies does not have to be taxed prior to the commencement of an action’. It was submitted that the claim before the Court was not for a determination of the amount of fees due, but for a determination of the existence or not of an agreement for fees. Counsel cited **Cooke on Costs**¹ in illustration of her position in relation to the inquiry of the Court on an agreement for fees.

¹ Cooke on Costs, 2019 @ 157

[9] Subsequent to the conclusion of the hearing, the Court invited Counsel for both parties to consider the following authorities, with a view to extracting any guidance that might be relevant to the application of the relevant sections of the LPA. These authorities were:-

- (i) **Edghill & Patel v Paradise Beach et al**²
- (ii) **Rameshwar-McCleod v Samaroo et al**³
- (iii) **Geeta Maharaj v Kenson Operational Services Ltd.**⁴
- (iv) **Vincent Nelson QC v Attorney-General**⁵

Both Counsel obliged and submitted further submissions on the authorities as requested by the Court. Counsel for the Claimant also made reference to a few other cases besides those referred by the Court. It is noted, that both Counsel appropriately pointed out that case (i), had been the subject of an appeal, and as such based their submissions on the appellate decision which affirmed the decision at first instance.

[10] Counsel for the Defendant in her review of the cases referred by the Court, contended that *Rameshwar-McCleod*, *Vincent Nelson QC* and *Edghill* offer no assistance to the matter before the Court. This is so stated on the basis that these decisions were based on recovery of fees for contentious legal services,

² Barbados Supreme Court CV1145/2010

³ Trinidad & Tobago HC CV2012 of 2006

⁴ Trinidad & Tobago HC CV1066 of 2018

⁵ Trinidad & Tobago HC CV4386 of 2016

as opposed to non-contentious services as in the case at bar. Additionally, the legislation in Trinidad & Tobago⁶ is not the same in relation to contentious fees, whilst the situation in the **Edghill** case, was that there was pleaded as required by section 36(5) of Cap. 370A, a written agreement on which the claim was based. Counsel's view of the *Maharaj* case, was that it was of some assistance, being based on an agreement for non-contentious legal fees.

[11] However, the decision is regarded as of assistance only to the extent that the claim having commenced on an agreement for non-contentious fees, it was stated by the court that there ought to have been compliance with Trinidad & Tobago's LPA section 51(1) (which is the equivalent of Barbados' LPA section 34(1)). Further, that would be the extent of relevance to the case at bar as the decision was otherwise resolved with reference to the Trinidad & Tobago CPR, which would not be applicable in Barbados. To the extent that there was provision in the Trinidad LPA for agreements in relation to recovery of non-contentious legal fees, the decision of the case, that section 51(1) still ought to have been complied with but for the CPR, Counsel for the Defendant considers this case the most applicable to the case at bar.

⁶ Legal Profession Act, C. 90:03, sections 51(1); 53

- [12] Counsel for the Claimant on the other hand submitted that **Edghill & Patel v Paradise Beach Ltd et anor**⁷, is of application to the case at bar. Particularly, Counsel refers to paragraph 17 of the dictum of the Master (the decision was upheld on appeal), in which it was stated that sections 36(6) and 36(7) were in the same terms as sections 57(4) and 57(5) of the UK Solicitor's Act; and the effect of such sections (based on the case of **Walton v Egan**⁸) was that an attorney and client are able to agree fees and exclude such fees from the requirement of taxation. Also based on *Walton v Egan*, section 36(7) was interpreted as effective only upon the application of a client, or otherwise by the Court on its own motion. As a consequence, Counsel for the Claimant contends that section 34(1) of the LPA does not apply in the instant case, given the existence of an agreement for (non-contentious) fees, as governed by section 36 of the LPA.
- [13] With respect to the further authority of *Vincent Nelson QC v Attorney-General of Trinidad & Tobago*, Counsel for the Claimant apprehended the similarity between sections 51(1) of the Trinidad & Tobago LPA and section 34(1) of the Barbados LPA.

⁷ Edghill, *supra*

⁸ [1982] QB 1232

Counsel acknowledged that at first blush the authority appeared to support the Defendant's application, given the statement by the judge therein that section 51(1) assumes that a bill of costs would have been taxed prior to the recovery of the suit brought in non-contentious business. However, Counsel points out that the judge went on to advert to the parties' freedom to enter into and enforce a contract for fees, and such entitlement not being taken away by section 51(1). As a consequence, the judge concluded that section 51 is merely a procedural requirement and not a bar to the commencement of a claim without the taxation of a bill of costs. Counsel for the Claimant commended this aspect of the judgment in *Vincent Nelson*, to the Court in the case at bar. She further submitted, that any question of whether or not an agreement subsists or whether the fees sought to be recovered are fair or reasonable, are matters to be determined by a trial judge, once pleaded in defence to the claim on the agreement for fees.

[14] Counsel for the Claimant was also of the view that based on the authorities *Vincent Nelson QC*⁹, *Ade-John v Mark Walker*¹⁰ and *In the Application by Roberts*¹¹, the effect of the Civil Procedure Rules, 2008 is that there is no longer any need for taxation prior to the commencement of an action.

⁹ *Supra*

¹⁰ Trinidad & Tobago HC CV2016/4358

¹¹ Trinidad & Tobago HC CV2017/3063

In particular, *Ade John v Walker*, is commended for the Court's attention insofar as the judge therein found that the court now has the discretion pursuant to the CPR (Trinidad & Tobago's Rule 67.2)¹² to enquire into an agreement for fees. On that basis it was held in that case that the failure to comply with section 51(1) of the Trinidad LPA was not a bar to commencing the action. In relation to the Barbados CPR provisions, Counsel referred to the overriding objective and Rule 65.2(3) as the bases upon which the Court would be entitled to examine an agreement for costs between an attorney and client, specifically, Rule 65.2(3)(h).

Discussion and analysis

[15] The Court agrees with Counsel for the Defendant that the issue to be decided is a narrow one, particularly as it arises out of statutory construction. Before considering the question of whether section 34(1) applies to the Claim or not, the first task must be to properly identify the subject matter of the Claim. This must be done with reference to the pleadings before the Court. The Claimant has filed a claim form and statement of claim in the following terms:-

“The Claimant’s claim is for One million two hundred and fifty thousand United States Dollars (\$1,250,000.00USD) for work done services rendered for and behalf of the Defendant during the negotiations between the Defendant and SOL (Barbados) Ltd. for the sale of the shareholding of the Barbados National

¹² As per submissions of Counsel for the Claimant, Trinidad's CPR 67.2 is the equivalent of Barbados' CPR Rule 65.2(3)

Terminal Company Limited to SOL (Barbados) Ltd. for... The amount claimed by the Claimant represents the outstanding and unpaid portion of the fee which is due and owing to the Claimant.”

Thereafter follows a table which includes further sums for court fees, interest, Attorney’s Fixed Costs & Vat and other unspecified charges.

- [16] The statement of claim sets out the background to the Claimant’s engagement for legal services, the carrying out of the services for which he was retained, and that the Claimant calculated his fees pursuant to the Legal Profession (Attorneys-at-Law) (Remuneration for Non-Contentious Business) Rules, 1997. Thereafter, as asserted by Counsel for the Claimant, the statement of claim from paragraphs 13-15, pleaded an agreement as follows:-

“13. The Defendant duly paid to the Claimant Two million five hundred thousand Barbadian dollars (\$2,500,000.00BDS) or One million two hundred and fifty thousand United States dollars (\$1,250,000.00USD) in partial settlement of fees which were charged by the Claimant and agreed to by the Defendant.

14. The Defendant then requested that the Claimant reduce his fees which the Claimant agreed to do with the proviso that he had to first seek the permission of the Barbados Bar Association.

15. The Claimant accordingly sought and received permission from the Barbados Bar Association to reduce the fee applicable to the negotiation. The Claimant duly reduced the fees to the Defendant and accordingly requested that a further One million two hundred and fifty thousand United States dollars (\$1,250,000.00USD) be paid.”

[17] The statement of claim concluded by alleging that the Defendant failed to pay the balance outstanding and recited the following prayer for relief (including the usual claim for costs and interest):-

“Damages in the sum of Two million five hundred thousand Barbadian dollars (\$2,500,000.00BDS) or One million two hundred and fifty thousand United States dollars (\$1,250,000.00USD).

Counsel for the Claimant says that the Claim before the Court is to determine whether or not an agreement existed, and that paragraphs 13-15 of the SOC contain the pleading of the agreement to which section 36 and not 34 of the LPA applies. Counsel for the Defendant says the SOC has not pleaded any agreement within the terms of section 36 of the LPA, namely, *a written agreement signed by the person to be bound*, as provided by section 36(5) of the LPA. The Court will return to the question of the agreement pleaded, but first, the relevant provisions of the Act must be examined.

The Legal Profession Act, Cap. 370. (LPA)

[18] When dealing with construction of a statute, it is generally prudent to read relevant provisions with reference to the particular section as a whole, along with the surrounding sections, and where feasible, to be aware of the entire Part under which the provision falls.

It is generally never the case, that a subsection can properly be construed without accounting for references and cross references to other provisions within the Act. The sections under consideration - sections 34(1) and section 36 of the LPA, should therefore be considered with proper reference to any other provisions which are relevant to the issue before the Court. The Court commences with section 34.

“34.(1) Subject to this section and section 36, 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 for payment 15 days before the filing of the suit.

(2) The court may on the application of an attorney-at-law authorise him to commence or proceed with a suit for the recovery of any costs before the expiration of 15 days from the delivery of the copy of the bill of costs required by subsection (1) if it is satisfied that there is reasonable cause for believing that the person chargeable with the costs is about

- (a) to leave Barbados;*
- (b) to become bankrupt; or*
- (c) to do any other act which would tend to prevent or delay the attorney-at-law from obtaining payment.*

(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.

(4) It shall not be necessary in the first instance for an attorney-at-law in proving compliance with this section to prove the contents of the bill served and it shall be sufficient to prove that the bill

(a) signed by the attorney-at-law, or, in the case of a partnership, by any one of the partners either in his own name or in the name of the partnership; or

(b) being enclosed in or accompanied by a letter signed in the manner specified in paragraph (a) referring to the bill, was duly served.

[19] Section 34 is construed in the following manner:-

- (a) Section 34(1) contains a general prohibition, which is that an attorney is precluded from commencing an action for recovery of the amount of any bill of costs for any legal business...unless the bill of costs is taxed and a copy served on the client with a demand for payment, 15 days before filing the action. This provision is quite clear insofar as it imposes a general requirement for an attorney's bill of costs to be taxed, prior to commencement of any action for recovery of legal fees. There need be no deliberation of what is meant by 'bill of costs' or 'legal business'. Costs is defined and would apply to the fees claimed at bar; legal business is defined and includes both contentious and non-contentious legal business.

There is no issue that the nature of the legal business in this case, is non-contentious. Therefore, with no further consideration, section 34(1) applies to attorneys' fees (obviously presented by way of a bill of costs), in relation to both contentious and non-contentious legal work;

- (b) The first exercise in construction of this subsection however, starts with the opening words '*Subject to this section and section 36*'. Where counsel for the Defendant enters into a discussion of whether the section is mandatory or directory, having regard to the use of the word 'may', with respect to the commencement of an action and taxing of a bill of costs, the Court apprehends the use of the word 'may', differently. The words '*Subject to this section and section 36*', communicate to the reader from the onset, that in either or both sections 34 and 36, there are departures from the general position, or that the general position is affected by these sections in some respect. In such circumstances, the action required or prohibited is expressed in the permissive sense, as the requirement is not absolute;
- (c) Within section 34, one immediately sees a departure from the general position, provided in sub (2). That departure pertains to the requirement to serve the demand for payment 15 days prior to commencement of an action for recovery of fees as prescribed in sub (1).

An attorney may commence an action for recovery of fees less than 15 days after service of their demand for payment upon application to the court in circumstances, then set out in (a)-(c) of sub (2). This is a departure from the general position in sub (1), hence the use of the permissive 'may not' in relation to the commencement of the action for recovery of fees. The remainder of section 34 is not relevant to the case at bar, but it is observed that subsection (3) would be applicable to any proceedings before a court, not only an action for recovery of fees;

- (d) Further, the Court's power to determine whether fees charged are fair and reasonable arises only in relation to fees which either (i) are sought to be recovered and there is no scale of fees prescribed; or (ii) disputed, and there is no scale of fees prescribed. The court's power under this subsection is not triggered in respect of fees sought to be recovered or disputed, in respect of which there is a scale of fees prescribed. Section 34(3) is therefore not a general power of the Court to determine whether fees charged are fair and reasonable;

[20] Instead of moving on to section 36, which is the other section which falls to be construed by virtue of the Defendant's Application, it is prudent to examine section 35 as it pertains to fees for non-contentious business, and provides as follows:-

“35. (1) Subject to section 27 of the Tenancies Freehold Purchase Act, the Bar Association may, with the approval of the Judicial Advisory Council, make rules prescribing and regulating the remuneration of attorneys-at-law in respect of non-contentious business.

- (2) Rules made under this section may*
- (a) regulate the amount of remuneration with reference to*
 - (i) the position of the person for whom the attorney-at-law is concerned in the business, whether as vendor or purchaser, lessor or lessee, mortgagor or mortgagee or the like,*
 - (ii) the place where and the circumstances in which the business or any part thereof is transacted,*
 - (iii) the amount of the capital money or rent to which the business relates,*
 - (iv) the skill, labour and responsibility involved in the business on the part of the attorney-at-law,*
 - (v) the number and importance of documents prepared or perused without regard to length; and*
 - (b) authorise and regulate –*
 - (i) the taking by an attorney-at-law from his client of security for payment of any remuneration to be ascertained by taxation or otherwise, which may become due to him, and*
 - (ii) the allowance of interest.*

(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, subject to section 36, be regulated by those rules.”

[21] With one exception of the Tenancies Freehold Purchase Act¹³, Rules for prescribing and regulating remuneration for non-contentious business, have been enabled in respect of non-contentious business, at the instance of the Bar Association, with the approval of the Judicial Advisory Committee. Subsection (2) elaborates on the scope and content of any rules made under this section 35. The Rules made under this section are accepted as the Legal Profession (Attorneys-at-Law) (Remuneration for Non-Contentious Business) Rules, 1997. Subsection (3) prescribes that ‘subject to section 36’ the rules made as to non-contentious remuneration under section 35, are to govern taxation of bills for non-contentious costs. One is again put on notice that the position that non-contentious bills are taxed under the Non-Contentious Rules, 1997, is either affected by or departed from under section 36. It can also be said that notwithstanding providing that taxation of a bill of costs for non-contentious business is to be carried out pursuant to the Rules pertaining to non-contentious business, this section provides no assistance in relation to when, or in what circumstances taxation arises.

[22] Section 36 provides:-

“36. (1) Subject to this section, an attorney-at-law and his client may make an agreement as to the amount and manner of payment

¹³ It is expected by virtue of this exception that the Tenancies Freehold Purchase Act, contains provisions or its own rules which prescribe and regulate fees associated with any services performed under that Act.

of remuneration for the whole or part of any legal business done or to be done by the attorney-at-law.

(2) An agreement under this section relating to non-contentious business may –

- (a) provide for the remuneration of the attorney-at-law by a gross sum, percentage, commission, retainer or otherwise; and*
- (b) be made on the terms that the amount of the remuneration therein stipulated for shall or shall not include all or any disbursements made by the attorney-at-law in respect of searches, plans, travelling, stamps or other matters.*

(3) Where an agreement under this section relates to contentious business –

- (a) it may provide for the remuneration of the attorney-at-law by a gross sum, retainer or otherwise and at a greater or less rate than that at which he would otherwise have been entitled to charge;*
- (b) subject to paragraph (c), it does not affect the amount of any rights or remedies for the recovery of any costs payable by the client to or to the client by any person other than the attorney-at-law and that person may, unless he has otherwise agreed, require those costs to be taxed according to the rules in force relating to the taxation thereof;*
- (c) the client is not entitled to recover from any other person under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his attorney-at-law in respect thereof under the agreement;*
- (d) it shall be deemed to exclude any claim by the attorney-at-law in respect of the business to which it relates other than –*
 - (i) a claim for agreed costs, or*

(ii) *a claim for such costs as are expressly excepted therefrom ; (e) subject to this section and section 37, it shall be exempt from taxation and from the provisions of this Part relating to the signing and delivery of an attorney-at-law's bill of costs.*

(4) *A provision in an agreement under this section that the attorney-at-law shall not be liable for negligence or that he shall be relieved from any responsibility to which he would otherwise be liable as an attorney-at-law is void.*

(5) *An agreement under this section shall be in writing and signed by the person to be bound thereby or his agent in that behalf.*

(6) *Subject to this section and section 37, an agreement under this section may be sued and recovered on or set aside in like manner and on the like grounds as an agreement not relating to the remuneration of an attorney-at-law.*

(7) *If on any taxation of costs an agreement under this section is relied on by the attorney-at-law and objected to by his client, as unfair and unreasonable, the taxing officer may enquire 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 that the amount payable thereon should be reduced, the court may order that the agreement be cancelled or the amount payable thereunder be reduced and may give such consequential directions as it thinks fit.”*

[23] Subsection 36(1) ('subject to this section') firstly enables an attorney and client to make an agreement for payment of remuneration for any legal business.

As acknowledged by both Counsel, the agreement may be made for contentious or non-contentious business, however the remaining provisions of section 36 should be closely examined.

- (a) Subsection (2), affords freedom to agree the manner of payment and rate of remuneration, but applies only to relation to non-contentious business.
- (b) Subsection (3), does the same in relation to an agreement for remuneration for contentious business, but also makes further provision in relation to contentious business only, as follows:-
 - (i) The operation of any remuneration agreement between attorney and client does not affect the right or liability of any third party to recover from, or pay costs to the client, and such third party is entitled to taxation of such costs to be recovered or paid¹⁴;
 - (ii) Where entitled to an order for recovery of his legal costs from a third party and such costs are provided for in a remuneration agreement between attorney and client, the client cannot recover from the third party, more than what he is liable to pay under the agreement¹⁵;

¹⁴ Section 36(3)(b)

¹⁵ Section 36(3)(c)

- (iii) The agreement is actionable by the attorney only in relation to the costs agreed or costs expressly excluded¹⁶;
- (iv) Subject to section 36 itself and section 37, the remuneration agreement is expressly excluded from taxation and requirements under the entire Part VI which deals with costs.

[24] In terms of section 36(3)(e) whilst it is clear that contentious agreements are excluded from taxation (therefore from section 34(1)), the reference to ‘*subject to this section and section 37*’, means that in order to be so excluded, the contentious agreement must satisfy any requirements or restrictions relating to its validity, scope and operation. Such requirements or restrictions would be such applicable either specifically to contentious agreements; or otherwise to both non contentious and contentious agreements under section 36 as a whole, as well as section 37. For example, two such restrictions which apply to both contentious and non-contentious are (i) sub-section 36(4) which absolutely prohibits any attempt to contract out of liability for negligence; or (ii) sub-section (5), which requires the remuneration agreement to be in writing and signed by the person to be bound or his agent in that behalf.

[25] The Court will pause at this juncture to apply the law to the Claimant’s case with reference to the pleadings.

¹⁶ Section 36(3)(d)

If as just said, one is relying on an agreement for legal fees made under section 36 of the LPA, the agreement must be in writing, signed by the person to be bound or by his/her agent. The Court understands the Application of the Defendant, to allege that there is no such agreement in writing as required by section 36(5) that has been pleaded by the Claimant. Counsel for the Claimant says that there has been an agreement pleaded and as such there is no requirement for the Claimant to have submitted a bill of costs for taxation further to section 34(1).

- [26] The Court reverts to the pleading extracted verbatim from the Claim and SOC. There is no allegation pertaining to an agreement *in writing* that has been pleaded. The reference in paragraph 13 of the SOC to the Claimant having agreed to reduce his fees, subject to obtaining permission from the Bar Association, and thereafter following through on that action is not a pleading of an agreement in writing. For purposes of illustration, reference is made to **Edghill & Patel v Paradise Beach Limited et anor.**¹⁷ The claimants therein sued for the balance of legal fees owed for legal services (the nature of the services provided appeared to be non-contentious, albeit not expressly so stated). The defendant applied to strike out the claim on the basis that the claimants had failed to comply with section 34(1) of the LPA.

¹⁷ Barbados High Court CV1145/2010, affirmed in Civ. App. 10/2011

The application to strike out was refused and the refusal was affirmed on appeal. It was found at first instance¹⁸, that there was an agreement pleaded in the SOC which qualified as an agreement under section 36 of the LPA.

[27] This finding was not disturbed on appeal albeit it was expressed that the existence or not of the agreement was within the determination of the trial judge. The point of relevance to the case at bar however, is that there was reference to the pleadings in the claim brought before the court. From both the decision of the Master and the judgment of the Court of Appeal, it can be seen that the pleadings advanced an agreement in writing (or a promissory note), described as follows by Master Roberts¹⁹:-

The question which naturally arises is whether the pleadings disclose an agreement. Looking at the Statement of Claim one finds that it identifies the parties, outlines the subject matter, sets out the consideration and the demand therefor and the subsequent agreement to pay. This is an agreement specific enough for section 36.

The Court of Appeal decision²⁰ extracted the pleadings set out at paragraph 10 of the SOC, in which the Master found the agreement to have been pleaded by means of the letter signed by one of the defendants therein, acknowledging

¹⁸ Ruling of Master Roberts, K

¹⁹ Ibid @ para 14

²⁰ Edghill, Civ. App. No. 10/2011 @ paras 8-9

the obligation to pay the outstanding fees. This is not the position in relation to the SOC pleaded in the case at bar.

[28] The Court makes further reference regarding the pleading of an agreement in writing, to the case of **Walton v Egan et al**²¹ which was referred to by Counsel for the Claimant in her further submissions that section 34(1) does not apply to the Claim. This decision was extensively referred to in the first instance decision of Master Roberts. It pertains to a non-contentious agreement for fees as enabled under section 57 of the UK Solicitors Act, 1974. This decision also engaged discussion on the operation of the UK Solicitor's Remuneration Order, 1972 which mandated a procedure in some ways similar to section 34(1) of the LPA. This decision has peculiar facts which resulted in the exclusion of the 1972 Solicitor's Remuneration Order, and judgment for the solicitor based upon an agreement found to exist for the solicitor's fees pursuant to section 57 of the Solicitor's Act, 1974. This latter section is said to be similar to section 36 of the LPA. Notwithstanding Counsel for the Claimant's reliance on this case, the Court finds the case supportive of the Defendant's position regarding the failure to plead a written agreement.

²¹ [1982] QB 1232

[29] Mustill J's account of the facts²² revealed that the plaintiff solicitor had originally issued a bill for his fees which was not paid. After several failed attempts to collect, *'the plaintiff agreed with the first defendant to accept payment by installments, on terms that the defendants paid interest of 15% on the running balance, with retrospective effect from the 1st October, 1979. The first defendant countersigned a letter dated 14 March, 1980 recording the agreement...'* Further, *'...Accordingly, the plaintiff began the present action, claiming alternatively under the 1972 order and the agreement of March, 1980.'* Ultimately, the Mustill J found that the action was grounded in contract by the agreement of March, 1980 and that such agreement amounted to an agreement under section 57, thereby ousting the operation of the procedure for serving a bill of costs under the Solicitor's Remuneration Order, 1972.

[30] Even further, it was held that the agreement was capable of standing by itself as a compromise of a debt, which a client was free to enter into and a solicitor then at liberty to sue upon as a separate agreement outside of section 57. This case does not assist the Claimant as pertains to the issue of what has been pleaded in the Claim, relative to the finding of an agreement under section 36 of the LPA.

²² Walton supra, @ pg 1235-1236

It can be seen from the specific factual bases in both *Edghill* and *Walton*, that agreements in writing were found arising out of correspondence adopted and signed by the parties, which then satisfied the requirement for the agreement to be in writing and signed by (or on behalf of) the person to be bound. Paragraphs 13-15 of the SOC in the instance case, do not plead any agreement in writing, whether to be found within correspondence or otherwise.

- [31] The Court therefore agrees with Counsel for the Defendant, that there has been no agreement in writing which has been pleaded, or otherwise put before the Court in this Claim. This is not the same as the Court saying that there is no agreement between the parties, relating to fees. There is no agreement in writing, signed by the Claimant, that has been identified in, much less appended to the Claim or SOC. It therefore means, that without further consideration, the Court is entitled to rule at this point that section 36 of the LPA, is not applicable to this Claim, so that the Claimant was obliged to have submitted a bill for taxation prior to commencing the claim, as provided by section 34(1) of the LPA. This view notwithstanding, the Court will nonetheless examine the remainder of section 36 and the application of section 34(1) to an agreement in writing for non-contentious business, as the Court's order upon disposal of the Application will leave room for the Claimant to plead his agreement in writing, if such an agreement exists.

[32] Section 36(6), is plain and uncontroversial – an agreement for remuneration whether for contentious or non-contentious legal business, may be treated in law and sued upon like any other agreement that is not a remuneration agreement. This sub-section says ‘*subject to this section and section 37.*’ Like the qualification appended to the exclusion of a contentious remuneration agreement from taxation (sub-section (3)(e)), ‘subject to this section’, means that all stipulations, requirements, restraints or limitations, in relation to either or both types of agreements, must be satisfied or observed in order for the agreement for fees to operate in law like any other agreement. In relation to section 37, the limitation therein, is not relevant to the case at bar, as it applies to remuneration agreements entered into by a client acting in certain representative capacities²³.

[33] Finally in relation to section 36, subsection (7) provides to the effect that if on any taxation, an agreement under this section is relied on by the attorney-at-law and objected to by his client, as unfair and unreasonable, the taxing officer may enquire into the facts and certify same to the court. The Court upon such certification may cancel the agreement or reduce the amount payable. Obviously, given that the contentious agreement is excluded from taxation and requirements of signing and delivering a bill of costs under the entire Part

²³ Eg as a trustee under will or deed, or guardian.

VI, the question arises as to what taxation does sub-section 7 apply to. The question that divides respective Counsel for the parties, is whether the non-contentious agreement is subject to section 34(1) and even if so, whether the result of failing to comply with section 34(1) is a claim that is barred. The cases are now referred to in an attempt to ascertain what if any guidance may be obtained in relation to the proper application of the section.

The Authorities and the Application of Section 34(1) to a Non-Contentious Agreement made pursuant to section 36(1).

[34] The authorities examined, (from Trinidad and Tobago²⁴ and the UK²⁵), will have to be assessed with reference to the compatibility of their respective legislation to the Barbados LPA.

(i) **Edghill & Patel v Paradise Beach Limited**²⁶ – The Court agrees with Counsel for the Defendant that this decision is not helpful to the Court in relation to the instant case. The Court of Appeal decision, which Counsel for the Claimant submits is binding on this Court as authority for the position that section 34(1) of the LPA does not apply to a remuneration agreement made under section 36 of the LPA, does not provide assistance to this Court in the manner submitted.

²⁴ Sections 51 and 53 of the Legal Profession Act, 1986, Trinidad & Tobago.

²⁵ Sections 56 and 57 of the Solicitors Act, 1972 UK.

²⁶ Barbados Civil Appeal No. 10 of 2011

- In examining the Appeal, the discussion of the matter commences at paragraph 16 of the judgment of Moore JA. The discussion summarises the facts and arguments made in the court below. However, the judgment does not raise or determine any question as to whether section 34(1) of the LPA applies to agreements made under section 36 of the LPA. In paragraphs 20-21, the gravamen of the court's decision is set out in relation to the sufficiency of the cause of action pleaded, relative to the ground of the application to strike out, which was that there was no reasonable ground for bringing the claim.
- Moore JA identified two issues arising out of the claim, namely (i) the existence or not of a written agreement, and (ii) the applicability or not of section 34(1) to any such written agreement. These two issues were within the context of the appeal against the refusal to strike out the claim, categorized as disputes of fact and law, which were to be determined at trial. A decision in these terms, is not a ringing endorsement of any binding decision that an agreement (non-contentious) made pursuant to section 36 of the LPA, is not subject to section 34(1).

- (ii) **Vincent Nelson QC v Attorney General**²⁷ - The remuneration agreement in this case pertained to contentious business, which in the first place presents no similarity with the case at bar which concerns non-contentious business.
- Moreover however, the Court would decline to extract any guidance from this decision as the Trinidad & Tobago LPA makes no provision for remuneration agreements for contentious business at all. Section 51 of Trinidad's LPA is more or less the same as section 34 of Barbados' Cap. 370. Section 52, more or less the same as Barbados' section 35.
 - However, section 53 of is not similar to Barbados' section 36, in that the latter embodies specific provisions relating to contentious agreements, which in the Court's view, would cause the interpretation to differ, as pertains to the operation of section 34(1). Specifically, the Court is referring to what would then be the scope of taxation in section 34(7), the counterpart to which is section 53(4) of the Trinidad LPA.
 - In light of the specific restraints pertaining to remuneration agreements for contentious business in section 36(3) of Barbados'

²⁷ Trinidad & Tobago HC CV4386 of 2016

LPA, it can be seen that should an agreement not conform, or should section 36(3)(b) apply as it does to the entitlement of a third party to taxation of a remuneration agreement, those are two instances in which a taxation under section 36(7) would arise. This will not be the same in construing Trinidad's section 53(4)

- Insofar as there was reference to the Trinidad CPR in determining this case, as a result of the fact that there is still scope for taxation to apply to a remuneration agreement as well as the specific provisions applicable to agreements for contentious work, the Court is not of the view that the CPR in any way alters the question of whether and when taxation would be required (even if replaced with the terminology 'assessment').
- In this regard CPR Rule 65.2(3)(h), firstly applies in circumstances where as permitted by the Rules, the question of assessment of costs arises for the court's consideration outside of the application of the established bases of prescribed, fixed, budgeted or costs assessed otherwise in accordance with Part 65. The application of Rule 65.2(3)(h) applies to an action already before the Court in which the question of assessment involving an agreement for costs arises. This does not assist with the question of whether the existence of a

remuneration agreement for non-contentious business must comply with section 34(1) of the LPA;

- (iii) **Rameshwar McCleod v Samaroo et al**²⁸ - as acknowledged by Counsel for the Claimant, this decision pertained to contentious business and was pre Trinidad's CPR, and as such as later shown by *Ade John v Walker et anor*, the CPR in Trinidad is viewed as impacting the application of recovery of costs under the LPA. This decision need not be considered.
- (iv) **Yetunde Ade-John v Walker et anor**²⁹ - The work sued for in this case was non-contentious, there was default judgment in favour of the attorney, based on a written agreement. Upon the attorney seeking to enforce the default judgment, the Court sought to satisfy itself that the default judgment on the agreement for remuneration was properly obtained having regard to the requirements of section 51 of the Trinidad LPA.
- The attorney in this case agreed that her action as it were, on an agreement for non-contentious work, was carried out in

²⁸ Trinidad & Tobago HC CV2012 of 2016

²⁹ Trinidad & Tobago HC CV4358 of 2016

contravention of section 51(1), there having been no bill of costs taxed and delivered to the client;

- The judge in the first instance, acknowledged that on its plain terms, section 51(1) of the Trinidad LPA applied whether to contentious or non-contentious matters. (This is the same conclusion to be applied in relation to section 34(1)). However, the judge thereafter, as herein commended to the Court by Counsel for the Claimant, held that to require the written agreement under section 53 to be assessed prior to filing of the claim was inconsistent with the principle of freedom to contract;
- Further, that by virtue of the applicability of the CPR to taxation of costs for non-contentious business pursuant to section 52 of the LPA, it was clearly intended that the Court would have some supervision over agreements made under section 53. However, that such supervision (taxation arising under section 54(4)), could only arise upon objection by the client who was being charged.³⁰
- The Court does not find that there is much assistance to be obtained from this decision at all. Again, the absence of provision for contentious agreements as contained in Barbados' section 36,

³⁰ Ade-John v Walker, supra, per Mohammed J @ paras 21-22

renders the scope of interpretation of the section different. The legislation here has exempted contentious agreements from taxation in plain language. The same was not done for non-contentious agreements;

- Further, there is no room for consideration of the applicability of the CPR to remuneration agreements for non-contentious business in the manner reasoned by Mohammed J in this authority. Mohammed J at paragraphs 20-21 of *Ade-John v Walker* stated that the regulation of non-contentious business prescribed in section 52 (equivalent to Barbados' section 35), was the Civil Procedure Rules (Trinidad & Tobago).
- There is no such position in Barbados in relation to the CPR being applicable to the regulation of non-contentious business as prescribed in section 35 of the LPA. The regulation of remuneration for non-contentious legal business is governed by the Non Contentious Business Rules³¹.
- Counsel for the Claimant's reference to CPR Rule 65.2(3)(h) as it pertains to written agreements takes the consideration of the matter no further.

³¹ The Legal Profession (Attorneys-at-Law) (Remuneration for Non-contentious Business) Rules.

Rule 65.2(3) as a whole, sets out factors the court may take into consideration when it is exercising its discretion to quantify costs (arising from proceedings in court), other than in accordance with the three set bases of costs established in Parts 64 and 65³². The CPR 2008 costs provisions have no applicability to remuneration for non-contentious legal business.

- (v) **Walton v Egan**³³ - Walter v Egan as already briefly discussed, concerned a suit for recovery of fees for non-contentious business, where there was found to be a special agreement within the terms of section 57(4) of the UK Solicitors Act 1974 (equivalent to Barbados' section 36(5)'s agreement in writing). This case is relied on by Counsel for the Claimant insofar as it states that the existence of the agreement therein, obviated the need for compliance with the process relating to recovery of fees on the basis of a bill of costs. The decision *inter alia*, reads as follows:-

“Where there is no special agreement, the procedure begins with delivery of a bill. This is followed by notification to the client that he is entitled to the safeguards of a Law Society certificate and taxation. Thereafter...the solicitor can sue on the bill. If, however, the client so desires, and if he acts in

³² Rule 64.2, defines Fixed costs – Rule 65.4; Prescribed costs – Rule 65.5; Budgeted costs – Rule 65.8. NB, Rule 64.5(c) would not be arising out of an agreement for non-contentious legal business as it pertains to recovery of costs of ‘proceedings’.

³³ [1982] QB 1232

time, he is entitled to a taxation as of right and the proceedings cannot go forward until the taxation is complete.”

“Where there is a special agreement under section 57 the procedure is quite different. The solicitor’s right of action is founded on the agreement not the bill; indeed so far as section 57 is concerned there is no need for the solicitor to render a bill at all. Nor is there any room for taxation under section 70, for this is concerned with bills, not agreements. It is true that section 57(4) seems to contemplate that a taxation may occur, but this is in my view a procedure initiated by the court pursuant to its own inherent powers to supervise solicitors as officers of the court; it is not a procedure exercised as of right by the client. When an action on a special agreement comes before the court, the matter may be sent to the taxing master so that he can inquire into the facts and report back to the court. When doing so, he is acting as a delegate of powers exercised by the court, and he is not exercising his own originating powers of taxation.”

- This decision has to be properly viewed from the context of the applicable legislative provisions. In the UK, the counterpart of the LPA (Cap. 370A) was the Solicitor’s Act, 1974. Section 56 of that Act, is the equivalent to section 35 of the Barbados LPA, namely, the enabling of provision for the regulation of remuneration for non-contentious business. The UK’s section 56 has given rise to the Solicitor’s Remuneration Order 1972 whilst Barbados’ section 35 has given rise to the Legal Profession (Attorneys-at-Law Remuneration for Non-Contentious Business) Rules, 1997.

Unlike the Barbados Rules, which is primarily a scale of fees, the UK Remuneration Order 1972 sets out prescribed processes regarding recovery of fees, delivery of bills of costs, and taxation.

- The provisions of this Order dealing with non-contentious business, are subject to the wider provisions of section 69 and 70 of the Solicitor's Act, 1974 which require an attorney to deliver a bill one month prior to commencing any action for recovery of costs. The client is then entitled to have those costs taxed if desired. It is likewise observed, that the taxation of a bill of costs under the Remuneration Order, 1972 is also moved only at the instance of the client.
- The attorney's obligation is to deliver a bill containing notice of the client's right to seek taxation if so desired; and if so desired by the client, the suit for recovery of fees cannot be commenced unless the bill delivered to the client has been taxed. Against this backdrop the Court in *Walton v Egan* ruled that the provision speaking to taxation in section 57(4), (the equivalent of Barbados 36(7)), is effected at the instance of the court and not the client.

- In Barbados, the position regarding recovery of fees is governed by the LPA in relation to both contentious and non-contentious business. The requirement for taxation under section 34(1) unlike in UK's fee recovery regime, is not invoked only upon the application of the client. The requirement under section 34(1) is an obligation placed upon the attorney at law. Further, unlike the UK position, the provision made for regulation of remuneration for non-contentious business as enabled by the equivalent to section 35 of the LPA (section 57(4) UK) does not make any provision for the recovery of fees, as do the provisions of the UK Solicitor's Remuneration Order, 1972.
- Even further, unlike the position in the UK, provision is made for special agreements (agreements in writing), in relation to contentious and non-contentious business together under section 36 of the LPA. By that section, the requirement for taxation of a bill of costs is excluded in (section 36(3)(e)) only in relation to agreements for contentious legal business and the Court considers that exclusion from taxation to be significant in terms of the operation of section 34(1). The provisions in the UK, despite being similar in content, are therefore different, in the Court's view in significant ways.

- In **Walton v Egan**³⁴, Mustill J concluded that section 70 (Barbados' section 34(1)) was not concerned with agreements, but with bills of costs. In Barbados, section 34(1) is made subject to section 36 which deals with written agreements. If section 34(1) is to be regarded as applicable to only to bills of costs and not written agreements (as concluded by Mustill J), there ought to have been no need to express section 34(1) as subject to section 36, or to have expressly excluded taxation from applying to agreements for contentious business.
- On the one hand, the distinction between the respective legislation (Barbados LPA and UK) is admittedly not surgically precise; but on the other hand, that lack of preciseness serves as sufficient reason to decline to apply the decision in favour of the interpretation preferred by Counsel for the Claimant.

[35] The consideration of the authorities above has not enabled the Court to come to any other conclusion than that the particular legislative scheme of the Barbados LPA, requires that even in relation to a written agreement for remuneration for non-contentious legal business, an attorney-at-law is required to comply with section 34(1) and to submit a bill of costs for taxation and serve same on the client, as a prerequisite for commencing a claim for

³⁴ Supra @ pg 1238

recovery of his or her costs. The position in relation to remuneration for contentious agreements is different, having regard to the express exemption of such agreements from taxation by virtue of section 36(3)(e) of the LPA. However, the contentious agreement must comply with all requirements imposed by the wider section 36 as well as 36(3).

- [36] The final question that must be addressed, is whether having found that there is no written agreement to which section 36 applies which has been pleaded, and there having been no taxed bill of costs delivered to the Defendant, the Court should stay the Claim as sought by the Defendant. The Court is not of the view that the correct approach is to seek to compel the Claimant to submit a bill of costs for taxation. Rather, the Court considers that if the Claimant wishes to pursue his right to recover his fees, he is to be given the opportunity to comply with section 34(1) within a time stipulated by the Court, failing which the statement of case is to be struck out. It would be a matter for the Claimant whether he chooses to amend his Claim to plead whatever written agreement he may be relying on, in addition to providing evidence of a bill of costs that has been taxed and served on the Defendant.

Disposition

[37] The Defendant's Application for a stay of the Claim is disposed of in the following manner:-

- (i) The Claimant's statement of case fails to plead any agreement in writing made under section 36(1) of the Legal Profession Act, Cap. 370A;
- (ii) The Claimant's claim for recovery of fees is governed by section 34(1) of the Legal Profession Act, Cap. 370A of the Laws of Barbados;
- (iii) The Claimant is directed by the Court to file an amendment to his statement of claim on or before the 15th December, 2020, failing which the Claimant's statement of case is to be struck out as an abuse of process for failure to comply with section 34(1) of the Legal Profession Act, Cap. 370A.
- (iv) The matter is adjourned for Report, to a date to be fixed by the Court at which time the Court will hear the parties on costs arising from the hearing and disposal of the Application.

SHONA O. GRIFFITH
Judge of the High Court