

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2016/0199

BETWEEN

ABDEL – KARIM TAHER ITUM

Claimant/Defendant to the Counterclaim

AND

FORBES HARE

Defendant/Counterclaimant

Appearances: Ms. Elizabeth Ryan, Counsel for the Claimant/Defendant to the Counterclaim
Mr. Robert Nader, Counsel for the Defendant/Counterclaimant

2020: 15th – 16th June

2020: 1st December

JUDGMENT

- [1] **ELLIS J:** In the claim herein, the Claimant/Defendant to the Counterclaim (“the Claimant”) seeks special damages in the sum of USD\$433,000.00 being the sum held in trust by the Defendant/Counterclaimant (“the Firm”) for the Claimant together with interest and costs. Alternatively, the Claimant seeks damages for breach of contract; interest at such a rate as the Court deems fit; costs and further and other relief as the Court may deem fit. The Firm has counterclaimed seeking payment of the sum of USD\$385,974.15 plus contractual interest in the sum of USD\$36,066.68 and continuing at a rate of 1.5% on all outstanding sum until judgment or sooner payment and costs. The facts giving rise to the present action are set out hereunder.

Background

- [2] The Defendant/Counterclaimant is a firm of solicitors and barristers practicing in the Virgin Islands. The Claimant is an individual said to be resident in Canada. In or about July 2014 the Claimant

instructed his legal representatives, at the time, Simonette Lewis to commence Claim No. BVIHC (COM) 2014/0004 in the Commercial Division of the British Virgin Islands against eight defendants. The proceedings did not, however, progress and the Court first stayed that claim against the third and fourth defendants (in favour of arbitration in Indonesia) and later set aside leave to serve the claim out of the jurisdiction on the 1st and 2nd defendants. The Court also ordered the Claimant to pay the costs of the application to set-aside and refused the Claimant leave to appeal. This left the Claimant with no viable claim and substantial liability in costs.

[3] In November 2014, the Claimant sought to retain the Firm to provide legal advice and services. The Firm sent an email dated 20th November 2014 to the Claimant attaching a copy of their engagement letter (“the Engagement Letter”). In the email, Mr. William Hare acting on behalf of the Firm explained the Engagement Letter and asked that the Claimant execute and return a copy of the Engagement Letter to the Firm. The material terms of this letter are as follows:

“Our initial scope of work will involve:

- drafting and filing an application for leave to appeal the orders of 5th November 2014 and the papers relating to any subsequent appeal (should leave be granted);*
- appearing on any resulting appeal hearing in the Eastern Caribbean Court of Appeal;*
- renewing the application for leave to serve the 1st and 2nd defendants and seeking orders for substituted service on Harney Westwood & Riegels;*
- conducting a full review of the file and pleadings, drafting amended pleadings and applying for an extension of time to serve the amended pleadings...*
- conducting any further applications for leave to appeal and any appeals;*
- liaising and instructing external counsel to advise in relation to the proceedings generally and to appear at the hearings of any appeals (the counsel currently identified is Stephen Midwinter of Brick Court Chambers);*
- taking instructions from you and liaising with you and Simonette Lewis; and*
- identifying, liaising with and preparing materials to present to prospective litigation funders to fund this litigation and any possible arbitral proceedings.”*

and

“the purposes of conducting this work are to keep this claim alive, to strengthen the claim where possible, and to secure the funding necessary to take the claim to trial”

and

“The terms of this engagement letter and the Appendices contained herein apply to all work done in anticipation of the execution of this engagement letter and will apply to any other assignment unless we agree different terms in writing”

and

“... We would broadly estimate the likely fees and disbursements for performing the work specified above to be approximately USD 250,000. However, as many factors may affect this figure it could be higher or lower”

and

“notwithstanding the fact that time costs will be higher, we ask that you now pay USD 100,000 on account of our fees and disbursements pending the completion of the work specified above. Should we be successful in keeping the claim alive, further fees and disbursements will be payable to take the claim to trial, in respect of which we apprehend you will be seeking funding. Of course, if you are successful or partially successful in your appeal, you may be able to obtain an order that the other side pay some of your costs to date”

and

“At the end of our involvement in the matter, we will render an account and return to you all money held on account and not applied against outstanding fees and disbursements”

and

“If you continue to instruct us after receiving this retainer letter, we will assume that you are content to be bound by its terms.”

- [4] The cover email message (to which the Engagement Letter was attached) included the following terms:

“As a very rough estimate, the scope of work contemplated, including counsel’s fees and disbursements are going to be around \$250,000. As agreed, however, we will limit our request for a retainer payment to \$100,000 at this stage and will not seek further sums on account pending completion of the scope - at which time if successful we will speak to funders and/or revisit the engagement contract.”

[5] On 21st November 2014, the Claimant sent an email to the Firm in the following terms:

“One thing I need your understanding and confirmation on:

- 1. due to funds limitation please allow a \$50K now and the balance \$50K in two months, Please rest assured I will not be late but I need to arrange.*
- 2. If we fail in our efforts, I understand that my liability to you is limited to \$100K including all expenses, councils... etc as agreed ... however, if we win and find a funder, sure the additional can be settled through the funder...however, if we cannot find a funder the cap remains at \$100K and we make a new contract for the trial or arbitration if I can continue.*

Once succeed in the claim, we can still go back and re visit this contract for the additional sum if we continue through the trial and win.

I hope we are in agreement and I am much obliged.

Nader can send me the invoice for the first \$50K now so I can remit.”

[6] The Firm then sent an invoice to the Claimant for the sum of \$50,000.00 and indicated that it will render the second tranche the next month. On 26th November, 2014, the Claimant paid the Firm the sum of \$50,000.00 with the additional \$50,000.00 to be paid upon the Firm issuing the second tranche. The Firm however did not issue an invoice for the second tranche and so only the sum of \$50,000.00 was paid.

[7] The Firm asserts that it performed substantial work both before and after 20th November 2014. Most of the work was performed by Mr. Hare as partner and Mr. Baird as senior associate. Disbursements of USD 33,796.65 (mostly in respect of counsel) were also incurred. The fee note discloses that the following work was performed:

- (a) On-boarding the file, reviewing and advising on the claim and engaging with the former legal practitioners;
- (b) Preparing and moving an application for the service of the claim out of the jurisdiction;
- (c) Preparing an application for leave to appeal and obtaining the same;
- (d) Preparing the substantive appeal;
- (e) Amending the pleadings, including taking steps to discontinue the claim against certain parties;

- (f) Attending the Court of Appeal Case Management Conference;
- (g) Dealing with an appeal by the defendants in the proceedings in respect of their costs;
- (h) Dealing with an appeal by the fifth defendant in respect of the terms of the orders below;
- (i) Dealing with costs claims made by Harneys in respect of the first instance costs orders;
- (j) Preparing an application to stay the defendant's costs order;
- (k) Dealing with a further jurisdictional application issued by the defendants;
- (l) Dealing with an additional stay application moved by the defendants that was grounded in the payment of costs;
- (m) Dealing with the unpaid costs of the Claimant's former legal practitioners; and
- (n) Latterly, assisting the Claimant with settlement.

[8] The Firm states that items (g) - (n) above were outside the scope of work described in the Engagement Letter and in fact comprised a substantial proportion of the work performed. The Firm contends that it was heavily engaged during the period mid-November 2014 to early May 2015 and there were other attendances outside that period.

[9] On or around 24th February 2015, the Claimant contacted the managing partner of the Firm by email in the following terms:

"Dear William

I just had a talk with Richard. I then talked to my wife. She is now going through a major stress and we just cannot go through this stress as a family. I want to stop this with the least cost now please... I need your help how to do. I am not sure if you can offer a settlement they take their losses and we drop the case... Can you please think of a way to end this? I will still pay you the money I owe, but I need this to help me go through the finish line as soon as possible with the least cost. Let me know your idea. Thanks Karim Itum, PE"

[10] The following day the Claimant sent a further email:

"Dear William

Subsequent to my email of yesterday, and if we can not settle the issues amicably before the hearing date, we must go with full force to the hearing that will provide us a win.

We just can not afford any loss any more. Looks like Sami is bringing expensive QC and wining [sic] and we have to pay as well at the end of the day.

Really this time your full focus is required to start reversing things for us.

Let me know your thoughts.

Thanks

Karim Itum, PE"

- [11] The Firm accordingly commenced settlement overtures to the defendants in the substantive commercial court proceedings in Claim No. BVIHCV (COM) 2014/0004, which were rejected. On 10th March 2015, the Firm attended a costs hearing at which it is said to have obtained a substantial discount on the Claimant's costs liability. Thereafter, it became clear that the Claimant wished to bring an end to the litigation in Claim No. BVIHCV (COM) 2014/0004 and he invited the Firm to assist in negotiating an out of court resolution. The Firm did not agree with this proposed course and in fact strongly advised against it by emailed correspondence of 13th March 2015, Mr. Hare on behalf of the Firm wrote to the Claimant in the following terms:

"Dear Karim

I strongly advise you not to do this.

- 1. It is in my view the worst possible time to settle.*
- 2. I think you could and should be asking for substantially more ...*
- 3. Your case is now on a much stronger footing than it was. The weak points which we inherited have now largely been pruned off, the costs liability has been well contained (which is not reflected in the figure, which remains the same as before you had the assessment at which they thought they were going to get on order for immediate payment of over \$300K to exert pressure on you), and going forward you are on much firmer ground.*

Finally, our own time charges (up to an including settlement) will come to just over \$200K. I do not have figures, but we also have fee liability for Stephen Midwinter and Andrew Westwood, which will need to be added.... In other words if there is a net payment of just \$270K for which you have to pay your own disbursements, even after applying the \$50K we currently hold on account there is not going to be much left for you.

...

In summary:

A - this is a very bad settlement agreement and I am strongly against it

B - you will get very little net benefit but will be relinquishing a valuable cause of action

C - all that said, it is your case, and if you want us to write a letter we will do so.”

[12] The Claimant replied on the same day in the following terms:

“Dear William

I spoke with my family, and I am sorry to do this but we want to settle.

You need to know that I am very thankful for you and the team for what you have done, without which I could not reach this point.

Surely Sami will not accept to pay even a single dollar without the success of the lost hearing, but I just have no energy any more and I do not want to lose my life for this ...

As for your charges, the last thing I want to do is get into a disagreement with a good lawyer.

We are both reasonable.

The only thing I can say now is this....

Unless you have a Funder who is willing to come in today and take even 50% of the claimed value in the future, I can not keep going with this.

I expect the Funder as well to pay Sami now the 120K that the court ordered

The value now I accept to settle is not a 270k, it is 270 plus 163k, so it is 433k.

[13] By March 2015, Claim No. BVIHCV (COM) 2014/0004 was settled with the defendants therein agreeing to pay the Claimant the sum of \$433,000.00 in final settlement. As part of the settlement agreement, the Claimant agreed that the sum of \$433,000.00 would be paid into the Firm's trust account by 15th May 2015 and that the Claimant would discontinue Claim No. BVIHCV (COM) 2014/0004. The release agreement dated 8th day of April 2015 was later executed. Pursuant to the terms agreed with the defendants in the proceedings, the settlement sum was paid in two tranches. The sum of \$270,000.00 was paid in early April 2015 and the balance of \$163,000.00 in early May 2015.

- [14] After payment of the final sum, the Claimant sought payment of the entire settlement sum. There then developed a dispute between the parties and the relationship broke down. On several occasions after 8th May 2015, the Claimant personally demanded the payment of the sums held for the Claimant by the Firm. However, the Firm declined to comply with the Claimant's request. The Firm however advised the Claimant that they would issue an invoice by the Friday so that they can forward the balance of the settlement monies to the Claimant. In or around January 2016, the Claimant received a bill from the Firm for professional fees in the sum of \$352,267.50, plus disbursements (including external counsel's fees) of \$33,706.65, a total of \$385,974.15. However, the Claimant has refused to pay the invoice rendered by the Firm and refuses to permit the Firm to apply sums held in the Firm's client account towards the invoice.
- [15] By a letter dated 27th April, 2016, the Claimant demanded payment of the sums. However the Firm has declined to pay the amount sought by the Claimant, maintaining that it is entitled to be paid in full or the matter should otherwise be subject to a solicitor/client taxation so that some other sum can be determined by the Court.

The Claimant's Case

- [16] The Claimant submits that during the course of discussions with the Firm prior to retaining its services, the Firm sent an email dated 20th November, 2014 to him attaching a copy of their Engagement Letter. In the email, Mr. Hare explained the Engagement Letter and asked that him to execute and return a copy to the Firm. The Claimant submits that upon reviewing the Engagement Letter sent by the Firm, he rejected its terms and made it abundantly clear that his liability to the Firm would be limited to USD\$100,000.00 inclusive of all expenses and counsel. He noted further that due to his limited funds, he was willing to pay USD\$50,000.00 now and the balance within two months.
- [17] The Firm in response to the Claimant's email and on the basis of this acceptance sent an invoice to the Claimant for the sum of USD\$50,000.00 and indicated that it would render the second tranche the following month. The Claimant contends that at no time did he agree to the Engagement Letter sent by the Firm and in fact, he never signed the Engagement Letter.

[18] When he was cross examined under oath, the Claimant testified that he hired the Firm to protect him and that his limit to the Firm is capped at USD\$100,000.00. He further maintained that he never agreed to or signed the Engagement Letter sent by the Firm. Instead, he maintained that he rejected the Engagement Letter and by an email made it abundantly clear to the Firm that his liability to the Firm is limited to USD\$100,000.00. The Claimant therefore concluded that in those circumstances, there was both a valid offer and an acceptance so as to constitute a binding agreement with respect to the counterproposal and not the Engagement Letter.

[19] Counsel for the Claimant further submitted that the evidence in the present matter is that both Parties acted on the basis of the emailed correspondence dated 21st November 2014 in which the Claimant made clear:

“One thing I need your understanding and confirmation on:

- 1. due to funds limitation please allow a \$50K now and the balance \$50K in two months, Please rest assured I will not be late but I need to arrange.*
- 2. If we fail in our efforts, I understand that my liability to you is limited to \$100K including all expenses, councils... etc as agreed... however, if we win and find a funder, sure the additional can be settled through the funder... however, if we cannot find a funder the cap remains at \$100K and we make a new contract for the trial or arbitration if I can continue.*

Once succeed in the claim, we can still go back and revisit this contract for the additional sum if we continue through the trial and win.”

[20] Counsel for the Claimant submitted that estoppel by convention arises where both parties to a transaction have acted on the agreed assumption as to the existence of a state of facts, or as to the true construction of a document. The parties are then precluded from denying the truth of that assumption if it would be unjust to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any “clear and equivocal” representation or promise: it can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party.¹

[21] To give rise to an estoppel by convention, the mistaken assumption of the party claiming the benefit must however have been acquiesced by the party alleged to be estopped: and both parties must have conducted themselves on the basis of such a shared assumption: the estoppel requires

¹ Chitty on Contracts 27th ed. Vol 1 paragraphs 3 – 080 – 081; Amalgamated Investment & Property Co. Ltd. v Texas Commerce International Bank Ltd. [1982] Q.B. 84

the communication to pass across the line between the parties. It is not enough that each of the two parties acted on assumption not communicated to the other. Such communication may be effected by the conduct of one party, known to the other. The effect of estoppel by convention is to preclude a party from denying an agreed assumption of fact or the meaning of a document.²

[22] In the circumstances, the Claimant submits that both Parties in this case have acted on the agreed assumption that the liability of the Claimant to the Firm is capped at USD\$100,000 and that the Firm took steps by forwarding an initial invoice for the first USD\$50,000 and which was paid by the Claimant. In those circumstances the Claimant submitted that the Firm is estopped from denying that there was a valid offer and acceptance and that Claimant's liability to the Firm is limited to USD\$100,000 which includes all expenses and counsel.

[23] Finally, Counsel for the Claimant submitted that there is no question that the Firm carried out work for the Claimant and should be compensated for the work done for his benefit. However, the Claimant contends that the sum of USD\$385,974.15 claimed by the Firm in respect of its professional fees plus disbursements is unreasonable and excessive in all the circumstances and more so in light of the length of time its services were engaged. The Claimant contends that alternatively, the Firm should be compensated for reasonable remuneration.

[24] Counsel for the Claimant submitted that the law on whether a claim for reasonable remuneration is contractual, quasi contractual or "restitutionary" appears unsettled. He cited the judgment of Etherton L.J in **Westlaw Services Ltd. and Anor. v Boddy**³ in which the learned judge noted that *"there is considerable scope for argument whether the claim for reasonable remuneration is contractual one rather than a restitutionary claim."*

[25] Counsel also relied on the following excerpt from the **Halsbury's Laws of England** in which the learned authors stated:

"Quantum meruit translates roughly as "the value of what was done" and exemplifies numerous situations where a benefit is conferred but not necessarily asked for. Beyond thus, the term "quantum meruit" is used in different senses at common law. For example, in some cases quantum meruit is used to express the measure of recovery in a contractual claim. In other cases it is used to denote a restitutionary claim. The claim is clearly

² Chitty on Contract 27th ed. Vol 1 paragraphs 3 -081 – 082

³ [2009] EWCA Civ. 1251

contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done. Where, however, no contract is ever concluded between the parties or the contract is void or otherwise unenforceable, the claim cannot be contractual in nature and is likely to be restitutionary.”

[26] However, the Claimant submits in order for the Firm to rely on this alternative ground, the counterclaim must include a claim for reasonable remuneration for work done on a *quantum meruit* basis.⁴ The Claimant noted that the Firm claims the sum of \$385,974.15 with respect to fees outstanding pursuant to the engagement agreement and not a claim for reasonable remuneration for work done on a *quantum meruit*. That the sum of \$385,974.15 is not reasonable remuneration for work done on a *quantum meruit* and it is grossly excessive.

[27] In the circumstances, the Claimant submits that he ought to be granted the reliefs sought in his Claim and the Firm's Counterclaim dismissed with costs to the Claimant.

The Firm's Case

[28] Counsel for the Firm submitted that the claim is misconceived from the outset because, even on the Claimant's case, he is only entitled to payment of USD\$382,920 out of the monies held on trust. Counsel noted that prior to the trial, the Claimant accepted that the Firm was in any event entitled to be paid USD 100,000 in respect of its services. Counsel noted that when the Claimant was cross examined under oath, he vacillated on the issue, before appearing to settle on the idea that USD\$100,000 was a cap that was operative in respect of all his liabilities to the Firm. Counsel asked the Court to note that the Claimant has even refused to agree that the Firm should be permitted to apply the sum of USD \$100,000 held on trust.

[29] According to the Firm, in reality the claim is for the payment of USD \$383,920 out of the trust monies, with the balance going to the Firm. Nevertheless, to date, the Claimant has refused to allow the Firm to apply any of the funds it holds on trust (notwithstanding the fact that there is no apparent dispute that the Firm has carried out work claimed and incurred the disbursements charged). Counsel for the Firm submitted that this is completely unjustifiable.

⁴ Claim No.SVGHCV2014/0040 Israel Bruce and Wilma Black Williams and Clifford Williams

- [30] According to the Firm, this matter is a simple solicitor/client fees dispute which would have been better resolved in a different way. In particular, the Firm's position is that the matter ought to have been resolved in a form of solicitor - client taxation, and the Firm has proposed that from the outset. The Claimant claims his liability to pay fees to the Firm was capped at USD 100,000 by agreement. The Firm says no such agreement was reached and that, even if it was reached on the terms alleged by the Claimant, it would not have been operative in the circumstances.
- [31] The Firm does not dispute that the Claimant did not execute the Engagement Letter. However, the Firm relies on the standard provisions set out in Forbes Hare engagement contracts which it says are operative and binding notwithstanding the fact that the Engagement Letter was not signed. Counsel argued that it is well established in contract law that where the terms of an offer expressly or impliedly waive the requirement for communication or acceptance, in particular by the express mandating of acceptance by a form of conduct, such conduct will amount to acceptance.⁵
- [32] According to Counsel, the proper analysis is that the Firm proposed a contract which was expressed to be binding in its terms (and in particular by operation of the Clause) if the Claimant continued to give instructions, that contract was therefore presumed to be agreed and binding as between the Parties so long as the Claimant continued to instruct the Firm.⁶ Counsel also submitted that the Firm did not accept the Claimant's proposed scheme which, in any event, would have been unenforceable at common law. see: ***Awwad v Geraghty & Co. (a firm)* [1999] EWCA Civ 3002**.
- [33] Counsel further argued that at best, the Claimant proposed a variation to this contract which was not accepted. However, the unilateral nature of the Claimant's proposal means that it cannot constitute a variation of the contract⁷ because the terms of the Engagement Letter required any variation to be agreed in writing.

⁵ see Chitty on Contracts at paragraph 2 – 045

⁶ One of the consequences of the subsistence of the Defendant's standard terms is that the contractual interest provision remains operative.

⁷ *Cowey v Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45

- [34] The Firm further submitted that it is clearly wrong to suppose that the Claimant's proposed scheme could have been a freestanding contract in itself, because it makes no sense save in the context of the engagement letter. It is furthermore clear that the Claimant's proposed scheme could only have been a variation and not a new contract because: (a) the express terms of the email by which it was proposed acknowledge the subsistence of the balance of the terms in engagement letter and standard terms and conditions and there is no attempt to vary those (*"the letter seems to be ok but the attached standard letter looks a bit scary, but I assume that it is a standard one"*); and (b) the Claimant's complaint that he did not receive a monthly bill, is derived from the Firm's standard terms and conditions, which the Claimant must therefore believe to have been operative.
- [35] In the event that the Court finds that there was in fact no concluded contract at all or that the terms on which the Firm was to be paid were not fixed, then it submits that it remains that case that it is entitled to be paid a reasonable sum for the work undertaken on the Claimant's instructions. Notwithstanding the Claimant's pleaded claim to the effect that the amounts charged were purportedly excessive, Counsel for the Firm submitted that the Claimant accepted in cross examination that he instructed the Firm to undertake work that was performed and that he was very satisfied with the result. Counsel also noted that apart from work undertaken prior to the engagement letter, the Claimant has taken no issue with any specific time entries.
- [36] Counsel concluded that if the Court so finds, then it may grant "further or other relief" as pleaded in the counterclaim and deal with the Firm's fees on a *quantum meruit* basis (although, of course, it has pleaded that it was not the intention of the parties that it be paid on that basis). In that regard, Counsel noted that in the event that no scale for remuneration is fixed, the law imposes an obligation to pay a reasonable price provided that it is clear that it was not intended for the work to be done gratuitously (which in this case it clearly was not).⁸
- [37] Counsel argued that part of the analysis that enables a *quantum meruit* assessment is the determination that a party has been enriched at the expense of another and that such enrichment was unjust. Enrichment entails the obtaining of a benefit which can include the provision of services. **Crown Prosecution Services v Eastenders Group [2015] AC 1 at paragraph [101]**.

⁸ Way v Latilla [1937] 3 ALL ER 759 HL

Counsel submitted that the requirement that such enrichment was at the firm's expense is satisfied given that those services were specifically requested by the claimant. (see: **Folcke v Scottish Imperial Insurance Company** (1886) 3 Ch D 234) or where the claimant has "freely accepted" those services (see: **R (on the application of Rowe) v Vale of the White Horse District Council [2003] 1 Lloyd's Rep 418 (Lightman J) at [12]**). As to such enrichment being "unjust" this requirement is made out where, as in this case the claimant has freely accepted services from the firm, where he knew (or ought to have known) that the firm expected to be paid (see: **MSM Consulting Ltd v United Republic of Tanzania [2009] EWHC 121 (QB) (Christopher Clarke J) at [171 (c)]**).

[38] Counsel further argued that if the Court is minded to deal with the matter on a *quantum meruit* basis then it may choose to make an assessment now based on the fee note, given that the Claimant expresses himself to be wholly satisfied with the work done, acknowledges he gave the instructions for it to be done and that it was done and further does not query the rates. Counsel argued that the only issue ought to be whether or not the Firm can recover for the work undertaken prior to the engagement letter. Counsel for the Firm submitted that that objection would have no force in circumstances where the Claimant is contending that the Engagement Letter is inoperative in any event. He further submitted that if the Firm is entitled to a *quantum meruit* payment because there is no validly executed contract, then it not open to the Claimant to advance that the work performed prior to the non-execution of a contract should be viewed any differently from that performed after this purported non-event.

[39] In the event that the Court proceeds on a *quantum meruit* basis, the correct approach for quantification is to determine "*the price which a reasonable person in the [Claimant's] position would have to pay for the services*". See: **Benedetti v Sawiris [2014] AC 938 at paragraphs [17], [100], [103] and [178]**. In fixing remuneration in this way, the Court will have to identify what market rates are likely to be **Benedetti v Sawiris at paragraphs [105] - [106]** in which case the arrangements contemplated by the parties (which must include the Firm's hourly rates that the Claimant does not take issue with) may provide the basis for any assessment. **Benedetti v Sawiris at paragraph [168]**.

[40] Counsel for the Firm further argued that it was entirely appropriate for it to continue to hold monies on trust pending trial of the matter on the basis that there was a lien over the funds. He submitted that it is by now well established that a solicitor may assert a retaining lien over monies in his client account in respect of his fees and disbursements. See: **Withers LLP v Rybak (2011] EWHC 1151 (Ch).**

[41] In conclusion, Counsel for the Firm summarised that there is no fee cap in play because it was not agreed. He further argued for the reasons set out above, no estoppel could be operative in favour of the Claimant/Defendant to the Counterclaim to limit his liability to the Firm. Even if there was a fee cap, such fee cap would only operate as a variation to the contract represented by the engagement letter, so that fees for “out of scope work” are payable in full in addition to capped fees. The terms of the Engagement Letter are completely standard, legal and seek to cater for the Claimant’s then-subsisting needs by limiting the amount of fees to be paid on account notwithstanding the fact that the estimate for the in-scope work was USD 250,000. Counsel submitted that there is nothing objectionable about the terms proposed by the Firm in its engagement letter, which only differ from the standard form of commercial court Engagement Letter in allowing the Claimant to pay a reduced amount on account.

[42] In the premises, Counsel argued that the Firm is entitled to be paid in full pursuant to the engagement letter and is entitled to contractual interest as provided for in the retainer letter from the date on which the Firm’s fee note was rendered (31st December 2015). Counsel argued that it must be part of the calculation that interest runs on the amount due to the Firm at the rate of 1.5% per month and this must be added to the sums due and owing. However, if there is no valid contract in respect of remuneration between the parties, it is open to the Court to subject the fees to a *quantum meruit* analysis and award the Firm its fees on that basis.

ISSUES

[43] The issues for the Court to determine in order to arrive at a decision in the matter are as follows:

- i. Is there a binding and enforceable agreement between the Parties reflected in the engagement letter or otherwise?
- ii. Assuming that there is a valid agreement for legal services between the Parties is the Defendant’s remuneration limited by the purported fee cap of \$100,000.00?

- iii. In the event that the Court is not satisfied that there was a concluded contract, how is the Court to assess the work done by the Firm?
- iv. Is it appropriate for the Firm to hold on to a beneficiary funds on the basis that lien is held for money owed?

COURT'S ANALYSIS AND CONCLUSION

Is there a binding and enforceable agreement between the Parties reflected in the engagement letter or otherwise?

[44] An engagement or retainer letter is a contract of employment whereby in return for a client's offer of employment, an attorney agrees to render legal services specified therein. When it is given, it provides the foundation upon which the relationship between attorney and client rests.⁹

[45] Under the general law of contract in the BVI, a retainer need not be in writing. However, where memorializing is preferred, the form of writing is immaterial provided there is a note or memorandum signed by the party to be charged or some other person lawfully authorized by him.

[46] It is common ground between the Parties that the Claimant did not sign or execute the Engagement Letter. Counsel for the Firm submitted that this is of no moment because of the provision in the engagement letter which provides that:

"If you continue to instruct us after receiving this retainer letter, we will assume that you are content to be bound by its terms."

[47] Counsel for the Firm also submitted that this standard provision is operative and binding notwithstanding that the Engagement Letter was not signed. He argued that it is well established that where the terms of an offer expressly or impliedly waives the requirement of communication or acceptance and expressly mandates acceptance through some form of conduct, such conduct will amount acceptance. So that where as in the case at bar, the Claimant continued to provide instructions, that contract was agreed and binding as between the Parties so long as the Claimant continued to instruct the Firm.

⁹ Groom v Crocker [1938] 2 All ER 394 at 413

[48] This Court takes no issue with this general statement of principle. However, it is not a complete statement of the law. As this is not a unilateral contract, in the normal course, communication of acceptance would not generally be waived. The principle also does not address the untraversed evidence of the Claimant that he expressly rejected the material provisions concerning remuneration.

[49] The following cases illustrate the importance of this distinction. In **Roberts v Hayward**¹⁰, a tenant occupied premises, under an agreement for three years, at £45 a year, which expired at Midsummer 1826. Thereafter, he held over in possession but at the Michaelmas following, the landlord gave him notice to quit or alternatively he was to pay the rent of £50 a year. He continued in possession, but refused to pay more than the £45 rent. The Court held that under the circumstances, he must be taken to have acquiesced with the new proposal, and was bound to pay the rent of £50.

[50] However, in **Glossop v Ashley**¹¹ the landlord gave the tenant notice to quit on June 24, 1920, and also gave him notice that if he held over after that date his rent would be 130l. per annum, alleging that that was the standard rent of the premises in 1914. The tenant remained in possession and tendered rent at the rate of 30l. per annum, but he refused to pay rent at the rate of 130l. per annum. The rateable value of the premises was 24l. 16s. The landlord claimed to recover possession of the premises on the ground of the tenant's breach of obligation to pay rent at 130l. per annum. The Court held that that it could not be assumed from the mere fact that a tenant remained in possession of premises after receiving notice from the landlord of increase of rent that the tenant assented to the increase of rent, and that the tenant never in fact assented to the increase of his rent to 130l.

[51] McCardie J. noted the critical point of distinction in that case observing that in **Roberts v Hayward**,

“...the tenant continued in possession. He made no protest against the notice. He was absolutely silent. Best C.J. held that under the circumstances the tenant was bound to pay the increased rent. In my opinion, Best C.J. did not lay down any general rule of law. I think he merely held that upon the facts of the case the tenant assented to the new terms proposed by the landlord.” The learned Judge then went on to observe and find that *“In the*

¹⁰ (1828) 3 C&P 432

¹¹ [1921] 2 KB 451

action now before me it is reasonably clear that the defendant never assented to the plaintiffs' claim to an increased rent. On the contrary, I think that the effect of the letters is that he was strongly though impliedly protesting against the proposed increase. I find as a fact that the defendant never agreed that the rent should be increased to 130."

- [52] The Firm's proposed terms regarding remuneration indicated a broad estimate of \$250,000.00 covering likely fees and disbursements for performing the work which was identified with an advanced retainer of \$100,000.00 to be paid on account of fees and disbursement pending completion of the work specified. The Engagement Letter went on to state that should they be successful in keeping the claim alive, further fees and disbursements will be payable to take the claim to trial, in respect of which it was apprehended that the Claimant would seek funding. At the conclusion of the matter, the Firm would render an account and return all sums held on account and not applied against outstanding fees and disbursements.
- [53] The Claimant has advanced that he expressly rejected the Firm's terms making it abundantly clear that his liability to the Firm was to be limited to \$100,000.00 which includes all expenses and counsel. Such a response, offering as it was different terms, in the Court's view mounts to a counter offer which automatically rejected the prior offer. It required an acceptance under the terms of the counter offer or there would be no contract.¹² The Court is therefore satisfied that the Engagement Letter would not constitute an enforceable written memorandum of the contractual relationship between the Parties.
- [54] Although it was the Firm's intention that there should be a written retainer contract, to be executed by the Claimant signing the Engagement Letter, in the Court's judgment, the written retainer never came into existence, as the Claimant clearly expressed never signed and returned the same. However, under general contract principles, this would not bring an end to the matter because even where there is no written authority or express retainer, the Court may imply the existence of a retainer from the actions or conduct of the Parties.
- [55] This may arise where a client by his conduct has performed part of the contract of employment. The case **Parrott v Echells**¹³ is illustrative. This was an action on an attorney's bill for defending a tithe suit. The retainer was disputed by the defendant but he called at the plaintiff's office, and left

¹² Hyde v Wrench (1840) 49 ER 132

¹³ (1839) 3 J.P. 771

his writ and notice of declaration and he afterwards expressed his determination 'to go to the bottom of it.' This was held to bring an implied retainer into existence.

- [56] Moreover, it is now well established that a client may be estopped by his conduct from denying the authority of the solicitor even where there was no express retainer. In **Blyth v Fladgate**¹⁴ the court held that although there was no express retainer, the relationship of client and solicitor might be inferred from the acts of the parties and the benefits conferred.

"Now the law as to implied obligations was discussed by Lord Justice *Bowen* in the case of *Falcke v. Scottish Imperial Insurance Company* (1), and during the argument (2) his Lordship referred to the law as laid down in *Smith's Leading Cases*, in the notes to *Lampleigh v. Brathwait* (3): that if a party adopts and enjoys the benefit of what has been done by another person, his request that it should be done will be presumed, and said that that seemed to be stated too widely. In his judgment he said (4): "With regard to ordinary goods upon which labour or money is expended with a view of saving them or benefiting the owner, there can, as it seems to me, according to the common law be only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or to give a lien. It is perfectly true that the inference of an understanding between the parties - which you may translate into other language by calling it an implied contract - is an inference which will unhesitatingly be drawn in cases where the circumstances plainly lead to the conclusion that the owner of the saved property knew that the other party was laying out his money in the expectation of being repaid. In other words, you must have circumstances from which the proper inference is that there was a request to perform the service." That was a case which related to the payment of a premium on a policy by a person not liable to pay it. But the observations of Lord Justice *Bowen* seem to apply to a case like the present; and the question is, whether the Court can come to the conclusion that there was an implied contract on the part of Mr. *Morgan* that Messrs. *Fladgate* should be paid for the work done by them."

- [57] In the case at bar, no written contract has been entered into by the Claimant but the question is whether he has impliedly entered into an agreement with the Firm as to services rendered by them of which he had the benefit. The untraversed evidence in the case at bar reveals that the Claimant provided ongoing instructions to the Firm and that he also in fact paid the sum of \$50,000.00 as a part payment. Having considered the untraversed evidence in this case, this Court finds that the Firm was in fact retained to act for the Claimant in legal proceedings Claim No. BVIHC (COM) 2014/0004.

¹⁴ [1891] 1 Ch. 337 at 357-359

[58] Having found that the Firm was retained by the Claimant to perform certain legal services in 2014, the Court must now proceed to consider what if any express terms were agreed as to remuneration. This is because, once it is clear that the existence of a retainer is proved, then the prima facie obligation which at once emerges is as Atkin LJ described in **Adams v London Improved Motor Coach Builders Ltd**¹⁵:

“The ordinary terms applicable to a person who employs a professional man to do professional work on his behalf – namely that he shall remunerate him come into effect.”

[59] In determining the enforceability of the retainer as it relates to the remuneration it is important to first recognize that it concerns a contentious business agreement. In the BVI, the law governing the enforceability of contentious business agreements for remuneration is not without some controversy.

[60] Section 59 of the English Solicitors Act 1974 provides in effect that in order to enjoy the rights and protection conferred by statute a contentious business agreement must be in writing and signed at least by the person to be bound or his agent on his behalf.¹⁶ Section 59 provides as follows:

Contentious business agreements

- (1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a “contentious business agreement”) providing that he shall be remunerated by a gross sum [or by reference to an hourly rate], or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.
- (2) Nothing in this section or in sections 60 to 63 shall give validity to—
 - (a) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or
 - (b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding, stipulates for payment only in the event of success in that action, suit or proceeding; or
 - (c) any disposition, contract, settlement, conveyance, delivery, dealing or transfer which under the law relating to bankruptcy is invalid against a trustee or creditor in any bankruptcy or composition.

¹⁵ [1921] 1 KB 495

¹⁶ Re Baylis (1896) 2 Ch. 107

- [61] This provision would have been incorporated into the laws of the Virgin Islands by virtue of section 77 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act 1969**¹⁷ which provides that;
- “Subject to modifications by the rules of court, the law and practice relating to solicitors, and the taxation and recovery of costs in force in England shall extend to and be in force in the Territory and shall apply to all persons lawfully practicing therein as solicitors of the Court.”
- [62] In **Zulani and Others v Veira**¹⁸ the Judicial Committee of the Privy Council considered the extent to which the law and practice in the England is received into the laws of St. Kitts by virtue of a similar provision¹⁹. The Board affirmed the reasoning of Byron JA of the Eastern Caribbean Supreme Court of Appeal in which he acknowledged that “...*although there is a serious drawback to the practice of importing wholesale the law and practice on any given subject*” it is generally accepted that the above mentioned reception provision “...*was effective to enact in St. Kitts the law currently in force in England on this subject, being the Solicitors Act 1974 and the Solicitors’ Remuneration Order 1972 S.I. 1972 No. 1139.*”
- [63] Applying the dicta of both the Court of Appeal and the Privy Council this would seem to imply that the English Solicitors Act 1974 and the Solicitors Remuneration Order were by the above-mentioned reception provisions also incorporated into the laws of the BVI. Unfortunately however, the **Legal Profession’s Act 2015**²⁰ (“the LPA”) which since repealed Part IV of the Eastern Caribbean Supreme Court (Virgin Islands) Act (under which section 77 falls)²¹ without implementing any replacement provisions specifically dealing with contentious business agreements.²² It is therefore arguable that the reception gateway is now closed and that these legislative provisions no longer form part of the Virgin Islands legislative landscape.
- [64] However, the situation is not dire given that even in England the courts have found that the common law position was not affected by the enactment of the Solicitor’s Act. In **Clare v Joseph**,²³ the English Court of Appeal found that the rights conferred by that Act do not displace or replace the common law. Rather it merely provided that in order to enjoy the rights conferred by that statute

¹⁷ Cap 80 of the Laws of the Virgin Islands

¹⁸ (1994) 45 WIR 188

¹⁹ Section 78 of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act 1975

²⁰ No. 13 of 2015, Laws of the Virgin Islands

²¹ Section 66 of the LPA

²² See: Part VII of the LPA 2015

²³ [1907] 2 KB 369 per Fletcher Moulton LJ at page 376

the agreement needed to meet the prescribed formalities. It therefore did not render unenforceable unwritten agreements in respect of a solicitor's remuneration. Accordingly, the Court is satisfied that the common law position would apply in the Virgin Islands any event.

- [65] Under the common law, contentious business agreements are both valid and enforceable whether made orally or in writing provided that are fair and reasonable. Further, in accordance with the common law position, such agreements while valid are not as a general rule enforceable against the client if they are not favorable to the client. This is so because as Kay LJ noted in **Re Baylis**, the court must consider the great influence which a solicitor has over his client. Such agreements are therefore generally viewed with great vigilance by the courts because they are reached between a man and his legal adviser as to the terms of the latter's remuneration. In **Clare v Joseph**,²⁴ Buckley LJ stated the position in the following terms:

"At that date agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense. But when it appeared that the agreement was favourable to the client, the Courts often held the solicitor to his bargain, for there was no ground in equity why they should be suspicious of a bargain of that kind."

- [66] At pages 355 – 358 of **Blyth v Fladgate** the Court described a very similar set of circumstances as obtains in the case at bar.

"...the main question raised by the pleadings is, whether the relation of solicitor and client subsisted between the Plaintiff, Mr. Morgan, and the firm of Messrs. *Fladgate, Smith, & Fladgate*. It is quite plain that no formal or express retainer was ever given by him to them; but that was not necessary, for although no such express retainer has been given, the relation may subsist, and its existence may be inferred from the acts of the parties. If any authority for that proposition be required, it will be sufficient to refer to the decision of the Court of Appeal in the case of *Bean v. Wade* (1)

.....

Now, Mr. *Morgan* knew that Messrs. *Fladgate* had been acting with reference to the proposed mortgage, and that, as he said, "The mortgage and everything were all prepared before I gave my consent at all - they were only waiting for my signature and consent to

²⁴ At pages 378 – 379

become a trustee." No man of business, no sensible man, could suppose that Messrs. *Fladgate*'s services were given gratuitously.

....

But the observations of Lord Justice *Bowen* seem to apply to a case like the present; and the question is, whether the Court can come to the conclusion that there was an implied contract on the part of Mr. *Morgan* that Messrs. *Fladgate* should be paid for the work done by them. In my opinion the facts here justify the inference that there was an implied contract on the part of Mr. *Morgan* that Messrs. *Fladgate* should be paid. "

[67] There can be no doubt that the Claimant was represented by the Defendants in Claim No. BVIHC (COM) 2014/0004 and that the sum of \$50,000.00 was paid in order to facilitate the work done on his behalf. There is therefore an implied obligation to remunerate the Firm. This Court finds support for this conclusion in the dicta of Justice Lang DBE in **Fladgate LLP v Harrison**.²⁵ In that case, the London firm, Fladgate successfully sued client, Lee Harrison for £63,332 in unpaid fees for work done in a corporate restructuring. One of Mr. Harrison's arguments against his liability to pay was that he never signed or agreed the letter of engagement sent to him, and that there was no evidence to support the finding that a contract of retainer had come into existence orally, nor that it could be implied by conduct.

[68] At paragraphs 47 – 49 of the judgment, Justice Lang held as follows²⁶:

"Although it was the Claimant/Defendant to the Counterclaim's intention that there should be a written retainer contract, to be executed by both parties signing the letter of 14 April 2008, in my judgment, a written retainer never came into existence, as the Defendant never signed and returned the acceptance slip. However, it was not a pre-requisite to the formation of the Defendant's personal retainer that he should sign and return either of the retainer letters, dated 18 January 2008 and 14 April 2008. I conclude, on the evidence, that a personal retainer was agreed orally, and implied by the conduct of the Defendant in employing the Claimant to carry out the work requested by him. In my judgment, the letters of 18 January and 14 April 2008, and the Claimant's "Terms of Business" annexed to each letter, are evidence of the terms of the personal retainer. In these circumstances, I consider it would be unfair to reject the Claimant's case on the basis that it initially pleaded its case as a written retainer, when the essence of its claim was set out in the claim form, namely, that there was a contract for services, which had been provided to the Defendant, but not paid for. Furthermore, in its Reply, the Claimant pleaded its case more fully, and in paras 5(f) and (h) said that the agreement between the Claimant and the Defendant was

²⁵ [2012] EWHC 67 (QB), [2012] NLJR 262 since applied in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 3 ALL ER 1

²⁶ see [38], [41], [42] of the judgment

“contained in *and/or evidenced by* the Retainer Letter and the Terms and Conditions”. The phrase “evidenced by” correctly summarises the position.”

[69] Justice Lang then held:

“In my judgment, the giving of instructions by a client to a solicitor constituted the solicitor's retainer by that client. It was not essential that the retainer was in writing. It might be oral. It might be implied by the conduct of the parties in the particular case. The giving of that retainer was equivalent to the making of a contract for the solicitor's employment, and created the solicitor's right to be paid. In determining whether or not a retainer had come into existence, the general principles of contract law applied. On the basis of established authority, whether there was a binding contract between the parties, and if so on what terms, depended upon what they had agreed. It depended not on their subjective state of mind but upon a consideration of what was communicated between them by words or conduct and whether that led objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law required as essential for the formation of legally binding relations.”

[70] This Court approves and applies this reasoning. The Court therefore finds that the giving of instructions by the Claimant to the Firm constituted the enforceable retainer. This Court further finds that the giving of that retainer was equivalent to the making of a contract for the solicitor's employment and prompted the solicitor's right to be paid. The remuneration terms however will depend not the Parties' subjective state of mind but upon a consideration of what was communicated between them by words or conduct and whether that led objectively to a conclusion that they intended to create legal relations.

Assuming that there is a valid agreement for legal services between the Parties is the Defendant's remuneration limited by the purported fee cap of USD\$100,000.00?

[71] This Court is satisfied that in determining the enforceability of an agreement for remuneration, the general principles of contract law applied. Applying those principles to the case at bar, the Court notes that the terms of this purported fee cap are set out in the Claimant's email to the Firm of 21st November 2014.

[72] Applying ordinary contract principles, it is clear that this response did not posit a clear and unconditional acceptance of the terms offered in the Firm's Engagement Letter. Rather, such a response which clearly sets out different terms to that proposed in the engagement letter would in

the normal course amount to a counter offer which required an acceptance under the terms of the counter offer or there would be no contract.

- [73] Counsel for the Claimant represented that both Parties have acted on the agreed assumption that the liability of the Claimant to the Firm is capped at \$100,000 and that the Firm took steps by forwarding an initial invoice for the first USD\$50,000 which was then paid by the Claimant. In those circumstances, Counsel for the Claimant submitted that the Firm is estopped from denying that there was a valid offer and acceptance and that Claimant's liability to the Firm is indeed limited to USD \$100,000 (which includes all expenses and counsel).
- [74] However, the Firm disputes this. It asserts that it did not at any stage agree to cap its fees. According to the Counsel for the Firm, it only agreed to limit the amount that the Claimant had to pay on account of his fees to USD\$ 100, 000.00 (i.e. the retainer payment). Counsel submitted that this is clear from the terms of the Engagement Letter and it is also clear from the emailed correspondence (in which the actual fees were estimated to be in the order of \$250,000.00).
- [75] Moreover, they contend that even on the Claimant's expressed position there could be no operative fee cap in any event. This is because on his own terms the Claimant has proposed a scheme which would protect him from incurring liabilities to the Firm in excess of USD\$100,000.00 applicable only in circumstances where he lost (and therefore incurred further liabilities in costs in addition to the US\$308,000.00 which he was facing at the time) whilst allowing the Firm to recover costs plus the retainer (or from funding) in the event that the Claimant was successful in the litigation. Counsel for the Firm submitted that Claimant's email of 21st November 2014 makes it clear that he simply wished to be protected from paying out of his own pocket to a ceiling of USD\$100,000.00 if he lost the substantive litigation or (*If we failed in our efforts*) in respect of the activities that formed the scope of work in the engagement letter (which was limited to those activities required to allow a viable claim to proceed in the commercial court). In the event that the Firm was successful then he would have recourse to a costs order made in his favor.
- [76] In other words, Counsel argued that it was a condition precedent of the proposed fee cap that the Firm would have failed in its efforts (which did not occur) of that the Claimant lost the appeal and there was some short fall that could not be satisfied out of the costs award of from a third party

funder. Counsel relied on the case of **Wickman Machine Tool Sales Ltd.v Schuler QG [1974]**

A.C. 235 at 250 – 251 where the court observed:

“In the ordinary use of the English language "condition" has many meanings, some of which have nothing to do with agreements. In connection with an agreement it may mean a pre-condition: something which must happen or be done before the agreement can take effect. Or it may mean some state of affairs which must continue to exist if the agreement is to remain in force. The legal meaning on which Schuler relies is, I think, one which would not occur to a layman; a condition in that sense is not something which has an automatic effect. It is a term the breach of which by one party gives to the other an option either to terminate the contract or to let the contract proceed and, if he so desires, sue for damages for the breach.”

[77] Counsel concluded that the proposed fee cap could not be operative in circumstances where the condition precedent was not fulfilled and the Claimant elected to settle before they could be fulfilled.

[78] According to the Counsel, the Claimant's own proposed terms were completely silent as to what would happen in the event of a favorable settlement. In this case, they say that it is clear that the Claimant had achieved substantive success as every step of the process. Even if the Claimant's email of 21st November 2014, could be said to generate a cap on fees it cannot be the case that that cap operated to also cap the scope of work performed by the Firm on the Claimant's instructions and cannot be operative in the context where the Claimant did not lose but rather brought the matter to an end by settlement rather than by seeking the further funding which he had said he would in due course seek for the trial of the matter. The Firm submitted that it is not open to the Claimant to take the benefit of the settlement and then rely on it in an attempt to deprive the Firm of the majority of its fees.

[79] Counsel for the Firm noted further that value of the out of scope work is substantial amounting as it were to \$93, 895.50. He asserts that these fees are payable in any event even if the Court concludes that there was a cap on the fees within the scope of work set out in the engagement letter because most of the work post-dates the Claimant's indication that he wished to settle the claim and Mr. Hare's indication of the likely level of the fees.

- [80] This Court has no doubt that the Claimant's emailed message of 21st November 2014 set out the Claimant's proposed terms for remuneration of the Firm. He clearly did not oppose the upfront payment of the sum of \$100,000.00. He simply wished to have that paid in staggered tranches. However, it is clear that the Claimant intended to limit his liability to the Firm
- [81] Looking first at the plain terms of the Claimant's 21st November 2014 emailed communication, it is clear to the Court that in so far as litigating the appeal, the Claimant intended to limit his personal liability to the Firm. In the event that the litigation proved unsuccessful, the Claimant plainly sought to cap the fees at \$100,000.00 – *(If we fail in our efforts, I understand that my liability to you is limited to \$100K including all expenses, councils... etc as agreed ...)*. On the other hand, in the event that the Claimant was to achieve success, he clearly contemplated that any liability over and above the sum of USD\$100,000.00 would be footed by a funder under a funding agreement. *(...however, if we win and find a funder, sure the additional can be settled through the funder...)*. However, in the event that no third party funder could be found, his liability would remain capped at \$100,000.00 but that the parties would then enter into fresh contractual arrangements in regard to the prospective fees and expenses incurred in the pursuing the trial or arbitration. *(...however, if we cannot find a funder the cap remains at \$100K and we make a new contract for the trial or arbitration if I can continue.)*
- [82] The position does not stop there however. The Claimant goes on to state that if he ultimately achieves success at trial, he was prepared to revisit their agreement for any sum incurred over and above the sum of \$100,000.00. *(Once succeed in the claim, we can still go back and re visit this contract for the additional sum if we continue through the trial and win.)* No doubt the additional sum contemplated would be the full profit costs due to the Firm for the work done on the appeal.
- [83] What is clear from this correspondence is that these terms do not represent a clear unconditional acceptance of the terms of the Engagement Letter. Rather, these terms were obviously intended to vary the terms of the Engagement Letter and it is clear that the Claimant sought to have his terms confirmed and agreed by the Firm. *(One thing I need your understanding and confirmation...I hope we are in agreement and I am much obliged.)* To that extent this is so, this emailed correspondence represented a counter offer as regards remuneration.

- [84] It is settled law that a communication fails to take effect as an acceptance where it attempts to vary the terms of an offer. In such cases it is a counter-offer, which the original offeror can either accept or reject. Making a counteroffer amounts to a rejection of the original offer which cannot subsequently be restored or accepted (unless the parties agree).²⁷
- [85] It is common ground between the Parties that the Firm did not respond to the Claimant's email of 21st November 2014. Instead, it issued an invoice for the sum of \$50,000.00 which was later paid by the Claimant. Again, it is settled law that an offeror may not arbitrarily impose contractual liability upon an offeree merely by proclaiming that silence shall be deemed consent.²⁸ This is because silence is usually equivocal as to consent. However, the Claimant contends that the facts of the case disclose that an estoppel (by convention) arose on the basis of a purported agreed assumption that his liability to the Firm would be capped at USD\$100,000.00 which included all expenses and counsel.
- [86] The Firm opposes this contention on a number of grounds. First, they say that the scheme proposed in this counter offer is contrary to public policy and therefore invalid at common law. Counsel submitted that a party is not liable on the basis of an estoppel by convention if an alleged agreement would incorporate an invalid term into a contract. **Keen v Holland [1984] 1 WLR 251** Second, Counsel submitted that there is no evidence that there was any agreement on the part of the Firm or convention by which the parties regulated their dealings. **Amalgamated Investment & Property v Texas Commerce International Bank Ltd. [1982] QB 84 at 122 C-D** He argued that the Claimant's own silence when told that the fees were in excess of \$200,000.00 in February 2015 and the disbursements were ore is a compelling indication of this. Third, Counsel submitted that even if the Claimant's proposed scheme could have resulted in some estoppel, it was not operative in the event of a settlement reached in favour of the Claimant because on its own terms, the fee cap would only be operative if the appeal failed and no claim survived. Counsel submitted that there was no failure at all because leave to appeal was granted, an amended claim was issued and leave to serve the same outside the jurisdiction was granted. The appeal did not proceed because settlement was achieved. Counsel argued that the Claimant's scheme was not expressed to operate in the circumstances which ultimately eventuated.

²⁷Hyde v Wreny [1840] 3 Beav 334

²⁸ Felthouse v Bindley (1862) 11 CBNS 869

[87] Moreover, Counsel for the Firm argued that the Claimant's proposed scheme could only have operated in respect of the scope of work expressly described in the Engagement Letter which was the minimum work needed to get the matter back before the Commercial Court., it could not cover the out of scope work which included dealing with the costs assessment and stay application pending the payment of costs and dealing with the settlement. That work accounts for USD\$100,000.00 of the fees. For all these reasons, the Firm submitted that there no estoppel can operate in favour of the Claimant to reduce his liability to the Firm.

[88] The learned authors of **Chitty on Contracts** state that estoppel by convention arises when the parties have acted on an assumption "*...being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it. It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party*".²⁹

[89] The judgment in **Lokumal (K) & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, (The August Leonhardt)** ³⁰ makes clear that for an estoppel by convention, a common understanding must actually be communicated by one party to the other. At paragraph 19 – 20 of the judgment, the principles were set out in the following terms.

"Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. The alleged representor's participation in this conduct can then be relied upon by the representee as a basis for this form of estoppel....There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that—across the line between the parties—his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered."

[90] At paragraph 73 of the judgment in **Dixon and another v Blindley Heath Investments Ltd** ³¹ the English Court of Appeal stated that estoppel by convention is "*not founded on a unilateral representation, but rather on mutually manifest conduct by the parties based on a common, but*

²⁹ Chitty on Contracts 31st Edition at paragraphs 3 – 107,

³⁰ [1985] 2 Lloyd's Rep 28

³¹ [2015] EWCA Civ 1023

mistaken, assumption of law or fact" and that its basis is consensual. The effect of the estoppel by convention is to bind the parties to their shared, even though mistaken, understanding or assumption rather than to provide a cause of action (as is the case in promissory and proprietary estoppel). If and when the parties realise that the common assumption between them is mistaken, the parties may be estopped from departing from the assumption if it would be unconscionable for the party seeking to deny the assumption to be permitted to do so. It was not sufficient for the parties to have merely conducted themselves on the basis of the shared assumption; the parties must have communicated the shared assumption to each other. The communication must be *"very clear conduct crossing the line....of which the other party was fully cognisant"*.

[91] The Court is not satisfied that an estoppel by convention can arise on the facts presented. The Claimant has advanced that he relied on the assumption that his costs liability to the Firm was capped at \$100,000 and that the Firm agreed to this by forwarding an initial invoice for the first \$50,000 which was then paid by the Claimant. In the Court's judgment this purported assumption was not sufficiently clear and equivocal since the invoicing and acceptance of the sum of \$50,000.00 could be otherwise explained on the basis that it was prepared to accept its advanced retainer in tranches and/or for reasons unassociated with any assumption rather than an agreement to cap the Claimant's fees e.g. the invoicing may well speak to the agreement to limit the amount that the Claimant had to pay on account of his fees to USD\$100,000.00.³²

[92] In these premises, the Court is not satisfied that any estoppel by convention could arise here. It has not been demonstrated that there was an agreed assumption as to the existence of the state of facts or as to the true construction of the document such that the Firm would be precluded from denying that there was a valid agreement to cap the fees. Indeed, equivocation persists even on the part of the Claimant such that it is unclear what was in fact intended. This is demonstrated in the subsequent emailed correspondence of 24th February 2016 in which the Claimant communicated:

"I did not sign the engagement letter but rather I confirmed to you by email that out of pocket expenses would not exceed 100K taking the case all the way to trial and you never disputed this proposal.'

And later

³² See - Emailed message of 29th February 2016 from Forbes Hare

“...without periodic invoicing I was of the assumption that you had not exceeded the \$50K deposit that I paid.”

[93] In the Court’s judgment these statements is completely inconsistent with the Claimant’s previous statements and they also contrast with his oral evidence. It is therefore not at all clear that there was any common mistake spontaneously made by the parties or any subsequent conduct by the Firm from which any unequivocal acquiescence in the Claimant’s mistaken assumption could be inferred. The essence of this principle is that parties have conducted themselves on a conventional basis which is wittingly or unwittingly, different from the true basis and in circumstances where the Parties could not be said to have in any event mutually adopted a common assumption, the Claimant has not demonstrated mutually manifest conduct by the Parties based on a common but mistaken assumption of fact.

[94] Moreover, the Court has considered the totality of what was proposed by the Claimant and in the Court’s judgment it has the hallmarks of a conditional fee arrangement which would be contrary to public policy and therefore unenforceable. Conditional fee agreements are agreements where payment to an attorney-at-law depends or is contingent upon there being some successful recovery or award in the case. The law governing the proscription of contingency fees is said to have been derived from the public policy relating to champerty and maintenance both of which attracted criminal penalties prior to 1967. It stems from the common law fear that the champertous maintainer (*the attorney*) might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.³³

[95] In **Wallersteiner v Moir (No. 2)**,³⁴ Buckley LJ explained the position in the following terms;

"A contingency fee, that is, an arrangement under which the legal advisers of a litigant shall be remunerated only in the event of the litigant succeeding in recovering money or other property in the action, has hitherto always been regarded as illegal under English law on the ground that it involves maintenance of the action by the legal adviser. Moreover, where, as is usual in such a case, the remuneration which the adviser is to receive is to be, or to be measured by, a proportion of the fund or of the value of the property recovered, the arrangement may fall within that particular class of maintenance called champerty ... It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can, I think, be summarised in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an

³³ Lord Denning MR in *Re Trepca Mines Ltd.* [1962] 3 ALL ER 351 at 355

³⁴ [1975] 1 ALL ER 849 at 866-868

officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations."

[96] In **Pittman v Prudential Deposit Bank Ltd**,³⁵ Lord Esher MR stated:

"In order to preserve the honour and honesty of the profession it was a rule of law which the Court had laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation."

[97] The common law position remains unchanged in the BVI. In **Israel Bruce v Wilma Black-Williams**,³⁶ Master Corbin-Lincoln (Ag.) considered the development of the law in the United Kingdom and she distinguished the same from the BVI;

"Various efforts to reform the legal profession in the United Kingdom culminated in the passage of the Courts and Legal Services Act in 1990 "(the Act") which made significant changes to the delivery of legal services. Section 58 of the Act provided that a conditional fee agreement which satisfied the conditions of the Act would not be unenforceable by reason only of it being a conditional fee agreement. One of the many criteria set out in the Act is that the agreement must be in writing.

The common law prohibition against contingency fee agreements was therefore changed in the UK and also in some Caribbean territories by statute. In Jamaica for example, the common law position was changed by the introduction of the Legal Profession Act 1971.

In this jurisdiction there is no legislative enactment which changed the common law with respect to contingency fee agreements."

[98] The learned Master then went on to consider the judgment in **Awwad v Geraghty & Co (a firm)**³⁷ (a case relied on by the Defendant herein) in which efforts to expand upon conditional fee agreements sanctioned in the United Kingdom by the Courts and Legal Services Act were disapproved. In **Awwad**, the court held:

Although in 1993 there was no statutory provision which made a conditional normal fee irrecoverable that was not the position at common law. It was contrary to public policy for a solicitor to act for a client in pursuance of a conditional normal fee agreement in circumstances which were not sanctioned by statute. While a conditional normal fee agreement might not expose a lawyer to the same temptation as a contingency fee

³⁵ (1896) 13 TLR 110 at 111

³⁶ Claim No. SVGHCV2014/0040

³⁷[2000] 1 ALL ER 608 [2011] 2 ALL ER 240 and see *Morris v Southwark London Borough Council*

agreement, it did expose him to temptations to which he would not have been exposed if he had not entered into it. The public interest in the highest quality of justice outranked the private interests of the two litigants. That rendered it particularly important that lawyers should not be exposed to avoidable temptations not to behave in accordance with their best traditions. The concept of a 'normal' fee was singularly elusive: some solicitors' normal fees were a multiple of those charged by others for what on the face of it was the same work. It would be very difficult and undesirable for the answer to the question whether or not an agreement was illegal to depend on a detailed examination in each case of solicitors' costs structures. Moreover, if solicitors' practices conducted the bulk of their business on the basis of conditional normal fee arrangements, then their normal fees would presumably have to be higher than they would have been had such arrangements not been usual in the firm. In those circumstances, it could not be said that the 1990 rules were ultra vires, since such a submission was premised on the assumption that the rules sought to forbid what was permitted under the common law. The judge had, accordingly, been right to hold that the agreement between G and A was champertous and unenforceable."

[99] This case demonstrates quite definitively that even where there have been legislative enactments changing the common law position, courts have been reluctant to find that the public policy reasons underlying the prohibition against conditional fee agreements have been altered with the passage of time.³⁸ Therefore, where as in the case at bar, the purported agreement advanced proposes that the fees be capped at USd\$100, 000.00 in the event that there was no success in advancing the appeal, but that in the event of ultimate success in the litigation, the Parties may "*go back and revisit... for the additional sum*" such that Forbes Hare could recover its full profit costs, this would have the effect putting the Firm in a position where its own interests could conflict with its duties to the court. In the circumstances, the Court finds that even if it could be said that the Claimant contracted with the Firm on such terms, such an agreement would likely be unenforceable at common law.

[100] For all of these reasons, the Court is not satisfied that there could be said to be any enforceable agreement to cap the Claimant's fees.

In the event that the Court is not satisfied that there was not enforceable written retainer or cap on fees, how is the Court what is owed to the Defendant by the Claimant/Defendant to the Counterclaim?

[101] Having found that there was an oral agreement by which the Claimant contracted to employ the Firm to carry out legal services, the Court is satisfied on the authority of **Fladgate LLP v Harrison**,

³⁸ Israel Bruce v Wilma Black-Williams at paragraph 34

that this contract included a right on the part of the Defendant to be paid. The Court has found, on the evidence, that the Claimant instructed the Firm to act in connection to the prosecution of his appeal and later in connection with the settlement of the cause and that the Firm carried out the work. The Firm is therefore entitled to be paid for its services.

[102] The Claimant does not takes issue with the fact that the Firm should be compensated for the work done for his benefit. However, he submits that the counterclaim for compensation could only include reasonable remuneration for work done on a quantum meruit basis³⁹ The Claimant contends that the sum of \$385,974.15 claimed by the Firm in respect of its professional fess plus disbursements is unreasonable and excessive in all the circumstances and more so in light of the length of time the Firm's services were actually engaged.

[103] Counsel for the Claimant relied on the following excerpt from **Halsbury's Laws of England**;

"Quantum meruit translates roughly as 'the value of what was done' and exemplifies numerous situations where a benefit is conferred but not necessarily asked for. Beyond this, the term 'quantum meruit' is used in different senses at common law. For example, in some cases quantum meruit is used to express the measure of recovery in a contractual claim. In other cases it is used to denote a restitutionary claim. The claim is clearly contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done. Where, however, no contract is ever concluded between the parties or the contract is void or otherwise unenforceable, the claim cannot be contractual in nature and is likely to be restitutionary.⁴⁰

[104] Counsel for the Claimant submitted that the Firm claims the sum of \$385,974.15 with respect to fees outstanding pursuant to the Engagement Letter and not a claim for reasonable remuneration for work done on a *quantum meruit*.

[105] The Firm also agrees that if the Court were to conclude that there was no concluded contract, then it is entitled to be paid a reasonable sum for the work undertaken on the Claimant's instructions. However, Counsel submitted that notwithstanding the Claimant's pleaded claim to the effect that the amounts charged were purportedly "excessive", the Claimant accepted in cross examination that he instructed the Firm to perform the work that was performed, that it was performed and that he was very satisfied with the result. Counsel noted that apart from work undertaken before the

³⁹ Claim No.SVGHCV2014/0040 Israel Bruce and Wilma Black Williams and Clifford Williams

⁴⁰ Vol. 88 Halsbury's Laws (5th Edn) at paragraph 408

engagement letter was sent to him the Claimant has taken no issue with any specific time entries. Counsel submitted that in the event that no scale for remuneration is fixed, the law imposes an obligation to pay a reasonable price. see: **Way v Latilla [1937] 3 ALL ER 759 HL** provided that it is clear that it was not intended for the work to be done gratuitously which they say it clearly was not.

- [106] Counsel for the Firm also made substantial submissions which sought to address principles of unjust enrichment. These proved to be wholly unnecessary in light of the Claimant's concession and in view of the fact that the Parties are essentially in agreement that it is open to the Court to deal with the matter on a *quantum meruit* basis.
- [107] The Firm has issued an invoice in respect of its professional fees with particulars of the work performed. Counsel for the Firm submitted that if the Court is minded to deal with the matter on a *quantum meruit* basis then it may choose to make an assessment now based on that fee note, given that the Claimant expresses himself to be wholly satisfied with the work done, acknowledges he gave the instructions for it to be done and that it was done and further does not query the rates.
- [108] According to Counsel, the only issue ought to be whether or not the Firm can recover for the work undertaken before the Engagement Letter was sent to the Claimant, which is the limit of his expressed complaint. However, that objection has no substance in circumstances where the Claimant is contending that the Engagement Letter is inoperative in any event: if the Firm is entitled to a *quantum meruit* payment because there is no validly executed contract, then the Claimant can scarcely contend that the work performed prior to the non-execution of a contract should be viewed any differently from that performed after this non-event.
- [109] In the event that the Court proceeds on a *quantum meruit* basis, Counsel for the Firm submitted that the correct approach for quantification is to determine "*the price which a reasonable person in the [Claimant] position would have to pay for the services*" (*Benedetti v Sawiris* [2014] AC 938 @ [17], [100], [103] and [178]. In fixing remuneration in this way, the Court will have to identify what market rates are likely to be (*Benedetti v Sawiris* at [105] - [106]) in which case the arrangements contemplated by the parties (which must include the Firm's hourly rates that the Claimant does not take issue with) may provide the basis for any assessment [*Benedetti v Sawiris* at [168]].

[110] The governing **Code of Ethics** found at Schedule 4 of the **Virgin Islands Legal Profession Act** 2015 which came into force in the Virgin Islands on 11th November 2015, provides that a legal practitioner shall not charge fees that are unfair and unreasonable.⁴¹ Clause 7 of Part B of the Code of Ethics provides that:

A legal practitioner shall not charge fees that are unfair or unreasonable and 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 legal practitioner;
- (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 legal practitioner concerned;
- (h) any scale of fees or recommended guide as to charges prescribed by law or by the Association.

[111] This dovetails with the provisions of Part A clause 26 (1) of the Code of Ethics which provides that:

- (1) A legal practitioner is entitled to reasonable compensation for his or her services but should avoid charges which either overestimate or undervalue the service rendered.

[112] It also dovetails with the Part 65.2 (2) of the Civil Procedure Rules ("**CPR**") which provides that;

- (2) If the court has a discretion as to the amount of costs to be paid to a legal practitioner by his or her client the sum allowed is –

- (a) the amount that the court deems to be reasonable; and
- (b) which appears to be fair both to the legal practitioner and the client.

- (3) In deciding what would be reasonable the court must take into account all the circumstances, including –

⁴¹ Clause 7 of Part B of Schedule 4 of Legal Profession Act

- (a) any order that has already been made;
- (b) the care, speed and economy with which the case was prepared;
- (c) the conduct of the parties before as well as during the proceedings;
- (d) the degree of responsibility accepted by the legal practitioner;
- (e) the importance of the matter to the parties;
- (f) the novelty, weight and complexity of the case;
- (g) the time reasonably spent on the case; and
- (h) in the case of costs charged by a legal practitioner to his or her client –
 - (i) any agreement about what grade of legal practitioner should carry out the work;
 - (ii) any agreement that may have been made as to the basis of charging; and
 - (iii) whether the legal practitioner advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

[113] The CPR therefore provides guidelines for quantifying an attorney's fees and charges in respect of contentious business where, as in the case of the Virgin Islands, there is no statutorily prescribed scale of fees. In accordance with the provisions of the Virgin Islands Legal Profession Act, a legal practitioner may not commence suit for the recovery of the amount of any bill of costs for any legal business done unless a bill of costs in respect of the legal business done by him unless a bill of costs in respect of the legal business is taxed and the taxed bill served on the client within in the time prescribed prior to the commencement of the suit. Although there are some exceptions (none of which are applicable here) section 42 (1) of the Legal Profession Act provides as follows:

Subject to this section, a legal practitioner shall not commence any suit for the recovery from his or her client of the amount of any bill of costs for any legal business done by him or her unless

- (a) the bill of costs has been agreed between the legal practitioner and the client; or
- (b) a copy of the bill of costs is served on the client with a demand in writing for payment fifteen day before the filing of the suit.

[114] Section 42 (4) of the Legal Profession Act further provides that;

- (3) It shall not be necessary in the first instance for a legal practitioner in providing compliance with this section to prove the contents of the bill served, and it shall be sufficient to prove
 - (a) that the bill
 - (i) signed by the legal practitioner or, in the case of a partnership, by any one of the partners either in his or her own name or in the name of the partnership, or
 - (ii) being enclosed in or accompanied by a letter signed in the manner specified in paragraph (a) referring to the bill, was duly served; or in the case of electronic billing, that the name of the legal practitioner or the partnership, as the case may be, was entered on the bill and that the bill was submitted to the client in the manner agreed between the client and the legal practitioner or the partnership.
- (6) The master or registrar may direct that the party against whom the bill is assessed pay the costs of the party whose bill is being assessed and, if so, must assess such costs and add them to the costs ordered to be paid.

[115] Section 42 (3) of the Legal Profession Act also provides that;

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.

[116] These provisions must be read together with CPR Part 64.2 (2) which provides that if costs of a legal practitioner to his or her client are to be taxed or assessed by the court, they must be assessed in accordance with rule 65.12. That Rule provides that;

- (2) If the assessment relates to part of court proceedings it must be carried out by the judge, master or registrar hearing the proceedings.

- (3) If the assessment does not fall to be carried out at the hearing of any proceedings then the person entitled to the costs **must apply to a master or the registrar for directions as to how the assessment is to be carried out.**
- (4) **The application must be accompanied by a bill or other document showing the sum in which the court is being asked to assess the costs and how such sum was calculated.**
- (5) On hearing any such application the master or registrar must either –
 - (a) assess the costs if there is sufficient material available to do so; or
 - (b) fix a date, time and place for the assessment to take place. Emphasis mine

[117] In the case at bar, there is no evidence that the Firm has complied with these requirements. Instead, from all accounts, the Firm has presented its schedule of costs as an annexure to the closing submissions filed in the trial. The Court is not satisfied that this would qualify as satisfactory delivery.⁴² It would, in the Court's judgment be wise for all practitioners in the jurisdiction to bear in mind that the provisions of the Schedule 4 to the Legal Profession Act in which the Code of Ethics makes clear that a legal practitioner should avoid controversies with clients regarding compensation for his or her services as far as is compatible with self-respect and his or her rights to receive reasonable compensation for his or her services. It seems to the Court that given the position adopted by the Claimant that the Firm should have moved promptly to invoke the jurisdiction of the master or registrar to carry out the assessment to verify the quantification which was due.

[118] Other than generalised complaints about the total amount of the charges and whether they represented a proper and reasonable fee for the work done, the Claimant has not commented on the itemized entries. No doubt this is because, the Firm has not applied for assessment of the bill under the CPR which it was open to them to do. Indeed, the Court is satisfied that a focused assessment of the costs is required, and the Court is not in a position to conduct such an assessment on the basis of the current state of the evidence.

⁴² McGregor v Keily (1849) 3 Ex Ch. 794.

- [119] Counsel for the Firm has submitted that given that the Claimant expresses himself to be wholly satisfied with the work done, acknowledges that he gave the instructions for it to be done and that it was in fact done should be enough to ensure complete recovery. This Court disagrees. The Court is not satisfied that this approach is either legitimate or reasonable. On the basis of the evidence presented, both documentary and oral, and without carrying out a detailed assessment, the Court is not satisfied that the fees charged were properly and reasonably incurred by the Firm in carrying out the work which it was instructed to do. The Court is also not satisfied that there is sufficient material available to carry out the assessment which this matter demands.
- [120] This Court therefore declines to make an award for the sum claimed without the benefit of an appropriate assessment. The matter will need to be referred to an assessment. In so doing, the Court will note that there is no scale of fees prescribed a formula or method has been devised for the purpose of calculating fees in respect of contentious business.⁴³ In **Property and Reversionary Investment Corporation Ltd. v Secretary of State for the Environment**⁴⁴ Donaldson J made clear that applying this method of calculating fees the object of the exercise is “to arrive at a sum which is fair and reasonable, having regard to all the circumstances of the case. It is an exercise in assessment, an exercise in balanced judgment – not an arithmetical calculation. This Court is satisfied that this is the approach to be applied in this assessment.
- [121] In that regard, the Court is satisfied that in addition to the factors prescribed at Clause 7 of Part B of the Code of Ethics and CPR Part 65.2, costs would be said to have been reasonably incurred if they were incurred with the express or implied approval of the client and to be reasonable in amount if their amount was expressly or impliedly approved by the client and to have been unreasonably incurred if they are of an unusual nature or amount and the attorney did not tell the client that as a result the costs might not be recovered from the other party. Examples of such unusual charges could include the preparation of solicitor client bills, normally considered to be non-chargeable. See: **Breyer Group Plc & Ors v Prospect Law [2017] ALL ER D 240.**

⁴³ *Treasury Solicitor v Regester and Another* [1978] 2 All ER 920 at 924; *Maltby v D.J. Freeman & Co. (a firm)* [1978] 2 ALL ER 913 at 916

⁴⁴ [1975] 2 ALL ER 436 at 441

- [122] In addition, an important consideration in this case will be the fact this appears to be a case where the Firm had given an estimate which has been far exceeded. The relevance of that yardstick will no doubt feature prominently in any assessment in this matter. See: **Mastercigars Direct Ltd v Withers LLP [2007] EWHC 2733 (Ch)**.

Is it appropriate for the Defendant to hold on to the settlement funds on the basis that a lien is held for money owed?

- [123] Counsel for the Claimant submitted that it is trite law that an attorney has a common law lien to recover outstanding fees owed by a client. Counsel referred the Court to the case of **Bailey Terrelonge Allen (A Firm) v National Transport Cooperative Society Limited**⁴⁵ in which Campbell J. observed at paragraph 43 – 44 that;

“There was no opposition to the Applicant’s submission that an Attorney has a lien or common law right to the fruits of a judgment or settlement that has come about through his exertions. Bryan A. Garner in Black’s Law Dictionary, 9th Ed., states that a ‘charging lien’ is an Attorney’s lien on a claim that; (1) An Attorney has helped the client perfect, as through a judgment or settlement; (2) A lien on specified property in the debtor’s possession.

The question of retention of money, papers or other property does not arise in this case, but was accepted by both sides that such a right exists. In addition to the right of retention, is the right that personal property recovered stands as security for his costs, for such recovery. These are common law rights of the attorney-at-law which are called “liens”. Cordery on Solicitors 1, Issue 5, November 1997, ‘Division L, Renumeration’ states that at common law a solicitor has a general lien to retain any money, papers, other property belonging to his client which properly comes into his possession until payment of his costs, whether or not the property was acquired in connection with the matter which the costs were incurred. The solicitor may retain property, other than money, to any value even if it greatly exceeds the amount due, until payment of his costs; but he cannot hold money in excess of the amount due.”

- [124] Counsel for the Claimant submitted that the sum of \$433,000.00 is now held by the Firm behalf of the Claimant. The Firm contends that the sum of \$385,974.15 is due and owing. In these premises, Counsel submitted that even on the Firm’s case it has wrongly withheld funds which are in excess of the amount that it contends is due and owing to it. Counsel further submitted that the Firm being the trustee for the Claimant placed a lien on the Claimant’s settlement funds and has breached their duty to the Claimant.

⁴⁵ Jamaica [2015] JMSC Civ 251

[125] The Firm however continues to assert that it is well entitled to withhold the entirety to the funds held on trust and they have advanced in support the case of **Withers LLP v Rybak**⁴⁶ which they say establishes that a solicitor may assert a retaining lien over monies in his client account in respect of fees and disbursements. In that case, the claimant solicitors sought a declaration as to whether they had a right to assert a solicitor's common law lien over sums in its client account. The defendant-clients had asserted a security interest in the money and had assigned that interest, but the claimants said that substantial sums remained due to it in fees. The court found that Withers established that they had a retaining lien over the monies held in their client account in respect of their reasonable legal fees and expenses in relation to these proceedings.

[126] Morgan J summarised the solicitor's position in the following terms:

'At common law, a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity; this lien is called a retaining lien. The second right, called a lien, is the right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery; this is called a preserving lien. In addition, a solicitor has by statute (now Solicitors Act 1974, section 73) a right to apply to the court for a charging order on property recovered or preserved through his instrumentality in respect of his assessed costs of the suit, matter or proceedings prosecuted or defended by him. The lien asserted by Withers is a common law retaining lien.'

[127] Morgan J then went on to consider the retaining lien;

A retaining lien extends to any deed, paper or personal chattel which has come into the solicitor's possession in the course of his employment and in his capacity as solicitor with the client's sanction and which is the client's property. Money in a client account may be the subject of a retaining lien, even where it is otherwise held by the solicitor on trust for the client: see Loescher v Dean [1950] Ch 491....

A retaining lien extends only to the solicitor's assessable costs, charges and expenses incurred on the instructions of the client against whom the lien is claimed and for which the client is personally liable. The lien does not extend to costs which are due to the solicitor in a capacity other than that of solicitor or to loans or to sums paid by the solicitor at the client's requests and thus in effect lent by the solicitor or to debts generally.

A solicitor having a retaining lien over property in his possession is entitled to retain the property as against the client and all persons claiming through him and having no better right than the client, until the full amount of the solicitor's assessed costs payable by the

⁴⁶ [2011] EWHC 1151

client is paid. The solicitor has no better right to retain the property in question than his client would have had if he still had possession of it.

[128] **Halsbury's laws of England** summarises the solicitor's retaining lien and the benefits it brings in the following terms:

"A retaining lien extends only to the solicitor's assessable costs, charges and expenses incurred on the instructions of the client against whom the lien is claimed, and for which the client is personally liable, including the costs of recovering the remuneration by action or upon an assessment. The lien is a general lien extending to all costs due to the solicitor and is not limited to the costs incurred in relation to the particular documents in question or upon the particular instructions in consequence of which the property came into the solicitor's possession. In this respect the retaining lien differs from the lien on property recovered." Emphasis mine

[129] There can be no doubt that at common law a solicitor can hold a lien over money that the solicitor is holding on behalf of a client. And indeed in the Court's opinion, equity would also recognise that it would be just where the practitioner has done work which has contributed to the recovery of the judgment or the settlement proceeds that he should also be entitled to look to those proceeds for the payment of his or her fees. However, legal practitioners also have a statutorily recognized ethical obligation which prescribes that they are not to retain money received on behalf of their clients for longer than is necessary.⁴⁷ In the Court's judgment, there is no practical conflict presented by this common law right and this ethical obligation. It simply requires adherence to the basic tenets which govern the profession. So that for example, after a legal case a solicitor might receive a cheque for the client. The cheque will generally be deposited into the solicitor's client of trust account. The solicitor will then prepare a bill to the client and ask for the client's authority to pay the bill with money from the trust account. If the client refuses to authorise payment or objects to payment, the solicitor can hold in the client or trust account enough money to pay the bill – but not more. This would not of course prevent the client from having the costs assessed by a court under Part 64 and Part 65.12 of the CPR. But it seems highly irregular to this Court that an attorney who has presented a bill which he or she contends sets out fair and reasonable costs, charges and expenses in respect of work done, should then purport to retain sums which far exceed the sum claimed in the bill of costs and any costs incurred in the recovery the remuneration by action or upon an assessment.

⁴⁷Clause 11 of the BVI Legal Practitioner's Ordinance - Schedule 4 Code of Ethics Part B Mandatory Provisions and Specific Prohibitions

[130] In any event, where the practitioner is aware that he/she holds funds which are in excess of the reasonable costs, charges and expenses which are claimed and where the Claimant objects to such the payment, it seems to the Court that it is incumbent on such practitioner to seek to have these costs swiftly and finally assessed so that the bill may be satisfied and remaining funds immediately remitted. After all, the quantum of money for which the solicitor has the right to a lien is the amount which is properly owed to the solicitor by the client, whether that amount be ascertained by taxation of a bill of costs, or assessment, or pursuant to a costs agreement.

[131] This position was made clear in the case of **Loescher v Dean**⁴⁸ where at page 495 -496 of the judgment Harman J found;

“The former (which he calls the "retaining lien") still remains and is independent of the statute, and he says: "The retaining lien is founded on the general law of lien which springs from possession, and is in general governed by the same rules as other cases of possessory lien." There is then set out a list of items to which the lien can attach, ending with "or money, **but money being divisible the lien only attaches on the amount actually due.**" The authority for that is *Miller v. Atlee* (1), where the decision appears merely to have been that there was no lien in favour of a solicitor on any sum in hand beyond the amount of his debt. **It was assumed or conceded that the solicitor had a lien on the money to the extent of his debt.** I do not see why a solicitor, if he has money in his possession, has not got an ordinary lien on it.” Emphasis mine

[132] The evidence reveals that in this case the Firm offered to review the costs and that they offered to submit to a solicitor client costs assessment but that these offers were not taken up. Indeed, even after the Claimant issued a pre-action letter, the Firm chose to adopt a passive role in advancing the assessment, in circumstances where it is clear that it held sums in excess of what was claimed. In the Court’s judgment this approach lacked the appropriate robustness which would be expected in the circumstances.

Costs

[133] Both sides in this matter have sought to recover their costs in the even that they are successful. Costs would normally be determined in accordance with the prescribed costs regime. However, given the Court’s findings herein and the conduct of the Parties herein, the Court is satisfied that should be no order as to costs on either the claim or counterclaim.

⁴⁸ [1948 L. 1045] - [1950] Ch. 491; applied *Miller v. Atlee* (1849) 3 Exch 799 in which the Court held that: “An attorney has no lien on his client’s money in his hands, beyond the amount in which the latter is indebted to him.”

[134] The Court's Order is therefore as follows:

- i. **The Firm is directed to comply with the terms of the Legal Profession Act and the CPR and produce and serve a Bill of Costs on the Claimant within 14 days of today's date.**
- ii. **The Firm do forthwith remit all sums in excess of what has been claimed.**
- iii. **In the event that the Parties are unable to arrive at an agreement within 14 days of service, the matter is to be set down for assessment before the learned Master.**
- iv. **Once the assessment is completed, the Firm is to thereafter remit all outstanding sums (if any) due to the Claimant.**
- v. **There will be no order as to costs.**

[135] Finally, the Court conveys its sincere regrets for the inordinate delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar