

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2017/0391

BETWEEN:

TANZANIA TOBING TANZIL

Claimant

and

1. LINDSAY F.P. GRANT
2. JONEL F.H. POWELL

Defendants

Appearances:

Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo Bobb for the Claimant
Mr. Brian Barnes for the Defendants

2020: February 27
(Reissued 4 March 2020)

RULING

- [1] **VENTOSE, J.:** This matter is about the evidence relating to, and the judgment of the court in respect of, misappropriation, breach of trust and breach of fiduciary duty by two Attorneys-at-Law, namely, Mr. Lindsay Grant and Mr. Jonel Powell, who are both partners of the law firm of Grant, Powell & Co. Although receiving the sum of US\$460,000.00 from the Claimant, their former client, in May 2013, the Defendants, without lawful excuse, despite **repeated requests** from the vendor and the Claimant, failed to pay the balance of the purchase price to the vendor of a condominium unit that the Claimant was purchasing on the closing date of 28

September 2015. The Defendants finally made the payment of the balance of the purchase price of the condominium unit to the vendor in July 2018, approximately three (3) years later.

The Factual Background

- [2] The Defendants are partners in a law firm based in Basseterre, Saint Christopher, named, Grant, Powell & Co. The firm was retained by the Claimant in May 2013 to represent him in applying for citizenship under the Citizenship by Investment Programme (the “**CIP**”). The Claimant wanted to invest in a pre-approved real estate project with the minimum value of US\$400,000.00 resaleable after five (5) years.
- [3] The Claimant had originally intended to purchase a condominium unit at Silver Reef for the purchase price of US\$475,000.00, of which he had paid the sellers US\$15,000.00 as a deposit with the balance of US\$460,000.00 to be paid at closing. The completion of the sale was dependent on his successful application for citizenship under the CIP. The Claimant’s application was approved in principle on 26 September 2014. The First Defendant advised the Claimant via email dated 13 May 2013 to pay the balance of the purchase price into the client account of Grant, Powell & Co. and not directly to the sellers of the Silver Reef condominium unit. This was based on the advice given to the Claimant by the First Defendant that in the event that his application for citizenship was unsuccessful he (the First Defendant) was not satisfied that the Claimant would be refunded the sum of US\$460,000.00. The sum of US\$460,000.00 was subsequently transferred by the Claimant to the client account of Grant, Powell & Co. at First Caribbean International Bank (Barbados) Limited, Basseterre Branch, in Christopher (the “**FCIB Account**”). The First Defendant confirmed receipt of the sum of US\$460,000.00 on 5 June 2013.
- [4] The First Defendant advised the Claimant that he should abandon the agreement to purchase the condominium unit at Silver Reef and instead purchase a unit from a developer called, Trans-AmericaInvest (St. Kitts) Limited (“**TAI Limited**”) located in Frigate Bay, Saint Christopher. The Claimant followed the advice of the First

Defendant. On 26 August 2015, the Claimant entered into a written agreement with TAI Limited for the purchase of condominium No. R-228 together with an undivided interest in the common area appurtenant thereto and registered as No. 22 in the Condominium Corporation Index (the “**Condominium Unit**”) for US\$450,000.00 (the “**Sale and Purchase Agreement**”). Under the Sale and Purchase Agreement, the Claimant had to pay TAI Limited a deposit of US\$45,000.00 on the date of the execution of the Sale and Purchase Agreement or no later than 14 business days after execution, and the balance of the purchase price (US\$405,000.00) on the date of approval of citizenship or no later than 14 business days after approval in principle. The Claimant obtained approval in principle in respect of his application for citizenship on 26 September 2014 which meant that the closing date was on or about 11 September 2015.

- [5] Under Clause X of the Sale and Purchase Agreement, the Claimant and TAI Limited’s management company, Royal St. Kitts Hotel Management Company, agreed to rent the Condominium Unit for a term of five (5) years at a rate of US\$750.00 per month for a total rental sum of US\$45,000.00. Under Clause V of the Sale and Purchase Agreement, TAI Limited, the Defendants (as the appointed escrow agent) and the Claimant entered into an escrow agreement that outlined the manner in which the purchase price of US\$450,000.00 should be held and disbursed (the “**Escrow Agreement**”). Under the Escrow Agreement:

- (1) The purchase price of US\$450,000.00 was to be held by the Defendants in escrow in the FCIB Account;
- (2) The Defendants were obliged to act trustworthy between TAI Limited and the Claimant;
- (3) The Defendants were to hold the purchase funds in the escrow account pending the approval of the Claimant’s economic citizenship application and the closing of the real estate transaction; and
- (4) Upon receipt of the (original) memorandum of transfer duly executed by TAI Limited and stamped by the Inland Revenue Department, the

Defendants were to deliver a closing statement to TAI Limited and transfer to TAI Limited the remaining balance of the purchase price.

- [6] TAI Limited by letter dated 11 September 2015 provided the Defendants with a copy of the executed and stamped Memorandum of Transfer with a closing date of 28 September 2015. TAI Limited also notified the Defendants that it was ready, willing and able to close, and it deducted the sum of US\$81,000.00 from the purchase price at source, being the relevant commissions due to the agent. The outstanding balance on the purchase price due at closing was therefore US\$369,000.00. TAI Limited was able to fulfill its obligation to ensure that closing could take place, but the Defendants failed to pay the balance of the purchase price to TAI Limited, thereby causing the Claimant to breach the Sale and Purchase Agreement.
- [7] TAI Limited made various formal demands on the Defendants to pay the outstanding balance of the purchase price by letters dated 15 August 2016, 4 October 2016 and 20 February 2017. In the letter dated August 2016 to the Second Defendant, Mr. John Zuliani, the President of TAI Limited, noted that the Claimant had confirmed to him on 28 August 2015 that the Defendants held the purchase funds for the Condominium Unit and that a copy of the Memorandum of Transfer was submitted to the Defendants on 11 September 2015. Mr. Zuliani continued that, “despite the forgoing, the purchase funds remained outstanding” and that he “would appreciate prompt settlement of the account” so that the transfer documentation could be submitted to the Registrar’s office for registration. In the letter dated October 2016 to the Second Defendant, Mr. Zuliani references a telephone conversation with the Second Defendant whereby the Second Defendant proposed to have the outstanding debt paid within three (3) months. He ends the letter by stating that he looks forward to receiving the full amount of US\$369,000.00 by 28 December 2016 failing which he would have no recourse but to notify the Claimant and his Agent of the non-payment by the Defendants of the outstanding balance of the purchase price of the Condominium Unit.

- [8] In the letter dated 20 February 2017 to the Second Defendant, Mr. Zuliani makes reference to the October 2016 letter and noted that, to date, TAI Limited had not received any payment at all of the balance of the purchase price for the Condominium Unit. Mr. Zuliani also pointed out that, at his meeting with the Second Defendant in January 2017, it was proposed that the Defendants would pay US\$100,000.00 of the debt owed by 15 February 2017 and the balance over a period of three (3) months. He continued that, to date, no payments had been made as agreed or at all and that if payment was not made as agreed TAI Limited would notify the Claimant and his Agent of the non-payment by the Defendants of the outstanding sum of the purchase price of the Condominium Unit.
- [9] The Defendants only paid TAI Limited the sum of \$US40,000.00 via cheque drawn on a bank account at the Royal Bank of Canada. This sum was received by TAI Limited on 22 February 2017. The Claimant had sent the sum of US\$460,000.00 to the client account of Grant, Powell & Co., namely, the FCIB Account, not to a bank account at the Royal Bank of Canada.
- [10] TAI Limited informed the Claimant in February 2017 that the Defendants had failed to pay the balance of the purchase price of the Condominium Unit. Despite numerous demands made by the Claimant to the Defendants to pay the balance of the purchase price owing to TAI Limited, the Defendants failed to pay the balance of the purchase price of the Condominium Unit. Consequently, the Claimant travelled to Saint Christopher on 8 June 2017 to understand fully what was going on with the purchase of the Condominium Unit. The Claimant was informed by the First Defendant that the Defendants were not in a position to pay the balance of the purchase price to TAI Limited because the funds were “not available”. The First Defendant, despite the Claimant’s insistence that he had said 30 days, confirmed that the Defendants would pay the balance of the purchase price of the Condominium Unit within 90 days, that is, by 29 September 2017.
- [11] The Claimant states that the Defendants informed him that: (a) the funds were resent to the Claimant by the Royal Bank of Canada Limited when that was not the bank to which he sent the sum of US\$460,000.00 in 2013; (b) the funds were sent

to an “old account at the RBC” when the Claimant would have sent the funds to the FCIB Account; (c) Saint Christopher and Nevis was hit by three (3) hurricanes in September 2017 which interrupted business for two and a half weeks; and (d) the Defendants were working “day and night” with TAI Limited to complete the transaction.

[12] The Claimant wrote to the Defendants on 21 July 2017 indicating that he had waited 30 days for the payment by the Defendants to TAI Limited for the Condominium Unit but that the Defendants had “promised to settle the delay payment quickly, [but that] unfortunately there are no sign (sic) of any payments”. The Claimant also threatened to go to the media, the Prime Minister and copied to the Attorney General and all members of Parliament with the issue but he was assured by the Second Defendant via email dated 1 August 2017 that the matter would be concluded by 29 September 2017 and that “there is no need to go to the media or any other authority as that would only complicate the issue and **cloud the matter for all of us**” (emphasis added). The Second Defendant stated that the Defendants were on track to have the matter completed within 90 days and that he (the Second Defendant) was aware that the matter had been frustrating to the Claimant but thanked him (the Claimant) for his patience.

[13] The balance of the purchase price for the Condominium Unit was not paid by the Defendants to TAI Limited on 29 September 2017 as promised. Consequently, the Claimant engaged another Attorney-at-Law who, on 6 December 2017, wrote to the Defendants stating that the Defendants acknowledged receipt of the sum of US\$460,000.00 in 2013 but have failed to pay the balance of the purchase price of the Condominium Unit to TAI Limited. It was also noted that the Defendants gave a number of different explanations as to why the balance of the purchase price of the Condominium Unit was not paid to TAI Limited, and that, despite many demands made to them by TAI Limited, the Defendants have failed to pay the said sums. The letter also stated that the Claimant believed that the Defendants jointly had misappropriated the Claimant’s monies to their personal use in breach of trust and their fiduciary duties owed to him as his Attorneys-at-Law and officers of the

court. The letter ended with a demand that the Defendants pay the sum of US\$460,000.00 into the Chambers of the Claimant's new Attorney-at-Law within seven (7) days.

[14] The Defendants responded to the Claimant's new Attorney-at-Law on 13 December 2017 stating, among other things, that the transaction "had been resolved" and that the transfer would take place no later than 22 December 2017. Counsel for the Claimant received a letter from TAI Limited on 18 December 2017, sent via email, indicating that the issue with the outstanding balance of the purchase price of the Condominium Unit had been resolved and that the transfer documents would be filed on or before 22 December 2017. Counsel for the Claimant replied to TAI Limited on 20 December 2017 noting that the copy of the **personal cheque** and the receipt of the same by TAI Limited, both of which were attached to the email of 18 December 2017, were not evidence of the existence, and the receipt by TAI Limited, of the actual purchase funds from the Defendants especially when the Defendants had repeatedly failed on previous occasions to pay out the funds. Counsel for the Claimant was prepared only to accept a certified cheque or manager's cheque as evidence of payment by the Defendants of the balance of the purchase price of the Condominium Unit to TAI Limited.

[15] As a result of the above, the Claimant on 22 December 2017 filed a claim against the Defendants seeking the following:

1. An order that the Defendants have breached their fiduciary duty and/or their duty of trust owed to the Claimant as his Solicitors and escrow agents and/or acted fraudulently in receiving, using and/or failing to account for the sum of US\$460,000.00 which was transferred to the Defendants' bank account numbered 0106966680 at First Caribbean International Bank (Barbados) Limited, Basseterre branch in Saint Kitts, in or about May 2013, for the specific purpose namely, to purchase a condominium unit under the Citizenship By Investment Programme, and secure title to the property;
2. An order that the Defendants have misappropriated funds belonging to their then client, the Claimant, in the sum of US\$460,000.00 which funds were paid into the Defendants' bank account numbered 0106966680 at First Caribbean International Bank (Barbados) Limited, Basseterre branch in Saint Kitts, initially on trust, and

thereafter in escrow for the purchase a condominium unit under the Citizenship By Investment Programme, and to obtain title to the property in breach of the contract for professional services entered into between the parties;

3. Damages

4. An order requiring the Defendants to return immediately the sum of US\$460,000.00 paid to them in trust and/or in escrow for the purchase and execution of title of condominium unit R-228 with interest thereon pursuant to section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act CAP 3:11 of the Revised Laws of Saint Christopher and Nevis

5. Costs

6. Such further or other relief as the Court deems just.

[16] The claim brought against the Defendants by the Claimant was, therefore, for, among other things, breach of fiduciary duty and/or breach of trust as the Claimant's solicitors, misappropriation of client funds and for damages caused by the failure of the Defendants to pay to TAI Limited the balance of the purchase price of the Condominium Unit entrusted to them as Attorneys-at-Law for the Claimant.

[17] On 22 December 2017, TAI Limited sent a sealed envelope to the Claimant's new Attorney-at-Law containing a letter from TAI Limited that included two (2) copies of the original Memorandum of Transfer and blank Certificates of Title with the Claimant's name on it as registered owner of the Condominium Unit. The Claimant states that the parent title for the Condominium Unit that is required in order to complete the transfer was never handed over and that, as a result, there was a Vendor's lien placed on the Condominium Unit. The Claimant later discovered that this lien was placed on the Condominium Unit because the personal cheque issued by the Defendants on 13 December 2017 to TAI Limited for the balance of the purchase price (US\$329,000.00) did not clear and/or was dishonored by First Caribbean International Bank. Mr. Zuliani via letter dated 5 June 2018 informed Counsel for the Claimant that the cheque issued from the FCIB Account by the Defendants to TAI Limited in the sum of US\$329,000.00 representing the balance of the purchase price of the Condominium Unit "ha[d] not cleared into [TAI

Limited's] account". Mr. Zuliani, therefore, requested that Counsel for the Claimant return the closing documentation and, in particular, the two original Memoranda of Transfer and Certificates of Title that were previously sent to Counsel for the Claimant on 22 December 2017.

- [18] The Defendants finally paid TAI Limited the balance of the purchase price in the sum of US\$329,000.00 on 3 July 2018. TAI Limited informed Counsel for Claimant about this via letter dated 4 July 2018 and attached the following documents: (a) two original Memoranda of Transfer; (b) two original Certificates of Title; (c) a receipt VFL83 for the Condominium Unit for the payment of US\$329,000.00; (d) a closing statement dated 4 July 2018; and (e) a direction Re Transfer of Title.
- [19] However, the Defendants did not refund the Claimant the sum of US\$10,000.00 which is the difference between the amount of money entrusted to them by the Claimant in May 2013 (US\$460,000.00) and the purchase price of the Condominium Unit (US\$450,000.00).

A Summary

- [20] The court entered judgment in default of defence on 9 October 2018 with terms to be determined by the court. On 11 February 2019, the court, in determining the terms of the judgment, accepted the pleadings as being truthful to the fact that the Defendants breached their fiduciary duty and/or their duty of trust owed to the Claimant as his Solicitor or escrow agents and/or acted fraudulently in receiving and/or misappropriated funds in using and/or failing to account for the sum of US\$460,000.00 which was transferred to the Defendants' bank account numbered at First Caribbean International Bank (Barbados) Limited, Basseterre branch in Saint Christopher, in or about May 2013, for a specific purpose, namely, to purchase a condominium unit under the Citizenship By Investment Programme, and secure title to the property. There can be no question that there is a judgment of the court wherein the court accepted that the Defendants, two partners, namely, Mr. Lindsay Grant and Mr. Jonel Powell, of the law firm of Grant, Powell & Co had misappropriated the sum of US\$460,000.00 belonging to the Claimant. The court accepted that the Defendants were also in breach of trust and of their fiduciary

duties to the Claimant. The court ordered damages to be assessed with a hearing date of 12 December 2019 which was stayed by the Court of Appeal on 2 December 2019.

The Status Hearing

- [21] The matter came on for status hearing on 27 February 2020 where Counsel for the Claimant informed the court that the Court of Appeal on 12 February 2020 had dismissed the Defendants' application for leave to appeal the refusal by the court to set aside the default judgment. Counsel for the Defendants informed the court that the Court of Appeal refused the Defendants leave to make an oral application for an extension of time to appeal and that the Defendants have since filed that application to the Court of Appeal.

The Application for an Extension of Time to file a Defence

- [22] Counsel for the Defendants also informed the court that the Defendants had filed an application on 10 February 2020 for an extension of time to file a defence with supporting affidavit of the Second Defendant. The Defendants also filed a defence on 10 February 2020. The essence of the argument of Counsel for the Defendants was that the order of the court dated 9 October 2018 where it had entered judgment in default of defence on terms to be determined by the court was only "entered" when the Registrar of the High Court on 11 February 2020 perfected the order. Counsel for the Defendants further noted that since the defence was filed on 10 February 2020, the day before the Registrar of the High Court perfected the court order, it meant that the default judgment was not "entered" until after the defence had been filed. Consequently, Counsel for the Defendants further submitted, it also meant that there was in fact no default judgment "entered" when the defence was filed.
- [23] Counsel for the Defendants sought to rely on the decision of the Court of Appeal in **Hyacinth v Joseph** (GDAHCVAP 2015/0025 dated 20 June 2016) where the Court of Appeal had to consider an appeal from a decision of a trial judge who, at the first hearing of a fixed date claim on 23 January 2014, struck out the

appellants' defence and counterclaim and entered judgment for the respondent on the fixed date claim. The first distinguishing feature of this case is that it was concerned with a fixed date claim that is not subject to the rules relating to default judgment (see CPR 12.2(b)). The second is that the respondent applied earlier in the day on 2 May 2013 for an order that final judgment be entered against the first and third defendants for failing to file acknowledgements of service or defences and later that same day the appellant filed a defence and a counterclaim. This meant that when the matter came before the trial judge for first hearing on 23 January 2014, the court had a properly filed defence before it. That defence could not have been affected by the application for default judgment. The Court of Appeal explained the position as follows:

The entry of judgment

[13]. It follows from the finding that the judge was not authorised to strike out the defence that the procedure that she should have followed at the first hearing of the fixed date claim form was to treat the applicant as a defendant who was entitled to defend the claim, treat the hearing as a case management conference and give directions for the continued hearing of the claim. What the judge should not have done was to treat the applicant as a person in default and proceed to dispose of the case and give judgment for the respondent on the basis of the claim form and the respondent's affidavit in support, both filed on the 6th December 2012.

[14]. The resulting judgment is irregular and is liable to be set aside by this Court. In the circumstances, I think that the applicant has good prospects of succeeding on appeal if he is granted leave to appeal.

- [24] Counsel for the Defendants' reliance on this decision is misplaced. Counsel for the Defendants seem to rely on an erroneous theory that a default judgment is entered when the order of the court is perfected by the Registrar of the High Court and points to paragraph 13 of **Joseph** to suggest that somehow the order of the court on 9 October 2018 entering default judgment against the Defendants was not actually "entered" until the order of the court was perfected by the Registrar of the High Court on 11 February 2020. When the Court of Appeal stated in **Joseph** that "[w]hat the judge should not have done was to treat the applicant as a person in default and proceed to dispose of the case ..." it was merely stating that, in the context of a fixed date claim that is incapable of being subject of a default

judgment, the trial judge should not have treated the appellant as a person in default and should have given directions for the hearing of the claim. No default judgment can be entered in respect of fixed date claims. Nowhere in **Joseph** does the Court of Appeal suggest that the date on which the Registrar of the High Court perfects the order of the court is the date on which that court order is entered. The court would not have thought that it needed stating explicitly but the Court of Appeal in **Joseph** assumed (for it was not in dispute) that the judgment was entered by the court when the trial judge gave the order at the first hearing of the fixed date claim on 23 January 2014 because the heading before paragraph 13 is entitled: “**The Entry of Judgment**”. There is simply no mention of any perfection by the Registrar of the High Court of the order of the court that was entered by the trial judge on 23 January 2014.

- [25] If the argument of Counsel for the Defendants is correct, it would run a coach and horses through the CPR 2000. It would mean that the date on which an order of the court takes effect is the date on which the Registrar of the High Court decides to perfect the order of the court. This could be weeks, months or even years, or in this case over sixteen (16) months. It is unacceptable that an order of the court would be perfected so late by the Registrar of the High Court. This would frustrate litigants and Attorneys-at-Law who can only serve on third parties perfected orders of the court. The intricate system devised by the framers of the CPR 2000 cannot be held hostage by those administrative inefficiencies. Counsel for the Claimant submitted that pursuant to CPR 42.8 a judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date. That is a complete answer to the submissions of Counsel for the Defendants. If the date on which the Registrar of the High Court perfects any order or judgment of the court is the date that that judgment or order is entered, it would undermine completely CPR 42.8. Counsel for the Defendants was present when the court entered judgment in default of defence on 9 October 2018. The arguments of Counsel for the Defendants have no merit whatsoever and the court rejects them.

[26] The court would urge the Rules Committee of the Eastern Caribbean Supreme Court to revise CPR 42.4(2) as follows:

- (2) Every judgment or order must –
 - (a) be sealed by the court;
 - (b) bear the date on which it is given or made; and
 - (c) be signed by the registrar or by the judge or master who made it.

[27] This is not a bold recommendation since it seems to the court to be unimaginable that an order made by a High Court Judge or Master can only be a document of the court when it is signed by the Registrar of the High Court and *no one else*. Of course, one must expect Registrars of the High Court to carry out their functions with the usual efficiency and integrity that is expected of a holder of the office Registrar of a High Court, but one may conceive of a situation (unimaginable as it might seem) where a Registrar of the High Court refuses to perfect an order or where that order is perfected many months or even years later. Is the only recourse to litigants in this scenario to file an application for leave to apply for judicial review to compel performance by the Registrar of the High Court of his or her duty to perfect court orders? Could that rogue Registrar of the High Court simply decide not to list that application before the High Court Judge thereby frustrating further that litigant? This issue needs to be addressed by the Rules Committee as a matter of urgency!

[28] CPR 42.4(2) of the Jamaica Civil Procedure Rules 2002 provides as follows:

- Every judgment or order must -
 - (a) be signed by the registrar **or by the judge or master who made it;**
 - (b) be sealed by the court; and
 - (c) bear the date on which it was given or made. (emphasis added)

[29] The Civil Procedure Rules 2016 of Trinidad and Tobago merely provides in CPR 43.4(2) that every judgment or order must be sealed by the court.

- [30] Judgment in default having been entered on 9 October 2018, and the terms determined by the court on 11 February 2019, the only option available to the Defendants was to apply to set aside the default judgment. This they did on 16 October 2018. The application to set aside the default judgment was heard on 26 September 2019 and the court gave its decision refusing to set aside the default judgment on 28 October 2019. Judgment in default having been entered on 9 October 2018, there is no merit in the application filed by the Defendants for an extension of time to file a defence. How could such an application be made after the entry of judgment in default of defence and a refusal by the court to set it aside? I fail completely to appreciate why this application was made at all, and the tenuous basis on which it was made has already been laid bare above.
- [31] In closing, the court notes that the defence (and the application for an extension of time) was filed on **10 February 2020** approximately **two (2) years and one month** (or 25 months) after the deadline to file a defence had passed. The court also notes that the default judgment that was entered by the court on 9 October 2018 was perfected by the Registrar of the High Court *the very next day* on **11 February 2020**, approximately **sixteen (16) months** after the court entered the judgment in default of defence.

The Administration of the CPR and the Civil Justice System

- [32] It would be remiss if the court does not take this opportunity to remind officers of the court of the manner in which matters are to be dealt with under CPR 2000. Counsel for the Claimant wrote to the Registrar of the High Court on 23 May 2018 indicating why, after four (4) months, the Claimant's *ex parte* application for default judgment was returned to them and no date was set for the matter to be heard by a High Court Judge or Master. Counsel for the Claimant notes that, on perusing the court file, there was a notation on the court file dated 16 February 2018 apparently bearing the initials of the Registrar of the High Court stating, "Counsel to come & explain this application to me as I am very confused". The letter continues that there was absolutely no doubt that applications pursuant to CPR 12.10(4) and (5) do not require the review by the Registrar of the High Court or her

comprehension. These applications, which can be heard without notice, must be sent to a High Court Judge or Master for determination. Counsel for the Claimant directed the attention of the Registrar of the High Court to the decision of the Court of Appeal in **Dr. Fellows v Carino Hamilton Development Company Inc.** (Claim. No. HCVAP 2011/0006 (Nevis Circuit) dated 6 June 2012) where it was stated as follows:

11. CPR 12.10(1)(b) provides that a default judgment on a claim for an “unspecified sum of money” must be judgment for the payment of an amount to be decided by the court. The footnote to this paragraph explains that the procedure for assessment of damages where judgment is entered under this paragraph is dealt with at CPR 16.2. CPR 16.2 provides that an application for a default judgment to be entered under CPR 12.10(1)(b) must state various things. Note that an “application”, not a “request”, must be made for judgment in default in this case. The only form of application in CPR 2000 is Form 6. The use of this word “application” means by necessary implication that Form 7 may not be used to request a default judgment in respect of an unspecified sum of money. CPR 16.2 also provides the subsequent procedure by which a hearing for the judge or Master to assess damages will be fixed. It will be on an application without notice. The application will be heard by the judge or a Master in the usual way, and the terms of the default judgment settled. This is a judicial process, and not an administrative one as it is when the Form 7 procedure is followed.

- [33] Counsel for the Claimant further noted that since the filing of the *ex parte* application for default judgment on 23 January 2018, Counsel for the Claimant had been served with an application by the Defendants to strike out the claim form and statement of case (filed on 31 January 2018), and with an application to set aside the default judgment (filed on 1 February 2018). Counsel for the Claimant notes that the application to strike out was filed a mere eight (8) days after the filing of the Claimant’s *ex parte* application for judgment in default.
- [34] The court on 9 October 2018 observed that the application to set aside the default judgment was **premature** and dismissed it because judgment had not been entered at the time of the filing of the application to set aside the default judgment. The court on that date also dismissed the application to strike out the claim form and statement of case because the request for judgment in default was **first in time** and had not been determined in accordance with CPR 2000.

- [35] Counsel for the Claimant further noted that, in the affidavit in support of the application to set aside default judgment, the Second Defendant avers that “[o]n 23 January 2018 the Defendants **through an agent** learnt that an application for default judgment was filed by the Claimant on 23 January 2018” (emphasis added). Counsel continued that this was a very alarming revelation by the Second Defendant on the same date as the Claimant’s application for default judgment was filed, which application was intended to be *ex parte* as provided for by the CPR 2000. Counsel for the Claimant continues that the Claimant intends to pursue this matter and that, in the meantime, the Claimant expects and is entitled to rely on the highest level of professionalism and ethical standards in the administration and application of the CPR 2000 and that he expects and deserves to have his application for default judgment dealt with in an expeditious and timely manner as possible, given the resources of the court and the court office. Counsel for the Claimant concluded stating that he expects and urges that immediate and appropriate steps be taken to place the *ex parte* application for default judgment before the court.
- [36] Counsel for the Claimant did not receive a response to his letter dated 23 May 2018. Consequently, on 18 July 2018, Counsel for the Claimant wrote to the Registrar of the High Court noting that this letter was a final pre-action letter before the filing of an application for leave to apply for judicial review seeking to elicit appropriate actions and/or responses from the Registrar in her capacity as Registrar of the High Court. Counsel notes that the Claimant would challenge: (a) the refusal by the Registrar to list and/or (b) the decision by the Registrar to refuse to list the Claimant’s *ex parte* application for default judgment for deliberation by a High Court Judge or Master and/or the decision of the Registrar to review and or deliberate over the *ex parte* application for default judgment.
- [37] The Registrar of the High Court replied on 25 July 2018 noting that she took serious issue with the contents and tone of the letter dated 23 May 2018 which she states is a “patent attempt to malign [her]self, [her] brother and the Government of this Federation”. The Registrar of the High Court continued that

Counsel's "accusations are baseless and appear to be politically motivated and far exceed the ambit of reasonable representation" of the Claimant. The Registrar of the High Court also stated that she found Counsel for the Claimant's letter to be "very insolent and disrespectful and in demanding me to act; you have overstepped your bounds. I take my instructions from the Chief Justice, the Judge, Master and Chief Registrar and no one else". Counsel for the Defendants also wrote to the Registrar of the High Court on 4 June 2018 purportedly in response to Counsel for the Claimant's letter dated 23 May 2018 to the Registrar of the High Court. Nothing contained in that letter requires repeating here.

- [38] The administration of justice requires hard work and efficiency from all persons who form part of the civil justice system in Saint Christopher and Nevis, namely, High Court Judges, Masters, Registrars, Attorneys-at-Law, court office staff, police officers and others. In order to achieve the efficient administration and application of the CPR 2000, each player must play his or her part with competence, integrity, professionalism and efficiency. This requires Attorneys-at-Law, among other things, to abide by the deadlines in the CPR 2000 and in any court order. It also requires the Registrar of the High Court, representing the court office, expeditiously and efficiently to carry out his or her functions, among other things, pursuant to any Rule in the CPR 2000 or in any court order.
- [39] The court office is the engine room of the administration of justice in all the States and Territories served by the Eastern Caribbean Supreme Court. The court office staff must be commended for the hard work that they do every day in their various capacities in facilitating the smooth working of the civil justice system in Saint Christopher and Nevis. However, if they fail properly to carry out their functions, then, the entire system is bound to find itself in a gridlock. The court, through the use of its case management powers, can properly manage matters coming before it. The court does not, however, have any similar direct control over the court office that is managed by the Registrar of the High Court.
- [40] The CPR 2000 makes a clear demarcation between the powers to be exercised by the court (High Court Judge and Master) and the court office or Registrar of the

High Court. In most cases where matters are to be done by the court office, it requires no discretion; it is automatic and is an administrative act, for example, CPR 12.4 states that “[t]he court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if – ...”. There is no discretion to be exercised by the court office in respect of a request by a claimant to enter judgment for failure to file an acknowledgment of service provided the conditions in CPR 12.4(a)-(f) are satisfied. If the court office has any concerns or questions in respect of whether any of the conditions are satisfied, the matter must **immediately** be referred to the High Court Judge or Master.

[41] CPR 12.10(4) and (5) are as follows:

(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.

(5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply.

[42] Counsel for the Claimant is correct in stating that where the claim is for some other remedy or for an unspecified sum, any application for default judgment does not require any determination by the court office or the Registrar of the High Court. It is a matter for the court (High Court Judge or Master). About this, there can simply be no dispute since the CPR is pellucid and this forms part of the *ratio* of the decision of the Court of Appeal in **Fellows**, decided as long ago as 2012.

[43] The experience of the court is that in 2018 applications and other documents were routinely placed on the court file in 4-5 days. Thankfully, this has since improved with applications or other documents being placed on the court file by the court office within one or two days. The *ex parte* application was filed by the Claimant at 12:10 p.m. on 23 January 2018. In the affidavit of the Second Defendant in support of the application to set aside the default judgment, the Second Defendant avers (at para. [20]) that “[o]n 23 January 2018 the Defendants **through an agent** learnt that an application for default judgment was filed by the Claimant on 23 January 2018”. It is very unlikely that from 12:10 p.m. to 3:30 p.m. when the court

office closes, the *ex parte* application would have been placed on the court file in this matter. It seems more likely than not that someone in the court office informed the Defendants of the Claimant's *ex parte* application. If that is correct, it raises serious questions concerning the confidentiality of court documents and processes.

[44] The court notes the following: first, the *ex parte* application for default judgment, as mentioned before, should have been immediately placed before the High Court Judge or Master for determination. Secondly, as an *ex parte* application, only the High Court Judge or Master had jurisdiction to order that the Claimant give notice to the Defendants. Third, given the nature of the application, notice to the Defendants would serve no purpose. Fourth, only a High Court Judge or Master may exercise any of the powers of the court. Fifth, the court office may not, under any circumstances, exercise any power, albeit only a procedural one, of the High Court Judge or Master. Sixth, it was not correct for anyone in the court office to inform the Defendants of the Claimant's *ex parte* application for default judgment. Seventh, public confidence in the administration of justice in Saint Christopher and Nevis will be seriously and perhaps irreparably eroded if the public perceives that the court office "picks sides" in disputes coming before the court particularly where that dispute involves public figures, politicians or government officials. Eighth, systems must immediately be put in place to ensure that this never happens again.

[45] It goes without saying that the court office in carrying out its essential functions must always remain neutral between opposing parties in disputes coming before the court in Saint Christopher and Nevis. If this persists or becomes an entrenched part of the culture of the court office, the court will not hesitate to use its powers under its inherent jurisdiction to preserve its processes from any actual or attempt at misuse or abuse.

[46] It could not have been correct for the Registrar of the High Court to direct Counsel to come and explain the *ex parte* application to her because the *ex parte* application was simply not one over which she had any jurisdiction. The court is of

the opinion that it could see no good reason why this *ex parte* application was not immediately listed for hearing before a High Court Judge or Master. Moreover, if there was any serious issue with such an application (or any other), it should have been brought immediately to the attention of a High Court Judge or Master. In addition, it is completely unacceptable that an application that was filed on 23 January 2018 was listed by the court office to be heard by the Master approximately nine (9) months later on 9 October 2018. The administration of justice will effectively be compromised if this were to become common practice.

- [47] The concerns of Counsel for the Claimant in his letter to the Registrar of the High Court dated 23 May 2018 appear to the court to be **entirely** justified.

Misappropriation and Professional Misconduct

- [48] Misappropriation by an Attorney-at-Law of client funds is a serious matter. First, it can be the subject of civil proceedings for misappropriation and or breach of trust and or breach of fiduciary duties as occurred in the instant case. Second, it can be the subject of a disciplinary complaint by the former client to the Disciplinary Committee of the Bar Association of Saint Christopher and Nevis, or the subject of disciplinary proceedings under the common law jurisdiction by two High Court Judges. Third, it is a criminal offence of larceny contrary to the provisions of Larceny Act CAP 4.16 of the Revised Laws of Saint Christopher and Nevis.
- [49] The facts of this case, as outlined above at paragraphs [2]-[19], are not altogether dissimilar from those in the case of **Ganpot v Wardally-Beaumont** (Claim No. GDAHCV 2007/0237 dated 26 January 2015) where Wallbank J. (Ag.) held that conduct by the defendant, an Attorney-at-Law, should be referred to a disciplinary tribunal comprising at least two Judges of the Supreme Court for a determination of whether the defendant should be suspended from practice or struck off the Roll for professional misconduct. **Ganpot** concerned alleged misappropriation by the defendant/attorney-at-law of monies belonging to the claimant/client. In that decision, the defendant/attorney-at-law received in April 2005 the sum of \$304,419.99 on behalf of one of her clients, the claimant, representing settlement sums in matrimonial proceedings between the claimant/client and his ex-wife.

Despite many demands made by or on behalf of the claimant/client, the defendant/attorney-at-law failed to pay over the said sum. The claimant/client sued the defendant/attorney-at-law and judgment in default of defence was entered against the defendant/attorney-at-law in favour of the claimant/client on 13 July 2007 for the total sum of \$308,248.69.

[50] As mentioned above, in the instant case, the court has given judgment (albeit a default judgment that has not been set aside) in this matter that the Defendants breached their fiduciary duty and/or their duty of trust owed to the Claimant as his Solicitor or escrow agents and/or acted fraudulently in receiving and/or misappropriated funds in using and/or failing to account for the sum of US\$460,000.00 which was transferred to the Defendants' bank account numbered 0106966680 at First Caribbean International Bank (Barbados) Limited, Basseterre branch in Saint Kitts, in or about May 2013, for a specific purpose, namely, to purchase a condominium unit under the Citizenship By Investment Programme, and secure title to the property.

[51] Until the judgment of this court dated 28 October 2019 is overturned by the Court of Appeal, there is a finding by, and a judgment of, this court that the Defendants, as Attorneys-at-Law, have misappropriated monies belonging to their former client, the Claimant, and that they have also breached their fiduciary duties and duty of trust owed to the Claimant. In the course of its reasoning in the judgment in relation to the Defendants' application to set aside the default judgment, this court accepted that the Defendants had not shown that they had a real prospect of successfully defending the claim. However, the default judgment of the court dated 9 October 2018 is not specifically relevant for the purpose of determining whether there exists a *prima facie* case of professional misconduct by the Defendants. It is the evidence as outlined above at paragraphs [2]-[19] and the supporting documentation found in the pleadings in this matter that are relevant to that determination.

[52] Section 80(1) of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act CAP 3.11 of the Revised Laws of Saint Christopher and Nevis states

that every person practising as a solicitor and whose name shall be enrolled as aforesaid either as a barrister or solicitor, shall be deemed to be an officer of the court. Section 81 then states that:

81. Barristers and solicitors may be suspended or struck off roll.

Any two Judges of the High Court may, for reasonable cause, suspend any barrister or solicitor from practising in the State during any specified period, or may order his or her name to be struck off the Court Roll.

[53] There cannot be any doubt that the power of the court to suspend any barrister or solicitor from practicing in Saint Christopher and Nevis or to have his or her name struck off the Court Roll is derived from the common law. What section 81 seeks to do is to provide that, in exercising that common law power, the court must sit with two High Court Judges presiding. I agree with Wallbank J. (Ag.) in **Ganpot** that this section makes provision for the manner in which the court's common law jurisdiction to discipline by way of suspension or striking off from the Court Roll is to operate, that is, by any two High Court Judges.

[54] That common law jurisdiction has been expressly preserved by section 39 of the Legal Profession Act No. 33 of 2008 as follows:

39. Notwithstanding anything contained in this Act, the jurisdiction, power or authority vested in any court immediately before the commencement of this Act

(a) **by the common law with respect to discipline;** or

(b) by any enactment to deal with contempt of court committed by attorneys-at-law,

shall continue to be exercisable after the commencement of this Act.
(emphasis added)

[55] This court, sitting as a single High Court Judge, **does not** have the power to exercise the common law jurisdiction to discipline by way of suspension or striking off the Court Roll solicitors and barristers admitted to practice in Saint Christopher and Nevis. Attorneys-at-Law are officers of the court and this court will not hesitate to exercise the power of referral where the relevant facts and circumstances are such that the conduct of an Attorney-at-Law merits investigation by two High Court Judges, sitting as a disciplinary tribunal, in the exercise of the common law

jurisdiction, to determine whether he or she should be disciplined for professional misconduct by way of suspension or striking off the Court Roll of Saint Christopher and Nevis.

- [56] To assist those Attorneys-at-Law who need reminding of duties they breach as officers of the court when they misappropriate client funds, I can do no better than to quote Wallbank J. (Ag.) in **Ganpot** where he stated as follows:

Opening remarks

[2] This matter has manifestly and understandably attracted a degree of public interest. At an earlier hearing of this matter Learned Counsel for the Claimant invited the Court to make a pronouncement to reassert fundamental principles for the benefit of Attorneys-at-Law and the public in general. I therefore make the following opening remarks.

Misappropriation of funds by an Attorney-at-Law

[3] This matter concerns alleged misappropriation by an Attorney-at-Law of funds belonging to a client, the Claimant. Misappropriation by an Attorney-at-Law of client funds breaches a number of fundamental principles that an Attorney-at-Law is bound to uphold. One of these is an obligation on such an Attorney-at-Law to protect a client's money and assets. This principle goes to the heart of a solicitor's duty to act in the best interests of a client.

[4] Misappropriation of client funds can take many forms. All such forms are seriously egregious. They cause scandal, incalculable distress and anxiety to the immediate victims, and great harm to the administration of justice system, including to public confidence in the Courts and the legal profession. Misappropriation of client funds is not the preserve of the thoroughly devious, which is why instances undermine the reputation of the legal profession so profoundly. They breach the tenet around which the entire civil administration of justice revolves, that client funds are sacrosanct.

[5] Why misappropriation of client funds is so serious bears reflection. The first reason of course is the immediate harm it causes. Then there is the indirect damage that it does to the fabric of society as a whole. It constitutes a breach of contract, but is more than that. It is a breach of trust, but is also more than that. Breaches of contract and trust can be, and unfortunately are, committed by tradesmen, businessmen and ordinary members of the public, but a solicitor is none of these. He or she practices pursuant to an oath that he or she professes upon admission. That is why a solicitor is referred to as a professional, in the original and etymologically correct sense of the word. Misappropriation of client funds

is a betrayal of the obligations freely assumed, for all time, when the solicitor takes the oath.

[6] Betrayal of an oath is a form of perjury. Historically, even when oaths were made generally and extra-judicially and thus not punishable by common law or statute, breach of an oath was treated as aggravation for offences committed by officers.

[7] Again, historically, and in the Anglo-Saxon legal context, King Alfred the Great in the 9th century A.D. accorded greater priority to the need to keep oaths than to prevent murder, treason and other heinous crimes, by making this the subject of the first statute in his Legal Code. Whilst the punishment, as a penalty, for oath breaking was less than for those other offences, breach of oaths was visited with far more sophisticated but nonetheless dire consequences, which were simultaneously a punishment in terms of imprisonment, a removal of weapons privileges and property rights, a spiritual penance assigned by a Bishop, and measures calculated to rehabilitate and rebuild relationships ruptured thereby. Failing all such measures, and as a last resort, the unrepentant oath traitor was to be cast out of civilized society: treated as an outlaw and excommunicated, and, should he be slain during pursuit, his body was to lie unransomed. This package of measures was calculated to cure the temporal (ethical) and spiritual (moral) catastrophe of a broken oath.

[8] The oath was – and still is – a special kind of bond which binds society together. Again, in the post Anglo-Saxon, English historical Common Law context, oaths gave rise to mutual legal obligations that were known as homage.

[9] This focus on the historical Anglo-Saxon/English legal dimension of oaths would be incomplete without mentioning that they are a concept common to most if not all peoples, from the dawn of time, usually, but not always, invoking divine assistance.

[10] The slightest glance at our legal system demonstrates that oaths pervade it. They are the cornerstones of testimony and formal confirmation. Specially appointed officers commission them. Their form is carefully prescribed. They still are – or should be – the ethical guarantee that enables matters to be progressed with a high degree of confidence.

[57] Section 29(1) of the Legal Profession Act states that:

29. (1) All money received for or on behalf of a client by an attorney-at-law shall be held on trust for that client to be paid subsequently to the client or as the client may direct.

[58] While Wallbank J. (Ag.) was speaking with specific reference to misappropriation of client funds, Schedule 4, Part A, of the Legal Profession Act 2008 contains the

Code of Ethics which governs **all Attorneys-at-Law admitted to practice** in Saint Christopher and Nevis.

- [59] The decision of the Court of Appeal of Jamaica in **Scott v General Legal Council** (Supreme Court Civil Appeal No. 118 of 2008 dated 30 July 2009) merits consideration. This was an appeal by an attorney-at-law who was struck off the roll of attorneys-at-law entitled to practise in the several courts in the island of Jamaica by the Disciplinary Committee of the General Legal Council (the “**Committee**”). The client had retained the attorney-at-law to sell his apartment in Ocho Rios for J\$2.2m. The sale took place and the client received a letter from the attorney-at-law that the sum of J\$2,105,272.41 was due to him from the transaction. The client received a cheque dated 6 June 2005 in that amount from the attorney-at-law. He deposited the cheque in his account and by letter dated 20 June 2005 he was informed that the cheque was returned dishonoured. Up to the date of the complaint, the attorney-at-law had not paid the client all the proceeds of the sale of his apartment. During proceedings before the Committee, the client gave evidence that he informed the attorney-at-law of the dishonoured cheque who then requested time to reimburse the client. The client allowed the attorney-at-law one month to pay the proceeds of the sale, but she merely provided excuses for her continued failure to pay him the proceeds of the sale.
- [60] At the disciplinary hearing before the Committee, counsel for the attorney-at-law informed the Committee that the attorney-at-law had agreed to a structured payment with the client. The client then informed the Committee that he wished to withdraw the complaint against the attorney-at-law. The Committee refused to allow the complaint to be withdrawn and proceeded with the disciplinary hearing. It then heard evidence from both the client and the attorney-at-law. The Committee found, among other things, that: (a) all the undisputed facts had been proven; (b) the attorney-at-law used the proceeds of sale entrusted to her for and on behalf of the client to her own use and benefit or to the benefit of others; (c) the attorney-at-law acted dishonestly in her use of the client’s funds; and (d) the client did not loan the proceeds of the sale to the attorney-at-law. The Committee, therefore, held

that the attorney-at-law breached Canon VII(b(ii) of the Legal Profession (Canons of Professional Ethics) Rules in that she “failed to account to the [client] ... for all the monies in her hands for his account or credit although reasonably required to do so” and that she also breached Canon 1(b) in that by her conduct “she failed to maintain the honour and dignity of the profession and has not abstained from behavior which may tend to discredit the profession of which she is a member”. The attorney-at-law was found guilty of professional misconduct for which she was disbarred from practicing as an Attorney-at-Law in the several courts of the island of Jamaica.

[61] The Court of Appeal of Jamaica, in dealing with the issue of what significance, if any, was there to the agreement between the client and the attorney-at-law to settle the matter, stated that:

45. What difference does it make, that the appellant had agreed to the payment of interest on the outstanding sum to the complainant? It had been disclosed during the hearing that the parties who were represented by their respective attorneys had negotiated to settle the matter. According to Mr. Townsend who appeared at the hearing, the transaction between the appellant and complainant was converted to an interest bearing loan account and that he Mr. Townsend had structured the appellant's practice in order to facilitate the payment schedule. It was at that point of the hearing that the complainant interjected and informed the Committee that he wished to withdraw the complaint. He had also disclosed that the sum owing up to that point was \$750,000.00. The appellant had also informed the Committee that she had repaid the sum of \$1,300,000.00 including interest at 4% per annum which was agreed to in writing.

46. The learned authors of "Cordery on Solicitors" (8 th Edition) have stated at page 322:

"Reparation to the client made by the solicitor during the proceedings is no reason for the court to stay its hand (Re Holmes (1875) 31 LT 730; Re A Solicitor (1877) 36 LT 113) and a matter once brought before the court is not allowed to drop by private arrangement..."

47. The rule that the client's money must be kept different from the attorney's bank account is well-known to all practising attorneys. The appellant herself has acknowledged to the Committee that she knows this. In further answer to the Committee when asked if she was indebted to other clients of hers she said yes. ...

[62] The Court of Appeal of Jamaica in **Scott**, in dismissing the appeal of the attorney-at-law against the sanction imposed by the Committee, noted that the conduct of the attorney-at-law was “inexcusable and unacceptable” and that “the appropriate sanction has to be disbarment”. The Court of Appeal referred to **re A Solicitor** (1959) 103 Sol Jo. 875 where a solicitor was charged before the Disciplinary Committee of the Law Society of England and Wales with, among other things, professional misconduct in using for his own purposes of money received on behalf of his clients. Chief Justice Lord Parker stated:

His Lordship found it unnecessary to go into the details of how the deficiency arose. A cash shortage of this nature inevitably meant that a solicitor had spent a client's money for the purposes other than those of the client. Public confidence in the profession would be shaken if such conduct were tolerated.

[63] The Court of Appeal of Jamaica in **Scott** also referred to **Re Browne** (1972) 19 WIR 1 where the Chief Justice of Barbados held that a solicitor's failure to account for and to pay over amounts received by him from his clients after numerous requests, and unfulfilled promises to pay, with no explanations constituted conduct unbecoming of a solicitor of the Supreme Court. That solicitor was suspended by the court from practice for two (2) years. Chief Justice Douglas (at p. 5) stated that:

I hold that the respondent was under a duty to pay over to his clients the amounts set out in the notice of motion. Further, the uncontroverted facts contained in the affidavits show that he had no valid claim to the money. His failure to pay over after numerous requests, his unfulfilled promises to pay, the absence of any explanation, either to his clients or in this court, all go to show that the only logical inference to be drawn in this case is that the respondent either used the money himself, or if he still has it, he has refused to pay it over.

[64] Having regard to the serious allegations of improper conduct outlined in the pleadings, and all the matters summarized above at paragraphs [2]-[19] above, the court is of the considered opinion that the conduct of the Defendants merits investigation by such a disciplinary tribunal because there exists a strong *prima facie* case that the Defendants have engaged in conduct that constitute professional misconduct. Consequently, the court, on its own motion, hereby

refers to a disciplinary tribunal comprising two (2) High Court Judges of the Eastern Caribbean Supreme Court for a determination of whether the Defendants, Attorneys-at-Law, should be suspended from practice or struck off the Court Roll of Saint Christopher and Nevis for professional misconduct.

Civil Proceedings and the Disciplinary Tribunal

[65] After the court entered its orders in respect of the establishment of the disciplinary tribunal to investigate the conduct of the Defendants to determine whether they should be suspended from practice or struck off the Court Roll of Saint Christopher and Nevis for professional misconduct, Counsel for the Defendants stated that there would be parallel proceedings in the event that the Court of Appeal was to overrule the decision of this court to refuse to set aside the default judgment. This was essentially a disguised plea to stay the court order directing the commencement of proceedings before the disciplinary tribunal.

[66] The first point to note is that judgment has already been entered and determined since 2019. The second is that the Court of Appeal in **Sylvester v Faelleseje, A Danish Foundation** (Civil Appeal No. 4 of 2005 dated 20 June 2006) rejected a similar argument. In **Sylvester**, the appeal was against a decision of a Master: (a) refusing to strike out proceedings in which an aggrieved person sought a rule nisi to issue against the appellant, a barrister, to show cause why he should not be suspended or struck off the roll of barristers and solicitors; (b) refusing to stay those proceedings; and (c) directing that the rule nisi issue to the barrister to show cause. The only difference in this case and the instant one is that in **Sylvester** the “claimant”, and former client, had filed an application in the High Court for the Attorney-at-Law to show cause why he should not be disciplined for professional misconduct whereas in the instant case the court, on its own motion, has decided to refer the matter to a disciplinary tribunal for investigation. This does not in any way undermine the reasoning of the Court of Appeal in **Sylvester** to refuse to stay the proceedings, stating as follows:

[16]. The record of appeal shows that the barrister applied to stay proceedings on the ground that the civil proceedings raise substantially

the same issue as proceedings in the disciplinary proceedings. The application was supported by the affidavit of a clerk in the firm of the solicitors acting for the barrister. It was purely formal and argumentative. There were no personal or particular facts placed before the master that could entitle the barrister to a stay. The affidavit simply stated that the two proceedings relate to the same issue, that the instant proceedings are dependent and inextricably bound up with the issues in the civil claim, that the civil claim is estimated to last at least four months and accordingly a stay of five months was being requested, and that the barrister may be prejudiced if a stay was denied as there was a real likelihood that the civil proceedings may be struck out.

[17] In the written submissions placed before the High Court extensive argument was given to this issue. One premise in the arguments for the barrister was that the mere fact that two sets of proceedings were currently before the court made it oppressive. That is not a proposition that I would accept: no authority was cited that supports it and to my mind there has to be a factual basis to establish oppression.

[18] The related arguments were made that the barrister should not be vexed twice in the same matter and that there was a likelihood of inconsistent verdicts but the point that counsel for the barrister made about the different nature of civil and disciplinary proceedings is relevant here. It has not been shown how disciplinary proceedings, in which the criminal standard of proof applies, can be embarrassed by a possible inconsistent verdict in civil proceedings. Indeed, I can see the possibility of civil proceedings being defeated on certain grounds (which I will not mention so as to avoid altogether any suggestion that I endorse them) while disciplinary proceedings are unaffected by those grounds, so the outcome of one set of proceedings need not hinge on the outcome of the other. It is also to be noted that the submission on behalf of the barrister about not litigating the same issues in two sets of litigation at the same time is misconceived, because it is clear that disciplinary proceedings are not litigation and are not conducted to resolve issues. In this regard, counsel's reference to inconsistent verdicts is also misconceived because a verdict refers to the outcome of civil or criminal proceedings and, as was the foundational point of counsel's submission, the instant proceedings are neither.

[19] Even now there is not advanced any factual basis for the assertion that simultaneous proceedings would be oppressive. It can be accepted as a matter of argument that simultaneous proceedings would be inconvenient and expensive for the barrister but on reflection, probably no more so than they would be for the foundation. In any case, I do not see that inconvenience alone can justify interfering with the master's discretion and it was not argued that it could. I note that in the written submissions on appeal the matter of a stay was not even identified as an issue, although it was the subject of a ground of appeal and was advanced in

oral argument. The short response to the argument is that the master exercised his discretion on the issue and, as is well known, even if this court would have exercised the discretion differently, it will not interfere with the master's exercise of discretion "unless the appellate court is satisfied the judge erred in principle and as a result of this error the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong." That has not been shown and, in my view, this court has no basis upon which to interfere with the master's refusal to stay these proceedings.

- [67] The decision of the Court of Appeal in **Sylvester** is a complete answer to the submission of Counsel for the Defendants referred to above.

Disposition

- [68] For the reasons explained above, I make the following orders:

The Application for an Extension of Time

- (1) The application for an extension of time to file a defence is hereby refused.
- (2) The defence filed by the Defendants on 10 February 2020 is hereby struck off.

The Assessment of Damages

- (3) The hearing of the assessment of damages is set for 19 May 2020 at 1:00 p.m.

The Disciplinary Tribunal

- (4) The whole conduct of the Defendants (as outlined in paragraphs [2]-[19] above) leading to the filing of the claim form in this matter shall be considered by a disciplinary tribunal comprising at least two High Court Judges of the Eastern Caribbean Supreme Court for the purpose of determining whether the Defendants should be suspended from practicing for a specified period or be struck off from the Court Roll, pursuant to section 81 of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act CAP 3.11 of the Revised Laws of Saint Christopher and Nevis.
- (5) There shall be established within 60 days of today's date such a disciplinary tribunal by the Registrar of the High Court, in consultation with the Judicial and Legal Services Commission.
- (6) The Registrar of the High Court shall serve this order on the Secretary of the

Judicial and Legal Services Commission within 14 days of today's date.

- (7) A notice of first hearing of the matter before the disciplinary tribunal shall be given to the Defendants and the Claimant via their respective solicitors on record in this claim.
- (8) At the first hearing, the disciplinary tribunal shall give directions as to the further hearing of the matter, including as to granting any other interested parties, including the Bar Association of Saint Christopher and Nevis, an opportunity to be heard.
- (9) The disciplinary tribunal shall take into account all the circumstances of the Defendants' conduct, such as may be found by the disciplinary tribunal and the degree of responsibility that ought properly to be ascribed to the Defendants.
- (10) The disciplinary tribunal shall be entitled to instruct Counsel to act as amicus to the tribunal, the reasonable cost thereof to be met in the first instance by the public purse of Saint Christopher and Nevis.

[69] At the status hearing, I had given Counsel for the Defendants carriage of the order, however in light of the written ruling of the court it is now unnecessary to include that aspect in the orders outlined at paragraph [68] above.

Eddy D. Ventose
High Court Judge

By the Court

Registrar