

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **BVIHCV2014/0294**

Between

JS Archibald & Co.

Claimant/Respondent

and

Clearlie Todman-Brown

Defendant/Applicant

Before: MASTER Ermin Moise

Appearances:

Ms. Elizabeth Ryan holding for Mrs. Patricia Archibald-Bowers of Counsel for the Claimant
Mr. Jamal Smith of Counsel for the Defendant

**2018: August, 17th (submissions on paper)
December, 5th**

JUDGMENT

[1] **MOISE, M.:** On 31st January, 2018, the claim filed by the respondent was struck out with costs to the applicant. On that date, judgment was also entered in favour of the applicant on her counterclaim in which she claimed, among other things, damages for the alleged professional negligence of the respondent. Despite this, I note that the order of the master dated 31st January, 2018 did not state that damages were to be assessed. In fact, despite noting that the applicant was entitled to judgment on the counterclaim and the reliefs sought, no award of damages was made. The master ordered the respondent to return files and records and all related matters stemming from case number BVIHCV2009/0195. This was part of the relief sought by the applicant in her counterclaim. The applicant has nonetheless filed an application for an assessment of damages. In my view, when the master entered judgment it was open to her at that point to also award damages to be assessed. She did not do so and I am of the view that the court ought not to entertain an application for an assessment of damages in these circumstances and would dismiss the application on that basis alone. However, in the event that I am wrong I have also considered

the evidence and submissions and would decline to award damages for the reasons outlined below.

[2] On 19th November, 2014 the respondent filed an action seeking the sum of \$85,675.95US as damages for legal representation provided to the applicant in case number BVIHCV2009/0195. In that case the applicant claimed damages against Mr. Melvin Rymer for breach of a building contract. That case concluded in a judgment in favour of the applicant in the sum of \$438,650.00US. In response to the present claim against her the applicant filed a defense and counterclaim on 19th December, 2014 in which she pleaded that the respondent was negligent in that he failed and/or refused to place cautions and/or take necessary steps to secure the assets of Mr. Melvin Rymer before, during and after obtaining the high court judgment. She further pleaded that the respondent was negligent in that he failed and/or refused to assist her in approaching the National Bank of the Virgin Islands. As a result of these allegations she claimed the following relief:

- (a) Damages;
- (b) Injunctive Relief directing that the Defendant's files and records be returned to her, or until the files and records are so returned that the claimant continue to handle the appeal from the high court judgment and all related matters stemming from BVIHCV2009/0195;
- (c) Statutory Interest at the rate of 5% per annum pursuant to section 7 of the Judgments Act and/or at such rate and for such period as the court considers just;
- (d) Costs; and
- (e) Such further or other relief as the court thinks fit.

[3] As it relates to BVIHCV2009/0195, judgment was entered in favour of the applicant on 11th May, 2011. She complains that as her counsel and legal representative, no effort was made by the respondent to take the necessary steps to enforce the judgment. However, it is worth noting that Mr. Rymer, who was the defendant in that case, successfully appealed that decision in the court of appeal. At paragraph 5 of her counterclaim, she states that "as a result of the failure to do various things required by the court of appeal on both sides, the matter has been traversed to the next court of appeal sitting in 2015, during the court of appeal case management conference on 9th

September, 2015". These pleadings relate to the fact that none of the parties to the appeal had filed submissions within the requisite time and the court of appeal, on a number of occasions, adjourned the matter to facilitate compliance with the rules and directions prior to proceeding to hear the substance of the appeal.

- [4] From my perusal of the submissions filed by counsel for the applicant on this application for assessment, it would seem that two issues are being raised as it relates to the noncompliance with the rules at the level of the court of appeal. Firstly, it is generally submitted that the respondent was negligent in the manner in which he conducted the appeal. Secondly, it is submitted that the applicant could have benefitted from an application to have the appeal dismissed for Mr. Rymer's own noncompliance. This opportunity was not taken with the result that the appeal was subsequently allowed. In light of this, the applicant submits the following at paragraph 20 of the written submissions filed:

"The defendant was the claimant in the matter to which this claim pertains to ... Therein she obtained a judgment against Melvin Rymer for \$409,150.00. By reason of the professional negligence of the claimant, none of this money was recovered, and this led to Melvin Rymer appealing the judgment. During the course of this appeal, the claimant had several opportunities to have the appeal determined in the Defendant's favour, but failed to even file skeleton arguments, despite making representations that Melvin Rymer's basis of appeal was weak. This resulted in the claimant herself, having to make representations before the court of appeal, including independently filing an affidavit in an attempt to strike out Melvin Rymer's appeal. Moreover, though Melvin Rymer was ultimately successful in his appeal, it was on very shaky grounds, something which was evidenced by the fact that the defendant was granted conditional leave to appeal to her Majesty in Council. Such leave would not have been granted had the defendant not have a real prospect of success in this matter..."

- [5] I wish to make a number of observations relating to these submissions. Firstly, I note that the court of appeal delivered its judgment on the appeal on 14th January, 2016. Despite the fact that this was an oral judgment, it would seem from the digest of decisions that the appeal was determined on the substantive issues arising therein. Whilst it may be true that there was noncompliance on the part

of counsel then on record for the applicant in filing written submissions on time, it appears that the court of appeal granted additional time within which to do so. It is not clear to me from the facts presented as to whether these submissions were filed prior to the hearing of the substantive appeal, but nothing on the record of appeal, inclusive of the reasons provided by the learned judges of that court, suggests that the applicant was not allowed an opportunity to present submissions before the court. In light of this it is difficult to see the circumstances under which the applicant should be granted the damages she seeks on the basis that sufficient steps were not taken to enforce the judgment delivered by the high court in her favour. This judgment was overturned on appeal, not for the failure to comply with any rule or order, but on the substantive merits of the appeal. To award the applicant damages in the sum originally entered in the high court judgment for failure of her counsel to enforce that judgment cannot be justified given that this decision has since been overturned on its merits.

[6] Secondly, counsel for the applicant submits that the fact that conditional leave was granted to the applicant to appeal the decision of the court of appeal to the Privy Council is an indication that the success of the appeal was on shaky grounds. I do not accept this submission as a basis on which to award damages. It would appear that final leave to appeal was not granted due to noncompliance with the law and the court of appeal felt constraint to deny an application for an extension of time to comply with the conditions of the provisional grant due to the expiration of the 90 day period within which to do so. Despite this, it must be noted that the court of appeal's decision, as well as the grant of conditional leave to appeal, were all facts which took place subsequent to the filing of the counterclaim. These do not form part of the pleadings and, in my view, cannot form part of the basis on which the counterclaim was filed, neither can it form the basis upon which to award damages. In any event, I do not agree with the submissions that conditional leave to appeal is a basis for stating that the outcome of the appeal was obtained on shaky grounds. The court of appeal, after assessing the written judgment of the trial judge, determined that the appeal should be allowed. It is not for me to determine at this stage that the judges of that court were likely to have been wrong or that they rendered their decision on shaky grounds.

[7] Thirdly, it is submitted that by failing to file submissions on time at the court of appeal, the applicant lost an opportunity to have the appeal dismissed for Mr. Rymer's own non-compliance. Counsel for

the applicant referred to a number of authorities to support the proposition that the loss of a chance due to professional negligence can form the basis of an award for damages. However, I rather doubt that the circumstances of this case are such that one can determine that the court of appeal would have dismissed Mr. Rymer's appeal in the event that the applicant's submissions were filed within the requisite time. Further, the fact that the court of appeal determined that the appeal should be allowed on the substance of the matter rather than on noncompliance with various rules or directions is sufficient reason to reject this submission. What is clear is that the court of appeal determined that the judgment delivered in the high court was wrong and that the defendant was not entitled to the relief which she sought then. To award the sum of the high court judgment in damages against the applicant's attorneys would be an unjust result in the circumstances of this case.

[8] Lastly, I observe that the applicant has submitted that she had a 90% chance of success and requests that the court grants her damages of up to 90% of the award granted to her in the high court claim. For reasons I have already explained I do not accept this submission. It is unclear to me as to what the 90% chance relates to. She was afforded an opportunity to defend the appeal. In addition to this, the issues relating to the appeal to the Privy Council arose subsequent to the filing of the counterclaim and do not form part of the pleadings. Further, I note that in her counterclaim she merely claims damages with no specific pleading for special damages. To my mind, the damages which she now claims on this assessment are special damages which were not specifically pleaded. I am not satisfied that the facts pleaded in the defence and counterclaim as well as the witness summary and affidavit evidence submitted substantiates a proper claim for the damages which she seeks. I would not venture to speculate as to the reasons the master did not award damages when judgment was entered in favour of the applicant. However, I am not of the view that a sufficient case has been made out for the amount claimed in damages on this application.

[9] In the circumstances I would dismiss the application for assessment of damages and would decline to award any damages to the applicant. Given that the respondent has not participated in these proceedings I would make no order as to costs.

Ermin Moise

Master

**By the Court
Registrar**