

EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2015/0205

IN THE MATTER of a claim for breach or
repudiation of a retainer for legal services

and

IN THE MATTER of the Legal Profession
Act, 2008 of the Laws of the Federation of
St. Kitts and Nevis

BETWEEN:

DELANO F. BART

Claimant

and

[1] CONSTRUCTION TECHNOLOGIES LTD

[2] LINCOLN PEMBERTON

Defendants

Appearances:

Ms. Midge Morton and Ms. Maurisha Robinson for the Claimant

Mr. Glenford Hamilton and Ms. Deidre Williams for the Defendants

.....
2017: October 10; 11;

2018: July 24
.....

JUDGMENT

Introductory

[1] **LANNS, J. [AG]:** The claimant, Delano Bart QC (Mr. Bart QC), sues the defendants, Construction Technologies Ltd. (Contec) and Lincoln Pemberton (Mr. Pemberton), for professional fees for breach of a retainer agreement. Contec denies that it owes Mr. Bart QC any money. It says that Mr. Bart QC has already been paid US\$20,000.00 and he is entitled to no more. Mr. Pemberton

says Mr. Bart QC has no case against him because he is not the directing mind of Contec; he is simply an agent of Contec and thus, the case brought against him should be dismissed. For the reasons discussed below, I conclude Mr. Bart QC is entitled to recover under the retainer agreement in a sum to be set by the court on assessment.

Relevant Background Facts¹

- [2] Mr. Bart QC is an attorney-at-law and one of Her Majesty's counsels, practicing in St. Kitts and Nevis. Contec is a company incorporated under the laws of St. Kitts and Nevis. It is engaged in a variety of business ventures including ready-mix concrete delivery, masonry blocks, equipment related construction rentals, concrete aggregates production, general construction, civil construction, land development and real estate.
- [3] Mr. Pemberton is the Chief Executive Officer (CEO) and Managing Director of Contec. Mr. Bart QC claims that Mr. Pemberton is the directing mind and will of Contec. Mr. Pemberton denies this allegation.
- [4] The statement of claim alleges that in December 2009, Contec and Mr. Pemberton retained Mr. Bart QC to provide legal services in relation to drafting and reviewing of contracts between Contec and Mr. Pemberton and other persons. The contracts to be drafted and/or reviewed were to be relation to three projects, namely:-
- a. The Beacon Heights Development Project with the Social Security Board;
 - b. The Design, Construction and Build-out of the Basseterre West Link Road, and the Design, Construction and Build-out of the Road in the Buckley's Park, Shadwell East, South and West Housing Development for, and with the Government of St. Kitts and Nevis and the National Housing Corporation (NHC).
 - c. The purchase of lands from the Tobias family.
- [5] The retainer agreement was in the form of a letter from Mr. Bart QC to Mr. Pemberton dated 9th December 2009. It was executed by Mr. Bart QC and by Mr. Pemberton on behalf of Contec.

¹ For convenience from here on, I will refer to the defendants interchangeably as 'the defendants,' Contec, or Mr. Pemberton as the case may be.

Apparently, Mr. Bart QC and Mr. Pemberton had met previously in New York and spoke about the projects and the retention of the services of Mr. Bart QC, and thus, the agreement in essence reduced to writing the parties' previous discussions.

[6] The letter reads in pertinent parts:

"Dear Lincoln

Thank you for selecting Delano Bart QC to represent Construction Technologies Ltd (Contec) in connection with various matters relating to Contracts to be entered into by Contec with others but in Particular (1) The Beacon Heights Development with Social Security Board (ii) The Design Construction and Build-out of the Basseterre West Link Road, and the Design Construction and Build-out of the Road in the Buckley's Park, Shadwell East, South and West Housing Developments for the NHC and (iii) the purchase of the lands from the Tobias family."

"Where the St. Kitts Nevis Bar Association has recommended Fees for the work done, that will be the basis of the billing of my fees or any attorney that I engage to assist me. Where the work is not covered by the St. Kitts Nevis Bar Association recommended Fees, my Fees or any Attorney that I engage to assist me will be based on the complexity and/or importance of the matter, skill, expertise and experience required, and time devoted to preparation and representation. The Fees for any Attorney that may assist me and my Fees range from approximately US\$150.00 per hour to over US\$600.00 per hour... "

"As most of the above arrangements will be covered by the St. Kitts Nevis Bar Association recommended Fees, I will Bill in accordance with those Fees unless I'm required to provided (sic) services not covered by those Fees. "

"If upon the submission of my Bills it is necessary to have them or some part of them paid by installments over a period of time, we can come to an arrangement for that. If at that time Agreements cannot be reached, I will reserve the right to determine how the fees should be paid. If Agreement is reached on the payment of the fees but the Agreement is not honoured, I will reserve the right to demand payment of the outstanding fees."

- [7] Mr. Bart QC asserts that in or about January 2010, in furtherance of the retainer agreement, he commenced work on the preparation of the Building Phase Contract for the Beacon Heights Project (the Building Contract). The parties to this contract were the St. Christopher & Nevis Social Security Board and Contec. According to the statement of claim, upon completion of a draft, Mr. Bart QC forwarded the draft (Exhibit "DB2") to the defendants for their review and further instructions. Mr. Pemberton received the draft on behalf of Contec; he did not indicate to Mr. Bart QC whether any amendments were required. However, in a letter dated 16th February 2010, Mr. Pemberton provided Mr. Bart QC with a signed copy of the Building Contract (DB3). Thereafter, Mr. Bart QC sought unsuccessfully to contact the defendants to enquire as to the contract sum and/or the Bills of Quantities needed to compute his fee in accordance with the bar association's recommended fees.
- [8] In relation to the Design, Construction and Build-out of the Basseterre West Link Road, and the Design, Construction and Build-out of the Road in the Buckley's Park, Shadwell East, South and West Housing Development for and with the Government of St. Kitts and Nevis and the NHC, Mr. Bart QC asserts that he prepared a draft of an agreement (DB4) pursuant to instructions received from the defendants. The intended consideration in respect of that agreement was EC\$20,000.000.00. Mr. Bart QC asserts that he forwarded the draft to the defendants on or about 24th November 2009. The defendants did not provide him with an executed copy of that agreement, nor did they advise him whether they pursued the agreement. Notwithstanding the same, Mr. Bart QC claims he is entitled to be paid for the work involved in the preparation of the draft agreement in the sum of EC\$200,000.00, 1% of the intended consideration.
- [9] As regards the purchase of lands from the Tobias family, the statement of claim alleges that in or about 23rd April 2010, in pursuance of instructions from Mr. Pemberton, Mr. Bart QC commenced preparation of an agreement for sale in relation to the sale and purchase of five acres of land situate at Buckley's Estate, at EC\$10.50 per square foot. The intended vendor was Mrs. Myrtle Tobias and the intended purchaser was Crest Hill Residential Estates Ltd.². The statement of claim states that Mr. Bart QC submitted the draft (DB8) to Mr. Pemberton for his further instructions thereon. However, during subsequent discussions Mr. Pemberton indicated that he had changed

² The claimant states that a search of the Company Registry revealed that Crest Hill Residential Estates Ltd. was never incorporated, but Mr. Pemberton represented that he has ostensible authority to give instructions on behalf of that entity.

his mind in relation to the sale. Based on the estimated price of the land, (EC\$2,286,900.00) and the terms of the retainer agreement, Mr. Bart QC produced an invoice for his work on the draft sale and purchase agreement in the sum of EC\$22,869.00 plus 17% Value Added Tax (VAT), bringing the total claim for the draft sale and purchase agreement to \$26,756.73.

- [10] Additionally, the statement of claim alleges that on instructions from Mr. Pemberton, Mr. Bart QC on or about the 24th April 2010, commenced preparation of and completed another agreement for sale and purchase of ten acres of land situate at Buckley's Estate at a price of EC\$4,356,000.00. The intended vendor was Mr. Elbridge St. Clair Tobias, and the intended purchaser was Crest Hill Residential Estates Ltd. After completing the first draft of the agreement, Mr. Bart QC sent a copy thereof to Mr. Pemberton on 24th April 2010. (DB12). Subsequently, Mr. Pemberton indicated to Mr. Bart QC that he had changed his mind about the purchase. In accordance with the terms of the retainer, Mr. Bart QC on the 18th May 2015, billed the defendants for work done in relation to the second draft sale and purchase agreement in the sum of EC\$43,560.00 plus 17% VAT for a total claim of EC\$50,965.20. (DB13). Mr. Bart QC complains that notwithstanding his many requests, the defendants refuse to pay him, causing him to suffer loss and damage.
- [11] It is alleged that in November 2014, Mr. Bart QC wrote a letter to Contec and Mr. Pemberton referencing all the work he had done, and requesting payment in the sum of US\$117,000.00, plus Value Added Tax (VAT) as partial payment for the overall work done by him at the request of Contec and Mr. Pemberton. Attached to that letter was an interim invoice for the said sum of US\$117,000.00. It is said that the invoice was prepared after Mr. Pemberton could not be reached to provide information pertaining to the contract sum and/or the Bills of Quantities. The letter spoke to the many difficulties Mr. Bart QC was encountering in having a sit down with Mr. Pemberton to discuss legal fees.
- [12] In May 2015, Mr. Bart QC sent another letter to Contec and Mr. Pemberton requesting payment of outstanding fees. Contec and Mr. Pemberton acknowledged receipt by affixing a stamp marked "Received" on a copy of the letter.
- [13] On or about the 20th May 2015, Mr. Bart QC wrote to Mr. Glenford Hamilton of Hamilton & Co., counsel for Contec and Mr. Pemberton, outlining the difficulties he was encountering in having his

outstanding fees addressed. Mr. Hamilton responded to the effect that his clients were desirous of settling the fees issue amicably. He asked Mr. Bart QC to provide him with a copy of the 'engagement letter'. Mr. Bart QC complied. Notwithstanding Mr. Bart QC's compliance, which was followed by a demand letter from Mr. Bart QC's legal representatives, Morton Robinson, LP, the indebtedness remains outstanding.

[14] On 29th September 2015, Mr. Bart QC commenced proceedings against the defendants claiming recovery of legal fees in an amount to be decided by the court for work done at the request of the defendants under the retainer agreement. The work allegedly done was in relation to the three projects, referred to in the retainer agreement quoted above.

[15] In relation to the Beacon Heights Development Project, Mr. Bart QC also seeks:

1. An order directing the defendants jointly and severally to provide the Bills of Quantities for the Building Phase Contract for the Beacon Heights Project entered into by the Social Security Board and Contec dated 18th January 2018;
2. And, or in the alternative, a declaration that the Contract Sum on the Building Phase for the Beacon Heights Project is an amount not less than Ten Million East Caribbean Dollars (XCD\$10,000,000.00), and that the legal fees due and owing to Mr. Bart QC as a consequence thereof, is 1% of the said contract in the amount of at least XCD100,000.00.

[16] By way of defence, the defendants deny that Mr. Bart QC played any role in the preparation or execution of the Building Phase Contract of the Beacon Heights Project (the Building Contract). They say the Building Contract was prepared and submitted by counsel for the Social Security Board in advance of the engagement letter between Mr. Bart QC and Contec. The defendants aver that the execution of the Building Contract was done on behalf of Contec without the assistance or advice of counsel. They state that the only time any aspect of the Building Contract was passed to Mr. Bart QC was on the 16th February 2010 when it accompanied a letter sent to Mr.

Bart QC.³ They say further that no instructions were given to Mr. Bart QC regarding the Building Contract prior to the letter of 16th February 2010. They deny that a payment of US\$117,000.00 is due to Mr. Bart QC. The defendants deny that Mr. Bart QC made several attempts to reach them and state that Mr. Bart QC is well aware of the registered office and telephone numbers of Contec and Mr. Pemberton. They say that it was the defendants who had difficulty reaching Mr. Bart QC, especially in relation to updating of assigned projects, as he was often off island on ambassadorial duties and could not be reached for discussion of certain matters that could not be addressed via email. They say further Mr. Bart QC never requested any Bills of Quantities prior to August 2014; that Contec was placed under receivership from about December 2012 (sic) to about March 2012 (sic); and during this time, Mr. Bart QC knew or ought to have known to submit invoices for debts allegedly due to him by Contec, and no such invoices were sent by Mr. Bart QC during the time Contec was in receivership.

- [17] The defendants contend that Mr. Bart QC is the one who is in breach of the retainer agreement. They go on to reemphasize that Mr. Bart QC did not draft the Building Contract and any claim by him for drafting fees in relation to the Building Contract is unreasonable and dishonest.
- [18] In relation to the Road Construction Project, the defendants deny that they gave Mr. Bart QC any instructions to draft any agreement between the government of St. Kitts and Nevis and the NHC and Contec. They also deny that they owe Mr. Bart QC the sum of EC\$200,000.00 for preparation of the alleged draft agreement. They say that what they asked Mr. Bart QC to do was to prepare an outline for the conceptual idea of the 'land-for-roadwork' project which they had discussed with Mr. Bart, QC, and they expected Mr. Bart QC to provide work at billable hours to reflect the day's work he did in outlining a business idea. The defendants further say that in 2012, Mr. Pemberton requested of Mr. Bart QC to prepare a bill to reflect the work he did but he did not do so.
- [19] As regards the purchase of lands from the Tobias family by Crest Hill Residential Estates Ltd, the defendants deny that they gave Mr. Bart QC any instructions to draft sale and purchase agreements. They claim the discussions they had with Mr. Bart QC about the Crest Hill Residential

³ In that letter Ms. Veira Galloway, on behalf of 'Lincoln Pemberton, Managing Director' wrote: "Please see attached a copy of the signed 'Building Phase' Contract for the Beacon Heights Project for your perusal". A copy of the Building Contract accompanied the letter. The exhibited copy on file was marked 'draft'; it bore no one's signature.

Project were not firm instructions of the type that could be acted upon by Mr. Bart QC to prepare any agreement for sale of land.

- [20] As to the purchase of lands of Myrtle Tobias, the defendants say that Mr. Bart QC was instructed to make an offer to Mrs. Tobias to purchase five acres of land at EC\$10.50. Instead, Mr. Bart QC chose to draft an agreement for the sale and purchase of the land. The defendants deny that Mr. Pemberton changed his mind about the sale and purchase of land from Myrtle Tobias. They say that Mrs. Tobias did not accept the offer, and negotiations were still ongoing. The defendants admit that they agreed to compensate Mr. Bart QC for work done in accordance with fees as prescribed by the St Kitts & Nevis Bar Association, but reiterate that Mr. Bart QC was never instructed to prepare an agreement for sale of land; that the sale never happened; that the invoice for work supposedly done on the purported agreement for sale was presented on or about the 15th May 2015, some five years after the offer to purchase fell through.
- [21] In relation to the agreement to purchase lands from Mr. Elbridge St. Clair Tobias, the defendants say they instructed Mr. Bart QC to make an offer to Mr. Tobias to purchase 10 acres of land from him. There was no agreed purchase price. There was an offer, but that offer was rejected, according to the defendants.
- [22] As to the Crest Hill project, the defendants say before 15th May 2015, Mr. Bart QC never invoiced them or made any request for payment for work done on the 'conceptual' Crest Hill Residential Development project. They were under the assumption that they were being billed hourly from their retainer sum of US\$20,000.00, which they had paid Mr. Bart QC on account. The defendants deny that they refused to settle their indebtedness. They say the invoices presented by Mr. Bart QC are misleading about the type and quantity of the work Mr. Bart QC actually did.
- [23] In the concluding paragraphs of the defence, the defendants put Mr. Bart QC to strict proof that he suffered loss and damage, and they urge the court to deny his claim.⁴

⁴ The defendants also counterclaimed for an accounting of all monies received by Mr. Bart QC from Contec, together with billing for work done in accordance with the retainer agreement. On the 8th December 2015, on an application brought by Mr. Bart QC, the counterclaim was struck by the master. The master went on to make a mediation referral order but the parties failed to reach agreement.

- [24] In his reply to the defence, Mr. Bart QC denied most of the averments in said defence. He maintained that Mr. Pemberton did instruct him to draft the Building Contract. He explained, however, that when Mr. Pemberton instructed him, he (Mr. Pemberton) brought with him a precedent of a contract between Contec and Frigate Bay Development. Mr. Bart QC asserts that before he could start drafting the contract, Mr. Pemberton came back with another precedent: this time a generic building contract which he (Mr. Bart QC) used as a guide in beginning to draft the Building Contract. During the time Mr. Bart QC was actually drafting the Building Contract, Mr. Pemberton presented him with a Social Security draft contract to use. Mr. Bart QC stated that he reviewed, re-worked and amended the document (the Social Security draft) and presented it via email to the defendants as the first and second review of the draft of the Building Contract. Mr. Bart QC states that he did not hear anything from the defendants regarding the draft he emailed to Mr. Pemberton, until the defendants on the 16th February 2010, sent him an executed version of the Building Contract, as reviewed and edited by him (Mr. Bart QC).
- [25] As to the receivership issue raised in the defence, Mr. Bart QC says he was not aware, nor ought to have known, that Contec was placed under court appointed receivership.
- [26] Mr. Bart QC reiterated that he did receive instructions from the defendants to prepare sales and purchase agreements in respect of five acres of land from Myrtle Tobias, and ten acres of land from Elridge Tobias. To bolster his assertion that he did receive such instructions, Mr. Bart QC pointed to the letter of engagement, as well as to email exchanges between Mr. Bart QC and Mr. Pemberton and/or his (Mr. Bart QC's) secretary Knicolia Huggins regarding instructions from the defendants to prepare, in particular, an agreement for the sale and purchase of ten acres of land from Mr. Tobias.

The Issues

- [27] The issues which arise for the court's determination may be summarised as follows:
- (1) Did a retainer agreement exist between Mr. Bart QC and both defendants or only between Mr. Bart QC and Contec?
 - (2) Did Mr. Bart QC receive instructions in respect of the retainer agreement?

- (3) If so, did Mr. Bart QC perform his duties in accordance with the instructions received?
- (4) If so, what are the legal fees owed under the retainer agreement for Mr. Bart QC's services?

[28] For the reasons discussed below, my findings and conclusions in relation to each of those issues are summarised as follows:

- (1) A retainer agreement dated 9th December 2009 existed between Mr. Bart QC and Contec only. There is no sufficient reason or explanation why Mr. Pemberton should be sued in his personal capacity under a written agreement which was expressed to be entered into on behalf of Contec.
- (2) Mr. Bart QC received instructions from Mr. Pemberton on behalf of Contec as to the work to be done pursuant to the retainer agreement in respect of the three named projects.
- (3) Mr. Bart QC complied with the instructions received from Mr. Pemberton.
- (4) Mr. Bart QC is entitled to recover, and Contec is obliged to pay legal fees in an amount to be decided by the court on assessment.

The Evidence

[29] At trial, I heard evidence over two days from (1) Mr. Bart QC; (2) Ms. Knicolia Huggins, a paralegal at the law firm of Dublin and Johnson; (3) Mr. Stanley Franks, Managing Consultant with Contec; (4) Mr. Halva Hendrickson, former Chairman of the Social Security Board; and (5) Mr. Lincoln Pemberton, CEO and Managing Director of Contec. I have also had the benefit of seeing and hearing the parties being cross-examined upon their evidence in chief, their amplification and their comments on the statements of other witnesses in the case.

[30] At one point, Mr. Hamilton sought to introduce into evidence the entire witness statement of Mr. Stanley Franks as his evidence in chief. The witness statement included statements pertaining to certain documents allegedly contained in a file which Mr. Franks said he gave to Mr. Bart QC for his attention, but which Mr. Bart QC was withholding. Learned counsel Ms. Morton objected to this evidence, on the ground of irrelevance. The objection was upheld. Accordingly, portions of Mr.

Franks' witness statement have been struck, except for his evidence that Mr. Bart QC told him that he was trying to get in touch with Mr. Pemberton to discuss a matter, and that Mr. Bart QC told Mr. Franks he was not giving up the files until he discussed the matter with Mr. Pemberton.

[31] Additionally, without objection by, and with the concurrence of learned counsel Mr. Hamilton, portions of paragraphs 18 and 21 of the witness statement of Mr. Pemberton were also struck on the ground of inadmissible hearsay.

[32] As to the evidence of Mr. Hendrickson, during amplification, counsel Ms. Williams sought to tender into evidence unsigned Minutes of a Meeting of the Beacon Heights Committee purportedly held on 5th May 2009, in an attempt to show, from those Minutes that the original draft contract was prepared by Hamilton & Co. Ms. Morton objected on the ground of inadmissibility. The objection was upheld.⁵

[33] Counsel on both sides, in their written submissions, referred to various aspects of the evidence and they presented authorities on certain aspects of their case although no authorities were cited or presented on the issue as to quantum recoverable where, as in this case, only one of the projects came to fruition; where, after completing two draft sale and purchase agreements, Mr. Bart QC was told not to proceed further in relation to the agreements for sale and purchase of the Tobias lands.

Whether a Binding Retainer Agreement Existed Between Mr. Bart QC and Both Defendants?

[34] Claimant's counsel Ms. Morton in her written submissions contended that the parties to the agreement were Mr. Bart QC and Contec and Mr. Pemberton. Defendants' counsel Ms. Williams took the position that Mr. Pemberton was not a party to the retainer agreement in his personal capacity, emphasizing the agreement was signed by and between Mr. Bart QC and Contec. The evidence discloses that the retainer agreement dated 9th December 2009 (DB4) was written by Mr. Bart QC, and executed by Mr. Pemberton 'on behalf of' Contec' – not in his personal capacity. In the agreement, Mr. Bart QC thanked Mr. Pemberton for "selecting Delano Bart QC to represent

⁵ Counsel made the point that the document (Minutes) which counsel is seeking to have tendered in evidence is the property of the Social Security Board who is not a party to the proceedings. Further, counsel pointed out that Mr. Hendrickson is no longer the Chairman of the Social Security Board; he was not the maker of the document which he is seeking to tender in evidence, so there is no basis for him to rely on the document.

Construction Technologies Ltd. (Contec) in connection with various matters relating to Contracts to be entered into by Contec with others.”

- [35] At paragraph 33 of his witness statement, Mr. Pemberton states in essence that it was Contec who engaged Mr. Bart QC. This is inconsistent, however, with the averment in the defence where the defendants state that they admit paragraph 4 of the statement of claim. Paragraph 4 alleges: “On or about 9th December 2009, the Defendants⁶ engaged the services of the Claimant to act as their attorney-at-law in relation to ...”. To develop her point that both Contec and Mr. Pemberton were parties to the agreement, learned counsel Ms. Morton also pointed to the testimony given by Mr. Pemberton during amplification and cross examination. The following exchanges took place:

Ms. Morton: Refer to the Agreement. When you say ‘your understanding’ to whom does ‘your’ refer?

Mr. Pemberton: ‘Your’ would be referring to Contec.

Ms. Morton: So the retainer would not have had anything to do with any other individual but Contec

Mr. Pemberton: Yes

Ms. Morton: When retainer says ‘our representation’ who is ‘our’ referring to?

Mr. Pemberton: Myself and Mr. Bart on behalf of Contec

- [36] The parties are bound by their contract. Although it is for the court to interpret the contract, the court has no authority to rewrite the contract to set a meaning other than the plain literal meaning. Accordingly, from an objective standpoint, the words, terms and conditions of ‘our representation’ in the last paragraph of the retainer agreement can only have meant the terms and conditions under which Mr. Bart QC and any attorneys assisting him would be representing Contec. I do not see it as meaning representation by both Mr. Bart and Mr. Pemberton on behalf of Contec, as Mr. Pemberton apparently understood it. But even if it could be understood that way, to my mind,

⁶ Plural

nothing turns on that understanding in the light of the signatories to the agreement, and the representative capacity in which Mr. Pemberton signed the retainer agreement.

[37] During amplification, Mr. Pemberton gave the impression that Mr. Bart QC was engaged by and/or was going to be paid by Crest Hill Residential Estates and or Contec DT. It is apparent that an entity which was to be called Crest Hill Residential Estates Ltd was to be the vehicle through which the lands of the Tobias family were to be purchased. But neither Crest Hill Residential Estates Ltd or Contec DT are specifically featured in the retainer agreement. Mr. Bart QC was engaged by Contec, not Crest Hill Residential Estates Ltd or Contec DT.

[38] In the foregoing premises, I am of the opinion that the agreement was made between Mr. Bart QC and Contec. Therefore, it was not necessary for Mr. Pemberton to be a party to the proceedings.⁷ Accordingly, this judgment proceeds on the footing that whatever instructions were given to Mr. Bart QC by Mr. Pemberton, they were given on behalf of Contec. I turn now to the defendants' principal contention that Mr. Bart QC was not involved in the Building Contract and that Mr. Pemberton gave no instructions to Mr. Bart QC to draft any sale and purchase agreements.

Did Mr. Bart QC Receive Instructions from Mr. Pemberton for Work to be done Under the Retainer Agreement; and if so did he Carry out Those Instructions?

a. The Building Contract

[39] Mr. Bart QC gave evidence that he received instructions from the 'defendants' to draft a building contract which he did. He acknowledged that he was given three drafts, on different dates, to use, the last of which was a draft contract between the Social Security Board and Contec, said to be provided by the Social Security Board. During cross examination, Mr. Bart QC maintained that he was given firm instructions by Mr. Pemberton to draft a building contract. Mr. Pemberton gave evidence that he discussed certain matters with Mr. Bart QC in respect of the Beacon Heights Project, and outlined to Mr. Bart QC the status of the existing agreements in relation to the Building Phase Contracts, and the disadvantaged position in which Contec stood in relation to the said existing draft contracts. For example, Contec was not comfortable with certain provisions in the

⁷ No application was made at the case management stage to remove Mr. Pemberton as a party to the proceedings. Under CPR 19.3 the court may remove a party on or without an application. CPR 8.5 states that a claim will not fail because a person was added as a party to proceedings who should not have been added. This is to be read in conjunction with CPR19.3 which gives the court discretion to remove a party on or without an application.

existing draft contracts and required someone to sit in a meeting to represent Contec to discuss its concerns. Mr. Pemberton in cross examination stated that he had a conversation with Mr. Bart QC, but said he gave no instructions to draft a contract.

[40] From the evidence, I find that Mr. Pemberton initially instructed Mr. Bart QC to draft a Building Contract, and provided Mr. Bart QC with two precedents for him to use. Why else would Mr. Pemberton make the drafts available to Mr. Bart QC? It must be in furtherance of instructions pertaining to the Beacon Heights Project referred to in the retainer agreement to which the Building Contract is linked. I find that while Mr. Bart QC was in the process of drafting the contract, Mr. Pemberton provided Mr. Bart QC with a draft building contract prepared by the Social Security Board for this project. In furtherance of the retainer agreement and in furtherance of instructions, Mr. Bart QC reviewed the Social Security draft and submitted it to Mr. Pemberton and Contec with the suggested amendments, some of which were utilised in the executed contract.

(b) Did Mr. Bart QC Prepare or Create the Building Contract?

[41] Mr. Hendrickson gave evidence that the Building Contract was prepared by Hamilton & Co. Mr. Bart QC in his reply to the defence and in his witness statement stated that while he was in the process of drafting the contract, using the two precedents already provided by Mr. Pemberton, Mr. Pemberton provided him with a draft building contract between Social Security and Contec. However, in furtherance of the retainer agreement and in furtherance of Mr. Pemberton's instructions, Mr. Bart QC reviewed and re-worked the Social Security draft, by making additions and deleting portions of it. He then submitted it to Mr. Pemberton and Contec.

[42] The evidence discloses that subsequently, Mr. Pemberton sent Mr. Bart QC a copy of the executed document, whereupon he (Mr. Bart QC) noted that while some of the amendments he made were not included in the executed contract, others were included. During the course of amplification, Mr. Bart QC painstakingly pointed out to the court the provisions in the executed contract which he amended, and the differences in the draft contract that he re-worked and the executed contract. In fact, Mr. Pemberton in cross-examination admitted that Mr. Bart QC made amendments to the draft agreement, but not all the amendments were accepted by the Social Security Board.

[43] It cannot be said, and I do not accept the evidence of Mr. Pemberton, or the submissions of counsel for Contec, that Mr. Bart QC did not work on the Building Contract. The evidence which I

accept is that Mr. Bart QC reviewed the Social Security draft contract, and based on the concerns of Contec as expressed by Mr. Pemberton, he vetted it, and reproduced it with the amendments, then forwarded it to Mr. Pemberton, who in turn attended a meeting with members of the Beacon Heights Sub-committee held on or about 16th December 2009, where (according to Mr. Pemberton) the agreement was finalized and executed.

- [44] A perusal of the contract on file shows that it was made between 'THE GOVERNMENT OF ST KITTS AND NEVIS; The NATIONAL HOUSING CORPORATION AND CONSTRUCTION TECHNOLOGIES LTD, also referred to as "CONTEC D.T.". It appears that the signatories to the agreement were Dr. Denzil Douglas, then Prime Minister, Mr. Calvin Esdaille, of NHC, and Mr. Lincoln Pemberton as Chairman of Contec DT. Thereafter, Mr. Pemberton sent a copy of the executed contract to Mr. Bart QC, who then sought to have a sit down with Mr. Pemberton to discuss fees payable to him for the work he did on the Building Contract. I find that certain areas of the draft contract were substantially improved, for example, the provisions concerning 191 units. It is accepted that when Mr. Bart QC was given the draft of the original contract, there was no provision in it for 191 units.⁸ It was suggested to Mr. Bart QC in cross-examination that the changes he made to the draft contract did not change the gist of the original contract. Mr. Bart responded thus: "When it came to me it did not contain 191 units so that is a substantial change; secondly, in so far as it was a building phase contract; it was substantially improved. I reworked all sections of it." I believe him. There was no challenge to this response. It is to be noted, curiously, that apart from Mr. Hendrickson's mere say so, no evidence was led that the original draft was prepared or created by Hamilton & Co. or by Mr. Hamilton himself. Mr. Hamilton was lead counsel at trial for the defendants. He did not give a witness statement in this matter. Instead, he simply suggested to Mr. Bart QC that he (Mr. Bart QC) did not prepare the executed Building Contract. Mr. Bart QC's response was: "That cannot be right. The defendant provided me with a Social Security draft for me to use and I reworked it. A draft came to me and I reworked it and that is what I sent off; so the reference to building contract must be the reworked building contract." I am entirely in agreement with him.

(c) Did Mr. Bart QC Prepare an Agreement in Respect of The West Basseterre Link Road in Accordance With Instructions Received.

⁸ Apparently only 14 units have been built so far, and Contec did not build all of them.

[45] Exhibit DB9 is a letter dated 19th November 2009 from Mr. Pemberton, as Managing Director of Contec, to Mr. Bart QC. The letter reads in pertinent parts as follows:

“Re: Proposal to execute Shadwell to West Basseterre infrastructure project

Please see attached documents including a draft agreement, to be used to aid in the construction of the Memorandum of Understanding (MOU) for the above stated.

Some of the keys (sic) areas we would like to highlight are:

1. DEVELOPER --- Construction Technologies Development and Trading Ltd
(CONTEC D.T).
2. CLIENT --- The Government of St. Christopher & Nevis
3. PROJECT --- Phase 1 – Link Road and Buckley’s Park
 - i. Commence Date: 5th December 2009
 - ii. Value: XCD \$11.5 M
 - iii. Terms: Payment on 20 acres of land at Olivees at \$8.00 per square ft. (7M – Land; 4.5 M to be paid within 90 days in 3 installments at 1.5 M each)Phase II -- Shadwell East, Shadwell West, Shadwell South
 - i. Commence Date: 5th December 2009
 - ii. Value: XCD\$ 8.5 M
 - iii. Terms; 30% on land transfers to be allocated to be negotiated

4. CONSIDERATION: -- Total cost project valued at XD 20M
Please note that the MOU seeks to accomplish the following:

All designs and construction implementation must be carried out by the DEVELOPER CONTEC DT

Other areas may include:

CLIENT bares (sic) of all land transfers and the project must be exempted from all government duties and tax etc.

...
Lincoln Pemberton
Managing Director”

- [46] By the above email, Mr. Bart QC is seeking to prove that he received instructions from Mr. Pemberton on behalf of Contec to prepare an MOU for the Link Road. However, it is apparent that it was an agreement, not an MOU, that was prepared. A copy of the agreement is exhibited as DB8. No MOU is exhibited. It appears that the draft agreement was intended to serve as both an agreement and a binding MOU, as the key areas highlighted in the letter to Mr. Bart QC to be addressed in the MOU were incorporated in the draft agreement produced by Mr. Bart QC. Indeed, Mr. Bart QC, commenting on Mr. Pemberton’s statement that the Link Road was just a concept which he discussed with Mr. Bart, pointed to the letter quoted above and explained that letter was the skeleton of an MOU but Mr. Pemberton wanted much more than that, hence the reason Mr. Pemberton provided Mr. Bart QC with a draft agreement and Mr. Bart QC drafted an agreement and presented it to Mr. Pemberton.
- [47] Counsel for the defendants did not, in their written closing submissions, dispute that Mr. Bart QC drafted an agreement in relation to the Link Road. Rather, counsel sought to submit that all and any work done by Mr. Bart QC was done on or before the 24th November 2009 prior to the execution of the retainer agreement and thus, does not fall within the ambit of the retainer agreement. That was not their case. Counsel further submitted that Mr. Bart QC was instructed to draft a MOU, and instead of following instructions, Mr. Bart QC drafted an agreement which was not the same thing as a MOU. Although counsel posited that Mr. Bart QC did not adhere to instructions; that the work he did on the Link Road was done outside the retainer agreement, counsel still took the view that any claim regarding work done on the Link Road by Mr. Bart QC must be on a quantum meruit basis.
- [48] I accept Mr. Bart QC’s explanation about how he came to draft an agreement instead of a separate MOU, and I find that the draft agreement that he produced in respect of the Link Road was consistent with instructions received from Mr. Pemberton on behalf of Contec. Counsel’s submissions—that the work done by Mr. Bart QC on the Link Road did not fall within the retainer—cannot be regarded as evidence. Moreover, there was no evidence given at trial that the work Mr.

Bart QC allegedly did on the Link Road was done outside the retainer agreement and or before the retainer agreement was executed.

(d) Did Mr. Bart QC Prepare an Agreement for the Sale and Purchase of Lands from Myrtle Tobias and from Elridge Tobias in Accordance With Instructions Received?

- [49] The parties dispute whether Mr. Bart QC was instructed to draft a sale and purchase agreement in respect of lands owned independently by Mr. and Mrs. Tobias. Mr. Bart QC claims that shortly before 23rd April 2010, on instructions received from Mr. Pemberton, he began preparing agreements for sale of 5 acres of land from Myrtle Tobias to Crest Hill Residential Estates Ltd. and 10 acres of land from Elridge Tobias to Crest Hill Residential Estates Ltd. After Mr. Bart QC had completed the first drafts, Mr. Pemberton changed his mind. Mr. Bart QC repeated these averments in his witness statement. In cross-examination Mr. Bart QC was asked what he did in relation to the Tobias lands and he responded thus: "My instructions were to draft the agreements." Mr. Hamilton then asked whether the agreements were proposals. Mr. Bart QC replied that they were offers of \$10.50 per square foot but the Tobiases wanted \$12.50.
- [50] In their defence, the defendants deny that Mr. Bart QC was instructed to prepare any draft agreement. They admit, however, that offers were made, but the Tobiases did not accept the offers. At paragraph 24 of his witness statement, Mr. Pemberton states in essence that he had permission to give instructions to Mr. Bart QC to draft a sale and purchase agreement for the purchase of Mr. Tobias' land: "In March 2010, I met and suggested to our Financial consultant, Mr. Hugh Pinard that we referred (sic) the legal aspects of the overall proposal with respect to the preparation of the draft sales and purchase agreement with Elridge Tobias, and he replied that he knew Mr. Bart very well and had no objection to the idea."
- [51] In his witness statement, paragraph 28, Mr. Pemberton stated as follows: "On behalf of Construction Technologies and our potential joint venture partners, I called and spoke with Shelly Tobias for confirmation and she indicated to me that unless we accepted the \$12.50 price they were not interested in selling their property. At that point, our Office Administrative Assistant informed Mr. Bart QC that there was to be no further action as neither Elridge nor Myrtle agreed to sell the land needed to move the proposal forward."

[52] Interestingly, in cross-examination, learned counsel Ms. Morton asked Mr. Pemberton what were his instructions to Mr. Bart QC in relation to the Tobias lands, and Mr. Pemberton replied thus: “To prepare a draft sale and purchase agreement.” The next question was “And was it done.” Mr Pemberton answered ‘Yes’. First, there is a denial, then an admission. These inconsistencies and contradictions cast doubt on the credibility of Mr. Pemberton and the soundness of the case for the defendants in relation to the issue of the sale and purchase agreements. Where there are inconsistencies and contradictions, the judge must decide what weight is to be given to the evidence.

[53] Accordingly, I find, based on the evidence, including Mr. Pemberton’s admission, that Mr. Pemberton gave instructions to Mr. Bart QC, on behalf of Contec, to draft agreements for the sale and purchase of lands from Myrtle and Elridge Tobias, and Mr. Bart QC carried out those instructions.

Whether Mr. Bart QC is Entitled to Recover Legal Fees as Invoiced for Work Done as per Instructions Given by Mr. Pemberton, in an Amount to be Decided by the Court on Assessment

[54] Mr. Bart QC and Contec agreed that where the work done is covered by the St. Kitts Nevis Bar Association recommended scale of fees, those fees would form the basis of his billing. It was also agreed that where the work is not covered by the St. Kitts and Nevis Bar Association recommended scale of fees, the fees will be determined based on certain stated factors, namely, complexity, skill, expertise and experience. The Bar Association’s scale of fees recommends that in relation to agreements involving real estate, the minimum that an attorney can charge is 1% of the consideration. Mr. Bart QC submitted invoices for work done as instructed pursuant to the items in the retainer agreement. He admitted that the sum of US\$117,000.00 was an interim figure claimed in order to encourage the defendants to sit down to discuss fees. There was no doubt that some of the projects fell through and did not come to fruition. Additionally, the evidence discloses that the sum of US\$117,000.00 was charged pending receipt of the Bills of Quantities, or the disclosure of the contract sum, neither of which was forthcoming.

[55] Counsel for the defendants submits that Mr. Bart QC’s claims regarding the Link Road must fail because his work was done outside of the retainer. Counsel submitted that Mr. Bart QC would

only be entitled to a quantum meruit and, since none was pleaded, Mr. Bart QC's claim in respect of the Link Road must fail.

[56] As regards the purchase of lands from the Tobias family, counsel for the defendants submitted that the Bar Association scale of fees contemplates completed work, and the draft sale agreements prepared by Mr. Bart QC were not finalized, and never 'graduated' to completion because the deal fell through. Accordingly, submitted counsel, there was no consideration upon which Mr. Bart QC could base his fee as claimed.

[57] As regards the Building Contract, counsel for the defendants pointed to the viva voce evidence of Mr. Bart QC where he admitted that he had no basis on which to quantify the interim figure of US\$117,000.00; that he only threw it out to get the defendants to the bargaining table.

[58] Defendants' counsel further submitted that the type of work carried out by Mr. Bart QC under the Building Contract cannot be considered a "Building Agreement" under the Bar Association scale of fees, and , in addition, the designated guidelines for building agreements is half of one percent of the value of the agreement. Counsel further submitted that the Building Contract does not speak to a stated consideration at the building phase. It is therefore erroneous, submitted counsel, to attempt to ascribe a value to the Building Phase Contract.

[59] It is clear to me that although Mr. Bart QC is entitled to recover his legal fees for work done, the amount to be recovered cannot be determined with exactitude, and that directions for an assessment will be required.

Other Issues Related to Damages

(a) VAT Issue

[60] In relation to the VAT issue, the gist of the defendants' submission is that VAT has no relevance to the invoices, because VAT did not come into being until 10th August 2010; so VAT should not be charged for work done prior to the coming into being of VAT. Counsel Ms. Morton had a differing view. Ms. Morton submits that notwithstanding the services were carried out prior to the coming into force of VAT, and notwithstanding the contract was concluded prior to the coming into being of VAT, Mr. Bart QC is still entitled to recover 17% VAT on invoices. During cross examination on

this issue, Mr. Bart QC said that he was not prepared to argue that point, but that he would be willing to concede the point if it was raised in negotiations.

(b) Bills of Quantities Issue: Whether the Defendants Should be Required to Deliver up the Bills of Quantities to Facilitate the Determination of the Contract Sum in Respect of the Building Contract, and Ultimately the Assessment Loss and or Damages Suffered by Mr. Bart QC.

[61] The defendants in their defence denied that Mr. Bart QC made any request for Bills of Quantities. The documentary evidence destroys that aspect of the defence. The evidence shows that as early as 16th December 2009, Mr. Bart QC, by email, requested the document from Mr. Pemberton. Moreover, the documentary evidence reveals that in November 2015, Mr. Bart QC applied unsuccessfully to the court (Master) for an order for specific disclosure of the Bills of Quantities to obtain information pertaining to the contract sum. Mr. Pemberton swore to an affidavit in opposition to the application. In it, he deposed that neither he nor Contec had any information at all in relation to the contract sum for the Beacon Heights Project. He deposed that whatever copies of documents pertaining to the Building Contract exist, those copies are no longer in the defendants' possession, and they do not know where to locate a copy. Curiously, Mr. Hendrickson, a witness for the defendants, admitted in cross-examination that as Chairman, he had access to every document including the executed contract. But he was not sure if he had the Bills of Quantities in his possession. However, when pressed by counsel Ms. Morton, Mr. Pemberton admitted that the Bill of Quantities was a part of the contract and he has a copy in his possession. It is my view that Mr. Pemberton was not being forthright with the court in relation to the Bills of Quantities. He seemed to have suppressed information about the contract sum and the Bills of Quantities, knowing fully well the terms of the retainer agreement in respect of billing on a percentage basis. The court is of the opinion that Mr. Bart QC is entitled to an order directing that a copy of the Bills of Quantities be delivered to counsel for Mr. Bart QC to facilitate possible assessment.

(c) The Quantum Meruit Issue

[62] Counsel for the defendants seem to be suggesting that in light of the fact that only one of the projects came to fruition, Mr. Bart QC is only entitled to a quantum meruit, and since he failed to plead a claim for quantum meruit, he is not entitled to any relief in that regard. No authority was cited for that submission. Even if Mr. Bart QC is entitled to recover fees on a quantum meruit

basis, the failure to plead quantum meruit does not mean that he cannot obtain an amount to be decided by the court.

What Quantum of Fees is Mr. Bart QC Entitled to Recover?

[63] In my judgment, there is insufficient information before the court to definitively determine the amount of fees that Mr. Bart QC is entitled to recover. In the first place, without the Bills of Quantities, the court cannot determine the value of the Building Contract. Ms. Morton suggested that the court consider the evidence given by Mr. Pemberton during cross-examination that the estimated cost of each unit would be between \$270,000.00 and \$1,140,000.00. Based on information and the estimate elicited from Mr. Pemberton in cross-examination, Ms. Morton asked the court to find that the estimated contract sum is 'no less than' \$143,250,000.00. Based on that sum and the retainer agreement, counsel submitted that Mr. Bart QC is entitled to \$1,432,500.00, but he will be required to give credit for the US\$20,000.00 which he received on account. When that is considered, Mr. Bart QC is entitled to \$1,379,500.00 on the Building Phase contract, submitted Ms. Morton.

[64] The court does not agree that it should proceed to determine quantum in the way suggested by counsel. Rather, the court is of the view that it should only determine liability at this time. During the hearing, it emerged from Mr. Bart QC himself that some of the fees claimed were simply plucked from the air as the limitation period was near and he was unable to meet with Mr. Pemberton to discuss, and probably reconsider the fees, especially in light of the fact that only one of the projects came to fruition. This is not to say that this matters, because the work he was instructed to do was performed. The Legal Profession Act provides that an attorney-at-law may sue on an agreement entered into relating to remuneration. However, I consider that the best approach would be for an assessment to take place.

Conclusion

[65] Based on the evidence, I conclude that a retainer agreement for remuneration on a percentage basis existed between Mr. Bart QC and Contec; that the agreement was signed by Mr. Pemberton on behalf of Contec; that in pursuance of the agreement, Mr. Pemberton gave Mr. Bart QC instructions pertaining to the projects specified in the retainer agreement; that Mr. Bart QC

performed the duties he was instructed to undertake; that he presented invoices in respect of the work undertaken pursuant to the instructions received and in accordance with the retainer agreement; that some of the invoices were based on estimates; that Contec has not settled the invoices; that Mr. Bart QC is entitled to recover fees for work done, including a set off of Contec's US\$20,000 payment; that there is insufficient information before the court to determine what sums Mr. Bart QC should recover; that Contec ought to disclose information relevant to the assessment of amounts which Mr. Bart QC should recover. There will, therefore, be judgment for the claimant against Contec in an amount to be decided by the court on assessment.

[66] And it is ordered that:

[1] Judgment be and is hereby entered for the claimant against Contec in an amount to be decided by the court on assessment.

[2] The application for assessment shall be made within 30 days hereof.

[3] To facilitate the assessment, and in as much as Mr. Hendrickson has given evidence that the Bills of Quantities was annexed to the executed contract which is in his possession, Contec, through Mr. Pemberton, is required to provide to counsel for the claimant within 14 days of delivery of a sealed copy of this judgment, an executed certified copy of the Building Contract together with the Bills of Quantities for the said Building Contract between the Social Security Board and Contec dated 18th December 2010. If the executed building contract and/or the Bills of Quantities are unavailable, then the court hearing the assessment may consider the estimated price for each of the 191 units as stated by Mr. Pemberton during cross-examination.

[4] The claimant shall have his costs as prescribed under CPR 65.5 Appendices B and C, (as amended) unless otherwise agreed.

[67] I am grateful for the assistance of all counsel involved in this matter.

[68] Last, but by no means least, I think an apology is in order. I completed hearing on the 11th October 2017. Closing submissions were filed on 26th and 27th October 2017. I intended to deliver the

judgment as early as possible (within 3 months) but other pressing work commitments and other court related matters and court vacations intervened. Those commitments are not meant to be an excuse for the delay. The case seems to be novel in this jurisdiction. Neither counsel has provided me with any authority which is on all fours with the facts of, and/or issues which have arisen in this case.

[69] I do apologise for the delay in handing down this judgment.

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar