[2016] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 6/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**ADOLPHY DeCORDOVA SAMUELS**	**1ST APPELLANT**
AND	**EUGENNIE ADASSA SAMUELS**	**2ND APPELLANT**
AND	**COURTNEY LIVINGSTON SAMUELS**	**3RD APPELLANT**
AND	**LORAINE VINETTE SAMUELS**	**4TH APPELLANT**
AND	**CLOUGH LONG & CO**	**RESPONDENT**

Leonard Green and Miss Sylvan Edwards instructed by Chen Green & Co for the appellants

Maurice Long and Lawrence Philpotts-Brown instructed by Clough Long & Co for the respondent

20, 21 January and 13 May 2016

PHILLIPS JA (Dissenting in part)

[1] This is an appeal from the decision of King J made on 6 February 2014 refusing the appellants' application filed on 24 April 2013 to strike out claim no HCV 00999 of 2013 brought by the respondent by way of an "Attorneys-at-Law and Purchaser's Bill of Costs" to recover costs for work done by them pursuant to the agreement for sale between the appellants and the respondent's client and for costs relating to the proceedings.

Background facts

[2] The appellants entered into an agreement for sale dated 5 November 2009 with a company, Ked Investments Ltd in relation to property situated at New Hope in the parish of Westmoreland. In this transaction the appellants were represented by M N Hamaty & Company, attorneys-at-law, and the respondent represented the vendor Ked Investments Limited. The respondent had carriage of sale, but at no time were the appellants, clients of the respondent.

[3] The dispute between the parties was in relation to certain sums claimed by the respondent to be due from the appellants. These sums related to alleged charges for work done pursuant to the agreement for sale and to which the appellants had agreed to contribute. There were other sums agreed to be paid which had been duly paid. In exchange of correspondence between the appellants' attorneys and the respondent, the parties had set out their respective positions, however, the issues remained unresolved. As a result the respondent filed a document in the Supreme Court on 22 February 2013 which was described as "Attorneys-at-Law and Purchasers' Bill of Costs" to recover the sums claimed, this was assigned claim no "2013 HCV 00999". The appellants filed an acknowledgment of service on 2 April 2013 but did not file a defence. The appellants did not file any points of dispute in respect of the costs claimed and the respondent therefore, on 17 April 2013, obtained a default costs certificate utilizing the procedure set out in part 65.21 of the Civil Procedure Rules, 2002 (CPR).

[4] The appellants responded by filing an application to strike out the claim on 24 April 2013 on the grounds that (i) the respondent had failed to comply with the rules

set out under part 8 and part 65 of the CPR; (ii) the respondent was aware that the appellants were contesting the amounts claimed as "costs"; and (iii) the costs claimed had not been arrived at by way of an order of the court, or by mutual consent. The appellants also claimed that the procedure being used by the respondent to recover its costs were in flagrant abuse of the process of the court and the claim disclosed no reasonable ground for bringing the proceedings. Notwithstanding the filing of this application, an order for seizure and sale of the goods was taken out by the respondent before the registrar on 26 June 2013.

[5] An application for a stay of the default costs certificate was made and granted by F Williams J (as he then was) on 2 July 2013. The respondent thereafter filed an application on 7 October 2013 asking that the order made by F Williams J be set aside, that the application to dismiss the default costs certificate be dismissed and that it be allowed to proceed with the execution of the writ of seizure and sale of the appellants' goods issued on 26 June 2013.

[6] These applications came before King J on 12 November 2013. The learned judge found that the Legal Profession Act (LPA) is the appropriate starting point when considering a bill for fees for an attorney-at-law against a paying party. He stated that section 22 of the LPA requires the attorney to commence suit for recovery of his fees one month after having served the party to be charged a bill for those fees. Within that period the paying party can ask for the bill to be referred to the taxing officer who is named as the registrar in the Act. If this does not occur, the receiving party can sue for his fees by a claim in court. The learned judge therefore concluded that in the instant

case, the receiving party (the respondent) had opted not to proceed by way of suit but had chosen an alternative procedure. That alternative procedure, he said, to filing a claim is taxation. By section 22(4) of the LPA the respondent could refer the bill for taxation after a month had elapsed having presented the bill. As a consequence, the learned judge opined, the respondent having chosen not to proceed by commencing a suit, part 8 of the CPR did not apply.

[7] The learned judge found that part 65 of the CPR dealt with the quantification of costs awarded by the court. He stated that part 65 does not conflict with the taxation of an attorney's bill of fees and with reference to section 22(4) of the LPA commented that "the Legal Profession Act gives referrals of bills of costs the same effect as a reference which has been ordered by the court". In the instant case he found that as the respondent (the receiving party) had referred the bill for taxation to the taxing master and had given notice of this to the appellants the bill of costs did not fall outside of the scope of part 65(1) of the CPR.

[8] The learned judge also found that once the matter had been properly referred to taxation, then part 65.17 of the CPR dealing with quantification of costs must be applicable to the said matter and so the appellants' claim that the respondent had wrongly proceeded under that part was without merit. Further, the right to dispute any of the charges laid by the respondent was conditional on the filing by the appellants of points of dispute pursuant to that part of the CPR.

[9] The learned judge commented that the statement by the appellants that the respondent was aware that they were disputing the charges was of no moment, as the law only recognised a specific procedure for challenging a bill of costs, namely the filing of points of dispute. There were, he stated no other means to do so, either by orally disagreeing, by letter, or even by filing a notice of application for court orders.

[10] The learned judge found, at paragraph [35] of his judgment, that the respondent:

> "… was entitled to utilize the procedures provided for in the Legal Profession Act and the Civil Procedure Rules to pursue taxation. Therefore there is no abuse of process in this case. There is no requirement to disclose reasonable grounds in the spirit of a classic claim for costs but only to comply with the requirements for taxation, which the [respondent] has done."

He therefore refused the applicants' application to strike out the claim and granted the respondent's claim to set aside the stay of the order for seizure of sale and indicated that the respondent was therefore free to enforce its order for payment of costs by way of seizure or sale. Costs were awarded to the respondent to be agreed or taxed.

The appeal

[11] The appellants filed five grounds of appeal, namely:

> "**1.** The learned trial Judge failed to demonstrate in his reasons for judgment that he understood that the Claimant/respondent was seeking to recover **fees** and not **costs** in accordance with the provisions set out under Parts 64 and 65 of the Supreme Court Civil procedure [sic] Rules.
>
> **2.** The learned trial Judge erred when he wrongly proceeded on the basis that the document filed by the claimant/respondent was a **Bill of Cost** [sic] under

and in accordance with the terms set out under the Civil Procedure Rules Parts 64 and 65 and he did so without examining the document described as a **Attorney-at-Law and Purchaser's Bill of Costs** nor did he demonstrate in his reasons for judgment that he had examined it.

3. The learned trial judge wrongly concluded that there was a requirement to file points of dispute to a document that in fact was a **Statement of Account** and not a **Bill of Costs** and wrongly comes to his conclusions regarding the Default Cost [sic] Certificate based on that erroneous conclusion.

4. The learned trial judge wrongly confused the procedure for taxation of a court ordered **Bill of Costs** under the Civil Procedure Rules with the procedure for taxation of an attorney's **Bill of Fees** in that the application for the **Bill of Fees** to the "taxing officer" under the Legal Profession Act is predicated on the service of a **Notice of Taxation** and there is no procedure under that act for the need to file points of dispute or for the taxing officer to issue a Default cost Certificate.

5. The learned trial judge failed to recognize that [sic] document before the court described as an **Attorney-at-Law and Purchaser's Bill of Costs** purports to be a party and party claim to which a claim number has been assigned and is the originating proceeding for a claim before the Supreme [sic] Court of Judicature of Jamaica." (Emphasis as in the original)

[12] The appellant also sought several orders summarised as follows:

1. The default costs certificate was irregular and wrongly entered.

2. The respondent had failed to comply with part 8 of the CPR in respect of the procedure for starting a claim.

3. The manner in which the respondent was seeking to recover cost was a flagrant abuse of the process of the court and disclosed no reasonable ground for bringing the proceedings.

4. The disputed matters between the parties could not be resolved by filing a billing of costs.

5. The respondents claim properly lay in breach of contract and not for cost and so the writ of seizure and sale ought to be set aside.

Submissions

For the appellants

[13] The appellants' main contention was that the course or procedure adopted by the respondent was the means by which attorneys-at-law claimed fees from their clients and they were never the respondent's client in relation to the transaction for which the fees were being claimed.

[14] This was the crux of the appellants' submissions which led them to raise the following issues:

(i) Whether the document which had been described as "Attorneys-at-Law and Purchasers' Bill of Costs" was a "Bill of Costs" for the purposes of part 65.18(3) and (4) of the CPR;

(ii) Whether such a document gave rise to the requirement for the appellants to file points of dispute;

(iii) Whether the appellants could be considered clients of the respondent for the purposes of part 65 of the CPR;

(iv) Could the respondent file an own client bill against a party who was not their client?

(v) Could the respondent claim an entitlement for legal fees in respect of services rendered during the course of the conveyancing transaction under part 65.17 of the CPR when that party was separately represented?

(vi) Does the taxation procedure under the CPR allow for the issuance of a default costs certificate in respect of an attorney-at-law's own client bill for fees under part 65.17 of the CPR? and

(vii) Finally, was there a distinction between an attorney's bill of fees under the LPA and an attorney's costs under part 64 of the CPR?

[15] Counsel submitted that there were no figures in the document described as "Attorneys-at-Law and Purchasers' Bill of Costs" that related to own client costs. The sums set out as cost items were either consideration/cost for the land or were sums charged for fees and related disbursements. None of the items were court awarded costs or charges that arose under the LPA as clients' "bill of fees" recoverable as own client costs. Indeed the document was not a "bill of costs" but instead was a "statement of account" outlining the balance due on the purchase price for the property from the purchasers and not monies due from the respondent's own client, the vendor. Thus, counsel submitted, even if the charges were in fact in relation to a "bill of costs" they could not have been recovered under part 65.17 of the CPR as the respondent was not claiming own client costs which are properly described under the LPA as "bill of fees".

[16] Counsel further argued that the learned judge should have considered whether there should have been a taxation as a bill taxed by the taxing officer is the only appropriate method of dealing with attorneys-at-law own costs. There is no provision dealing with the taxation of attorneys-at-law own costs which can be dealt with by way of a default costs certificate either under rule 65.17 of the CPR or the LPA. The LPA is the governing statute and the CPR must be read in conjunction with the provisions of the Act. The LPA provides the legal basis for an attorney-at-law seeking to recover fees from one's own client but not for the recovery of fees/charges or any monies which may be due to the attorney by way of the provisions of a contract from a third party or anyone who is not a client. The default costs certificate was therefore wrongly issued and the rules provide that it can be set aside if the receiving party was not entitled to it.

[17] Counsel further argued that the learned judge had therefore confused the bill of fess under the LPA, which can be initiated by notice of taxation, with the bill of costs ordered by the court. The procedure for collecting legal fees from a client is set out, counsel submitted, in sections 21 and 22 of the LPA. The taxation by the registrar following on the filing and service of the notice of taxation is relevant to the collection of fees from a client. The regime in relation to default costs certificates is not applicable.

[18] In the instant case, counsel submitted, that the respondent had initiated a claim in the Supreme Court. It was submitted by counsel that it was "not possible to start proceedings by [the] filing of a bill of costs". There was no claim form filed. If the respondent wished to proceed by way of the LPA, a notice of taxation should have been filed and that taxation would have had to have been concluded by the registrar. There is no provision in the LPA for a default costs certificate.

[19] The order made by the learned trial judge, for the respondent to proceed to levy the full amount stated in the default costs certificate which was $13,152,413.79 was clearly wrong as this sum did not represent legal fees. The purchase price for the property was $40,000,000.00 and the aforesaid sum of $13,152,413.79 would not have been considered reasonable as legal fees, and in fact it was not, it represented the balance of the proceeds of sale and not costs. As a consequence, there was a clear abuse of the court's process.

For the respondent

[20] In written submissions, the respondent argued that an "Attorneys-at-Law and Purchasers' Bill of Costs" was duly prepared and filed in the Supreme Court "which bill of costs set out in detail the purchasers' statement which incorporated the attorneys-at-law bill of costs, and which statement showed a total balance of $13,152,413.79 of which the costs due to the attorney-at-law therein was $2,501,586.00".

[21] Counsel conceded that at no material time were the appellants clients of the respondent, but stated that the appellants had been guided by their attorneys-at-law in the transaction, had executed the agreement for sale, had agreed to the payment of certain costs on the execution of the agreement for sale and to various half costs to be incurred under the heading "Cost of Agreement on Transfer". Counsel submitted that fees and charges had only been demanded once the work had been effected by the respondent. The charges had been disputed, and the appellants' attorney had suggested that the matter should be taken up before the court for the costs to be determined.

[22] Counsel maintained, in his written submissions, that the "Attorneys-at-Law and Purchasers' Bill of Costs" had been correctly filed pursuant to the LPA, and the quantification of the costs with particular regard to the assessment of reasonableness, is governed by rule 65.17 of the CPR. There is no required format. He accepted that the default costs certificate of $13,152,413.79 represented the "balance of monies due from the purchasers/appellants as set out in the bill of costs/purchasers statement" and at all times the attorneys representing the appellants were aware that the amount of

$2,501,586.00 was included in the statement as the amount due from the appellants to the respondent as costs. This amount he said, had been set out in a letter, dated 5 August 2013 which enclosed the purchasers' statement of account and which had been sent at the request of the attorneys at law for the appellants.

[23] As a consequence, counsel indicated that he had written to the bailiff of the Resident Magistrate's Court of Savanna-la-mar in the parish of Westmoreland on 9 September 2013, enclosing the order of seizure and sale; requesting that a levy be effected in the amount of $2,501,586.00 being costs to the respondent and indicating that the rest of the sum reflected in the writ was the balance of purchase price. Counsel insisted that it was never the respondent's intention to proceed to collect the entire amount stated in the writ of seizure and sale.

[24] Counsel then referred to the fact that in this court there had been two applications for the stay of execution of the writ of seizure and sale. One which came before Brooks JA on 25 March 2014 in which he ordered that the execution of the writ of seizure and sale issued by the Supreme Court in claim no HCV 00999 of 2013 be stayed on the condition that the amount of $2,501,586.00 be paid into an interest bearing account in the joint names of the attorneys at law for the appellants and the respondent, on or before 11 April 2014. The appellants' attorney then paid this sum into the joint account (although paid late) which necessitated the further application for a stay which came before Lawrence-Beswick JA (Ag) (as she then was) on 29 April 2014 when Brooks JA's order was extended to 1 May 2014 and on that day, the application having been heard inter partes, it was ordered by consent that:

"The execution of the Writ of Seizure and Sale issued by the Supreme Court in Claim No. 2013 HCV 00999 is further stayed pending the outcome of the appeal on the following agreed conditions:-

i. The Appellants agree to pay to the Respondent the sum of Two Million Dollars ($2,000,000.00) from account no. 960-8267 at Scotiabank, Duke & Port Royal Streets Branch, on or before May 7, 2014.

ii. The payment of Two Million Dollars ($2,000,000.00) is subject to the filing of the Respondent's Bill of Cost [sic] pursuant to the Agreements for purchase and sale entered into between the Appellants and Ked Investments Limited on the 25th day of November 2009, within two (2) weeks from today.

iii. The Respondent's Attorneys-at-law undertake to request the return of the Writ of Seizure and Sale issued pursuant to these proceedings of Claim no. 2013 HCV 00999, on or before May 7, 2014.

iv. No order as to costs."

[25] Counsel for the respondent contended that the amount of $2,501,586.00 agreed and ordered to be paid from account number 960-8267 at Scotia Bank, Duke and Port Royal Street Branch, had been paid on 7 May 2014 had been paid by the appellants' attorneys-at-law, and pursuant to the consent order he had requested the return of the original writ of seizure and sale of goods dated 26 June 2013. This was duly returned from the bailiff on 1 July 2014, which he thereafter returned to the registrar of the Supreme Court, and requested that the document be placed on the court's file.

[26] Counsel indicated that he subsequently prepared a new bill of costs, and served the same on the appellants' attorney-at-law in the sum of $2,753,392.60. The appellants once again, he submitted, failed to file any points of dispute, so he obtained

a default costs certificate in the sum of $753,392.60 on 15 July 2014 and sent the same to the bailiff for the parish of Westmoreland. The said amount was settled in full by payments from the appellants to the said bailiff. It was counsel's further contention therefore that the issue in relation to the amount due to the respondent for costs was no longer outstanding.

[27] Counsel's also contended that the appeal should be dismissed as the appellants' attorney had failed to follow the procedure laid down in the CPR, in that they had failed to file points of dispute in relation to the original bill of costs and also the subsequent bill of costs issued pursuant to the consent order, which they were obliged to do. They had also failed to file any defence within the prescribed time subsequent to filing the acknowledgment of service to the claim form.

[28] Having digested these submissions on behalf of counsel for the respondent, at first blush it was the court's concern as to why the parties were still before the court pursuing this appeal, particularly since at the hearing of the appeal counsel for the respondent conceded that he "may have overreached" and that the document entitled "Attorneys-at-Law and Purchasers' Bill of Costs" was not what it suggested, as it encompassed the purchasers' statement of account and represented, as he indicated in his earlier submissions, in the main, the balance of the purchase price for the property at New Hope in the parish of Westmoreland.

[29] As a consequence, the default costs certificate issued to the respondent and the writ of seizure and sale obtained thereafter would both have been void and

unenforceable. That being the case, the real issue then before the court became the true and proper interpretation to be accorded the order made by Lawrence-Beswick JA (Ag) on 1 May 2014, with the consent of the parties, pending the outcome of the appeal referred to previously at paragraph [24] herein.

Appellants' further submissions

[30] The additional submissions of counsel for the appellants ran thus:

1. The order was made at a stage in the proceedings "pending the outcome of the appeal".
2. The court was of the view that the respondent's costs should have been addressed and so the stay of the writ of seizure should be accompanied by conditions. The filing of the appeal did not prevent the respondent from proceeding to execute the writ of sale in the sum of $13,152.413.79. Indeed, the writ of seizure and sale still stands even though it had been retrieved from the bailiff and the respondent had indicated that he did not intend to proceed with it.
3. The order of Lawrence Beswick JA (Ag) could not have been intended to be a final order. The appeal was still extant. The court would still have to determine whether the respondent could have

obtained the charges as filed and in the manner in which it had sought to do so. The court would also have to determine whether the recovery of the charges by way of default costs certificate was appropriate and whether the respondent was clothed with any authority, not being in an attorney-client relationship with the appellants, to proceed to collect "fees" by commencing a claim.

4. As the appellants had not abandoned the appeal, the single judge of appeal could not have determined the appeal by way of an interlocutory order. Counsel relied on the decision of **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9 for that position. He accepted that the way the orders and conditions had been framed was unusual, as the orders previously made by Brooks JA were clear and unequivocal, as the monies being paid on the condition of the stay, were to be placed in an interest bearing account in the name of the respective attorneys. Counsel was adamantine that the view held by counsel for the respondent that the single judge of appeal had decided the matter was erroneous and

misguided. The respondent cannot, he argued, claim an entitlement to money obtained by way of a default costs certificate, and a writ of seizure and sale based on a bill of costs erroneously filed, which must be set aside.

5. As a consequence, counsel submitted if this court is of the view that the process for the recovery of disputed charges and disbursements cannot be accommodated under section 22 of the LPA there would be "no need to look at the rules set out in the CPR since rules 'can regulate the exercise of an existing jurisdiction, they cannot by themselves confer jurisdiction'. He relied, *inter alia*, on **Beverly Levy v Ken Sales** [2008] UKPC 6 paragraph 19 for this position. Counsel reiterated that the "basis for the filing of own client's bill of costs was grounded in the Legal Professions Act". Counsel therefore requested the court to find additionally that the respondent, not being a party to the contract for sale and the transaction of land between the appellants and Ked Investments Limited had no authority to file the claim against the appellants.

Respondent's further submissions

[31] Counsel submitted that the respondent had effected the work, as reflected in the bills of costs rendered, in respect of which they had been properly paid as agreed.

Analysis

[32] It is necessary to set out sections 21 and 22 of the LPA, which read as follows:

> "21.- (1) An attorney may, subject to any regulations made by the Council under subsection (7), in writing agree with a client as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:
>
> Provided that if in any suit commenced for the recovery of such fees the agreement appears to the Court to be unfair and unreasonable the Court may reduce the amount agreed to be payable under the agreement.
>
> (2) Fees payable under any such agreement shall not be subject to the following provisions of this Part relating to taxation nor to any other provisions thereof.
>
> (3) In the absence of evidence to the contrary, it shall be presumed that legal fees agreed to be paid or collected out of the proceeds of a judgment are contingency fees, so, however, that it shall be lawful for the Committee to examine any written agreement mentioned in subsection (1) 'for the purpose of determining whether or not the fees agreed in that agreement are contingency fees.
>
> (4) All causes of action and all applications to the Committee pursuant to section 12 in relation to the charging of contingency fees shall be commenced or made within a period of twelve months.
>
> (5) The limitation period mentioned in subsection (4) shall run-

(a) from the date of final payment by the attorney to the client of the proceeds recovered under a judgment, after any deduction of contingency fees; or

(b) where a written tender or offer of such final payment has been made by the attorney to the client, from the date of the receipt by the client, of such tender or offer.

(6) Where the amount of any contingency fees paid to an attorney is in excess of the amount properly chargeable in accordance with regulations made under subsection (7) the amount of such excess shall be refunded by the attorney.

(7) The Council may make regulations with respect to the making of agreements for contingency fees and in particular-

(a) the types of causes of action in respect of which such fees may be charged; and

(b) the requirements to be met by an attorney for the making of such agreements.

(8) In this section 'contingency fees' means any sum (whether fixed or calculated either as a percentage of the proceeds or otherwise) payable only in the event of success in the prosecution of any action, suit or other contentious proceedings.

22.- (1) An attorney shall not be entitled to commence any suit for the recovery of any fees for any legal business done by him until the expiration of one month after he has served on the party to be charged a bill of those fees, the bill either being signed by the attorney (or in the case of a partnership by any one of the partners either in his own name or in the name of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to the bill:

Provided that if there is probable cause for believing that the party chargeable with the fees is about to leave Jamaica, or to become bankrupt, or compound with his creditors or to do any act which would tend to prevent or

> delay the attorney obtaining payment, the Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the attorney be at liberty to commence an action to recover his fees and may order those fees to be taxed.
>
> (2) Subject to the provisions of this Part, any party chargeable with an attorney's bill of fees may refer it to the taxing officer for taxation within one month after the date on which the bill was served on him.
>
> (3) If the application is not made within the period of one month aforesaid a reference for taxation may be ordered by the Court either on the application of the attorney or on the application of the party chargeable with the fees, and may be ordered with such directions and subject to such conditions as the Court thinks fit.
>
> (4) An attorney may without making an application to the Court under subsection (3) have the bill of his fees taxed by the taxing master after notice to the party intended to be charged thereby and the provisions of this Part shall apply as if a reference for such taxation has been ordered by the Court."

[33] Additionally, as it is of some significance to the outcome of this appeal, section part 65.1 of the CPR reads thus:

> "This Part deals with the ways in which any costs awarded by the court are quantified."

[34] It is clear that sections 21 and 22 of the LPA, dealing with the recovery of fees and including taxation, are applicable to the relationship between attorney and client which in the circumstances of this appeal did not exist. In the instant case, the respondent represented the vendor and not the purchasers from whom he endeavoured to obtain the sums representing their fees. Part 65 of the CPR refers to client's costs and costs ordered by the court. Section 21 of the LPA requires the agreement between

attorney and client to be in writing. There was no agreement in writing between an attorney and client in this case.

[35] In my view, counsel for the respondent's concession that the bill of costs filed in the claim did not relate to client costs was correctly made. The document "Attorneys-at-Law and Purchasers' Bill of Costs" does not fall into either sections 21 and 22 of the LPA and was irregular and unenforceable. The writ of seizure and sale issued on it was equally unenforceable.

[36] The learned judge in his reasons for judgment failed to appreciate the fact that there was no attorney and client relationship between the appellants and the respondent, and as a consequence misconstrued the application of the provisions of the LPA and part 65 of the CPR to the facts of the case at bar, and so fell into error. His finding that the respondent had an alternative procedure to filing a claim, which was taxation, and therefore commencing "a claim" by the document "Attorneys-at-Law and Purchasers' Bill of Costs" which related to balance purchase price and not fees, was appropriate was also clearly palpably wrong. His finding therefore that part 8 of the CPR did not apply was also demonstrably wrong. His finding also that part 65, was applicable inclusive of the default costs regime, was also clearly wrong.

[37] As indicated, the important question is, how ought the court to interpret the order and the conditions attached thereto made by Lawrence-Beswick JA (Ag)? Subsequent to the order, the attorneys for the appellant wrote the following letter

dated 1 May 2014 to the respondent in an effort to comply with the order and the conditions under which it was made:

> "...
> **Clough Long & Co.,**
> **Attorneys at law**
> **81 Harbour Street**
> **Kingston**
>
> **Attention: Mr. Maurice Long**
>
> Dear Sirs:
>
> **Re: Clough Long & Co. Vs. Adolphy Samuels, Eugenie Samuels, Courtney Samuels & Loraine Samuels – Claim # HCV-00999/2013**
>
> Pursuant to the Order of the Honourable Mrs. L. Beswick J.A. made on May 1, 2014, we enclose for your attention the following:
>
> i) Scotiabank manager's cheque no. 0256866 dated May 1, 2014 drawn on account no. 960-8267 at the Duke & Port Royal Streets branch in the amount of $1,000,000.00.
>
> ii) Scotiabank manager's cheque no. 0256867 dated May 1, 2014 drawn on account no. 960-8267 at the Duke & Port Royal Streets branch in the amount of $1,000,000.00.
>
> The Two Million Dollars payment represents monies paid on account of Attorneys-at-law costs due to the Respondent's Attorneys-at-Law for work done pursuant to the Agreements for sale dated November 25, 2009 and is subject to the amount to be determined by the Registrar upon taxation.
>
> Kindly acknowledge receipt of this letter, the cheques and the terms set out herein by signing and returning the enclosed copy letter.
>
> Very sincerely,
> **CHEN GREEN & CO.**

PER: *Sylvan Edwards*
for LEONARD S. GREEN
Attorney-at-law

Enc."

[38] The first question that arises for consideration was whether the order made on 1 May 2014 was a true consent order? In deciding this issue certain questions arise such as: (i) was the order a consent order which embodied a real contract between the parties; (ii) at the conclusion of negotiation between them, would it be a true and binding contract between the parties, having been created between them and to which had been superadded the command of the judge and which bore his imprimatur, in which case the court will give effect to it where a party is in breach?; or (iii) was it a mere order of the court expressed to be made with the parties consent, to which they had agreed or to which they had not objected.

[39] Indeed in the words of Lord Green Master of the Rolls in **Chandless-Chandless v Nicholson** [1942] 2 All ER 315, at page 317 G:

> "...There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression..."

[40] The English Court of Appeal case of **Siebe Gorman & Co Ltd v Pneupac Ltd** [1982] 1 All ER 377 deals with a consent order that was made in the course of interlocutory proceedings. In that case, the attorneys for both parties agreed that Siebe would consent to an order for discovery if the time for compliance with the order for

discovery would be extended by 10 days. This order was formalised as one "by consent" and included a provision that in default of compliance Siebe's claim would be struck out. On the last day for complying with the order, Siebe's attorney sought an extension of time by three weeks to comply. Pneupac's attorney replied saying that since the time for compliance with the order for discovery had elapsed the claim was struck out. An application to extend time to comply with the order was made to the Master, who granted the same. Pneupac appealed to a judge who allowed the appeal and struck out Siebe's claim on the basis that Siebe was in default of the order. On appeal to the Court of Appeal, the appeal was allowed. Lord Denning MR explained the decision of the court at page 380:

> "We have a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v Nicholson* [1942] 2 All ER 315 at 317, [1942] 2 KB 321 at 324. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?...
>
> I cannot put any such interpretation on the order which was drawn up in this case. It often happens in the Bear Garden that one solicitor or legal executive says to the other: 'Give me ten days.' The other agrees. They go in before the

> master. They say: 'We have agreed the order.' The master initials it. It is said to be 'by consent'. But there is no real contract. All that happens is that the master makes an order without any objection being made to it. It seems to me that that is exactly what happened here. The solicitors for the plaintiffs were saying: 'We do not object to the order. Give us the extra ten days from the time of inspection, and that is good enough.' It seems to me quite impossible in this case to infer any contract from the fact that the order was drawn up as 'by consent'.

The cases of **Chandless-Chandless v Nicholson** and **Siebe Gorman & Co Ltd v Pneupac Ltd** were endorsed by Smith JA on behalf of the other members of this court in **Michael Causewell et al v Dwight Clacken et al** SCCA No 129/2002, delivered 18 February 2004. In the instant case, it is my view, that there was no real contract between the parties. It was a situation of the appellants agreeing or not objecting to conditions of an order being made by the court which was needed by them at that stage of the proceedings.

[41] My learned brother Brooks JA has referred to and relied on the dicta in **Chanel Ltd v FW Woolworth & Co Ltd and Others** [1981] 1 All ER 745 to support his view that the order made on 1 May 2014 by Lawrence-Beswick JA (Ag) was done by consent, and was contractually binding on the parties. However, I humbly and respectfully disagree with my learned brother with regard to his view of the ratio decidendi of that case and its application to the facts of the instant case.

[42] In **Chanel Ltd v FW Woolworth & Co Ltd and Others**, the defendants (FW Woolworth & Co Ltd and others) used the name "Chanel" to import and distribute

perfume to English retailers. Chanel, the registered holder of the "Chanel" trademark in the United Kingdom, commenced an action against the defendants for infringement of the mark and passing off and obtained, *ex parte*, injunctions against the defendants. The defendants gave an undertaking that they would not infringe on or pass off the plaintiff's mark until judgment in the action or a further order was made allowing this. This was reproduced in the form of a consent order. Subsequently, a Court of Appeal decision held that where a trade mark was developed as a house mark and was distinctive of a group of companies every company in the group was presumed to have given consent to other companies in the group using the mark. Based on, *inter alia*, this decision, the defendants applied to discharge the undertaking they had given. A judge dismissed their application on the basis that, *inter alia*, the consent order had contractual effect and could not be set aside unless there were grounds that were sufficient to set aside a contract. The judge also refused leave to appeal and so the defendants applied to the Court of Appeal for leave. Leave to appeal was refused by the Court of Appeal on the basis that, *inter alia*, there had been no change in the defendants' ability to successfully challenge Chanel's application for an injunction nor were there any grounds upon which they could seek to discharge or modify the consent order. Buckley LJ at page 751 said:

> "...In my judgment an order or an undertaking to the court expressed to be until further order, by implication gives a right to the party bound by the [order] or undertaking to apply to the court to have the order or undertaking discharged or modified if good grounds for doing so are shown. Such an application is not an application to set aside or modify any contract implicit in the order or undertaking. It is an application in accordance with such contract, being an

> exercise of a right reserved by the contract to the party bound by the terms of the order or undertaking...
>
> They, the defendants, are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters [one] cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter..."

At page 752 he continued:

> "...In my judgment there has been no change, since 6 April 1979, in the potential ability of the defendants to resist the plaintiffs' motion successfully, sufficient to justify a court in discharging or modifying the undertaking which the defendants then offered and gave..."

[43] **Chanel Ltd v FW Woolworth & Co Ltd and Others** supports the view that once there is an order that is subject to a further order, it does not oust the jurisdiction of the court. As previously indicated, the order made by Lawrence-Beswick JA (Ag) was made pending appeal, and so, based on the issues on appeal, the efficacy of the writ of seizure and sale and the conditions attached to the stay of the execution of it, were subject to the deliberation and any further order determined by this court.

[44] In the instant case, the writ of seizure and sale in the amount of $13,152.413.79 was looming large over the appellants' heads. They required it stayed. They maintained that it had been irregularly obtained based on a default costs certificate that was flawed it having been obtained utilising the wrong procedure. There was, as has already been stated, the substantive appeal yet to be determined, as the notice and grounds of

appeal had already been filed, which had not been withdrawn. The order was made by consent that the execution of the writ of seizure and sale be further stayed pending the outcome of the appeal on the agreed conditions which were stated thereafter. It was clear, in my view, that whatever payments were being made, they were being made as a condition pending the outcome of the appeal, that is, if the appeal was successful the payments would have to be returned.

[45] In my opinion, the bill of costs that was conditional on the order which was filed by the respondent, was to show that the sums being paid over bore some relation to the amount being claimed, particularly as the sums set out in the writ of seizure and sale, did not only relate to costs. It is of significance that condition number 2 of the order, which referred to the payment of the money being subject to the filing of the respondent's bill of costs, referred to the costs being referable to the agreement for purchase and sale entered into by the appellants and Ked Investments Limited, but does not refer to the costs being taxed. However, I accept that the particular statement in the letter of 1 May 2014 that the sum of $2,000,000.00 which was being sent to the respondent, was subject to the amount to be determined by the registrar upon taxation, does not appear on the face of it to be consistent with the position taken by the appellants.

[46] However, in my view, the fact that the writ of execution has subsequently been found by this court to be invalid, is crucial to the ultimate resolution of the appeal. The payments made thereunder by way of a condition of its stay are therefore also invalid. The fact that the conditions have been acted on, does not in my view affect their

invalidity as all aspects of the order were made pending the outcome of the appeal which has now declared the writ and the basis on which it was issued (default costs certificate) to be irregular. I am encouraged in my view by what occurred subsequently. The appellants did not file any points of dispute, which was consistent with their stance below and on appeal, that taxation was not applicable. This however resulted in the respondent obtaining a further default costs certificate which was also consistent with its stance in this court and the court below, but which we have found to be irregular. I do not think that what was stated in the letter of 1 May 2014 could elevate the conditions of the stay to a "true consent agreement". The order of Lawrence-Beswick JA (Ag) remained as Professor Zuckerman has explained in Zuckerman on Civil Procedure, Principles of Practice, 3rd Edition, paragraph 23.73:

> "...a consent judgment based on the parties' willingness to submit to judgment on certain terms or, at any rate, without objection from any of the parties to the proposed order..."

Compliance with the order of Lawrence-Beswick JA (Ag) by acting on the conditions was expected of the parties as the conditions were reflected in an order of the court which was enforceable by the court. However, the order of Lawrence-Beswick JA (Ag) was subject to the outcome of the appeal, and the conditions attached to the stay of the execution of a writ were based on an order made by King J, in the court below, which itself was on appeal.

[47] As a consequence, I would order that both writs of execution and default costs certificates be set aside. In the light of the above, the respondent attorneys must refund the sum of $2,000,000.00 paid as a condition for the further stay of a writ of

execution pending the outcome of the appeal and the additional $753,392.60 recovered from the second writ of seizure and sale. The respondent must pursue the collection of sums payable to them by virtue of their professional relationship with Keds Investment Limited against the appellants by way of litigation on behalf of Keds Investment Limited the vendor against the appellants. As a practical matter, if the parties can find a way to resolve this conundrum through pre-ligation negotiation or mediation subsequent to litigation, that may be a way of concluding their disputes without protracted litigation which will involve extensive cost. What is clear however is that the route to collection is not through a regime involving taxation and default costs certificates.

[48] I propose that we make the following orders:

1. Appeal allowed.
2. The decision of King J made on 6 February 2014 is set aside.
3. The orders made by Brooks JA on 25 March 2014 and Lawrence-Beswick JA (Ag) on 1 May 2014 are set aside.
4. It is declared that the bill of costs filed to commence claim no HCV 00999 of 2013 is irregular and an abuse of the process of the court, and is hereby struck out.
5. The default costs certificate issued herein on 17 April 2013, in the sum of $13,152,413.79, is irregular and wrongly entered, and is hereby set aside.

6. The writ of seizure and sale issued herein in the sum of $13,152,413.79, pursuant to that default costs certificate was wrongly issued, and is hereby set aside.

7. The default costs certificate issued herein on 15 July 2014, in the sum of $753,392.60, is irregular and wrongly entered, and is hereby set aside.

8. The writ of seizure and sale issued herein in the sum of $753,392.60, pursuant to that default costs certificate was wrongly issued, and is hereby set aside.

9. The sum of $2,753,392.60 is to be paid by the respondent's attorney-at-law into a joint account to be held by the attorneys-at-law representing the appellant and the respondent until the sum is settled or ordered by lawful procedure through pre-litigation negotiation, mediation or litigation by virtue of the agreement for purchase and sale between the appellants and Ked Investments Limited entered into on 25 November 2009.

10. Costs to the appellants both here and in the court below.

BROOKS JA

[49] The resolution of this appeal, as originally conceived, proved to be far simpler than the resolution of the situation resulting from an interim order made by a judge of this court.

[50] The appeal was from an order of a judge of the Supreme Court, made on 6 February 2014, refusing to set aside a claim filed by attorneys-at-law for costs arising from a conveyancing transaction. The attorneys-at-law have, in this court, conceded that, as the parties from whom they claimed the costs were not their clients, the bill of costs and the resultant default costs certificate were invalid. The order of the learned judge was, therefore, wrong and must be set aside.

[51] Before the appeal was heard, however, the parties consented, in this court, to an interim order by which the bulk of the monies claimed by the attorneys-at-law would have been paid to them and they were required to file a new bill of costs. The order was made pending the outcome of the appeal. The question which arises is whether the sums paid to the attorneys-at-law, pursuant to the consent order, should be repaid by them in light of the decision in the substantive matter.

[52] An outline of the background to the appeal is essential to an understanding of the issues raised in the appeal.

Background to the appeal

[53] The appellants, Adolphy Samuels, Eugennie Samuels, Courtney Samuels and Loraine Samuels (together hereafter referred to as the appellants), were the purchasers under two agreements for sale. One was for the purchase of land and the other for the purchase of an agricultural crop. Those agreements for sale were entered into on 5 November 2009. The vendor was KED Investments Limited (KED). Clough Long & Co (CL), acted for KED and is the firm of attorneys-at-law who had carriage of the sale. The appellants were represented by M N Hamaty & Co (MNH), attorneys-at-law.

[54] The agreement for the sale of the land stipulated that the appellants, as purchasers, would "pay the Vendor's Attorneys-at-Law" certain monies "on the execution" of the agreement. It appears certain monies were paid at that time. Other work was, however, to be done by CL thereafter.

[55] A dispute subsequently arose about the fees that CL sought to claim from the appellants. Correspondence on that issue between CL and MNH resulted in MNH suggesting to CL, in a letter dated 28 January 2013, that CL "take the matter up with the Courts to determine costs".

[56] CL filed a bill of costs on 22 February 2013 in which it claimed $13,152,413.79 as being the amount due from the appellants. The bill of costs was allocated a claim number, namely, "HCV 0999/2013". It will be referred to hereafter, as the claim. The claim was really a purchaser's statement of account and the sum claimed represented a number of items including legal fees, the outstanding balance on the purchase price

and interest on that balance. The appellants, although served with the bill of costs, did nothing about it, and on 17 April 2013 CL secured a default costs certificate in the sum of $13,152,413.79.

[57] On 24 April 2013, the appellants filed an application to strike out the claim. They also secured, on 2 July 2013, a without notice order, in the absence of CL, for the stay of the default costs certificate pending the hearing of the application to strike out. By that time, however, CL had secured a writ of seizure of sale (issued on 26 June 2013), in the sum of $13,152,413.79.

[58] CL filed an application to set aside the order for the stay. The application also sought an order that CL be allowed to proceed with the execution of the writ of seizure and sale. That application, as well as the appellants' application to strike out the claim, is what came on for hearing before the learned judge.

The decision in the court below

[59] The application to strike out the claim proceeded on a number of bases. They included complaints that CL had failed to properly commence the claim, that it had adopted the wrong procedure under the Civil Procedure Rules (CPR) and that the claim was an abuse of the process of the court. The learned judge rejected the complaints of the appellants. He ruled that part 65 of the CPR was applicable to the matter and that CL had properly proceeded in accordance with the provisions of that part.

[60] The learned judge ruled that CL was entitled to either proceed by way of suit or by way of a bill of costs pursuant to section 22 of the Legal Profession Act. He stated that it had "not opted to proceed by way of suit but has chosen an alternative procedure [namely] taxation" (paragraph [27] of the written judgment). He found that the appellants had ignored their obligations under the provisions of part 65. He held that they ought to have filed points of dispute in respect of the bill of cost. In the absence of their having done so, he decided that they were not entitled to apply to strike out the claim. On his reasoning, CL was entitled to proceed as it had and its approach did not amount to an abuse of the process of the court.

[61] Having rejected the appellants' application, he granted CL's application to set aside the stay of execution and stated that it was "free to enforce its order for payment of costs by way of Seizure and Sale" (paragraph [39] of the judgment). It is from that decision that the present appeal was filed.

Resolution of the appeal

[62] At the hearing of the appeal, learned counsel for CL, Mr Long, correctly accepted that there was no nexus between CL and the appellants that would allow CL to claim costs against them. The appellants were not CL's clients and there was no contract between CL and the appellants. He accepted that a claim for monies due under the agreements for sale would have had to have been filed by the vendor KED. Learned counsel argued that CL may have "overreached", by filing a bill of costs in the sum of $13,152,413.79.

[63] It necessarily followed that the bill of costs was a misguided attempt to collect those monies. It was therefore invalid, and CL was not entitled to a default costs certificate based on that bill of costs. Neither was CL entitled to the writ of seizure and sale issued pursuant to that certificate. The resolution of the appeal requires that the appeal be allowed, the bill of costs struck out as being an abuse of the process of the court, the default costs certificate declared irregular and wrongly entered, and the writ of seizure and sale set aside.

[64] The appellants, however, want more. Their request for other orders flow from certain steps that were taken in this court pending the hearing of the appeal.

The interim order in this court and the steps taken subsequent to that order

[65] Notwithstanding that the appeal had been filed, CL instructed the bailiff to have the writ of seizure and sale executed, there being no stay of the judgment in place. The appellants applied to this court for a stay of execution of the writ. An order was made, by a single judge of this court, for the execution to be stayed on condition that the appellants paid, on or before 11 April 2014, the sum of $2,501,586.00 into a joint account in the names of the attorneys-at-law for the parties. It appears that the deadline for the payment was not met (the payment was made, but late), and CL again set the bailiff in motion.

[66] The appellants again applied for a stay of execution of the writ. The application was heard by a different judge of this court. At a second hearing before that judge, the

parties agreed, on 1 May 2014, to the following order being made, pending the outcome of the appeal:

> "**UPON THE NOTICE OF APPLICATION FOR COURT ORDER** [sic] coming on for hearing and after hearing [counsel for both parties] **IT IS HEREBY ORDERED BY CONSENT THAT**:
>
> The execution of the Writ of Seizure and Sale issued by the Supreme Court in Claim No 2013 HCV 00999 is further stayed pending the outcome of the appeal on the following agreed conditions:-
>
> i. The Appellants agree to pay to the Respondents the sum of Two Million Dollars ($2,000,000.00) from account no. 960-8267 at Scotiabank, Duke and Port Royal Streets Branch, on or before May 7, 2014.
>
> ii. The payment of Two Million Dollars ($2,000,000.00) is subject to the filing of the Respondent's Bill of Cost [sic] pursuant to the Agreements [sic] for purchase and sale entered into between the Appellants and Ked Investments Limited on the 25th day of November 2009, within two (2) weeks from today.
>
> iii. The Respondent's Attorneys-at-law undertake to request the return of the Writ of Seizure and Sale issued pursuant to these proceedings of Claim no. 2013 HCV 00999, on or before May 7, 2014.
>
> iv. No order as to cost [sic]." (Emphasis as in original)

[67] The perfected order was promptly prepared and filed by the appellants' attorneys-at-law. The attorneys-at-law also acted promptly in sending the payment to

CL in obedience of the consent order. The covering letter for the cheques was dated 1 May 2014 and stated in part:

> "Pursuant to the [consent order] we enclose for your attention the following:
>
> i) Scotiabank manager's cheque…in the amount of $1,000,000.00;
>
> ii) Scotiabank manager's cheque…in the amount of $1,000,000.00.
>
> **The Two Million Dollars payment represents monies paid on account of Attorneys-at-law costs due to the Respondent's Attorneys-at-Law for work done pursuant to the Agreements for sale dated November 25, 2009 and is subject to the amount to be determined by the Registrar upon taxation**.
>
> Kindly acknowledge safe receipt of this letter, the cheques and the terms set out herein by signing and returning the enclosed copy letter." (Emphasis supplied)

[68] CL acted in accordance with the consent order. It prepared and filed, on 7 May 2014, a fresh bill of costs. Although the figure is not set out in that bill of costs, the total that is said to have been claimed by it was $2,753,392.60. Again the appellants did not file any points of dispute and CL secured, on 15 July 2014, a default costs certificate in the sum of $753,392.60, being the figure claimed in the bill of costs, less the sum of $2,000,000.00 that it already received, by virtue of the payment on 1 May 2014. CL secured a fresh writ of seizure and sale for the sum of $753,392.60 and the sum was collected.

Are consequential orders to be made in resolving the appeal?

[69] Mr Green, on behalf of the appellants, submitted that the consent order did not, and was not intended to be determinative of the appeal. He contended that the validity of the method that CL sought to use in the Supreme Court to secure payment, was a live issue. Learned counsel resisted the contention of Mr Long that the payment of the second default costs certificate concluded the dispute between the parties.

[70] Mr Green submitted that the consent order made by the single judge "must be set aside". He stressed that the order was made "pending appeal". On Mr Green's submission, there was no authority for CL to file a bill of costs to recover its fees and therefore, the same defect that invalidated the first bill of costs, also invalidated the second. He argued that if there is no statutory authority for that procedure, the court could not properly have ordered CL to have adopted it. Mr Green submitted that in addition to the consent order being set aside, the default costs certificate in the sum of $753,392.60 should be set aside and the sum of $2,753,392.60 should be ordered repaid to the appellants with interest thereon.

[71] Mr Long argued that the parties had, by the consent order, agreed to the way forward for settling the matter in dispute. He submitted that CL had acted in accordance with that agreement, that the appellants, although given an opportunity to contest the bill of costs, did not do so and so there could be no refund of the sums paid in pursuance of the consent order.

Analysis

[72] The position taken by the appellants in respect of the consequential orders is consistent with their position in respect of the appeal, namely, that CL was not entitled to proceed by way of a bill of costs to recover fees from a party who is not its client. The consent order and the terms of the letter enclosing the payment to CL, were, however, not consistent with that position. The question, therefore, is what effect, if any, those factors should have on the appellant's present position. Should the appellants, properly, be allowed to maintain their stance?

[73] Consent orders are not easily set aside. The learned editors of Halsbury's Laws of England 5th edition, Volume 12A (2015) at paragraph 1225 explain the basis on which that may be achieved. They state, in part:

> "A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. **Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority**. A compromise in ratification of a contract which is incapable of being ratified is not enforceable; and a compromise which is conditional on some term being carried out, or on the assent of the court or other persons being given to the arrangement, is not enforceable if the term is not carried out or the assent is given effectually. The court may refuse to set aside a compromise when the party seeking to set it aside is guilty of delay in questioning it. It has been held that a consent order cannot be set aside by way of appeal but in a recent case [**Middleton v Middleton** [1999] 2 FCR 681, CA] the Court of Appeal set aside a consent order in circumstances

> where it had been presented with all the information which the judge was likely to have had.
>
> There is a residual jurisdiction for a court of appeal to re-open a case in exceptional circumstances to avoid real injustice." (Emphasis supplied)

[74] A distinction must, however, be "drawn between, on the one hand, a consent judgment that is founded on a contract between the parties, and on the other hand a consent judgment based on the parties' willingness to submit to judgment on certain terms or, at any rate, without objection from any of the parties to the proposed order". Thus opined Professor Zuckerman, at paragraph 23.73 of the third edition of his work, Zuckerman on Civil Procedure. Although he used the term "judgment" in his opinion, the principle is equally applicable to orders. There is support for that principle in a decision of this court. In **Causewell and Another v Clacken and Another** SCCA No 129/2002 (delivered 18 February 2004), Smith JA, in delivering the judgment of this court said, at pages 16-17:

> "Thus, where an order is expressed to be made by consent, the Court must determine whether there was a true binding contract created between the parties to which is superadded the command of the judge and which bears his imprimatur, or whether it is a mere order of the Court to which the parties agreed or to which they did not object."

It is a question of fact in each case, to which of those categories the order belongs.

[75] The major reason for determining to which category the order belongs is to determine whether the court may vary any of its terms, particularly in the granting of applications for extension of time within which to perform obligations imposed by the

order. If the order is a true consent, the scope for varying its terms is very limited unless the other party consents. The limitations were mentioned in the above excerpt from Halsbury's Laws of England. There is more latitude if the order is one to which the parties merely submitted, or did not object. Lord Denning MR examined that issue in the case of **Seibe Gorman & Co v Pneupac Ltd** [1982] 1 All ER 377. He said, in part, at page 380:

> "…In *Purcell v F C [Trigell] Ltd* [1970] 3 All ER 671, [1971] 1 QB 358 the correspondence (which is set out in the facts of the case) showed that there was a real contract agreed between the parties that, unless a particular order for interrogatories was complied with, the matter should be struck out. **In that case I said that the court has a discretion to vary or alter the terms of the order for interrogatories, even though made by consent**…." (Emphasis supplied)

[76] The more recent cases of **Ropac Ltd v Inntrepreneur Pub Co (CPC) Ltd** All England Official Transcripts (1997-2008); [2001] CP Rep 31 and **Chaggar v Chaggar** [2002] EWCA Civ 1637; [2002] All ER (D) 455 (Oct) show that the principles in **Seibe Gorman** are still applicable to the regime governed by the CPR. In **Ropac Ltd**, Neuberger J (as he then was) opined that the CPR allowed the court more flexibility to grant relief even in cases where there is a real contract. That position has been criticised by the learned editors of Foskett on Compromise (6th edition). Although the learned judge used some strong language including advocating a principle that the overriding objective allowed the court to "override an agreement made between the parties", he did say that the court should be slow to do so "save in unusual circumstances". It is unnecessary to resolve that issue in this case but it is not difficult

to understand that the decision would face severe criticism. In **Chaggar**, the court was of the view that the court could intervene if the consent order allowed the court to intervene to work out the mechanics of the contract.

[77] In the present case, the appellants did not assert that any of the usual reasons for setting aside a consent order, in the true sense, applied in this case. There is no assertion of fraud or misrepresentation; no assertion of mistake; no assertion of non-disclosure, and no assertion of duress. They did contend, to be fair to them, that their application for the stay of execution was prompted by the fact that the court's bailiff was at their door attempting to execute a writ of seizure and sale, which, at that time, was in the sum of $13,152,413.79. Mr Green submitted that the appellants were obliged to agree to the payment as a term of the stay. That could not, however, count as duress in the face of the court which had been asked to stay the execution of that very writ.

[78] During the course of argument in the appeal, counsel who appeared before the single judge set out their respective understanding of the intent of the consent order. As mentioned above, Mr Green submitted that it was not intended that the bill of costs was to be used to resolve the matter.

[79] In answer to the court's question as to what was the purpose of the bill of costs, Miss Edwards, who appeared with Mr Green, stated that the bill of costs was not expected to be taxed, it was only to be reflective of the fact that some money ($2,501,586.00) had been reserved in an account, pursuant to the previous interim

order. Miss Edwards said that the appellants expected that the appeal would have resolved the disposal of all those monies.

[80] It appears that Mr Long came away from that hearing, before the single judge, with a different view. He stated that his understanding was that the bill of costs would have been laid, the appellants would have had the opportunity to contest the sums claimed, and that, on the order of the taxing officer, the matter would have been at an end.

[81] It may be that time has somewhat clouded the memories of counsel involved. What remains unchanged, however, are the documents emanating from that hearing, namely, the formal order and the letter sending the payment. These have been quoted above.

[82] The letter from the appellant's attorneys-at-law enclosing the payment specifically states that a taxation of the bill of costs was contemplated. The relevant portion is repeated for convenience:

> "The Two Million Dollars payment represents monies paid on account of Attorneys-at-law costs due to the Respondent's Attorneys-at-Law for work done pursuant to the Agreements for sale dated November 25, 2009 and is subject to the amount to be determined by the Registrar upon taxation."

This portion of the letter demonstrates that the appellants' attorneys-at-law understood the nature of the agreement, embodied in the consent order, into which the appellants had entered. It also demonstrated their appreciation that they were requiring CL to act

in accordance with that agreement. As mentioned above, CL did act in accordance with the agreement.

[83] These are indications of a true agreement. Both parties acted in accordance with its terms and the execution of the writ was stayed based on that agreement and performance. It is important to note that the "agreed conditions" in the consent order were not said to be on the basis that they were "subject to the decision in the appeal". It is also important to note that those "agreed conditions" were not made "pending the outcome of the appeal". It was the stay of execution of the writ of seizure and sale which was ordered "pending the outcome of the appeal". The stay was granted on the "agreed conditions".

[84] The appellants may, therefore, not resile from the position that there was an agreement. They benefitted from that consent order. Their actions in pursuance of that order resulted in their abandonment of any protest that they may have had against the order. If that was an order with which they were unhappy, it should not have been drawn up as reflecting that it had been made with their consent. This was not an order to which a party, "merely acceded" or "did not object". It required the appellants to do something; it required them to pay a significant amount of money. They acted in compliance on the basis that they knew why that money was being paid.

[85] The fact that the writ has been subsequently found to be invalid does not allow the appellants to undo their performance of their part of the bargain. It was held in **Chanel Ltd v F W Woolworth & Co Ltd** [1981] 1 WLR 485; [1981] 1 All ER 745 that

a change in the law which was effected after a consent order has been made is not sufficient reason to set aside the order. In **Chanel Ltd**, a motion by the plaintiffs was adjourned until trial, based on certain undertakings by the defendants. During the intervening period there was a decision in another but similar case. One of the defendants opined that the principle decided in the later case was determinative of the issue, in their case, and that that determination was in their favour. They filed a motion to be discharged from their undertakings. The motion was refused. The headnote of the former report records the decision of the English Court of Appeal as follows:

> "*Held* , dismissing the motion and refusing leave to appeal, that **a subsequent change in the law was not a sufficient reason for setting aside an order made by consent**; that, even if the consent order could be set aside, there was insufficient evidence to show that the present case was indistinguishable from the Court of Appeal decision...and that, therefore, it had not been shown that the plaintiffs had no real prospect of obtaining a permanent injunction at the trial and there were no grounds for discharging the undertakings." (Emphasis supplied)

[86] Even if the consent order in the present case were one which falls in the category of having been made by the judge, to which the parties, particularly the appellants, merely acceded, this court, as pointed out by Lord Denning MR in the excerpt from **Seibe Gorman**, has a discretion as to whether to relieve them from the obligation imposed by the order. In light of the reliance of both parties on the order, this court, contrary to Mr Green's submissions, should not set aside the order. This was not an unusual case, as contemplated by **Ropac Ltd v Inntrepreneur Pub Co**, or a

case where the order required the court to assist the parties to work out the mechanics of the order, as contemplated by **Chaggar**.

[87] The appellants are, however, entitled to insist that the bill be taxed. That was clearly set out in the terms of the letter of 1 May 2014. The taxation should have been in accordance with section 22(4) of the Legal Profession Act, rather than be finalised by a default costs certificate, pursuant to part 65 of the CPR. Neither the formal order nor the letter compromises the appellants' position in that regard. The appellants objected to the part 65 procedure from the beginning and have consistently maintained that position. CL should act in accordance with the terms of the 1 May 2014 letter. On that basis the bill of costs should be laid and either agreed or taxed. Thereafter, the monies that had been paid to CL should be divided between the parties accordingly, with CL repaying any sum due to the respondents.

Summary and conclusion

[88] Based on that analysis, CL was wrong to have initiated the claim in the Supreme Court. It had no privity of contract with the appellants. It therefore had no basis on which to claim costs from them. Consequently, the order made in the Supreme Court upholding CL's approach was wrong and must be set aside. The orders that follow from that finding is that the appeal should be allowed, the bill of costs should be struck out, and the default costs certificate and the writ of seizure and sale set aside, with costs to the appellants both here and in the court below.

[89] The appellants are not, however, entitled to have the interim order, made in this court, set aside. It was made with their consent, without any of the factors that would allow the setting aside of consent orders. A reading of the formal order and the letter sent by the appellants in performance of their obligation under the order, show that the parties contemplated a resolution of the costs issue by CL's laying a bill of costs for taxation. The appellants should not be relieved of the terms of the order. Even if the order were not in the nature of a true consent, but one to which they merely acceded, they had acted upon it and had required that CL should take certain steps in relation to it. For that reason this court should not exercise its discretion to set aside the order. The order should be given effect.

[90] Giving effect to the order imposes certain duties on CL. CL had laid the bill of costs but did not have it taxed. It reverted to the improper approach of a default costs certificate. The appellants did not agree to that approach. CL cannot benefit from it. The orders that should be made in respect of finalising the consent order is that CL should have its bill of costs taxed by the taxing master after notice to the appellants. The taxing master's order, subject to any appeal therefrom, would finalise the issue of the amount due, if any, from CL to the appellants. It is unlikely that the appellants would be required to pay anything further to CL since the latter has received all that it had claimed on its second bill of costs.

[91] It is proposed that the orders that should be made are as follows:

1. Appeal allowed.

2. The order made herein in the Supreme Court on 6 February 2014 is hereby set aside.

3. Subject to order 8 below, it is declared that the bill of costs filed to commence Claim No 2013 HCV 00999 is irregular and an abuse of the process of the court, and is hereby struck out.

4. The default costs certificate issued herein on 17 April 2013, in the sum of $13,152,413.79, is irregular and wrongly entered, and is hereby set aside.

5. The writ of seizure and sale issued herein in the sum of $13,152,413.79, pursuant to that default costs certificate, was wrongly issued and is hereby set aside.

6. The default costs certificate issued herein on 15 July 2014, in the sum of $753,392.60, is irregular and wrongly entered, and is hereby set aside.

7. The writ of seizure and sale issued herein in the sum of $753,392.60, pursuant to that default costs certificate was wrongly issued, and is hereby set aside.

8. As agreed by the parties, the bill of costs laid by the respondent on 7 May 2014 shall be taxed by the taxing master in accordance with section 22 of the Legal Profession Act and the relevant provisions of that Act shall apply to that procedure and any consequential procedure.

9. The respondent shall refund to the appellants any sum due to the appellants as a result of the taxation or any appeal therefrom.

10. Costs to the appellants both here and in the court below.

F WILLIAMS JA (AG)

[92] I have had the advantage of reading the draft judgments of Phillips JA and of Brooks JA in this appeal. Having done so, and having given particular attention to the very narrow point that separates them in this appeal, in relation to the way in which the consent order ought to be dealt with, I find myself to be in respectful disagreement with the position taken by Phillips JA and to be in agreement with the views expressed by Brooks JA in relation to the matter.

[93] I wish to adopt the discussion of the matter in paragraphs [72] to [87] of the judgment of Brooks JA, which represent my own views of the matter. Central to the resolution of this issue, it seems to me, is the recognition that the questioned order in this case could not be regarded as one that was based merely on the parties' submission to an order made by the court, to which they did not object.

[94] To my mind the consent order itself, and the letter dated 1 May 2014, pursuant to which it was written, amply demonstrate that the appellant's attorneys-at-law fully appreciated the nature of the agreement. I, therefore, concur in the view that they should not now be permitted to resile from it.

[95] I would also allow the appeal and make the orders suggested by Brooks JA.

PHILLIPS JA

ORDER

1. Appeal allowed.

2. The order made herein in the Supreme Court on 6 February 2014 is hereby set aside.

3. It is declared that the bill of costs filed to commence Claim No 2013 HCV 00999 is irregular and an abuse of the process of the court, and is hereby struck out.

4. The default costs certificate issued herein on 17 April 2013, in the sum of $13,152,413.79, is irregular and wrongly entered, and is hereby set aside.

5. The writ of seizure and sale issued herein in the sum of $13,152,413.79, pursuant to that default costs certificate, was wrongly issued and is hereby set aside.

6. The default costs certificate issued herein on 15 July 2014, in the sum of $753,392.60, is irregular and wrongly entered, and is hereby set aside.

7. The writ of seizure and sale issued herein in the sum of $753,392.60, pursuant to that default costs certificate was wrongly issued, and is hereby set aside.

8. Costs to the appellants both here and in the court below.

AND BY MAJORITY (PHILLIPS JA DISSENTING), IT IS FURTHER ORDERED

1. As agreed by the parties, the bill of costs laid by the respondent on 7 May 2014 shall be taxed by the

taxing master in accordance with section 22 of the Legal Profession Act and the relevant provisions of that Act shall apply to that procedure and any consequential procedure.

2. The respondent shall refund to the appellants any sum due to the appellants as a result of the taxation or any appeal therefrom.