JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 44/2009

BEFORE: **THE HON. MR JUSTICE COOKE, J.A.**
THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

BETWEEN	**MARGIE GEDDES**	**APPELLANT**
AND	**MESSRS M^{C}DONALD MILLINGEN**	**RESPONDENT**

Dr. Lloyd Barnett, Roderick Gordon and Christopher Levers, instructed by Gordon McGrath for the appellant.

Patrick Foster, Q.C., Maurice Manning and Ms Ayana Thomas, instructed by Nunes, Scholefield, Deleon and Co. for the respondent.

October 27, 28 & 29, 2009 and February 5, 2010

COOKE, J.A.

[1] On the 23rd March 2009, Jones J. determined that:-

> "There shall be summary judgment for the Claimant against the second Defendant in the sum of J$245,748,901.74 with interest at the rate of 1% above the commercial rate from April 24, 2008 to March 23, 2009, the date of this judgment. The commercial rate of interest to be assessed at a date to be fixed by the Registrar of the Supreme Court. There shall be costs to the Claimant to be agreed or taxed."

In this appeal the "Claimant" is the respondent and the 2nd defendant the appellant. I should also state that in the hearing before Jones J. there was also an application for summary judgment by the appellant in respect of the respondent's claim. The application was dismissed.

[2] The particulars of claim (paragraphs 4 – 12) which set out the basis of the claim is now reproduced.

> "4. In August, 1999, the First and the Second Defendants engaged the services of the Claimant to represent the Defendants to protect their interests in legal proceedings involving the First Defendant. The retainer was for the payment of the Claimant's fees against Invoices rendered until in November, 2003, when an agreement was made for no further payment of legal fees but only for a contingency fee of 15% of any amount recovered from the realization of the assets/surplus of Bardi Limited.
>
> 5. At the material time when the agreement was reached, the Supreme Court had ruled that the First Defendant was liable for a debt due to a trust company, namely ***Jorril Financial Inc. (JFI)***, in respect of promissory notes issued by the First Defendant to JFI in the sum of US$7,280,987.02 with interest at 12% per annum on the sum of US$4,474,326.00.
>
> 6. The Claimant duly performed the services of an Attorney-at-Law in representing the Defendant's interests.
>
> 7. In or about the 20th of April, 2006 the Claimant and the Defendants agreed to an amended contingency to the agreement provide for a contingency fee of 32½% to the Claimant.
>
> 8. The Claimant continued his (sic) representation of the Defendants until a further amended contingency fee

arrangement was finalized on or about February 4th, 2008 when the Defendants agreed to remunerate the Claimant with 40% of the surplus value of the First Defendant's assets after the satisfaction of creditors' claims.

9. Subsequent to numerous meetings and correspondence and negotiations with stockbrokers, other members of the financial sector and with the Trustee in Bankruptcy between November, 2007 and April, 2008 regarding the realization and liquidation of the assets of the First Defendant, and after due consideration, the Second Defendant on the advice of the Claimant injected capital into Bardi Limited in order to pay off its debts and as the best means of preserving the surplus to remain after payment of the debts.

10. Based on the foregoing, the First Defendant is no longer indebted to its several creditors and is likely to be released from bankruptcy and the involuntary winding-up order of the Court.

11. The Claimant has submitted its invoice dated April 24, 2008 for US$1,787,024.93 for professional services rendered calculated at 40% of US$3,834,817.45 which is the surplus of Bardi's assets remaining after payment of all its creditors and after allowing for the repayment to the Second Defendant of the sums loaned to the First Defendant. The Defendant has not settled the Claimant's Invoice but has instead raised issues which are irrelevant to the fee agreement and has requested copy documents and invoices for other work performed by the Claimant since 1999 in respect of unrelated matters in an obvious attempt to delay and or avoid payment of the Claimant's Invoice.

12. The Claimant avers that the sum in respect of his invoice dated April 24, 2008 is now justly due and owing pursuant to the revised fee agreement dated 4th February, 2008."

[3] It is necessary to appreciate the legal context in which the lawyer/client relationship between the appellant and respondent began and its development thereafter. Bardi Limited, who was the 1st Defendant in the court below, was a company in which Paul Geddes and his wife Margie (the appellant) were the only shareholders, each holding 50% of that company's shares. On the death of Paul Geddes his wife became sole beneficiary of his estate. Before his death the husband had established a trust in British Virgin Islands to benefit his children and grandchildren. He had prepared a series of promissory notes and endorsed and transferred those notes to Securities Trust and Management which subsequently endorsed them to Jorril Financial Inc. (JFI). Before the benefits of those promissory notes could be realized, Bardi Limited (the appellant now being the sole shareholder her husband having died), purported to enter into a contract to sell the most valuable asset of Bardi Limited i.e. the shares in Desnoes and Geddes. It is this purported contract which triggered litigation as JFI sought the aid of the court to enforce its rights pursuant to the promissory notes which had been endorsed to it. On the 16th January 2003 the court below (N. McIntosh J) gave judgment in favour of JFI and determined that the purported contract for sale of the shares of Desnoes and Geddes was invalid.

[4] The respondent alleges that in November 2003, subsequent to the decision in the court below, there was an agreement of 15% of any amount of the surplus of Bardi Limited, presumably after the satisfaction of the sum owed to JFI. On the 18th December 2003, there was a winding up order in respect of

Bardi Limited consequent on the ruling of N. McIntosh J. on 16th January 2003. On the 2nd February 2005 the Court of Appeal upheld the decision of the court below. The respondent alleges that in August 2006 there was an agreement of 32 ½ % contingency fee. On the 8th November 2006 their Lordships Board upheld the decision of the local courts. The respondent claims that on the 4th February 2008 there was an agreement that it should have 40% of the surplus after the winding up proceedings were completed.

[5] The respondent in paragraph 4 of the particulars of claim said it was engaged to represent and protect the interests of Margie Geddes and Bardi Limited in legal proceedings involving the latter. The scope of its involvement in these legal proceedings would appear to be limited to instructing counsel. It did not appear in any court nor do the court records list it as a participant in any proceedings. It is sufficiently certain that the appellant paid all the fees for counsel and costs awarded were to be paid by her.

[6] Paragraph 17 of the affidavit of Malcolm McDonald dated 21st October 2008 encapsulates the stance of the respondent. The relevant part reads:-

> "The contingency agreement related to the continuation of work done by the Claimant in prosecution of the appeal by Bastion Holdings Limited against Jorril Financial Inc in respect of the Sales of Shares Agreement between itself and Bardi Limited as well as work done by the Claimant to secure a surplus in the liquidation proceedings of Bardi Limited so that the Second Defendant, the sole shareholder and director would be left with a viable company."

Before moving on, I cannot help but note that the respondent's assertion in respect of a contingency agreement and the increasing percentages followed a loss in litigation. Further paragraph 5 of the particulars of claim would seem to be inaccurate.

[7] Jones, J. introduces his judgment in this way:

> "When is a contingency agreement not a contingency agreement? That is the question."

The learned trial judge assumed that there was a contingency agreement and the question was whether this agreement was enforceable by way of the summary proceedings then before him. I fear this was an incorrect approach. The first question should have been whether, on evidence, there was a lawful contingency agreement. On the 24th April 2007, an Act to Amend the Legal Profession Act came into operation. The respondent filed its claim on the 8th September 2008. Section 21 of the principal Act was amended by the Legal Profession (Amendment) Act 2007 to include inter alia, the following in subsection (8):

> "21. (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 proceeding."

The learned trial judge was in no doubt that there was unquestionably a contingency agreement. This is his reasoning as contained in paragraphs 33 – 35 of his judgment:

"33. On February 1, 2008, the Claimant sends an email to 2nd Defendant, which in my view, puts the entire discussions and understandings between the parties in its proper setting. This is how he puts it:

> 'the situation is that I have been acting on a contingency arrangement of 32.5% of the surplus in the liquidation. Because the numbers have shrunk since the judgment of the P.C I want to revise this to a split of 40% to me and 60% to you ... I await your confirmation of 60% you and 40% me split of the surplus. You cannot reasonably expect to get back the funds expended before splitting as I could receive nothing and have invested time over five years that I would have billed to other clients'.

34. Three days later on February 4, 2008, the 2nd Defendant accepts the proposal of the Claimant in the following terms:

> 'Your offer of 60% to me and 40% to you is acceptable to me. Please do carry on get the maximum you can get for both of us in that split.
>
> Regards, Margie'.

35. In my opinion, the email dated February 1, 2008, was an offer from the Claimant to the 2nd Defendant which was accepted by her in her email on February 4, 2008. The documentary evidence supports the conclusion that a contract in writing was formed for a contingency agreement of 40% of the surplus in Bardi Limited to the Claimant as remuneration for legal professional services. The claimant submitted an invoice for professional services, which is due and outstanding."

[8] The respondent bases its contingency fee agreement on its professional services which it says encompasses litigation and winding up proceedings. Quite

clearly, the respondent would not be entitled to any payment on the ground that there was any success in the prosecution of any action or suit. It, in so far as its involvement in this aspect is concerned, failed. The only question therefore is whether the respondent's professional services as to the winding up proceeding can properly be regarded as success in a contentious proceeding I think not. "Contentious" envisages an adversarial combat which arises from a dispute between contending parties. The respondent's affidavits speak to advice which was given to the appellant as to how best she should act so that a surplus would be obtained following winding up proceedings of Bardi Limited "so that the second Defendant (appellant) the sole shareholder and director would be left with a viable company" (see paragraph 4 supra). It is impossible for me to say that the legal professional services rendered, in this regard, to the appellant can be possibly regarded as "success in contentious proceedings. I find it more than a little curious that the Legal Profession (Amendment) Act was apparently not brought to the attention of the court below. It was not part of the debate before us. It was only in the preparation of this opinion that I was alerted to its existence as it was included in the bundle of authorities provided by the respondent.

[9] The learned trial judge in his judgment relied on **Swain v. Hillman** [2001] 1 All ER 91 and **Three Rivers District Council v. Bank of England (No. 3)** [2003] 2 A.C. 1. I have no difficulty in accepting as correct the views of

the respective judgments as to the application of Rule 15.2 (b) of our Civil Procedure Rules whereby summary judgment may be given where —

> "the defendant has no real prospect of successfully defending the claim or the issue".

In this case the claim and issue would be whether there was an unquestionable legally enforceable contingency agreement within the meaning of section 21(8) of the Legal Profession (Amendment) Act of 2001. It is my view that the learned trial judge's conclusion that the documentary evidence was conclusive of a contingency agreement cannot be accepted. The learned trial judge unfortunately, was not provided with crucial relevant legislation. The absence of any recourse to section 21(8) as provided in the Act to amend the Legal Profession Act (No 8 – 2007) means that the judgment of the court below cannot stand. It cannot be said that the appellant had no real prospect of defending a claim which was founded entirely on an alleged contingency fee agreement. I will go further and say that the claim of the respondent in the court below has no legal foundation. Before Jones J. was also an application for summary judgment by the appellant on the grounds that:

> "(a) the claimant has no real prospect of succeeding on the claim and there is no proof of the contingency agreement
>
> (b) Even if there is a contingency agreement as requested by law, the proposed transaction ... the basis of the agreement never occurred.

Jones J. dismissed this application. It is to be noted that those grounds bore no reference to the Legal Profession (Amendment) Act. Had this Act been brought

to the attention of the court, it is more than likely that this application would have succeeded. It should have, because of the amendment of the principal Act in 2007. I would allow the appeal. I would further grant the application for summary judgment brought by the appellant in the court below. The appellant should have her costs both here and in the court below.

[10] Finally, there are a number of issues which were debated before us but because of the conclusion to which I have come, it is unnecessary to deal with them. I would also like to state that I considered whether the court should have been reconvened to hear counsel on the effect of the critical amendment of 2007. However, I am convinced that in view of the stance of the respondent as to the basis underpinning its action and the definition of a "contingency fee" agreement, that action is doomed to failure.

HARRISON, J.A.

[11] This is an appeal against the decision of Jones, J. whereby he granted: (a) summary judgment to the respondent in the sum of J$245,748,901.74 with interest thereon at the rate of 1% above the commercial lending rate and costs to the respondent; and (b) dismissed an application for summary judgment filed by the appellant with costs to the respondent. My brother Cooke, J.A. has set out the background facts which have given rise to the appeal so there will be no need to repeat them. The case has its genesis in what is called a 'contingency

fee agreement' allegedly made between Messrs. McDonald Millingen, Attorneys-at-Law (the respondent) and their client, Mrs. Margie Geddes (the appellant).

The Issues

[12] Some twenty-one (21) grounds of appeal were filed, but in my judgment, they can be dealt with adequately under two main heads. They are:

> (i) Was there failure to comply with Rule 15.4(4) of the Civil Procedure Rules 2002 (CPR) in the application for summary judgment; and
>
> (ii) Was there clear evidence of a valid Contingency Fee Agreement between the parties?

Discussion

Issue (i) – The Failure to Comply with Rule 15.4(4) of the CPR

[13] Dr. Lloyd Barnett, for the appellant, submitted that in the summary judgment application before Jones J., the respondent had failed to comply with Rule 15.4(4) of the CPR which sets out the procedure whenever there is an application for summary judgment. The rule states as follows:

> "The notice under paragraph (3) must identify the issues which it is proposed that the court should deal with at the hearing."

[14] Dr. Barnett submitted that this rule requires the applicant to set out the issues and the grounds on which the application is based. He submitted that the

statement of issues not only identifies the points to which the defendant should respond but it limits the applicant to those issues. See **Balfour Beatty Construction Northern Limited v Modus Corovest (Blackpool) Ltd.** [2008] EWHC 3029 (TCC). He further submitted that although the Court has the power under Rule 26.9 of the CPR to rectify non-compliance with the Rules, the Court would be wrong to elect to exercise its discretion to make an order to put matters right since the error is not merely procedural but substantive. Furthermore, the application he said raised complex issues or matters requiring detailed analysis.

[15] Mr. Patrick Foster, Q.C. for the respondent agreed that the notice of application had failed to particularize the issues but submitted that it did state the grounds on which the application was made. He submitted that it was abundantly clear that the application was made pursuant to Part 15 of the CPR so, it was obvious what the grounds were, on which the respondent sought the order for summary judgment. He submitted that the issues which formed the basis of the application could have been gleaned from the affidavit filed in support as well as from the Claim Form and Particulars of Claim.

[16] Mr. Foster further submitted that there were exchanges of emails between the parties over a period of time, the rendering of invoices by the respondent for a specific period of time which said invoices were exhibited to the affidavit of the appellant and other correspondence which were sufficient for the

court to determine what the issues in the application were. There was no need in these circumstances he argued, for the trial process to proceed or for the appellant to give oral evidence. For those reasons he submitted that the summary judgment procedure was appropriate.

[17] Mr. Foster Q.C. also referred to the case of **Balfour Beatty** (supra) and **Shakira Dixon (by her next friend Norine Bennett) v. Donald Jackson** SCCA No. 120/2005 [19.01.06]). He finally submitted that failure to state the issues in the notice of application as required by Rule 15.4 (4) should not be fatal to the application since there was no prejudice to the appellant.

[18] In my judgment, there is merit in the submissions made by Dr. Barnett. It is abundantly clear that the purpose of the Rules is to allow the Court and the party meeting the application to have adequate notice of the issues raised by the application. This is not only desirable but also necessary, as the Court has to consider the appropriateness of the application before embarking on the hearing.

[19] Mr. Foster, Q.C. had urged the Court to accept his submission that the issues could be gleaned from the affidavit evidence of Mr. McDonald but I do believe that it did not state with the clarity demanded by the Rules any of the issues which arose for consideration by the Court. The application was dependent upon a construction of several emails, verbal discussions as well as an understanding of the wider context in which this particular matter took place. I would agree with the submissions of Dr. Barnett that this would not have been a

proper case for Jones, J. to have exercised his powers under rule 26.9 of the CPR which pertains to the general powers of the Court to rectify matters where there has been a procedural error.

Issue 2 – The Contingency Fee Agreement

[20] Prior to the enactment of the Legal Profession Act of 1971 (the Act), Jamaican law never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee'. Such an agreement was considered illegal, unlawful and unethical on the ground that it was contrary to public policy. That appears from the judgment of Lord Esher, MR in **Pittman v Prudential Deposit Bank** 13 TLR at 111:

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

[21] The state of the law has changed however since the introduction of the Act in 1971. Section 21(1) provides as follows:

> "21. (1) An attorney may 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."

[22] My brother Cooke, J.A. has pointed out in his judgment that section 21 (supra) was amended by the Legal Profession (Amendment) Act 2007 to include the following:

> "21. (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 proceeding". (emphasis mine)

[23] He has discussed the implications of this amendment and their effect on the case we have to consider on appeal. For my part, I will not pursue the appeal along the lines which have been set out in the judgment of my brother. It is abundantly clear to me however, that by virtue of the amendment success in the prosecution of the action, suit or proceeding, is the criterion for such fees being paid by the client.

[24] I will now turn my attention to the submissions which were raised in the appeal.

[25] Dr. Barnett submitted that for there to be a valid contingency fee agreement it must be in conformity with section 21 (supra). He argued that four (4) points should be noted when one comes to consider the above provision. They are:

1. There is the requirement for a written agreement;

2. The agreement must state the gross sum or percentage agreed on;

3. The amount which is fixed by the agreement cannot be subsequently altered; and

4. The agreement is subject to the court's determination as to whether it is unfair or unreasonable.

[26] It was conceded however, by the respondent that there was no written agreement in 2003 and Dr. Barnett submitted that in the circumstances of this case, the respondent's case was either in conflict with these provisions or was subject to the Court's jurisdiction to determine the scope of the agreement if any. He submitted that because of these factors, the case was unsuitable for summary judgment and that the appellant had a real prospect of succeeding in defending the claim.

[27] Mr. Foster Q.C. submitted on the other hand, that the fact that there was an agreement in 2003 between the parties not evidenced in writing as required by section 21 (supra) does not mean that there was no valid agreement between the parties. It is important he argued for one to make the distinction between

validity and enforceability. He submitted that the agreement that existed in 2003 was a valid agreement between the parties but at that time it was not enforceable by the attorney for the recovery of the contingency fee because it was not in compliance with section 21. He further submitted that the core issue of whether there was a valid contingency fee agreement between the parties was to a significant extent based on emails and correspondence exchanged between the parties. He argued that there were amendments as evidenced by the exchange of emails up to 2008 and that these documents would be sufficient to bring the contingency fee agreement in compliance with section 21 for the purpose of enforceability by the attorney.

[28] Mr. Foster Q.C. submitted that there is clear and incontrovertible evidence that from an email dated February 4, 2008 the appellant not only agreed to the respondent receiving 40% of the surplus but for that percentage to be deducted from it before the taking out of her expenses.

[29] It is necessary to examine the relevant e-mails and correspondence between the appellant and respondent. In a letter dated April 20, 2006 the respondent wrote to the appellant and requested an amendment to "the contingency arrangement" as follows:

> "...the amendment is asked because this matter is terribly complicated and will involve litigation possibly for years...the usual contingency fee is 40/50%. I am not proposing this percentage and I do not want to

> be unreasonable nor to appear greedy, therefore, I suggest 32.5%."

[30] Such a request in my judgment would lead to the question: what is the respondent seeking to amend when it is conceded that there was no written agreement in November 2003? Dr. Barnett's response was: Can you modify something that does not exist?

[31] By e-mail dated January 15, 2008, the appellant wrote to the respondent as follows:

> "After much thought and careful consideration I know that I would definitely like to see a surplus in Bardi limited...! definitely would like my costs replaced by a surplus so that if there is a surplus at the end of the day, anything over my gross expenses for this last eight to nine years of crapola, I will share with you at 50% to you with the agreement from you that you will assist me with media releases that could effectively educate the general reading public about the part that I did play and the part that I DID NOT play in this case."

[32] Mr. Malcolm McDonald then swears in his affidavit of September 12, 2008 that he had proposed a contingency fee of 40% of the surplus in liquidation which the 2nd Defendant agreed to by email dated January 16, 2008, where she responded:

> "I would think the 60 goes to me and the 40 to you"

[33] On February 1, 2008, the respondent emailed the appellant. Jones, J. expressed the view that this e-mail had placed "the entire discussions and

understandings between the parties in its proper setting". The e-mail states inter alia:

> "the situation is that I have been acting on a contingency arrangement of 32.5% of the surplus in the liquidation. Because the numbers have shrunk since the judgment of the P.C I want to revise this to a split of 40% to me and 60% to you...I await your confirmation of 60% you and 40%me split of the surplus. You cannot reasonably expect to get back the funds expended before splitting as I could receive nothing and have invested time over five years that I would have billed to other clients."

[34] On February 4, 2008, the appellant is purported to have accepted the proposal of the respondent in the following terms:

> "Your offer of 60% to me and 40% to you is acceptable to me. Please do carry on get the maximum you can get for both of us at that split.
>
> Regards, Margie."

[35] In the opinion of Jones, J. this e-mail of February 1, 2008 was an offer from the respondent to the appellant which he said was accepted by her in her email on February 4, 2008. The learned judge concluded as follows:

> "... - The documentary evidence supports the conclusion that a contract in writing was formed for a contingency agreement of 40% of the surplus in Bardi Limited to the Claimant as remuneration for legal professional services. The Claimant submitted an invoice for professional services, which is due and outstanding."

[36] Dr. Barnett submitted that with respect to the e-mail dated February 4, 2008 this document did not indicate (1) what is the work that is to be done, (2) on behalf of whom it was made, (3) how was the surplus to be valued, (4) whether or not it should be net or gross, (5) how the valuation or quantification of the surplus would be achieved; and (6) how the public relations exercise would be conducted.

[37] But Dr. Barnett submits and I agree with him that the contents of the e-mail of February 1, 2008 were not the case that was pleaded in the Claim Form filed September 8, 2008. The Claim reads as follows:

> "The Claimant ... (sic) to recover:
>
> (i) The sum of US$1,787,024.93 being the sum due to the Claimant as at the 24th of April, 2008 in respect of an invoice tendered for services rendered pursuant to an agreement reached between the parties in November, 2003 as modified and or varied on the 4th of February 2008.
> (ii) ...
>
> (iii) ...."

[38] The question is: if no written agreement for November 2003 can be produced, how can what does not exist be modified or varied on February 4, 2008? In my judgment, the respondent has failed to provide admissible and/or credible evidence regarding formation of the **base** Contingency Fee Agreement. The learned judge had therefore erred in his finding that there was an

understanding between the parties sufficient to form a valid enforceable contingency fee agreement.

Conclusion

[39] In my judgment, there are two bases for concluding that the appeal ought to be allowed. First, the respondent's application for summary judgment was defective and secondly, there was clearly no conclusive evidence of a valid contingency fee agreement between the parties. Once there are issues on which the defendant has a chance of succeeding, summary judgment should not be granted. See **Swain v Hillman** [2001] 2 All ER 91; **Three Rivers District Council v Bank of England (No. 3)** [2001] 2 All ER 513; and **ED&F Man Liquid Products Ltd. v Patel** [2003] EWCA Civ. 472.

[40] I would therefore allow the appeal as set out hereunder:

> Appeal allowed. Judgment entered for the appellant on the application for summary judgment in the court below. The appellant is to have her costs both in the appeal court and in the court below.

DUKHARAN, J.A.

[41] I agree with the conclusions of my learned brothers Cooke and Harrison, JJA that the appeal should be allowed and that the application for summary judgment brought by the appellant in the Court below be granted. However I

wish to add a few comments and particularly as it relates to section 21 of the Legal Profession (Amendment) Act 2007.

[42] The amendment to the principal Act is worth repeating which includes the following:

> "21. (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 proceeding."

[43] It seems to me that the respondent's affidavits concern advice given to the appellant as it relates to a surplus being obtained following winding up proceedings of **Bardi Limited**. It is clear to me that the legal professional services rendered by the respondent cannot be regarded as "success in contentious proceedings." The respondent in my view would not be entitled to payment as they were not successful in the prosecution of any action or suit.

[44] I agree with Dr. Barnett that for a valid contingency fee agreement there must be the requirement for a written agreement. The agreement must state the gross sum or percentage agreed on; and the amount which is fixed by the agreement cannot be subsequently altered. It seems quite clear to me that there was no compliance with section 21. I do not agree with Mr. Foster, Q.C. for the respondent, that although there was no written agreement in 2003, the exchange of e-mails up to 2008 would be sufficient to form the basis of a contingency fee agreement. In my view there was no valid contingency fee

agreement and the learned judge erred when he found that there was an understanding between the parties to that effect.

[45] Finally I agree with my brother Harrison, J.A. in his construction of the relevant rules in the Civil Procedure Rules pertaining to summary judgment.

COOKE, J.A.

ORDER

Appeal allowed. Judgment entered for the appellant on her application for summary judgment in the court below. The appellant is to have her costs in the appeal and in the Court below.