IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. J 061 OF 1999.

BETWEEN	GRESFORD JONES	PLAINTIFF
AND	YVON DESULME	1ST DEFENDANT
AND	THOMAS DESULME	2ND DEFENDANT
AND	CLAUDE DESULME	3RD DEFENDANT
AND	MYRTHA DESULME	4TH DEFENDANT

Mr. Dennis Morrison Q.C and Miss J. Mais instructed by Dunn, Cox,Orrett, Ashenheim and Stone for the Plaintiff.

Miss G. Mullings and Miss L. Stewart instructed by Patrick Bailey and Co. for Defendants.

Heard: December 14, 19, 2000; June 21, 28; July 11, November 5, 2001.

HARRISON J

The plaintiff seeks summary judgment against the first, third and fourth defendants pursuant to section 79(1) of the Judicature (Civil Procedure Code) Law in the sum of Five Million Seven Hundred and Fifty Thousand Dollars ($5,750,000.00) with interest thereon at the rate of 6% per annum from the 24th day of June, 1999 to the date of judgment.

On July 11th 2001 I completed hearing arguments and submissions in the matter and reserved judgment. I had promised to deliver judgment as early as possible but the legal vacation intervened. I do apologize for the delay in handing down judgment and now seek to fulfill this promise.

The Statement of Claim

The statement of claim alleges inter alia, that by an agreement in writing made between the plaintiff and the defendants (the first Agreement), the plaintiff agreed to act as an Attorney

at Law and to render professional services for and on behalf of the defendants and the defendants agreed to retain the plaintiff and to pay him for his professional services rendered on a contingency basis in connection with matters arising from the Estate of Thoams DeSulme, deceased. The First Agreement is contained in a Memorandum in writing dated the 30th April, 1996, signed by the first, third and fourth defendants and which provided for a contingency fee of $3,000,000.00. Memorandum in writing dated the 30th May, 1996 which was signed by the defendants had increased the contingency fee payable from $3,000,000.00 to $3,500,000.00. Memorandum in writing dated the 12th September, 1996 which was signed by the defendants had further increased from $3,500,000.00 to $4,500,000.00.

It was a condition of the first Agreement that the contingency fee would be payable upon the Defendants' success in the said actions.

Pursuant to the first Agreement, the Plaintiff acted as Attorney at Law for the defendants in connection with the said actions. On the 5th February, 1998 judgment was obtained in favour of the Defendants in suit No. E 352 of 1994 whereby the said Deed was held inter alia, to be null and void and was set aside. On the 16th February, 1998 in relation to Suit No. E 287 of 1996 judgment was again entered in favour of the defendants whereby the Supreme Court ordered, inter alia, that the said Jean Marie DeSulme and Jeffrey Pattinson submit detailed accounts of their dealings..."

There was an additional agreement in writing between the parties whereby it was agreed that the defendants would pay the sum of $500,000.00 to the Plaintiff to act as an Attorney at Law and to render professional services for and on behalf of the defendants in connection with an action filed by the said Jean Marie DeSulme and Jeffrey Pattinson.

The Defence

Appearances were entered by the first, third and fourth defendants respectively and a Defence was filed and served out of time. This Defence was returned and the defendants were advised to seek leave of the Court to file it. A proposed Amended Defence has now

been exhibited to the Affidavit of the 4th named Defendant sworn to on the 20th day of November 2000.

The Defendants have alleged that they had entered into a contingency agreement with the plaintiff and that it was contingent upon whether the plaintiff enabled the defendants to access benefits under the will of the Defendants' father, Thomas DeSulme, deceased. They further allege that the plaintiff never enabled them to access such benefits and is therefore not entitled to collect the sum alleged or any sum at all.

It is further alleged that the agreement is void for lack of consideration and at the same time had been obtained through the use of undue influence on the defendants. They aver that at all material times they were without income and desperate when they signed the contingency agreements with the plaintiff under undue influence.

The Defence further alleged that the contingency agreement was champertous and therefore illegal and/or void and/or contrary to public policy and cannot be relied on. Accordingly, the defendants alleged that the Plaintiff was not entitled to recover the sum claimed or any other sum pursuant thereto.

They have admitted they had entered into the agreements referred to in the statement of claim which alleged that it was a condition that the contingency fee would be payable upon the defendants' success in the aforesaid actions. They also admitted that there was a judgment in their favour in two actions.

With respect to the alleged agreement for the $500,000.00 fees alleged in paragraph 5 of the statement of claim, the defendants denied this allegation and have asserted that the Plaintiff would only be entitled to reasonable payment, if any, for services rendered subject to taxation by the Court.

The Affidavit Evidence

The affidavit evidence is voluminous. I have also had the benefit of seeing and hearing the fourth defendant being cross-examined upon her affidavit evidence. Counsel on both sides referred me to various aspects of the evidence and addressed me as well on these areas.

Let me summarize as best as possible what the deponents said.

The plaintiff deposed that he verily believes that the defendants have no defence to the action. He has denied exerting any undue influence upon the defendants and has asserted that they had expressed complete satisfaction with the efforts made by him on their behalf. He has also deposed that the lifestyle of the defendants is completely inconsistent with their allegation that at the time they entered into the various agreements they were "without income and desperate".

The defendants on the other hand, have contended in their affidavit evidence that they have a Defence to the Action and that they ought to be given leave to defend it. They have asserted that there was no consideration given for any of the agreements. They contend that a Ron Perry who had worked at their late father's company as a Consultant, had suggested to them that the plaintiff should be used as their Attorney in order to attain their objectives.

They further assert that they met with the plaintiff and disclosed to him at the outset that they did not have any money to pay him as they had already committed themselves to Messrs Rattray Patterson & Rattray who had filed a suit on their behalf and that they were impecunious. They also say that the plaintiff thereafter told them that he would do the matter on a contingency basis and all that they would require to pay at the outset was $15,000.00 as a retainer fee and that once they were put back in their positions he would collect his fees.

Accordingly, the agreements were subsequently formulated and prepared by the plaintiff and signed by them under undue influence. They were not allowed to have another

Attorney at Law to peruse the agreements hence they were unable to receive independent legal advice.

They contend that even though the actions in the Supreme Court were determined in their favour, an appeal is still pending in one of the suits.

They also complain that the contingency has not crystallized since they have not received any benefit so far from the estate of their deceased father.

They further contend that the fees demanded by the plaintiff are unfair, excessive, oppressive and unreasonable having regard to the minimal work he has done. They also contend that they were influenced by Ron Perry who had indicated that in order to receive his assistance they had to use the plaintiff as their Attorney at Law.

Submissions and Assessment of the Evidence

The Court was the beneficiary of written submissions furnished by the Defendants' Attorneys. For this, the Court expresses its indebtedness. Mr. Morrison Q.C, made oral submissions.

Criteria for summary judgment

Section 79(1) of the Judicature (Civil Procedure Code) Law is the relevant section dealing with applications for summary judgments. It is clear from the section that once the plaintiff satisfies the conditions set out, the onus shifts to the defendant to show cause why summary judgment should not be entered. He can only do so by showing that there is a good defence on the merits that is to say, that there is a triable issue or that for some other reason, there ought to be a trial.

The Head Note in **National Westminster Bank v Daniel** [1994] 1 All E.R 156 summarizes and sets out quite clearly the criteria for summary judgments. It reads as follows:

> "On an application by the plaintiff for summary judgment under RSC Ord 14 a defendant seeking unconditional leave to defend must satisfy the court that there is

a fair or reasonable probability of his having a credible defence and not merely that there is a faint possibility that he has a defence. If it is not credible, then there is no fair or reasonable probability of him setting up a defence. If the affidavits in support of the application for leave to defend give conflicting evidence the court may conclude that, because they cannot both be correct and the inconsistency is such as to cast doubt on whether either is correct, there can be no fair or reasonable probability of the defendant having a real or bona fide defence".

I will now turn to the issues in dispute.

Inconsistencies and contradictions

Mr. Morrison Q.C submitted that there was conflict between the Defence filed, the affidavit evidence of the fourth defendant and her evidence under cross-examination as to the benefit to be derived by the defendants. This he said must cast doubt as to whether or not there is a fair or reasonable probability of they having a credible defence.

Miss Mullings contended on the other hand, that even where discrepancies of facts arise (which is not admitted) they ought to be resolved at a hearing in open court. How does the authorities deal with this issue? In **Bhogal v Punjab National Bank, Basna v Punjab National Bank** [1988] 2 All E.R 296 at page 303, Bingham L.J stated:

" But the correctness of factual assertions such as these cannot be decided on an application for summary judgment unless the assertions are shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence."

The test in determining whether to grant an order for summary judgment where there are conflicts before the Court, is also stated by Glidewell L.J in **National Westminster Bank v Daniel and Others** [1994] 1 All E.R 156. He stated at page 160:

"is what the defendant says credible? If it is not, then there is no fair or reasonable probability of him setting up a defence".

I am of the view that where there are inconsistencies and/or discrepancies, these are matters for the trial judge to decide on despite the fact that the fourth defendant had been cross-examined upon her affidavits with respect to the benefits to be received. I find the dicta by Webster J in *Paclantic Financing Co Inc v Moscow Narodny Bank Ltd* [1983] 1 WLR 1063 most apt where he said at page 1067:

'. It does not seem to me that cross-examination of the defendant on his affidavit is likely to assist. If the case is complicated the preparation for and hearing of the cross-examination may involve almost as much time and expense as the trial. If the case is straightforward a speedy trial could be ordered. But in the absence of an opportunity to test the defendant's veracity, it seems to me that the court should never give summary judgment for the plaintiff where, upon the evidence before it, even a faint possibility of a defence exists.' (emphasis supplied)

Champerty

The defendants have raised in their Defence and proposed Amended Defence that the contingency agreement between themselves and the plaintiff was champertous. From the classic judgment of Danckwerts J in **Martell v Consett Iron Co Ltd** [1954] 3 All ER 339,[1955] Ch 363 to the decision of the House of Lords in **Trendtex Trading Corp v Crédit Suisse** [1981] 3 All ER 520,[1982] AC 679, the cases are harmonious on one point, namely that the purpose of this head of public policy is to protect the integrity of public civil justice. The doctrine was described by Lord Denning MR in **Re Trepca Mines Ltd** [1962] 3 All ER 351 at 355,[1963] Ch 199 at 219–220, as follows:

'The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be

exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law; and I may observe that it has received statutory support, in the case of solicitors, in s. 65(1)(a) and (b) of the Solicitors Act, 1957.'

Mr. Morrison Q.C argued that this area of the law is of no relevance in Jamaica since the passing of the Legal Profession Act. He also argued that subsequent to the passing of this legislation contingency fee agreements have been legal in Jamaica and the prohibition against such agreements in England are as a result not applicable.

Now, section 21 of the Legal Profession Act (referred hereinafter as "The Act") is the relevant provision which will have to be considered. This section deals with the recovery of fees where there had been an agreement in writing between the Attorney and the client and it allows the Attorney to bring an action for the recovery of fees. Section 21(2) provides that fees payable under any such agreement shall not be subject to taxation. Section 21(1) states as follows:

> "Section 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. (emphasis supplied)

What is meant by the term "percentage or otherwise" in section 21(1) of the Act? Mr. Morrison Q.C submitted that it definitely speaks to contingency fee agreements which are quite legal and enforceable. He referred to the case of **Gayle v Nugent** 19 JLR 453 and submitted that it is a useful decision on the question of contingency fees. He also referred

to and relied upon Canon IV(f)(viii) of The Legal Profession (Canons of Professional Ethics) Rules and submitted that there is express provision for contingency fees . This Canon states as follows:

> "iv(f)(viii) – The fees that an Attorney may charge shall be fair and reasonable and in determining the fairness and reasonableness of a fee any of the following factors may be taken into account:-
>
> ....
>
> (viii) whether the fee is fixed or contingent"

Finally, Mr. Morrison Q.C submitted that even if the law of champerty were applicable in Jamaica, the nature of the proceedings in the instant case would not bring the arrangements into the arena of champerty. In any event, he argued that the second agreement pleaded in the statement of claim was not a contingency agreement (This was an additional $500,000.00 fee agreement).

Miss Stewart submitted however, that there is nothing in the Act that can be construed to make any agreement by which a lawyer is remunerated on a contingency fee basis valid. She also submitted that champerty has been retained in Jamaica as part of the common law and that it was not correct to say that it had no relevance to Jamaica. Furthermore, clear language was required to abrogate common law principles.

She agreed that section 21 of the Act governed this case and that when one examines the agreements, champerty is apparent. She argued that the fees undertaken, increased from one document to the other. In "GJ1" it was $3M; "GJ 2" $3.5M and "GJ 3" $4.5M. It also appears she said that on the face of documents, the typed sums had been changed by agreement downwards. She argued that in addition to allowing the Attorney to recover his agreed fees under section 21(see **W.Bentley Brown v Raphael Dillion and Anor**. (1985)22 JLR 77) it also provides a safeguard to protect the client.

Miss Stewart further argued that the term "gross sum" related to lump-sum agreements and that Carberry J.A had observed in Bentley Brown (supra) that lump-sum agreements were legal before the Act, but were "viewed with great jealousy by the Court". She also said that "percentage" based fee agreements are well known in the legal profession. They are customarily used in non-contentious conveyancing and estate matters where fees are a percentage of the transaction. Accordingly, she submitted that section 21 of the Act does not by necessary implication relate to contingency fee agreements and that **Gayle v Nugent** (supra) cannot assist the Court in the interpretation of this section. As a matter of fact, she argued that the Court had expressly refrained from speaking on the issue.

Finally, Miss Stewart submitted that Canon IV(f)(viii) does not affect the common law policies in relation to Attorneys' contingent fees. Rather, it was equivocal on this issue. She maintained that the overriding principle was that the Court had a discretion to ensure that an Attorney, as an officer of the court, is remunerated properly. This was also the scheme of the Legal Profession Act. Furthermore, she argued that Canon IV(f)(viii) must be read in light of Canon IV(e) which provides that "An Attorney shall not enter into an agreement for or charge or collect an illegal fee".

A perusal of Gayle's case referred to above reveals that it is one in which an Attorney-at-Law was claiming fees pursuant to a contingency agreement in respect of an action filed in a foreign court. The issue was whether the claim was actionable unless costs were first taxed. Dr. Barnett who appeared in the case had argued that section 21 of the Legal Profession Act gives authority for a contingency fee for any kind of legal work done, and in relation to such fees, taxation is not a condition precedent to action for recovery of the same. I agree with Miss Stewart that no assistance can be gained from the case in the interpretation of section 21. The Court did not express an opinion on the submission made by Dr. Barnett with respect to the authorization of contingency fees.

It is my considered view that the issues raised by the defendants regarding champerty, contingency fee agreements under the Act and the Legal Profession Rules are serious and

these are matters which ought to be left for a trial judge to decide on. In **Awwad v Geraghty & Co. (a firm)** [2000] 1 All E.R 608, Shiemann L.J said at page 610:

> "The area of the law is one in which judicial perceptions have differed and in which there has been much public and parliamentary debate and some recent legislation. Many professions operate with the concept of success fees. But the position of solicitors and barristers is to a degree different in that they are regarded as owing a duty to the court which may require them to reveal to the court matters which it would be in the interests of their client to conceal. The background to the debate has been, on the one side, a historically widespread perception that if the lawyer has too much at stake in the success of the litigation then he may yield to the temptation to prolong litigation which could have settled or to a temptation to act improperly in order to secure success, and, on the other side, a conviction that it aids access to justice if clients can litigate without the fear of having to pay both sides' costs if they lose".

Sums being unfair and unreasonable

It was also submitted on behalf of the defendants that a trial would be necessary to determine whether the sums demanded were in breach of the Legal Profession Act in the sense of being "Unfair and Unreasonable" and/or in breach of section 21(1) as further charges for the same work. Miss Mullings argued that there was no information before the court from which one can effectively determine the value of the work done by the plaintiff. Nor has the court had the opportunity to take the evidence of expert witnesses as to what should have been done to provide the defendants with the relief they were seeking. She submitted that effective representation was therefore in issue and such effectiveness would have to be proved at a trial of this action by calling expert evidence. Furthermore, she argued that it was alleged at paragraph 2 of the Proposed Amended Defence that the services rendered by the plaintiff were unsuccessful and ineffective.

Crystallization of the agreements

There is also the issue as to whether or not the contingency had crystallized. Miss Mullings submitted that it has been pleaded by the defendants that the contingency on which the agreements were based had not crystallized. She argued that the plaintiff in his affidavits state that the defendants agreed that once he was successful in their matter he would be paid but the defendants allege that the agreement was contingent on their obtaining a tangible benefit from their deceased father's estate of which shares in Thermoplastics Limited was the major asset. She submitted that a trial would have to determine what was the true meaning of success with respect to the agreements. She submitted that this discrepancy was an issue of fact which must be resolved at a hearing in open court.

The Court's inherent jurisdiction

There is also the question of the Court exercising its inherent jurisdiction in relation to written agreements where the fee is considered to be unfair and unreasonable. Downer J.A in Frankson (supra) stated that although fees payable under a written agreement pursuant to section 21(1) shall not be taxed, section 21 did not touch the inherent jurisdiction of the Court to refer written agreements to the Registrars of either court for taxation on a solicitor and own client basis and thereafter, for the Registrar to report the matter to the Judge for a final determination of a fair and reasonable fee.

I do agree that this would have been one option open to me but I would hesitate at this stage in exercising this option in the given circumstances of the case.

The role played by Ron Perry

Of course, there is also another matter that a trial judge would have to decide and that is the role played by Ron Perry in the formation and conclusion of the agreements. He has been referred to in the agreements of the 30th May 1996 and 17th July 1996 (supra) respectively and the fourth defendant did allege in her affidavit of the 30th October 2000 how he came to be associated with the plaintiff. Did he elicit the patronage of the defendants and if so, was the plaintiff in breach of the Canons of the Legal Profession Act?

Was he an agent of the plaintiff and could his association with the plaintiff taint any contract that was entered into between the parties?

Undue influence

With respect to the issue of undue influence Mr. Morrison Q.C submitted that paragraphs 3 and 4 of the Defence lacked particularity. The proposed Amended Defence seeks to fill that gap however. He further submitted that the proposed particulars of undue influence cannot even if proved establish the defendants' claim to having acted as a result of undue influence. He argued that it was not sufficient merely to establish a relationship but it must be shown that the transaction was manifestly disadvantageous to persons such as the defendants in instant case.

He further argued that the agreements were entered after discussions had taken place over several months. Furthermore, the defendants were all adults and on the evidence of the 4th defendant they were not inexperienced in the ways of business.

For her part, Miss Mullings submitted that the allegations of undue influence are quite apparent in the instant case. She argued that manifest disadvantage was not a necessary ingredient to establish unconscionable bargain and in any event there was such manifest disadvantage in the circumstances of this case because the defendants did not have the means to pay and expected by virtue of the defendants' representations to have such means if they were effectively represented. She further argued that it was the plaintiff who had drafted the contract and represented them and it was he who interpreted same for them. The plaintiff's affidavits have denied these suggestions however.

It is my considered view that there is the serious issue of undue influence to be decided. It would have to be decided whether the defendants were truly desperate as they allege and whether they continued to sign contingency agreements for high sums when they were financially embarrassed. Again, a trial judge would have to decide Ron Perry's role in the transaction. There are allegations that the plaintiff had benefited from the representations made by Perry and in fact the agreements did secure Perry's fees.

Procedural flaws

The defendants also contend that there were procedural flaws which would prevent the plaintiff from obtaining summary judgment. They are:

(a) He failed to provide any evidence to the court that he is a registered taxpayer under the General Consumption Tax Act.

(b) None of the agreements were stamped pursuant to section 36 of the Stamp Duty Act.

(c) He failed to provide a tax invoice as required under section 22(a) of the General Consumption Tax Act.

(d) He failed to provide a proper invoice under the Legal Profession Act before filing suit.

Conclusion.

It is my considered view, that both the affidavit evidence on behalf of the defendants and the draft defence, demonstrate that a variety of serious issues arise for consideration. In the circumstances, it is further my view that these issues ought to be resolved at a trial. Furthermore, the plaintiff's claim raises questions which are of general public importance both to the legal profession and to the public at large. In the result I would refuse the application for summary judgment.

Order

1. The application by the plaintiff for summary judgment is dismissed.
2. The defendants are given unconditional leave to defend.
3. The Defence filed in the Registry of the Supreme Court on the 3rd April 2000, is to stand.
4. Leave granted to the Defendants to file and serve the proposed amended defence herein within fourteen days of the date hereof.
5. Costs to the 1st, 3rd , and 4th defendants to be taxed if not agreed.