[2022] JMCC Comm 36

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2020CD00252

BETWEEN WINSOME MCGLASHAN CLAIMANT

AND NICHOLSON PHILLIPS DEFENDANT

Appearances: Mr. Maurice Manning K.C and Allyandra Thompson instructed by Nunes, Scholefield, DeLeon & Co Attorneys-at-Law for the Claimant

Mr. Michael Hylton K.C and Daynia Allen Instructed by Hylton Powell Attorneys-at-Law for the Defendant

Heard: 2nd – 4th May, 6th June and 29th November and 9th December 2022

Contract for fee sharing between Attorneys - Whether mere referral – Breach of Canon IV (g) of the Legal Profession (Canons of Professional Ethics) Rules – Whether contract is unenforceable by reason of public policy – Attorneys' fees in the administration of estate

BROWN BECKFORD J

INTRODUCTION

"Whether law be a business or profession the question of remuneration remains to the end a most perplexing and disagreeable one"[1]

---

[1] **The Law. A Business or a Profession? Author(s): Champ S. Andrews Source: The Yale Law Journal, Jun., 1908, Vol. 17, No. 8 (Jun., 1908), pp. 602-610 Published by: The Yale Law Journal Company, Inc.**

[1] Ms. Winsome McGlashan is an Attorney-at-Law and a former partner of the law firm Banjoko McGlashan Weislaw Attorneys-at-Law **("Banjoko")**. Nicholson Phillips is a law firm whose partners are Mr. Manley Nicholson and Ms. Lorna Phillips. Ms. McGlashan and Nicholson Phillips, with Mr. Nicholson representing his firm, entered into a fee sharing arrangement upon the referral of a client of Banjoko, whose matter was being handled by Ms. McGlashan. This arrangement deteriorated over time and has culminated in this action.

[2] Ms. McGlashan commenced this claim against Nicholson Phillips by way of Claim Form and Particulars of Claim to recover damages for breach of contract. She seeks the following relief:

a. Damages for breach of contract in the sum of Nine Million Seventy-Three Thousand Two Hundred and Eighty-Seven Dollars and Seventy-Two Cents **($9,073,287.72)** representing one half portion of professional fees due and owing to the Claimant as at January 31, 2019.

b. That the Defendant provides an accounting of all sums received as professional fees in relation to the Administration of the Estate of Winston Riley, deceased.

c. An order that the Defendant pays to the Claimant one half of all professional fees found upon an accounting to have been received by the Defendant in relation to the administration of the Estate of Winston Riley, deceased, from October 7, 2015 to the date that the said administration is completed.

d. Interest pursuant to the Law Reform (Miscellaneous Provisions) Act.

e. Costs.

f. Such further and /or other relief as this Honorable Court deems just.

BACKGROUND

[3] Ms. McGlashan was previously a partner in Banjoko between 2013-2015. Ms. Jahasama Riley retained the firm to act on her behalf in the Administration of the Estate of her late father, Winston Riley. Ms. McGlashan assumed conduct of the matter and subsequently a Grant of Administration was issued on July 31st 2015. Banjoko was dissolved in 2015, around which time Ms. McGlashan entered negotiations with Nicholson Phillips for that firm to assume primary conduct of the Administration of the Estate, on behalf of Ms. Riley.

[4] By collaboration agreement dated 7th October 2015 between Ms. McGlashan and Nicholson Phillips, it was agreed that Nicholson Phillips would assume lead role in the Administration of the Estate of Winston Riley and would be responsible for collecting all fees for all work done in respect of the estate. All fees garnered from the Administration of the Estate would be shared equally between the parties. In accordance with this agreement, Ms. McGlashan released Ms. Riley from the existing Attorney-Client agreement. Subsequently, Ms. Riley entered into a similar agreement with Nicholson Phillips and signed the Client Engagement Letter dated 7th October 2015 on the 14th of October 2015.

[5] Several payments were made to Ms. McGhlashan which Mr. Nicholson claimed represented the entire sums owed to her pursuant to the Collaboration agreement. Ms. McGlashan disputed this, and claimed that based on the value of the estate, she had not received the half of the legal fees due to her. Mr. Nicholson's contention was that by virtue of an invoice submitted by her, Ms. McGlashan was only due to be paid for the services rendered by her, while at Banjoko, and for which she had not been paid by Ms. Riley.

[6] Ms. McGlashan disputed that was the intention of the invoice claiming that the invoice was sent at the request of Mr. Nicholson. Unable to resolve their disagreement, the parties engaged in discussions in an attempt to amicably resolve the issues between them. However, those discussions were futile. Mr. Nicholson later crystalized his position that:

(1) Ms. McGlashan was not entitled to any fees earned in respect of litigation, royalties management, intellectual property management and music management undertaken by Nicholson Phillips on behalf of Ms. Riley.

(2) In any event the Collaboration Agreement breached the **Legal Profession (Canons of Professional Ethics) Rules** and the **Real Estate (Dealers and Developers) Act.**

ISSUES

[7] The Issues that arise for determination are:

(1) Whether the Collaboration Agreement between Ms. McGlashan and Nicholson Phillips is unenforceable?

(2) Whether Litigation fees, Royalty Management fees, intellectual property management and Music Management fees should be excluded from the scope of legal services in the Administration of the Estate of Winston Riley?

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[8] The first line of attack by Mr. Maurice Manning K.C. was to the credibility of the sole witness for the defendant, Mr. Manley Nicholson. He submitted that Mr. Nicholson's evidence lacked credibility as it contained several discrepancies which the Court should not overlook. He contended that Ms. McGlashan's evidence should be preferred to that of Mr. Nicholson's as she remained consistent throughout her evidence. He asked the Court to consider the case of **Thornton v Northern Ireland Housing Executive** [2010] NIQB 4 in making its determination as to credibility.

[9] Mr. Manning submitted that the letter dated 7th October 2015 (the Collaboration Letter) constitutes the entire contractual agreement between Ms. McGlashan and Nicholson Phillips. To this effect he submits that the Collaboration Agreement possessed

all the elements of a binding and enforceable contract. He contended that Ms. McGlashan made an offer to Nicholson Phillips which it unequivocally accepted. Furthermore, Ms. McGlashan had performed legal work prior to and after the commencement of the agreement. Additionally, it was understood by both parties that this agreement would govern their relationship. Reliance was placed on **Keith Garvey v Ricardo Richards** [2011] JMCA Civ. 16.

[10] Further, Counsel urged the Court that pursuant to the Collaboration Agreement, Ms. McGlashan is entitled to her one half fees as the agreement clearly sets out the governing terms. He submitted that in construing the agreement the Court must consider the principles which govern the construction and interpretation of contracts. He relied on **Investors Compensation Scheme Ltd. V West Bromwich Building society** [1998] 1 WLR 896. He further submits that in the absence of any ambiguity in the agreement, the agreement should be construed in order to give effect to business common sense. Reliance was placed on **Ricardo McDonald v Island Networks Limited** [2019] JMSC Civ 125 and **Rainy Sky SA and others v Kookmin Bank** [2012] 1 ALL ER. On this basis Counsel submitted that Nicholson Phillips had breached the Collaboration Agreement by failing to pay Ms. McGlashan one half of the fees in the administration of the estate.

[11] It was also the position of Mr. Manning that Nicholson Phillips attempted to eliminate some of the fees owed to Ms. McGlashan by contending that the said fees did not fall into the category of *"Administration of Estate"*. Counsel argued that the term *"Administration of Estate"* is not an ambiguous term and what it entails would be known by attorneys, like Mr. Nicholson, who practice Succession Law. He further submitted that Administration of the Estate included all the necessary steps taken to gather, preserve and manage the assets of the deceased which included the real estate, intellectual property rights, rent and royalties payable to the estate. He relied on the definition proffered in **Black's Law Dictionary**. This, he conceded, did not include the real estate commissions earned by Mr. Nicholson in his capacity as realtor.

[12] On the submission by Counsel for Nicholson Phillips that the Collaboration Agreement was in contravention of **Canon IV (g) of the Legal Profession (Canons of**

Professional Ethics) Rules Mr. Manning contended that even though the agreement included the words *"referral fee"*, the evidence indicates that the arrangement between Ms. McGlashan and Nicholson Phillips was never intended to be a mere referral. He contends that Nicholson Phillips contacted Ms. McGlashan on numerous occasions requesting her guidance and comments relating to the administration of the estate. Additionally, Ms. McGlashan had invested over Four Hundred **(400)** hours into the administration of the estate. Furthermore, on cross examination Mr. Nicholson agreed that the situation was not to simply introduce him to Jahasama Riley and leave it there.

[13] In relation to the issue raised by Counsel for the Defendant that the contract was unenforceable as a matter of public policy, Mr. Manning submitted that a breach of public policy would require for there to be an illegal activity. However, there is no such illegal activity in the case at bar as Ms. McGlashan was not being paid for merely referring the client. He further submitted that there is no prohibition against fee sharing agreements between Attorneys.

[14] Lastly, Counsel submitted that based on the various percentages and hourly rates charged by Nicholson Phillips to the estate, the preferred method of calculation in determining the fees owed to Ms. McGlashan is one half of the legal/professional fees paid to Nicholson Phillips.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[15] Counsel Mr. Michael Hylton K.C took issue with the positions taken on behalf of Ms. McGlashan. He submitted that Ms. McGlashan is not entitled to any further sums as Nicholson Phillips and Ms. McGlashan agreed that they would share the fees garnered for work which they both did, and Nicholson Phillips would be solely entitled to fees for work it did alone. He further submitted that neither the Collaboration Letter nor the Engagement Letter stated that Ms. McGlashan would receive a share of the fees irrespective of the nature of the work or who did it.

[16] Counsel also submitted that the Collaboration Agreement was open to several interpretations and he argued that where there were rival interpretations, the Court should prefer the interpretation that would not lead to a commercial absurdity. He relied on **Wickman Machine Tools Sales Ltd. v L.G. Schuler AG1** [1974] AC 235 and **Blairmont Rice Investment Incorporated v Kayman Sankar Investments Limited and others** [2021] CCJ 7 (AJ) GY (delivered June 25, 2021). Mr. Hylton urged that the Court should find that it was the intention of the parties to share fees for work done by both parties and to not share fees for work not done.

[17] It was further submitted that in relation to **Canon IV (g) of the Legal Profession (Canons of Professional Ethics) Rules**, **("the Canon")** the mere mention of the words *"referral fee"* would not trigger the Canon to be considered, instead the substantive terms of the agreement should be examined. He submitted that if the Court were to proceed in the way that Ms. McGlashan is contending, this would involve the payment of a referral fee, as Ms. McGlashan would get a share of the fees irrespective of work done. Counsel submitted that the intent of the Canon and the policy considerations, were to ensure Attorneys are only paid for work done by them.

[18] Mention was made to the case of **Patel v Mirza** [2016] 3 WLR 399 in support of his submission that if Ms. McGlashan was to share in the fees for real esate business, this would be in contravention of **S. 11 of the Real Estate (Dealers and Developers) Act ("Real Estate Act")**. On this basis he contends that the agreement is unenforceable by reason of illegality. However, he conceded in oral submissions that the Collaboration Agreement did not run afoul of the **S.3(2)(b) of the Real Estate Act**, which specifically exempted attorneys-at-law from being *"engaged in the practice of real estate business in the course of providing legal advice and services ancillary thereto in connection with real estate business within the scope of his profession"*.

[19] Lastly, it was submitted that if the Court were to find that Ms. McGlashan is only entitled to be paid for work she did then she should not be paid fees earned from litigation. Mr. Hylton contended that Ms. McGlashan was not involved with any litigation work and did not lead any credible evidence to that effect. As such, Ms. McGlashan would not be

entitled to fees for that work. Additionally, Counsel further submitted that Ms. McGlashan conceded during cross examination that she played no role in relation to property management and royalty management.

LAW AND ANALYSIS

Whether the Collaboration agreement between Ms. McGlashan and Nicholson Phillips is unenforceable?

Breach Canon IV (g) of the Legal Profession (Canons of Professional Ethics) Rules

[20] The Defendant poses the questions thus: "*Does the agreement provide for a referral fee and if so should the claimant be allowed to enforce?*". The Defendant's position is that the agreement is in breach of the **Canon IV (g)** and is voidable for breach of public policy as it cannot be taken to be anything more than a mere referral fee. For context, the Canons allow fee sharing arrangements between attorneys[2] and permit the referral of a client's business, with the client's consent, if the interest of the client requires it, to another attorney.[3]

[21] As a matter of public policy a Court is reluctant to become involved in giving legal effect to illegal transactions. The United Kingdom Supreme Court clarified and restated the law in **Patel v Mirza** [2017] 1 All ER 191 **("Patel")**, stating: "*[t]he essential rationale of the illegality doctrine was that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality).*" The facts and ruling of **Patel** are comprehensively and clearly set out in the headnote reproduced below.[4]

---

[2] Canon IV (a)
[3] Canon IV (d)
[4] [2017] 1 All ER 191, pg 191-192

The claimant, P, paid £620,000 to the defendant, M, for the purpose of using the money to trade in shares using insider information which M expected to obtain from his contacts. The agreement amounted to a conspiracy to commit an offence of insider dealing under s 52 of the Criminal Justice Act 1993. The insider information never transpired and the agreement was not and could not be performed. P brought a claim for recovery of the money paid. The principal issue was whether a party to a contract to carry out an illegal activity was precluded from recovering money paid under the contract from the other party under the law of unjust enrichment. At first instance, applying the 'reliance principle' stated in Tinsley v Milligan [1993] 3 All ER 65, the judge held that P's claim to recover the sum paid was unenforceable as he had to rely on his own illegality to establish it, unless he could have brought himself within the exception of the doctrine of locus poenitentiae, and he could not do so since he had not voluntarily withdrawn from the illegal scheme (see [2013] EWHC 1892 (Ch)). The Court of Appeal allowed P's appeal (see [2015] 1 All ER 326). The majority agreed with the judge on the reliance issue, but disagreed on the application of the locus poenitentiae exception. They held that if an agreement for an illegal purpose had not been carried out, but remained executory, it would be open to a party who had made a payment or transfer of property under it to repudiate and withdraw from the agreement and recover what he had paid or transferred. M appealed to the Supreme Court. The case presented the Supreme Court with an opportunity to evaluate the state of the common law in respect of illegality in contracts, as founded on the maxim of Lord Mansfield in Holman v Johnson (1775) 1 Cowp 341 at 343 that 'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act' and the 'reliance principle' as stated in Bowmakers Ltd v Barnet Instruments Ltd [1944] 2 All ER 579 and Tinsley v Milligan.

Held – In all the circumstances, P was entitled to the return of the money. (Per Lord Toulson, Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge, Lord Neuberger concurring in part) ***The essential rationale of the illegality doctrine was that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality). In assessing whether the public interest would be harmed in that way, it was necessary (a) to consider the underlying purpose of the prohibition which had been transgressed and whether that purpose would be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim might have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment was a matter for the criminal courts…It was right for a court which was considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief…*** *A claimant, such as P, who satisfied the ordinary requirements of a claim for unjust enrichment, should*

> *not be debarred from enforcing his claim by reason only of the fact that the money which he sought to recover was paid for an unlawful purpose. There might be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there were no such circumstances in the present case. After examining the policy underlying the statutory provisions about insider dealing, there was no logical basis why considerations of public policy should require P to forfeit the moneys which he had paid into M's account, and which were never used for the purpose for which they were paid. Such a result would not be a just and proportionate response to the illegality. P was seeking to unwind the arrangement, not to profit from it. Accordingly (Lord Mance, Lord Clarke and Lord Sumption concurring for different reasons) the appeal would be dismissed (see [101], [107]–[110], [115], [116], [120]–[122], [144], [163], [174], [175], [186], [203], [209], [210], [222], [270], below); Tinsley v Milligan [1993] 3 All ER 65 not followed; Bowmakers Ltd v Barnet Instruments Ltd [1944] 2 All ER 579 disapproved; Hall v Hebert [1993] 2 SCR 159 considered. Decision of the Court of Appeal [2015] 1 All ER 326 affirmed. [Emphasis mine]*

[22] The Jamaican Court of Appeal deliberated on this issue in **Herbert Cockings v Grace Gertrude Cockings** [2018] JMCA Civ 17 **("Cockings")**. In this case Mr. Cockings and his ex-wife jointly owned a property and subsequently he executed a transfer of his interest in the property to his ex-wife. Mr. Cockings claimed to have done so in order to shield the property from the possibility of confiscation by the authorities in the United States of America, having been incarcerated in that country for criminal activities. The trial judge declined to consider his claim to the property by way of a resulting trust based on his admitted illegality. On appeal, Phillips JA conducted a thorough review of the authorities and accepted **Patel** as stating the applicable law. She noted that[5]:

> *Based on these guiding principles, the court, in the instant case, based on the "public interest" test outlined in Patel, is now required to: (a) consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim; (b) consider any other relevant public policy on which the denial of the claim may have an impact; and (c) consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts*

---

[5] **[2018] JMCA Civ 17, para 57**

[23] **Patel** was recently applied in the Privy Council case of **SR Projects Ltd (Appellant) v Rampersad, the Liquidator of the Hindu Credit Union Co-Operative Society on behalf of the Hindu Credit Union Co-Operative Society Ltd (Respondents) (Trinidad and Tobago) ("SR Projects")** [2022] UKPC 24 where the question for appeal was whether a secured loan made to the Hindu Credit Union Cooperative Society Limited can be enforced by the lender. The credit union became insolvent and in October 2008 the Commissioner for Co–Operative Development appointed a liquidator and ordered that it be wound up. The liquidator applied to the High Court for declarations to the effect that the loan and the security are void and unenforceable on the grounds that: (1) when the loan was made and the security given, the maximum liability of the credit union approved by the Commissioner in respect of loans or deposits had been exceeded; and (2) the credit union had no legal power to receive any loan in excess of its maximum liability or, alternatively, acted unlawfully in doing so. The High Court granted the declarations sought, and the Court of Appeal dismissed the lender's appeal. However, by a majority the Board allowed the appeal.

[24] The Board held that the credit union acted illegally in receiving the loan and that in applying the criteria established in **Patel**, the denial of the lender's claim to enforce the loan contract would not be a proportionate response to the breach in circumstances where the lender did not itself act illegally or knowingly participate in the breach.[6] Hence, the loan agreement and the security are enforceable. The application of the Patel principle to contracts is stated at paragraph 53.

> *Where the statute does not provide, expressly or impliedly, that a breach of a statutory prohibition against making or performing a contract has (or does not have) the effect of rendering the contract void or otherwise unenforceable, the court must go on to consider whether the public interest in preserving the integrity of the justice system should result in denial of a claim to enforce the contract. At this stage of the analysis the relevant considerations are those stated by Lord Toulson in Patel v Mirza at para 120, that is to say: "(a) … the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by*

---

[6] **Ibid. para 83-88**

> *denial of the claim, (b) … any other relevant public policy on which the denial of the claim may have an impact, and (c) … whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts." In considering proportionality, Lord Toulson declined to try to lay down a prescriptive or definitive list of factors that may be relevant "because of the infinite possible variety of cases", but said, at para 107: "Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."*

[25] From these cases, it is made abundantly clear that where a transaction or act in question is found to be illegal, such a transaction does not automatically render the governing agreement unenforceable. Based on the discussion and findings below the Court will not embark on a discussion of the considerations, along the lines set out in **Patel**, to determine whether the contact should be enforced.

[26] In the case at bar, Nicholson Phillips is asking the Court to find that the Collaboration Agreement is unenforceable by reason that it contravenes **Canon IV (g) of the Canons**. **Canon IV (g)** states**,**

> *An Attorney shall not pay or accept any fee or reward for merely introducing a client or referring a case or client to another Attorney.*

[27] The Court must first contemplate what the phrase *"merely introducing"* or *"referring"* means. There have been no authorities cited to the Court of judicial determination of the phrase/concept. One would therefore start with the first rule of interpretation giving the words their ordinary and natural meaning. The Court pondered the dictionary definitions of the words *"merely"*, *"introduce"* and *"refer"*. The definition of *"merely"* includes just, only, purely and nothing more, nothing more than, without admixture, altogether, entirely. *"Introduce"* means meeting for the first time and *"refer"* means pass a matter to. It is clear from these definitions that **Canon IV (g)** contemplates a situation where the transaction involves no other participation than the referring attorney bringing the two parties together.

[28] The genesis of this provision is, as submitted by Mr. Hylton, grounded in public policy and the protection of the public, and was consistent with similar provisions in other

jurisdictions at the time. Since then some jurisdictions have relaxed their posture to allow referral and introducer fees but the rules attendant on the new policies show the public policy concern. This is captured in the **UK Ethics Committee's publication, The Prohibition of Referral Fees**, it states as follows[7]:

> *The Bar Council views referral fees as: (1) threatening the quality of the service the lay client receives, since: (a) willingness and ability to pay a referral fee may have more influence upon the choice of advocate by the instructing solicitor than the ability of the advocate in question, and (b) advocates are no longer forced to rely upon the quality of their advocacy to attract work; (2) limiting client choice, by reducing the pool of advocates from which the solicitor will make a selection; and (3) compromising the independence of the advocate.*

Jamaica's position has however remained unchanged.

[29] With this background the Court now comes to determine the nature of the arrangement between the parties there being no dispute that a client of Ms. McGlashan's former firm was referred by her to Nicholson Phillips, through Mr. Manley Nicholson, a partner in the firm. Terms of the agreement were set out in the letter dated 7th October 2015.

[30] The Defendant argues that the Court should rely on the documents to determine the issues rather than the infallibility of the witness's memory, the frailty of which are well known. This as he conceded Mr. Nicholson in instances gave inconsistent evidence, he further pointed out that both witnesses had conflicts in their evidence. Ms. McGlashan's Counsel suggested that the inconsistencies in Mr. Nicholson's evidence, examples of which were such as to make his testimony wholly unreliable. For the Defendant, it was urged that such differences as there are, were inevitable due to the lapse of time and the frailty of memories generally. Save to agree that there were a number of inconsistencies in the testimony of both witnesses, I will only refer to the ones relevant to the issue under

---

[7] **The Ethics Committee, "The Prohibition of Referral Fees" (2012), pg 8**

discussion, resolving them after a closer examination of the evidence to determine the facts in dispute.

[31] As stated, Ms. Riley had engaged the services of Banjoko. The *"terms of the relationship"* was captured in a letter to her dated 4th May 2013. It provided that Ms. McGlashan had primary responsibility for the matter and in due course she obtained Letters of Administration of the Estate. At the time of terminating the retainer agreement with Banjoko, no fees had as yet been paid to them. It was not contested that at this juncture the work done by Banjoko exceeded Four hundred **(400)** hours.

[32] A review of the dealings between Ms. McGlashan and Mr. Nicholson is necessary. In about September 2015, Ms. McGlashan had discussions with Mr. Nicholson about him assuming conduct of the matter. At about that time Ms. McGlashan was leaving the firm of Banjoko and setting up her own practice. Mr. Nicholson's evidence was that this discussion was occasioned by her apprehension that there might have been contentious litigation arising from the grant of administration to Ms. Riley, which should have been made to the Administrator General as the deceased died leaving a minor child. Ms. McGlashan's evidence is that this information was given to her after the Grant of Administration had been issued as Ms. Riley had discounted it as false and mischief making. Nothing further was heard and it did not become an issue until February 2016 and thus could not have served as the basis for their discussions.

[33] I accept this evidence as it accords with a review of the correspondence in the agreed bundle passing between Ms. McGlashan and Mr. Kurt and Andre Riley[8] as well as the correspondence between Nicholson Phillips and Messrs Earle and Wilson.[9]

[34] In any event two documents were generated from this discussion, the Collaboration Letter from Nicholson Phillip, over the hand of Manley Nicholson, to Ms. McGlashan, and a Client Engagement Letter of the same date to Ms. Riley, these are

---

[8] **Exhibits 24 -26 and Nicholson Phillips and Kurt Riley exhibits 27–29**
[9] **Exhibits 36 to 43**

exhibits 13 and 14 respectively. While not expressly stated in the Collaboration Letter, Mr. Nicholson acknowledges that he was aware that Ms McGlashan was releasing the Estate from paying any fees to her on the referral of the matter to his firm.

[35] I wish to highlight certain portions of the Collaboration Letter.

i. The first is its subject line which states *Engagement in the Administration of estate Winston Riley Deceased*.

ii. Secondly it provides that professional fees with respect to the Administration of the Estate, *by way of a referral fee, Nicholson Phillips and Winsome McGlashan will share equally in the sums received thereon.*

iii. The professional fees for disposal of assets to be split evenly between Nicholson Phillips and Winsome McGlashan with Nicholson Philipps retaining carriage of sale.

iv. The overall conduct of the matter will be led by Manley Nicholson and his office and

v. He would consult with Ms. McGlashan throughout on *aspects of the transaction matter that we may agree for you to undertake personally* and

vi. Finally, *I look forward to working with you*.

[36] It takes no further discussion to understand that this letter was intended to be more than purely bringing the firm of Nicholson Phillips and the Estate of Winston Riley together with no further participation by Ms. McGlashan. This was admitted by Mr. Nicholson. In his evidence he stated that in principle they agreed to work together[10] and it was also

[10] **Witness Statement of Manley Nicholson, para 12**

specifically admitted by him in cross examination. I note that Mr. Nicholson in his witness statement recasts the arrangement to include:

i. Items for which Nicholson Phillips would be entitled to fees exclusively, that is for litigation work and work done in his capacity as a licensed real estate broker and;

ii. Work done jointly in the administration of the estate wold be shared equally.

[37] I reject Mr. Nicholson's explanation of the terms of the agreement between him and Ms. McGlashan. This version takes no account of the fees given up by her for the new arrangement which he agreed in cross-examination was in the contemplation of the parties at the time of striking the agreement, and most likely accounts for what seems like overly generous terms in her favour. As reproduced below from the closing submissions of the Claimant and verified from the Court's notes of evidence:

> ***Counsel:*** *In those discussions you had with Ms. McGlashan in terms of constructing the collab letter, you agree with me that she shared with you details of the work she had been doing to get to that point?*
>
> ***Nicholson:*** *I don't know if she shared all of those details.*
>
> *Counsel: But did she share with you the challenges she had in securing the grant of administration?*
>
> ***Nicholson:*** *Yes*
>
> *Counsel: That there were difficulties... and the amount of time she spent in obtaining the grant?*
>
> ***Nicholson:*** *Yes*
>
> *Counsel: And you also accept that that was a factor which you both considered in striking the agreement you did on the fee sharing?*
>
> ***Nicholson:*** *That was a factor, yes*
>
> ***Counsel:*** *In fact, that was a factor because Ms. McGlashan was by virtue of her actions in terminating the retainer with the client, also releasing the client from fees she would have earned in the work she would have done on behalf of the client?*
>
> ***Nicholson****: She would be releasing the client as such, yes."*

[38] Now that was the intention. What actually happened? Mr. Nicholson in cross examination insisted that Ms. McGlashan introduced the client and left it there. Nonetheless he agreed that:

1. He had discussions with her on renegotiating the fee agreement with the estate;

2. They discussed the valuation reports; and

3. A lot of what transpired between him and her was verbal/telephone discussions.

[39] I take these admissions to mean that in keeping with the Collaboration Agreement, Mr. Nicholson had overall conduct of the matter and consulted with Ms. McGlashan as he thought necessary. Though Mr. Nicholson sought to say that Ms. McGlashan's contribution to the drafting of documents, and his meeting with her in respect of an action brought against the Estate was simply based on her personal knowledge of relevant facts, I believe that is splitting hairs. This should be properly considered as an aspect of the Administration of the Estate. This will be clearer from the discussion below.

[40] Both the agreement and the subsequent actions of the parties take the transaction out of the realm of a mere referral. The Court finds favour with the submissions of Counsel Mr. Manning on this issue. I find therefore as a fact that Ms. McGlashan did not merely introduce the client to the firm of Nicholson Phillips and remained involved in the matter until her association was terminated by Mr. Nicholson. The agreement was not in words or execution, in breach of **Canon IV (g)** or public policy.

S. 11 of the Real Estate (Dealers and Developers) Act

[41] Before leaving this issue, a brief comment will be made on this submission, the error of which was rightly conceded by Mr. Hylton. Nicholson Phillips had contended that the Collaboration Agreement is unenforceable by reason that it contravenes of **S. 11 of the Real Estate (Dealers and Developers) Act.** As Counsel Mr. Manning in his written

submissions[11] agreed, real estate commissions collected by Mr. Nicholson in his capacity as a real estate dealer in the sale of property, were outside of the scope of the Collaboration Agreement and were not taken into account when calculating the fees owed to Ms. McGlashan. Paragraph 3 of the Collaboration Letter stipulating that Nicholson Phillips would retain carriage of sale, makes it clear that the fees to be shared for sale of property would relate only to the attorneys fees on the sale. In addition, the property management addendum dealt only with the maintenance of the properties and not sale.

Whether Litigation fees, Royalty Management fees, intellectual property management and Music Management fees should be excluded from the scope of legal services in the Administration of the Estate of Winston Riley?

Definition of Administration of Estate

[42] The first consideration of what sums may be due to the Claimant is a consideration of what constitutes the Administration of the Estate. **Black's Law Dictionary, 9th Edition** defines administration as;

> *The management and settlement of the estate of an intestate decedent, or of a testator who has no executor, by a person legally appointed and supervised by the court. Administration of an estate involves realizing the movable assets and paying out of them any debts and other claims against the estate. It also involves the division and distribution of what remains.*

[43] I also found useful guidance from the following quotation in the case of **Roberts v Gill & Co Solicitors and others** [2010] UKSC 22. The relevant facts have no bearing on this matter. Lord Collins in discussing whether the trustee was a necessary party and the *"special circumstances"* rule stated:

> *47. In all of the early cases the trustees were co-defendants with the third party debtor. In Bickley v Dorrington (1737) West T Hard 169, 25 ER 877 the bill was brought by creditors, and by one of the residuary legatees of the testator, against his executors, the other residuary legatee, and the*

[11] **Claimant's Closing Submissions, para 61**

> *former partner of the testator to recover from the former partner money owing to the estate. Lord Hardwicke LC said that the bill was totally improper as against the debtor, and inconsistent with the principles of law and the rules of the court: "No action or suit can be brought against a debtor to the estate but by the executor or personal representative of the testator.* ***The whole management of the estate belongs to him.*** *The right of it is vested in him, and cannot be taken from him by creditors or legatees. If he release a demand and is solvent, it is a devastavit in him, and he is personally answerable for the sum released. In cases of collusion or insolvency it may be proper to come here for satisfaction against the debtor; but there must always be some special case …" (pp 171, 879)* [Emphasis mine].

Accordingly, anything touching on the **management** of the estate carried out by or on behalf of the administrator is concerned with the Administration of the Estate. Therefore, tasks that are designed to collect, maintain, repair or preserve the property of the deceased all relate to the Administration of the Estate

[44] The second question is what comprises professional fees. This requires an analysis of the Client Engagement Letter of the same date as the Collaboration Letter. In that letter it was indicated that the legal services to be provided were outlined in the Appendix which states[12]:

> ***Appendix***
>
> ***Scope of legal services***
>
> ***PROVIDE LEGAL SERVICES*** *in the administration of the Estate Winston Riley, deceased, including selling or transferring properties situated in Jamaica, securing rights from intellectual and other property and assets situated in the United Kingdom, United States and elsewhere internationally and pertaining to all intellectual property, royalties and entitlement to the deceased as a record producer and/or to his estate; and to further include resealing Grant of Administration, pursuing all litigation (if it should arise) in the island of Jamaica, negotiation/mediation of matters of dispute.*

It is noted that the Scope of Services included litigation though the arrangement for fees provided it would be billed separately from other work. This Scope of Services was

---

[12] **Client Engagement Letter, exhibit 14**

enlarged by four **(4)** addenda, specifically made a part of the Engagement Letter, with respect to ligation, property management, music management and royalty management. Their terms are sufficiently important to reproduce them in full below.

> ***Addendum***[13]
>
> ***THIS ADDENDUM*** *forms part of the Appendix and engagement letter dated 7*
>
> *October, 2015 and executed on 14 October, 2015.*
>
> ***WHEREAS IT IS AGREED*** *that where litigation is required to be added to the scope of legal services outline in the Appendix; and*
>
> ***WHEREAS*** *the matter has taken on a potentially contentious nature; with new scope of legal and litigation services to include: Application to the Supreme Court of Jamaica to compel the production of Certificates of Titles; application for Orders for Sale of Lands, application for Orders to produce accounts of rental and maintenance of properties; claim for recovery of rental monies and royalties; application for a declaration for sufficiency of advertisement in local and foreign newspapers, and other court related matters.*
>
> ***THE PARTIES AGREE*** *that in addition to the percentage charges for legal services and set out in the Appendix, that the firm will charge for litigation and court related services in addition on a time recorded basis at the rate of US$170.00 per hour plus G.C.T. not including G.C.T. @ 16.5%, disbursements and incidental costs.*
>
> *NICHOLSON PHILLIPS*

> ***Addendum***[14]
>
> ***Re Property Management***
>
> ***THIS FURTHER ADDENDUM*** *forms part of the Appendix and engagement letter dated 7 October, 2015 and executed on 14 October, 2015 and an Addendum executed on 3 February 2016.*

---

[13] **Bundle of Agreed Documents, exhibit 20**
[14] **Bundle of Agreed Documents, exhibit 21**

WHEREAS IT IS AGREED that the maintenance of the properties of estate is to be added to the scope of services outline in the Appendix;

WHEREAS the properties known as 2 South Rd. Kingston 5 in the parish of St. Andrew comprising of six (6) individual apartments and 99 Orange Street in the parish of Kingston , which at one time or continue to be part of the estate, requiring management and to include dealing with existing tenants, procuring leases, determining security deposit, finding, screening/sorting through prospective tenants, running credit and criminal background checks, dealing with emergencies and maintenance requests, noise complaints; initiating evictions, making, cosmetic improvements of the property to keep them in top condition and/or to hire reliable contractors to attend to repairs.

AND WHEREAS it is represented that the principal, Manley Nicholson is a registered Real Estate Dealer, licensed by the Jamaica Real Estate Board, a member of the Realtors Association of Jamaica and having the over 30 years real estate experience including in property management.

THE PARTIES AGREE that in addition to the legal services set out in the Appendix and previous Addendum, the firm will charge for property management a fix rate of ten (10) percent of the rental income recovered not including disbursements and incidental costs.

NICHOLSON PHILLIPS

Addendum[15]

Re Music Management

THIS FURTHER ADDENDUM *forms part of the Appendix and engagement letter dated 7 October, 2015 and executed on 14 October, 2015 and an Addendum executed on 3 February 2016.*

WHEREAS IT IS UNDERSTOOD *that upon the death of Winston Riley all the management agreements with various agents came to an end and the Royalties coming to the Estate were no longer managed by such persons or companies who previously managed them; and there being no agent manager for the Estate, administration, management and preservation of the estate are required.*

[15] **Bundle of Agreed Documents, exhibit 22**

WHEREAS IT IS AGREED *that the management of Winston Riley/Technique Records' Music is to be added to the scope of services outline in the Appendix.*

AND WHEREAS *the management of Winston Riley/Technique Records' music includes maintaining ongoing "membership fees", reviewing & summarizing all royalty related provisions of agreements; assessing duration of license agreements; determining choice of governing law of license agreement to ensuring enforceability of the contractual provisions; negotiating terms and license requests for maximizing musical productions; assessing from whom royalties should be collected; analyzing and tracking the relevant data and computing payments to ensure accurate collection of royalties; Reviewing & summarizing advances, controlled composition, rate escalations and rate reductions; Liaising with royalty departments to obtain delinquent royalty statements/payments and obtaining royalty adjustments; negotiating new licensing Agreements, etc.*

AND WHEREAS *it is represented that the firm Nicholson Phillips, possesses the requisite skills for the management of the Music.*

THE PARTIES AGREE *that in addition to the legal services set out in the Appendix and previous Addendum, the firm will charge music management fee of twelve* ***(12)*** *percent of the royalties collected not including disbursements and incidental costs.*

NICHOLSON PHILLIPS

Addendum[16]

THIS FURTHER ADDENDUM *forms part of the Appendix and engagement letter dated 7 October, 2015 and executed on 14 October, 2015 and an Addendum executed on 3 February 2016.*

WHEREAS IT IS UNDERSTOOD *that upon the death of Winston Riley all the management agreements with various agents came to an end and Royalties coming to the Estate were no longer managed by such persons or companies who previously managed them. The copyright remained protected with the various recording companies, hence the Royalties, but there has been no agent manager for the Estate.*

WHEREAS IT IS AGREED *that the management of the Royalties is to be added to the scope of services outline in the Appendix.*

---

[16] **Bundle of Agreed Documents, exhibit 23**

> ***AND WHEREAS*** *the management of Royalties includes maintaining ongoing "membership fees", reviewing & summarizing all royalty related provisions of agreements; assessing duration of licence agreements; determining choice of governing law of licence agreement to ensuring enforceability of the contractual provisions; negotiating terms and license requests for maximizing musical productions; assessing from whom royalties should be collected; analyzing and tracking the relevant data and computing payments to ensure accurate collection of royalties; Reviewing & summarizing advances, controlled composition, rate escalations and rate reductions; Liaising with royalty departments to obtain delinquent royalty statements/payments and obtaining royalty adjustments.*
>
> ***AND WHEREAS*** *it is represented that the firm Nicholson Phillips, possesses the requisite skills for the management of the Royalties.*
>
> ***THE PARTIES AGREE*** *that in addition to the legal services and property management set out in the Appendix and previous Addendum, the firm will charge royalty management fee of twelve (12) percent of the royalties collected not including disbursements and incidental costs.*
>
> *NICHOLSON PHILLIPS*

[45] Each addendum indicated that it was the **law firm** of Nicholson Phillips that was being engaged and not the individual competence of Mr. Nicholson. In addition, the Administration of the Estate is about the collection and distribution of the Estate of Mr Riley, which includes his music, royalties and intellectual property, to his beneficiaries. The services set out in the addenda could only be geared towards the preservation and collection of the value of the Estate for the benefit of the beneficiaries and could not be the separate or private business of the administrator. Despite the nomenclature, the services in the addenda being provided by the law firm of Nicholson Phillips could only be construed as legal services incurred in the Administration of the Estate. Exhibits 30 to 33 show that Ms. McGlashan had engaged with persons relevant to the addenda, and informed them that Mr. Nicholson would now be the point of contact having taken over the matter.

[46] Attorneys at law, in practice, offer both legal and non-legal services in connection with a particular matter and in instances the difference is not easily discernible. There is no specific prohibition against this in the Canons or **Legal Profession Act.** There is guidance however to be found in the **LPA**. **S. 5(3C)** was considered and declared to be

constitutional by the Court of Appeal. It gives an idea of the range of services that may be offered by an attorney at law.

> *In respect of each calendar year, an attorney shall, on or before the 31st day of January of the next ensuing calendar year, complete and file with the Council a declaration in such form as may be prescribed by regulations made under this subsection by the Council, with the approval of the Minister, after consultation with the Minister responsible for national security, indicating whether or not the attorney has in tl}e calendar year concerned* ***engaged in any of the following activities on behalf of any client****- (a) purchasing or selling of real estate; (b) managing clients' money, securities or other assets; (c) managing bank, savings or securities accounts; (d) organizing contributions for the creation, operation or management of companies; (e) creating, operating or managing a legal person or legal arrangement (such as a trust or settlement); or (/) purchasing or selling a business entity.*

[47] The Court was again unable to find any cases in the commonwealth jurisdiction addressing this issue but again, it has been addressed in the United States. The **ABA Model Rules of Professional Conduct** adopted by the ABA House of Delegates in 1983 provides that;

> ***Rule 5.7: Responsibilities Regarding Law-related Services***
>
> *Law Firms And Associations*
>
> *(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:*
>
> *(1****) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients;*** *or*
>
> *(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.*
>
> *(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non lawyer.* [Emphasis mine]

These extracts show that the services provided for in the Client Engagement Letter and the addenda can be considered to be work undertaken by the attorney in the Administration of the Estate.

[48] In this case, Ms. Riley resided outside of the jurisdiction. It was reasonable and appropriate for her to rely on the Attorney-at-Law and for the Attorney-at-Law to engage the services, on her behalf, of other professionals. I agree with the Counsel for Ms. McGlashan that the corpus of the Estate includes the real estate and income, intellectual property comprising royalties and recordings and income from sale of real property, all of which fall within the scope of Administration of Estate. I find as a fact that all the actions undertaken by Nicholson Phillips on behalf of the administrator, including all the work described in the four addenda are legal services rendered in the Administration of the Estate. The legal fees therefore were properly incurred in the Administration of the Estate.

[49] How then should the Court treat with the obvious and undisputed differences between the responsibilities carried out respectively by the parties. Ms. McGlashan submits that the terms of the agreement should be given full effect and she should be award fifty percent **(50%)** of all sums earned. Nicholson Phillips submits that it should be based on the actual work done

[50] Understandably no cases were cited to the Court as there seems to be a dearth of cases on this topic in commonwealth jurisdictions. However, the Court again gets some guidance from a discussion of a similar provision in the United States which has been the subject of judicial dicta and scholarly commentary. I found to be very useful an article, written around the time the Canons were promulgated, discussing a similar provision in the American Bar Association's Canons of Professional Ethics. Canon 34 as adopted in 1937 stated:

> *"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."*

The precursor to this rule is seen in this extract;

> *Commenting upon this revised version of Canon 34 in his treatise on Legal Ethics, Henry S. Drinker stated: There was long at the bar a practice or custom whereby, when a lawyer, with authority from his client, forwarded a case to another lawyer for attention in the latter's jurisdiction, or merely recommended one, the forwarding attorney was allowed 1/3 of the fee earned by his correspondent. This was in the nature of a "Finder's Fee," and was payable irrespective of any real service performed or responsibility assumed by the forwarding lawyer. It was obviously the purpose of Canon 34 to condemn this [practice] 12*
>
> *A review of the decisions of state appellate courts rendered during the second and third quarters of this century reflects partial recognition of the basic principles of Canon 34 and at least superficial attempts by courts to integrate its provisions into the judicial resolution of intra-attorney fee disputes. However, as a general rule the courts continued to enforce strictly express intra attorney fee arrangements without regard to the proportion of services rendered or responsibility assumed by each attorney. They also found implied agreements for equal division of fees where no such express agreement could be pinpointed, provided that the claiming attorney had rendered any recognizable service other than the referral itself.*

[51] The author concluded that;

> *In the final analysis, the case law decisions of the New York appellate courts and those of other jurisdictions footnoted above only prohibit sharing of fees between attorneys where there has been absolutely no sharing of services or responsibility. The decisions prohibit a referral or finder's fee where an attempt has been made to justify the claimed fee as one based upon the rendering of legal services which are, upon close scrutiny, of little or no value. So long as the attorney seeking to share in the fee can establish that he participated in any measure with his co-counsel in the services rendered or responsibilities assumed, it would seem that every jurisdiction reviewed above would continue to enforce an implied agreement for the equal sharing of fees between cooperating attorneys, absent an express agreement to the contrary. No effort was made in these decisions to proportionately evaluate legal services rendered by cooperating attorneys or to define the scope of the "services or responsibility" contemplated by Canon 34.*

[52] The author's review of the cases shows the Courts' disposition to giving effect to the express terms of the agreement between the parties. I find this reasoning to be persuasive. It is not an insignificant consideration that the parties intended that subsequent to the agreement, the bulk of the work would be undertaken by Nicholson Phillips. I would give full effect to the terms outlined in the Collaboration Letter. Mr. Hylton submitted that any such fees taking into account work carried out by Ms. McGlashan while she was a partner in Banjoko could only be claimed for by the firm. In the absence of

evidence of the terms of the dissolution of the partnership and the acceptance by Mr. Nicholson that Ms. McGlashan would be paid the agreed amount, having regard this fact, I would reject that submission. Ms. McGlashan is therefore entitled to half of the legal fees earned by Nicholson Phillips in the Administration of the Estate.

[53] It was suggested on behalf of Ms. McGlashan that the Court could consider either that the fees be calculated as a percentage of the gross value of the Estate or on the pleaded method, that is Fifty percent **(50%)** of all sums earned. Mr. Hylton countered that the former was not pleaded and there was no actual work done to support the latter. As the Court has found that the agreement is not based on the amount of work carried out by each party, damages for breach of contract are to be paid on the basis of the fees earned by Nicholson Phillips. No issue was taken with the commercial interest rate of Twelve percent **(12%)**.

POSTCRIPT

[54] As said by Mr. Manning KC, no one involved in this matter could relish having to resolve this type of dispute in this forum. I wish to commend Counsel and the parties for treating with the issues sensitively and respectfully. I also wish to record my thanks for the great assistance given to the Court in both the oral and written submissions. The failure to refer to all the submissions is not a reflection of the Court's appreciation, I have assuredly considered all of them. While I am not suggesting that changes are needed or warranted, it may be useful for the General Legal Council to revisit the rules in this area and provide more definitive guidance to attorneys.

ORDERS

1) The Claimant is entitled to Fifty percent **(50%)** of all sums earned in the Administration of the Estate calculated to be the sum of Seven Million Five Hundred Thousand Six Hundred and Thirty-Five Dollars and Thirty-Three Cents

($7,500,635.33) as shown in the appendix hereto, plus interest at the commercial rate of Twelve percent **(12%)** from January 1, 2018 to December 16, 2022.

2) Cost of the claim to be the Claimant's.

3) This is judgment is stayed until January 16, 2023.

4) The Claimant's Attorney-at-Law to prepare file and serve this order.

_____

JUDGE

There is no challenge to the computation on the fees earned by NP being the sum of **$19,828,396.09.** Half of this is **$9,914198.04 = one half**

From this we understand that net sums paid to WM are to be deducted. The net sums paid under the invoice dated April 25, 2016 was $1,818,204.00.

From the other sums paid: J$393,000.00 Oct 2017 and US$2,713.33 Jan 2019 (J$344,592.91) total $737,592.91, the net sum on our calculation is

Net Legal Fees	-	$595,358.72
GCT.	-	$ 98,234.19
Reimbursements	-	$ 44,000.00

Total net sums already paid to our client is **J$2,413,562.72.** (being $1,818,204 + $595,358.72).

This figure should be deducted from the one half of $9,914,198.04 due to her. Therefore, the amount owing to her before the application of interest is **J$7,500,635.33.**

January 1, 2018

Interest at 12% pa to run from J~~une 22, 2017~~ to today's date.