IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00332

IN THE MATTER of s. 22(1) of the Legal Profession Act

AND

IN THE MATTER of legal advice provided and professional services rendered generally to Mrs Margie Geddes in relation to Bastion Holdings Limited and Bardi Limited (In Liquidation) and Jorril Financial Inc

BETWEEN	**McDONALD MILLINGEN**	**CLAIMANT / ATTORNEYS-AT-LAW**
AND	**MARGIE GEDDES**	**DEFENDANT/ OWN CLIENT**
AND	**BARDI LIMITED**	**INTERESTED PARTY**

IN CHAMBERS

Mr Vincent Chen and Mr Makene Brown instructed by Chen Green & Co, Attorneys-at-Law for the Claimant

Mr Roderick Gordon and Ms Kerene Smith instructed by Gordon McGrath, Attorneys-at-Law for the Defendant

Mr Michael Hylton and Ms Melissa McLeod instructed by Hylton Powell, Attorneys-at-Law for the Interested Party

Heard: 26th, 29th July and 26th September 2019

Remedies - Enforcement of Judgment - Application to vary ex-parte provisional charging order- Whether property can be subject of order

Company Law - Lifting the corporate veil - Principles to be applied.

Legal Profession - Whether bill of costs is the proper procedure to make a claim based on quantum meruit

Restitution - Procedure to be followed in making a quantum meruit claim based on unjust enrichment

LAING, J

The Background

[1] In **Messrs. McDonald Millingen v Bardi limited and Margie Geddes** Claim No. HCV 4243 of 2008, Messrs McDonald Millingen ("Milingen") claimed against Bardi Limited ("Bardi") and Mrs Margie Geddes ("Mrs Geddes") for fees in respect of legal services provided to them. Millingen asserted that the fees were payable pursuant to a contingency fee agreement and applied for summary judgment, which was granted by a Judge of the Supreme Court. Before the Judge was also an application by Mrs Geddes for summary judgment. On appeal to the Court of Appeal, this judgment in favour of Millingen against Mrs Geddes was overturned on the 5th February 2010 and the Court of Appeal also granted the application for summary judgment that had been made by Mrs Geddes before the Judge in the Court below. The reason for the Court of Appeal's decision was its conclusion that there was no legally enforceable contingency agreement within the meaning of section 21(8) of the Legal Profession (Amendment) Act of 2011.

[2] Millingen then filed a Bill of Cost, claiming against Mrs Geddes for fees for legal services performed between 1999 and 2008 on a *quantum meruit* basis to which the Registrar assigned a claim number. No points of dispute were filed by Mrs

Geddes and the matter proceeded to taxation. A default costs certificate was issued dated 30th January 2012, ordering Mrs Geddes to pay fees in the amount of US$1,048,807.19 ("the Default Costs Certificate").

THE APPLICATION BY MRS GEDDES

[3] In execution of the Default Costs Certificate, on 18th December 2012, an ex-parte provisional charging order was granted by Daye J, to Millingen, over 2 ordinary shares held by Mrs Geddes in Bardi, and also over 84,000,000 ordinary shares in Desnoes and Geddes Limited ("D&G"), held by Bardi. On 11th April 2012 Mrs Geddes filed an application seeking various orders including an order striking out the claim for costs, or alternatively, an order to set aside the Default Costs Certificate. The application was heard by King J, who reserved judgment on 21 March 2014, but unfortunately, the learned Judge retired before delivering the judgment. It was therefore necessary for this application to be heard *de novo*.

[4] Ms Geddes had also made an application to have the provisional charging order varied. This application was first heard by the Bertram Morrison J on 29th January 2016 and refused by the learned Judge. However, on an appeal before the Court of Appeal against the decision of Morrison J, the Court by an order dated 10th April 2018 varied the ex-parte provisional charging order dated 18th December 2012 to cover only 7,500,000 of the ordinary shares in D&G held by Bardi (as well as the dividends arising therefrom). The Court of Appeal also granted an injunction restraining Mrs Geddes from selling her shares in Bardi and the 7,500,000 ordinary shares in D&G held by Bardi, until the hearing of an application for a final charging order.

[5] Two separate notices of application were heard by me, one made by Bardi and the other by Mrs Geddes. Although they involve separate issues, and have received separate consideration and analysis, there are relevant facts which are common to both applications. For this reason, in an effort at the efficient use of judicial time, I have combined my decisions in this single written judgment.

The Application by Bardi

[6] As a consequence, of Mrs Geddes' undetermined application challenging the Default Costs Certificate, the hearing for the consideration of whether the provisional charging order is to be made final has not taken place.

[7] On 23rd September 2016 Bardi's application to be added as an interested party was granted but its application to set aside the provisional charging order was refused by Simmons J in the Commercial Division of the Court. This decision was appealed and on 20th December 2018 the Court of Appeal allowed the appeal and set aside the decision of Simmons J. The Court of Appeal also ordered that Bardi's application be heard by another Judge and this explains these proceedings, being a re-hearing of that previous application before my learned sister Simmons J.

[8] CPR rule 48.8(4) provides that the Court has the power to discharge a provisional charging order. No issue was raised by Mr Chen as to Bardi's standing to make the application and I do not consider this to be an issue which need to be addressed further.

Milingen's arguments in support of the charging order

[9] Millingen asserted that Mrs Geddes is beneficially entitled to the assets of Bardi including the 84,000,000 ordinary shares in D&G. The facts on which it relied are contained in paragraph 10 of the affidavit of Malcolm McDonald filed on 18th November 2012 in support of the ex-parte application for the charging order. It reads as follows:

> *"That Margie Geddes is one of two directors of Bardi Limited. Bardi Limited is the holder of 84,000,000 ordinary shares in Desnoes &Geddes Limited. That to the best of my knowledge information and belief, Bardi Limited does not trade or otherwise operate. In its Annual Returns filed at the Company's Office as at the 31st of December 2011, the total amount of indebtedness of the company in respect of all mortgages and charges of the kind required to be registered with the Registrar under the Companies Act was nil. That*

I do verily believe that the company has not traded since December 2011 to present and has not incurred trade debts or mortgages or charges over its assets. That accordingly Margie Geddes the sole shareholder is beneficially entitled to the assets of Bardi Limited namely over 84,000,000 shares in Desnoes & Geddes."

[10] The main pillar on which Millingen based the justification for a charging order over the D&G shares was that Bardi is the Alter Ego of Mrs Geddes. Millingen developed and amplified the facts which it said supported this assertion at paragraph 4 of the affidavit of Malcolm McDonald filed on 14th October 2016. Mr McDonald averred that the work which is the subject of the default cost certificate was undertaken at the request of Mrs Geddes and Bardi, and was to represent Mrs Geddes and Bardi in order to protect their interest in legal proceedings against Bardi by preserving Bardi's assets. He explained that, at that time, Bardi was in liquidation and there was a real possibility that it could have lost all its assets. Accordingly, the work done was to take steps to ensure that Bardi was taken out of liquidation, thus enabling it to hold its assets free of debt for the benefit of its sole shareholder Mrs Geddes.

[11] The facts which Millingen asserted support its contention that Bardi is Mrs Geddes' alter ego, are mainly summarised at paragraph 4.10 to 4.24 of Mr McDonald's affidavit filed on 14th October 2016 and I reproduce them hereunder.

" 4.10 There are only two (2) issued shares in Bardi. One is held by MG and one was held by Paul Geddes who died in 1999. I was consulted by MG to Probate Paul Geddes' Will. Probate was granted on the 3rd day of April, 2000 (see MM1 index page 13). I have read the affidavit of Mrs. Jackson in particular paragraph 5 where she states that the other share is owned by Estate Paul H. Geddes and say that this is incorrect. Paul Geddes' Will is attached to the above referred to Probate and I refer to the said Will where it states at clause 6 "I GIVE DEVISE AND BEQUEATH to my wife MARGIE GEDDES of 1a Braywick Road, Kingston 6 all of my estate real and personal absolutely and beneficially". It has always been accepted by all parties concerned that MG is the sole beneficiary under the Will and she is solely entitled to the other issued share in Bardi that was held by Paul Geddes, deceased. Accordingly MG owns 100% of Bardi.

4.11 MG is the only Executor and the only beneficiary of the Will of Paul Geddes. Therefore to depone that the share is held by the Estate

without more is misleading. As Executor MG is a bare trustee and is holding the share for herself and can transfer it anytime to herself.

4.12 Bardi does not carry on any trading activity. Its sole activity is to hold the Desnoes & Geddes shares. It held other shareholdings which were disposed of many years ago.

4.13 Bardi does not have any employees other than Mrs. Jackson a close friend of MG for over forty (40) years and as such looks after her affairs in Jamaica which are almost non-existent.

4.14 Bardi has no other assets in Jamaica.

4.15 Bardi has no other Directors.

4.16 Bardi does not file its returns as due under the Companies Act.

4.17 Bardi's only assets in Jamaica is its Desnoes & Geddes shares.

4.18 The sole activity of Bardi is to collect dividends from the shares held in Desnoes & Geddes.

*4.19 Bardi has one debt of approximately US$6 Million which is owed to MG. This debt arose in March 2008, when MG paid to the Trustee In Bankruptcy US$6,047,504.20 to enable Bardi Limited in Involuntary Liquidation to pay its debt and come out of bankruptcy. I exhibit and mark **MM1** and its Index at page 14 a copy of the Bank of Nova Scotia draft no. 001488 dated March 12, 2008 in the amount of US$6,047,504.20 payable to the Trustee in Bankruptcy.*

4.20 The loan by MG to Bardi enabled MG to get Bardi discharged from bankruptcy and MG thereby regained sole control of Bardi and retains it to this day.

4.21 The Board of Directors does not meet and MG is the only decision maker.

4.22 Bardi's Annual General Meeting is held on paper, there is no meeting.

4.23 MG rarely comes to Jamaica. Bardi exists for the sole reason of holding her shares in Desnoes & Geddes and nothing else.

4.24 Bardi does not buy or sell or transpose investments. It is passive. It undertakes no risk associated with carrying on business."

[12] Mr Chen placed heavy reliance on these facts and in his submissions took the Court through the affidavit of Mr McDonald filed on 14th October 2016 with meticulous detail. He submitted that the relationship between Bardi and Mrs

Geddes had to be distilled from the primary facts and this was a function best suited for the Court of first instance and which this Court now needs to perform. He proffered this as a possible explanation for the Court of Appeal not having taken the opportunity to decide the application, when it had what at first blush may seem to have been the perfect opportunity of doing so, on the appeal from the judgment of my learned sister Simmons J.

[13] Mr Chen submitted that the facts demonstrate that Bardi is the alter ego of Mrs Geddes and the Court ought not to allow Bardi to pretend that it is an independent legal person.

Bardi's submissions in support of setting aside the provisional charging order

[14] Mr Hylton QC in his submissions argued that a number of these assertions by Millingen were untrue or misleadingly incomplete. He pointed to evidence that Millingen knew that Bardi owns several other shares, and pointed to evidence that Bardi does file annual returns. He also highlighted the fact that Mrs Geddes only recently became the sole director of Bardi and that at the time the relevant orders were made, Mrs Felicity Brandt was also a director.

[15] Mr Hylton also identified other facts which he submitted contradicted the suggestion that either Bardi or Mrs Geddes treated Bardi as if it were her alter ego and not a separate legal entity. Counsel noted that the fact that the debt Bardi Limited owes to Mrs Geddes is secured by a formal legal document in the form of a promissory note evidences the acknowledgment of both parties of their separate legal existence.

[16] Mr Hylton also pointed to the fact that in the previous proceedings Millingen sued both Bari and Mrs Geddes, as evidence that Millingen itself recognised the separate legal personality of Bardi. Counsel further submitted that also of relevance was the fact that separate work was undertaken for Bardi and Mrs Geddes and each was billed separately. He argued that notably, Millingen's letter dated 11th December 2003 to Mrs Geddes acknowledged payment for the invoices

rendered to Bardi and undertook to repay her when payment was received from Bardi's liquidator.

[17] Mr Hylton submitted that even if the facts had been as Millingen alleged, the authorities show that the Court cannot pierce the corporate veil in this case. In support of his submissions, Counsel relied primarily on the Court of Appeal decision in **International Hotels Jamaica Limited v Proprietors Strata Plan** [2013] JMCA Civ 45, in which the Court of Appeal considered a number of leading authorities on this area of the law including **Prest v Petrodel Resources Limited** [2013] UKSC 34, (Transcript used in this judgment) also reported at (2013) 4 All ER 673.

Analysis

[18] It is a fundamental principle of English company law that a company is a separate legal entity distinct from its shareholders and they are liable only to the extent of their contributions to the company's capital. This principle of general application was settled by the case of **Salomon v Salomon & Co Ltd** [1896] UKHL 1, which confirmed the applicability of the principle to companies that were wholly owned and controlled by one person.

[19] The principle is not absolute however, and the courts have accepted that in appropriate cases it may be necessary to "pierce" or "lift" the corporate the veil. This refers to the process by which the courts disregard the separate corporate character of a company. Although the courts were generally reluctant to do so, principles that have been applied in so doing have varied over the years and arguably were never uniform or applied with any consistency. Accordingly, a detailed examination of the circumstances in which the courts have lifted the corporate veil would perhaps be best suited for a full textbook. Nevertheless, I will attempt to summarise these principles for purposes of this judgement.

[20] In the case of **Prest v Petrodel** (supra) the principles relating to piercing the corporate veil were examined in detail by the Court of Appeal and the Supreme

Court of England. In **Prest v Petrodel**, the wife in proceedings for ancillary relief following a divorce, joined as respondents companies belonging to a group known as the Petrodel group, which the judge found to be wholly owned and controlled (directly or through intermediary entities) by her husband. One company was the legal owner of five residential properties located in the United Kingdom and another company the owner of two more . The Judge found that general principles of law did not permit him to pierce the corporate veil of the companies unless they were being abused for a purpose that was improper. Nevertheless, the Judge concluded that he was entitled to pierce the corporate veil by virtue of section 24 of the Matrimonial Causes Act 1973 (England), which, in his opinion, gave him a wider discretion to do so. He therefore ordered that seven properties be conveyed to the wife in partial satisfaction of a lump sum order.

[21] In the Court of Appeal a number of the companies challenged the order and the Court of Appeal allowed the appeal on grounds which included, *inter alia*, that the Judge ought not to have made the order having regard to the fact that he did not find that the corporate personality of the company was being abused for an improper purpose.

[22] Among the issues to be determined by the Supreme Court on appeal from the Court of Appeal's decision, was whether this was an exceptional case which justified the Court in disregarding the corporate veil in order to grant relief, by ordering the transfer of these seven properties to the wife although they did not legally belong to the husband, but belonged to his companies.

[23] Lord Sumption at paragraph [27] accepted that the authorities confirmed that there was a general principle that "*the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing*". In his opinion it is in determining the nature of the wrongdoing which ought to be deemed sufficient to justify the application of the principle that poses the difficulty. He expressed the problem in the following terms:

> *"**[28]** The difficulty is to identify what is a relevant wrongdoing. References to a "facade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil."*

[24] Lord Sumption concluded as follows:

> *"**[35]** I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in **Ben Hashem,** [**Ben Hashem v Al Shayif** [2008] EWHC 2380 (Fam)] I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in **VTB Capital** [**VTB Capital plc v Nutritek International Corpn** [2012] EWCA Civ 808] who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."*

Conclusion and disposition

[25] Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. Having examined the facts on which Millingen relied to support its assertion that Bardi is the alter ego of Mrs Geddes, I am unable to accept that collectively they do so establish. Singly, most of the facts complained of are the very benefits that individuals intend to derive from the incorporation of a company. I have found no evidence capable of establishing on a balance of probabilities that Bardi was "*being abused for the purpose of some relevant wrongdoing*"

[26] Accordingly, I find that there is no justification for lifting the corporate veil in this case. I find that Bardi is entitled to the usual protections afforded to a corporate entity with separate legal personality. Its assets including the shares it holds in D&G do not belong to Mrs Geddes and cannot properly form the basis of a charging order over the assets of Mrs Geddes.

[27] For the above-stated reasons I make the following orders.

1. The Ex-Parte Provisional Charging Order made by the Honourable Mr Justice Daye on 18th December 2012, as varied by an order of the Court of Appeal dated 10th April 2018 to cover only 7,500,000 of the ordinary shares in Desnoes and Geddes held by Bardi Limited (and the dividends arising therefrom), is discharged insofar as it relates to the said 7,500,000 shares.

2. The injunction granted by the Honourable Mr Justice Daye on 18th December 2012, as varied by an order of the Court of Appeal dated 10th April 2018 restraining Mrs Margie Geddes from selling 7,500,000 of the ordinary shares in Desnoes and Geddes held by Bardi Limited until the hearing of the application for a final charging order, is hereby discharged.

3. Costs of the application are awarded to Bardi Limited against the Claimant McDonald Millingen to be taxed if not agreed

MRS GEDDES' APPLICATION

[28] Mrs Geddes by Notice of Application filed on 11th April 2013 seeks, inter alia, the following orders:

> *(1) The Respondent's claim for costs filed on April 19, 2011, be struck out.*
>
> *(2) In the alternative, the Respondent's claim for costs for legal services rendered from November 2003 to April 24, 2008, be struck out.*
>
> *(3) In the alternative, the Respondent's claim for costs for legal services rendered from February 4, 2003 to April 18, 2005, be struck out.*
>
> *(4) Further in the alternative, the Respondent's claim for costs for legal services rendered from April 25, 2008 to May 13, 2008, be struck out.*
>
> *(5) The Default Costs Certificate issued on January 30, 2012, in favour of the Respondent, be set aside.*
>
> *(6) In the alternative, the Applicant be permitted to file points of Dispute to the Respondent's Bills of Costs.*
>
> *(7) In the alternative, enforcement of the Default Costs Certificate issued on January 30, 2012, be stayed pending consideration of this application by this Honourable Court.*
>
> *(8) Costs of the Application to the Applicant to be taxed if not agreed.*
>
> *(9) Such costs to be on an indemnity basis.*
>
> *(10) Such further and other relief as this Honourable Court deems just.*

[29] The Grounds which are relied on concisely represents Mrs Geddes' position and I am of the view that it is helpful to set them out hereunder as follows:

> *(i) The Respondent's claim for costs filed on April 19, 2011:*
>
> > *(a) Is an abuse of the process of the court and should be struck out pursuant to Part 26.3(1) (b) of the Civil Procedure Rules, 2002.*
> >
> > *(b) Discloses no reasonable ground for bringing the claim and should be stuck out pursuant to Part 26.3 (1) (c) of the Civil Procedure Rules, 2002.*

(c) Does not comply with the requirements of Parts 7 and 8 of the Civil Procedure Rules, 2002 and should be struck out pursuant to Part 26.3(1) (d) of the Civil Procedure Rules, 2002;

(d) Is re-litigation of the earlier suit HCV 4243 of 2008, which was adjudicated upon by the Court of Appeal.

*(ii) The doctrines of **res judicata** and **issue estoppel** apply to the Respondent's claim for costs with respect to legal services rendered to the Applicant herein.*

(iii) The Respondent's claim for costs for legal services rendered from February 4, 2003 to April 18, 2005 is statute barred by operation of the Limitations Actions Act, 1881.

(iv) There is no valid agreement between the Applicant and Respondent for payment of costs for legal services rendered from April 25, 2008 to May 13, 2008.

(v) The Respondent is not entitled to the Default Costs Certificate issued on January 30, 2012.

(vi) Enforcement of the Default Costs Certificate by the Respondent will result in an injustice to the Applicant, and is not in accordance with the CPR.

[30] Mr Gordon submitted that Millingen erred in enacting the wrong procedure to recover its purported fees and referred the Court to section 22 of the Legal Profession Act which provides as follows:

> *"**22. -(1)** An attorney shall not be entitled to commence any suit for the recovery of any fees for any legal business done by him until the expiration of one month after he has served on the party to be charged a bill of those fees, the bill either being signed by the attorney (or in the case of a partnership by any one of the partners either in his own name or in the name of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to the bill:*
>
> > *Provided that if there is probable cause for believing that the party chargeable with the fees is about to leave Jamaica, or to become bankrupt, or compound with his creditors or to do any act which would tend to prevent or delay the attorney obtaining payment, the Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the attorney be at liberty to commence an action to recover his fees and may order those fees to be taxed.*

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

[31] Mr Gordon submitted that if Millingen sought to also proceed on a taxation basis it ought to have pleaded this in the alternative.

[32] In assessing Mr Gordon's submissions, it is helpful if Millingen's claim based on the Default Costs Certificate is placed in its correct factual context. It is not being asserted by Millingen that it was agreed between himself and Mrs Geddes and or Bardi that at all material times the work done would be billed on a work done or time basis. Millingen's position as contained in paragraph 4 of the particulars of the initial claim (**McDonald Millingen v Bardi limited and Margie Geddes** Claim No. HCV 4243 of 2008), was that invoices were rendered until 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*".

[33] It was also asserted by Millingen in paragraph 7 of the Particulars of claim of that initial claim that "*in or about the 20th of April, 2006 the Claimant and the Defendants agreed to an amended contingency to the agreement provide [sic] for a contingency fee of 32 ½ % to the Claimant*." In his affidavit filed 14th October 2016, Mr McDonald expressly confirmed that it was after the Court of Appeal ruled that the contingency fee arrangement was not valid that he proceeded to tax a bill of cost on a work done basis.

Quantum meruit claims

[34] Halsbury's Laws of England/Restitution and Unjust Enrichment (Volume 88 (2019))/1. Introduction/(2) Historical Development/408. The different senses in which the term 'quantum meruit' is used.

> **408.The different senses in which the term 'quantum meruit' is used.**
>
> *The term 'quantum meruit' is used in different senses at common law. For example, in some cases quantum meruit is used to express the measure of recovery in a contractual claim. In other cases it is used to denote an unjust enrichment claim or the measure of recovery in such a claim[3]. The claim is clearly contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done[4]. Where, however, no contract is ever concluded between the p arties or the contract is void or otherwise unenforceable[6], the claim cannot be in contract and will be in unjust enrichment. In other cases it can be difficult to discern whether the claim is in contract or in unjust enrichment. Where the implication of an obligation to pay a reasonable sum arises from an implied but genuine agreement, reflecting the intention of the parties that a reasonable sum would be paid for the goods sold or work done, the claim will be contractual, but where that is not the case the obligation to make restitution will be imposed as a matter of law to reverse unjust enrichment.*

[35] This situation faced by Millingen was therefore the classic case where the contract between itself and Mrs Geddes was found to be enforceable. In her affidavit filed 31st May 2013 Mrs Geddes admitted at paragraph 7 as follows:

> *"7. That the retainer was initially for payment of the Respondent's fees against invoices rendered and remained so 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 dispute over assets of Bardi Limited."*

[36] At paragraph 8 of the same affidavit Mrs Geddes refers to the fact that the Respondent indicated that the agreement for payment of legal fees on a

contingency basis was modified and or varied on February 4, 2008. Interestingly, she did not admit or deny that assertion.

[37] Therefore, Mrs Geddes is not asserting that no contract was ever concluded between the parties. Mrs Geddes is merely asserting, as the Court of Appeal has indeed concluded, that the contract is not an enforceable contingency agreement. As Mr McDonald correctly recognised, the judgment of the Court of Appeal does not purport to decide that Millingen must never be paid for legal services rendered, but rather it decided that the compensation for such services should not be on the basis of the asserted contingency fee agreement. Mrs Geddes benefitting from the legal services received without being under any obligation to pay any money at all would arguably amount to an unjust enrichment and these are the kinds of cases in which the quantum meruit principles become applicable. In such circumstances, it seems to me that Millingen would be entitled to make a valid claim for relief on a quantum meruit basis.

Did Millingen make a claim?

[38] Mrs Geddes application contains a number of objections which are based on Millingen having made a claim, for example an issue is joined as it relates to improper service of the claim.

[39] The Bill of Costs does not comply with the provisions of CPR Part 8 as to how to start proceedings using a claim form (Form 1) or a fixed date claim form (Form 2). If the Bill of Costs were to be considered a claim form, it would also not have complied with the requirements of CPR 8.16(1) as to the documents which should be served with a claim form. There would also be non-compliance with CPR 3.2 which requires a certificate of truth in each case. I appreciate that these issues of non-compliance may very well be academic, nevertheless I will briefly examine them.

[40] There are a number of authorities including **Whyllie James et al v David West et al** SCCA 120/2007 Jamaica Court of Appeal decided 30 July 2009, which have

decided that a failure to have a certificate of truth is an irregularity that can be cured. At paragraph 39 of the judgment Smith JA left open the question as to whether a claim can may be prosecuted without a certificate of truth. So, in principle, the absence of a certificate of truth is a defect which would not necessarily be an unsurmountable hurdle, if a litigant is able to amend the claim form.

[41] As it relates to the mandatory requirement to annex the relevant documents to the claim form this is a bigger issue. In the case of **B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2** the Court of Appeal had to deal with the issue of non-compliance with CPR 8.16(1). At paragraph 37 of the Judgment where Morrison JA (as he then was) made the following statement:

> *"Indeed, it is difficult to see why, as a matter of principle, it should follow from a failure to comply with rule 8.16(1), which has to do with what documents are to be served with a claim form, that a claim form served without accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular, as Sykes J and this court found in Vendrys, I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR, which governs how to start proceedings. It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non- compliance with rule 8.16(1). should not be able to take the necessary step to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule."*

[42] In the case of **Cedric Harper v Lee** Claim No 2016 CD 00094 this court concluded that where a claim form is being re-served, if the purpose of the re-service is to cure an initial defective service, the corrective re-service must be effected within 12 months of the date the claim form was issued. Based on this finding which I still believe to be correct, it would not be possible for Millingen to simply re-serve that claim with any missing documents to cure the non-service because 12 months have already passed and the court could not at this stage extend time for service of the claim form.

[43] Millingen has asserted that its claim is pursuant to the taxation procedure set out in section 22 of the Legal Profession Act. What it did, was to submit a claim to the registrar for fees on the basis on the basis of the work done. Mr Chen submitted, that although Millingen described the document it submitted to the Registrar as "*Attorneys-at-law's Claim For Cost From Own Client*" (with 5 Attorneys-at-Law and Own Client Bill of Costs attached), it was not a claim in the strict sense as used in the CPR (as Mr Gordon had submitted), but that it was really the rendering of a Bill of Costs in accordance with the provisions of CPR 65.23 which speaks to a taxation hearing. I unreservedly accept Mr Chen's submissions on this point as correct. The reference to the "*Attorneys-at-law's Claim For Cost From Own Client*" as a "claim" is therefore a misnomer and in an effort to reduce confusion, I will simply to refer to it hereafter as the Bill of Costs.

[44] Having regard to the Court's finding that Millingen has not filed a claim in the strict sense of an originating process as contemplated by the CPR, there are a number of issues which have fallen away and do not need to be resolved, such as whether there was improper service outside the jurisdiction of the claim and whether the claim is an abuse of the process of the court.

[45] Implicit in the Bill of Costs itself, and concomitant with its submission, was an implied assertion to the Registrar by Counsel that Mrs Geddes had agreed to pay fees on a work done basis as claimed therein. However, it is not disputed that there was no such agreement and in this respect this case is different from **Adolphy Decordova Samuels and others v Clough Long & Co** [2016] JMCA Civ 28 Court of Appeal Jamaica 13th May 2016 where it was being asserted that there was an agreement. Since any claim by Millingen for compensation, can, as a matter of law, only be based on quantum meruit principles, such a claim (being one for unjust enrichment) cannot be litigated by simply submitting the Bill of Costs to the Registrar for taxation pursuant to CPR 65.23 and/or section 22 of the Legal Profession Act.

[46] Even if Millingen were to argue that its claim is contractual in nature because it is to "*recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done*", that would not matter. Such claims are not contemplated by section 22 of the Legal Profession Act and are clearly outside the jurisdiction of the Registrar. One reason for this is that the type of exercise of discretion called for by the Registrar on a taxation of fees is different from that required to be exercised by a Judge using his powers in order to determine a quantum meruit claim. Admittedly, as a practical matter, there may be some similarity in the evidence that a Judge would consider in the computation of the amount of the compensation to be allowed, but the nature and character of the processes are different.

Conclusion

[47] Based on my conclusion expressed above, I find that Millingen's claim for costs from own client / Bill of Costs for fees for legal services from 4th February 2003 to 13th May 2008 was irregular. I find that the claim for these fees could only have been properly made on the basis of quantum meruit principles since the Court of Appeal had found that the contingency agreement between the parties was unenforceable. Accordingly, such a claim was outside the jurisdiction of the Registrar and the procedure contemplated by section 22 of the Legal profession Act.

[48] As a consequence, I find that the Default Costs Certificate dated 30th January 2012 purportedly issued by the Registrar was therefore irregular as a matter of law, and I hereby set it aside.

[49] For the avoidance of any doubt, I wish to expressly state that I am not making a finding that Millingen is not entitled to any fees for the legal services performed for the period which it has claimed. I have simply found that it is not entitled to claim such fees in the manner that it has purported to do, which is by the claim in the

form it has submitted to the Registrar and which resulted in the Registrar issuing the Default Costs Certificate.

[50] By way of comment, it should be noted that the irregularity in the procedure employed by Millingen in an effort to obtain compensation, is not a mere procedural irregularity which this Court can overlook or cure in the interests of the overriding objective to deal with the matter justly. The Bill of Costs procedure has deprived Mrs Geddes of the opportunity to defend what is effectively a claim for a quantum meruit in the manner which is afforded to her by the Court's recognised practice and procedure. That is to say, by filing a defence and or affidavits to be considered by a Judge of the Supreme Court, in the usual manner pursued in "claim form" or "fixed date claim form" proceedings.

[51] Having regard to my findings as earlier expressed, I do not find it necessary to decide on the other issues raised by Mr Gordon and I hereby make the following orders.

1. The Claimant's Attorneys-at Law Claim For Costs From Own Client filed on 19th April 2011, is struck out to the extent that it purports to commence claim No HCV O2900 of 2011.

2. The Default Costs Certificate issued on January 30, 2012, in favour of the Claimant is set aside.

3. Costs of the application are awarded to Mrs Margie Geddes the Defendant to be taxed if not agreed.