NMLR

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 35/2002

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:	**PIPER AND SAMUDA (A Firm)**	**1st.PLAINTIFF/ APPELLANT**
	PAMELA BENKA-COKER	**2ND PLAINTIFF/ APPELLANT**
AND:	**D.Y.C. FISHING LTD.**	**DEFENDANT/ RESPONDENT**

Charles Piper and Emile Leiba instructed by Piper and Samuda for the appellants

Christopher Dunkley, Marina Sakhno and Coleen Brown-Blake instructed by Cowan, Dunkley Cowan for the respondent

March 24, 28 and July 3, 2003

DOWNER, J.A.

Introduction

The appellants, who are Attorneys-at-Law, filed suit against the respondent company, D.Y.C. Fishing Ltd. regarding fees for professional services. In the Statement of Claim the sum of $913,683.50 was claimed by the first appellant and $660,000 claimed by the second appellant. The interest rate on both sums was fixed at 21%. Appearance was entered on 25th July and a Defence was filed 20th September, 2001.

Prior to the service of the Statement of Claim it seems that two invoices were served on the respondent on June 20, 2000 and October 18, 2000. They are at pages 30 and 34 of the Record. Both invoices are supported by time sheets showing the attorney-at-law from the firm of the first appellant who rendered professional services, the time spent, the rate per hour and the costs. The Writ of Summons and Statement of Claim were filed on 20th December, 2000.

The Defence raised an important point of law and it is necessary to set it out. It reads as follows at page 11 of the Record:

> "1. The ~~Defendant denies owing to the~~ Plaintiffs the sum of One Million Five Hundred and Seventy Three Thousand Six Hundred and Eighty Three Dollars and Fifty Cents ($1,573,683.50), for professional services rendered and denies the particulars thereof, as alleged and set out in the Statement of Claim, or at all.
>
> 2. Save and except that the Defendant agreed to engage the legal services of the Plaintiffs and to pay therefor fair and reasonable fees, the Defendant denies having at any material time any written or oral agreement with the Plaintiffs specifically with respect to the quantum of their fees."

An important distinction is adverted to in paragraph 2 above. While there is a written contract exhibited, with respect to the first appellant, at page 21 of the Record, there is no such contract with respect to the second appellant. When section 21 of the Legal Profession Act ("the Act") is analysed later in this judgment it will be shown that to be applicable there must be a written

contract. On the basis that there was no written contract with the second appellant, the part of the Statement of Claim relating to her should be struck out as showing no cause of action.

Then paragraphs 3 and 4 of the Defence raised issues of law with particular reference to section 22 of the Act. These paragraphs read:

> "3. The Defendant says that the fees charged and/or claimed by the Plaintiffs appear to be unfair and unreasonable in the circumstances of the Defendant's legal business with these Plaintiffs.
>
> 4. By letter dated August 21, 2001 the Defendant's Attorneys-at-Law requested the Plaintiffs to have their Bill of Fees prepared and taxed in accordance with the Legal Profession Act and to date hereof the Plaintiffs failed, neglected or refused to comply with the said request."

Suffice it to say that the issues of law raised have been the subject matter of two recent appeals in this Court namely **W. Bentley Brown v. Raphael Dillion and Sheba Vassel** (1985) 22 J.L.R. 77 and **Barrington Frankson v. Monica Longmore** Motion No. 13/99 [Downer, Langrin, Panton JJA] delivered July 31, 2000. The *ratio decidendi* in both cases was that a reference to the Registrar as the Taxing Officer may be the appropriate procedure in every instance where Recovery of Fees is in issue, pursuant to Part V of the Act. This must be so because of section 43 of the Judicature (Supreme Court) Act which reads:

> "43. Subject to the provisions of this Act and of the Civil Procedure Code and of rules of court, any Judge of the Supreme Court may order what matters in proceedings in the Court shall be investigated by the

> Registrar, and may direct the Registrar to take accounts and make enquiries, and may give such assistance and direction to the Registrar therein as he thinks fit:
>
> Provided that any persons aggrieved by any act or decision of the Registrar may appeal thereupon to the Court. All acts and proceedings of the Registrar under the provisions of this section shall be subject to ratification by the Court, and when so ratified shall be binding on all parties in the same way as an order of the Court."

An alternative procedure for reference to the Registrar is by reliance on the inherent jurisdiction of the Court which was preserved pursuant to section 5(1)(b) of the Act. Be it noted that a reference to the Registrar as taxing officer is the preferred procedure to enlist her expertise in computing the appropriate fees on an attorney-at-law and client basis. When she has completed her computation, the matter is considered by the Court and a final determination is made.

The next stage in the proceedings was that the appellants invoked the jurisdiction of the Supreme Court by an Amended Motion For Judgment. The material part of that motion states at page 13 of the Record:

> "1. The Defence filed herein on September 20, 2001, be struck out on the ground that same does not reveal any reasonable cause of Defence or alternatively on the ground that the Defence is frivolous and vexatious and is an abuse of the process of the Court.
>
> 2. Judgment be entered for the First Plaintiff in the amount of $1,182,951.01 arrived at as follows . . .

> 3. Judgment be entered for the Second Plaintiff in the amount of $847,803.30 arrived at as follows:. . ."

This brings us to the third basis for referring the matter of fees to the Registrar. It runs thus at the following sections of the Judicature (Civil Procedure Code) Law (the" Code"). Section 442 reads:

> "442. Except where by Law is expressly provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment."

Then section 448 is crucial. The very experienced judge must have been aware of it. It reads:

> "448. Upon a motion for judgment, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, may give judgment accordingly, or may, if it is be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as if it may think fit."

The particulars in paragraphs 2 and 3 of the Motion at page 13 of the Record indicate a Bill of Fees, not a contract for a gross sum or a percentage or otherwise: also that the appellants in the Motion above were relying on the statutory provision of section 191 of the Code to strike out the defence and section 442 of the Code to award them the amounts in the Statement of Claim.

The Motion was heard by Smith, J, as he then was, and it is of importance to set out his judgment in full. At pages 96-97 of the Record it reads:

> "The Court on the application of Mr. Piper granted an amendment to the Notice of Motion to add the words "or alternatively on the ground that the Defence is frivolous and vexatious and is an abuse of the process of the Court" immediately after the word Defence.
>
> The Court granted the amendment and submissions made on the alternative ground. It has considered all the submissions of Counsel including Section 21 of the Legal Profession Act, in particular Sections 21(1) and (2). Mr. Piper submitted that where fees were payable under an Agreement, same shall not be subject to provisions of this part relating to taxation. How can the Court be satisfied that a sum is reasonable or unreasonable if there was not a certain sum?
>
> When one looks at documentary evidence in Court including Time Sheets submitted by Mr. Piper it is reasonable for a client to say that I have certain questions, I want to know why a Junior Counsel wasn't assigned to do this.
>
> I am of the view he would be entitled to ask certain questions as to the Statement of Account.
>
> I will exercise my inherent Jurisdiction and direct that the matter be referred to the Registrar of the Supreme Court with a view to her taxing the Client/Own Attorney Bill of Costs.
>
> Leave to appeal granted, if necessary
>
> In my inherent jurisdiction, I will stay the proceedings pending the taxation."

It is this judgment which is the subject of the instant appeal. It might have been helpful if the learned judge had indicated that he was dealing with a

Motion for Judgment pursuant to section 442 of the Code. Had that been done there might have been less misunderstanding in this case.

Implicit in the judgment was that the learned judge ruled in favour of the Defence. By referring the matter for taxation, the judge was acknowledging that paragraph 4 of the Defence was well founded. To reiterate, that paragraph reads at page 11 of the Record:

> "4. By letter dated August 21, 2001 the Defendant's Attorneys-at-Law requested the Plaintiffs to have their Bill of Fees prepared and taxed in accordance with the Legal Profession Act and to date hereof the Plaintiffs failed, neglected or refused to comply with the said request."

What was implicit in the reasons for judgment is made explicit in the Order which reads at page 95 of the Record:

> "1. Matter referred to the Registrar of the Supreme Court for taxation of Client/Own Attorney-at-Law Bill of Costs;
>
> 2. Action stayed pending taxation;
>
> 3. No order as to costs;
>
> 4. Leave to Appeal, if necessary; granted."

In substance, the learned judge pursuant to section 448 of the Code directed the Motion "to stand over for further consideration." If the correct procedure by the appellants in the circumstances of this case was to invoke the jurisdiction of the Supreme Court by reference to the Registrar directly in the first instance, that part of the order, which stated "action stayed

pending taxation" is understandable. Proceedings on the Statement of Claim would be superfluous and it might have been appropriate to strike out the Claim on the ground that it was an abuse of the process of the Court or that it was frivolous and vexatious or that it showed no cause of action. Equally appropriate would have been for the respondent D.Y.C. Fishing Ltd. to have set the matter down to be determined on a preliminary point of law. I will return to this issue when addressing the Respondent's Notice.

The order for costs was unusual. Since the respondent company succeeded below, costs should have followed the event. It would also be appropriate to set aside this part of the order, and substitute the costs to the Defendant. It is against this background that the appeal should be considered.

The question of general public importance to be considered on appeal is this: Was it a proper exercise of discretion for the learned judge to refer the issue of Attorney-at-law fees to the taxing officer having regard to the written contract between the appellants and the respondent in the instant case?

Proceedings on Appeal

The grounds of appeal read as follows at pages 3-4 of the Record:

> "1. The Learned Judge erred in law or misdirected himself as to the law, by disregarding the provisions of sections 21 and 24 of the Legal Profession Act and invoking the inherent jurisdiction of the Court in referring the Attorneys' Bills of fees to taxation by the Registrar of the Supreme Court.
>
> 2. Having disregarded the provisions of sections 21 and 24 of the Legal Profession Act and by

invoking the inherent jurisdiction of the Court as aforesaid, the Learned Judge erred in law and misdirected himself by staying the Plaintiff's action pending the taxation of their Bills of Fees.

3. The Learned Judge misdirected himself as to the law and the facts and took into consideration matters which he ought not to have considered, namely that –

a. the Defendant would be entitled to ask questions as to the Plaintiffs' Bills of Fees,

and

b. the provisions of section 21 of the Legal Profession Act applies to Agreements in which fees which were agreed were for a certain sum

4. In determining that the said Bills of Fees should be the subject of a taxation the Learned Judge had clearly accepted that the Defence was frivolous and vexatious and/or was an abuse of the process of the Court but assumed a discretion to refer the said Bills of Fees to taxation when no such discretion is given having regard to the facts and the provisions of Part V of the Legal Profession Act."

As they are closely linked, these grounds will be dealt with together during the course of the judgment. It must be reiterated that there being no written agreement with the second appellant, section 21 of the Act was not relevant in the circumstances of this case. It will be demonstrated that section 21 is also not relevant to the first appellant on the facts of this case.

The relationship between the procedural provision of section 5 (1) (b) of the Act and the substantive provisions of section 21

The initial issue is to determine the relationship between section 5(1) and Part V of the Legal Profession Act. This will show that the learned judge's reliance on his inherent jurisdiction was sanctioned by the provisions of the Act. Section 5(1) of the Act reads, in so far as material:

> "5.-(1) Every person whose name is entered on the Roll shall be known as an Attorney-at-law (hereinafter in this Act referred to as an attorney) and
>
> (a) subject to subsection (2), be entitled to practice as a lawyer and to sue for and recover his fees for services rendered as such;
>
> (b) be an officer of the Supreme Court except for the purposes of section 23 of the Judicature (Supreme Court) Act; and
>
> (c) when acting as a lawyer, be subject to all such liabilities as attach by law to a solicitor."

The first crucial phrase to construe is to "be an officer of the Supreme Court". In **Barrington Frankson v. Longmore** Motion No. 13/99 (supra), I paid tribute to the masterly judgment of Carberry J.A. in **W. Bentley Brown v. Raphael Dillion and Sheba Vassell** (1985) 22 JLR 77 the **Bentley Brown** case. The references to this issue are at pages 38,39, 47-53, 54-57 of the **Frankson** judgment. Having regard to those extensive references, a summary of the position is all that is necessary in this case. In the **Frankson** case there is the following passage at page 49:

> "To anticipate the correct attitude or approach to this problem appears in a sentence taken from the judgment of Wilberforce, J., in **Electrical Trades Union v Tario** (1964) Ch. 720 at 734:
>
> > '... The Court has inherent jurisdiction to secure that the solicitor, as an officer of the court, is remunerated properly, and no more, for work he does as solicitor.'
>
> This also seems to be the principle on which section 21 (1) of the Legal Profession Act is based."

Then on page 53 of the **Frankson** judgment the following extract appears:

> "However the insertion in the new Legal Profession Act of Section 5 (1) (b) which expressly makes the Attorney-at-Law 'an officer of the Supreme Court' will have the effect of once again recognizing the inherent jurisdiction of the judges over the legal practitioners, so that one may perhaps say 'all is well that ends well." (Emphasis supplied)

The presiding judge, Kerr J.A. paid tribute to his brother Carberry's J.A. judgment. It is cited in the **Frankson** judgment thus at page 50:

> "I have had the benefit of reading the draft of the judgment of Carberry, J.A. in which he has reviewed with scholarly industry a number of cases relevant to the relationship of solicitor and client and the changes brought about by the fusion of the two branches of the profession – solicitors and barristers – by the Legal Profession Act and in which he has carefully summarized the evidence."

Then he concluded his reference to the judgment thus on page 57:

> "Having regard to the full treatment given to the question raised on appeal by Carberry, J.A., this addendum of mine will concisely be confined to the bare essentials."

With respect, I think one of the essentials omitted by Kerr J.A. was the reference to section 5(1)(b) of the Act in the **Bentley Brown** judgment and the numerous authorities which explained the time honoured phrase "an officer of the Court" and some of the consequences which flow from being such an officer. One such passage reads thus at page 94 of the **Bentley Brown** judgment:

> "Apart from these statutory provisions, the courts exercised over solicitors and attorneys *an inherent jurisdiction* as they were officers of the court, and as such bound to do what was considered right and just, regardless of ~~whether~~ or not they were liable in law. For example, undertakings given by them in their capacity as solicitors were enforceable by the courts whether they created a legal obligation or not: **Re a solicitor ex parte Hales** (1907) 2 K.B. 539 (1904-7) All E.R. Rep. 1050; **United Mining and Finance Corpn v. Beecher** (1910) 2 K.B. 296. Further, they might be held liable to pay costs incurred by the other side due to their default in the conduct of the litigation; **Myers v. Elman** (1940) A.C. 282."

It is true that in determining the actual fees in the **Bentley Brown** case, there was no reference to the Registrar for taxation as Carberry J.A. would have wished. This however did not detract from the law that a reference was both permissible and desirable in the interests of justice.

To illustrate further the inherent jurisdiction of the Court over Attorneys-at-law, reference ought to be made to **In Re H.A. Grey** [1892] 2 Q.B. 440 where Lord Esher said at page 443:

> "It seems to me that the true way of dealing with this case is to deal with it according to the principle which was laid down by this Court **In re Freston** 11 Q.B.D.

> 545, and recognized and approved of **In re Dudley.** 12 Q.B.D. 44. The principle so laid down is that the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore, be affected by anything which affects the strict legal rights of the parties. Such was the principle laid down in the cases to which I have referred, and which were decisions of the Court of Appeal, and therefore are binding on us till overruled by the House of Lords. So, if a solicitor obtains money by process of law for his client, quite irrespective of any legal liability which may be enforced against him by the client, he is bound, in performance of his duty as a solicitor, to hand it over to the client, unless he has a valid claim against him. If he spends it, or if, still having it, he refuses to hand it over, he commits an offence as an officer of the Court, which offence has nothing to do with any legal right or remedy of the client."

Bowen L.J. expressed the matter thus at page 447:

> "I am of the same opinion. The solicitor in this case is in a situation which presents two aspects, involving a double responsibility. He was a debtor, who owed a legal debt. He also owed a duty to his profession, and the Court of Justice whose officer he was, to pay over the money which belonged to his client, and of which he had possession through the confidence placed in him in his professional capacity, and as an officer of the Court. There are in such a case two wholly distinct rights, the right of the client at law to be paid his debt, and his right to apply to the Court as a person whose confidence has been abused by a person who is an officer of the Court, and whom he would not have trusted unless he had been such an officer."

Kay L.J. said at page 449:

> "The Divisional Court felt themselves put in a difficulty by the case of **In re Corbet Davies** 15 W.R. 46; 15 L.T. 161, and they have held that they had no jurisdiction to make the order for which the appellant applied. I agree so fully with what has been said by the Master of the Rolls, and Bowen, L.J., on the question of jurisdiction, that I will not repeat it. If that case did decide that the fact, that the client had obtained judgment against the solicitor for the money which he wrongly retained in his hands, took away the disciplinary jurisdiction of the Court to make an order for payment of it, all I can say is that I do not agree with it."

Then at page 451 Kay L.J. continued thus:

> "But it is clear, as I have said, that, notwithstanding the judgment, the solicitor remains subject to the disciplinary jurisdiction of the Court, and in the exercise of that jurisdiction the Court may, in its discretion, make an order on such terms as it thinks fit that the solicitor shall pay the money which he ought to pay in his character of solicitor before a certain day; and if such an order is made on him, and he does not obey it, he is brought exactly within the terms of the exception in the Debtors Act to which I have referred; and, that being so, proceedings against him for contempt can be founded on the order.

Earlier at page 450 Kay L.J. had said:

> "The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, provides that, with the exceptions thereinafter mentioned, no person shall, after the commencement of the Act, be arrested for default in payment of a sum of money. Then, among the exceptions is default by an attorney or solicitor in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order."

Was Smith J correct in referring the matter of fees to the Registrar?

There can be no doubt that Smith J. was correct to refer the issue to the Registrar as taxing officer. That judicial officer has the relevant expertise to come to the appropriate computation on the disputed issue of professional fees and then refer her opinion to a Supreme Court judge for a final decision. This is a procedural step permissible on the basis of the inherent jurisdiction of the Court in conformity with section 97 (4) of the Constitution and 5(1)(b) of the Act. Additionally, there are the statutory powers pursuant to section 43 of the Judicature (Supreme Court) Act, and in the circumstances of this case section 442 of the Code.

It was submitted by Mr. Piper that there ought to be no reference to the Registrar when the matter is governed by section 21 of the Act which reads:

"***PART V. Recovery of Fees***

> 21.-(1) An attorney may in writing agree with a client as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:
>
> Provided that if in any suit commenced for the recovery of such fees the agreement appears to the court to be unfair and unreasonable the court may reduce the amount agreed to be payable under the agreement.

> (2) Fees payable under any such agreement shall not be subject to the following provisions of this Part relating to taxation nor to any other provisions thereof."

Mr. Dunkley for the respondent is correct in submitting that the instant case was not governed by section 21 of the Act as the agreement was not for a gross sum or percentage or otherwise. "Gross sum or percentage" are plain words and need no explanation. They belong to a class. "Otherwise" suggests the proceeds of sale of specifics such as defined real estate, an ascertained block of shares or a specific bond. The security or estate must be fixed, the proceeds of the sale would depend on the market price. This limited use of "otherwise" is justified by reliance on the *ejusdem generis* rule. If the fees are not a gross sum or percentage there must be a fixed element. Counsel was correct as two clauses in the Terms of Engagement show that the fees claimed was not akin to a gross sum or percentage. They read:

> "1. Paid in connection herewith is the sum of $100,000.00 as your retainer on the understanding that you will present interim fee invoices to be paid by us as the matter proceeds.
>
> 2. We understand that it is not possible to accurately estimate the frequency with which, or the amount for which such interim fee invoices will be issued."

Paragraph 2 further demonstrates that section 21 is not applicable. These invoices were not fixed fees or a percentage. They were fees charged for work in progress. Further, both the Statement of Claim and the Amended

Motion for Judgment at pages 9 and 13 of the Record charged interest of 21% on the fees. There was no stipulation as to manner of payment. There was no provision for interest in the Agreement. If interest were to be claimed pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act the contract would have had to comply with the provisions of section 21(1) of the Act. Further the interest would be awarded when the Court adjudged the matter in favour of the Attorney-at-Law. This interest charge was a further charge prohibited by section 21.

Even if the issue ~~in the instant~~ case was governed by section 21 of the Act, this section does not deprive the Court of its inherent jurisdiction which has been preserved by section 5 (1) (b) of the Act, or its statutory powers pursuant to section 43 of the Judicature (Supreme Court) Act. Moreover, the proviso to section 21 expressly recognizes the court's power to intervene in cases of written agreements which are in compliance with the Act. This would include a reference to the Registrar expressly preserved by section 5(1)(b) which speaks of officers of the Court. Additionally, there is the express statutory power of reference pursuant to section 442 of the Code in instances where there is a Motion for Judgment. This reference will enable the Court to compare the taxed attorney and client costs to the gross sum or percentage claimed by the attorney-at-law. Judges have expertise in assessing damages or determining compensation. We have no expertise in the matter of fees for Attorneys-at-law. The arm of the Court which has such expertise is the

Registrars who are the taxing officers of the Court. We are capable of reviewing the decisions of taxing officers after hearing from counsel on both sides. We ought to be satisfied with that limited but important role.

There is one other aspect of section 21 of the Act which requires explanation. Section 21(2) of the Act precludes an agreement on fees which is in compliance with section 21(1) of the Act from being submitted to the Registrar for taxation either by the Attorney-at-Law or the client. However for the recovery of fees ~~the Court's~~ intervention is set in motion pursuant to the proviso to section 21(1) and a reference to the Registrar is permissible because of the specific statutory provisions referred to previously.

The following citation from the **Bentley Brown** case is apt in the circumstances of that case at page 89:

> "As Lord Warrington of Clyffe said in delivering the Privy Council decision in **Macaulay v. Sierra Leone Supreme Court Judges** (1928) A.C. 344 at 350, where one wishes to induce people to resort to the courts for the settlement of their disputes rather than to personal violence
>
> > ". . . it is essential that the people should be brought to feel the greatest respect not only for the impartiality and independence of the tribunal, *but for the honesty and fairness of those who practice before them."* (Emphasis supplied)
>
> Jamaica is, like several other countries, an inheritor of the common law systems. The aim of that system was to produce not only impartial and independent tribunals or courts, but to produce an independent and fearless advocate, honest in his practice before the court, and reasonable in the

> charge that he made (if any) for taking up the cause of his client."

By referring the fees in dispute, the legal system ensures that the expertise of the Registrar and the impartiality of the Judge provides that the fees of advocates are reasonable. This is what the public expects of the legal and judicial system. This analysis disposes of ground 3 which challenged the learned judges finding that section 21 of the Act relates to a situation where the fee charged is a sum certain. It also disposes of ground 4 of the Notice and Grounds of Appeal which contended that the learned judge had no discretion to refer the disputed fees to the Registrar. In this case the learned judge, relying on his inherent jurisdiction could have struck out the Statement of Claim as showing no cause of action. Instead he stayed the action which is the courteous way in which the judiciary has always treated the profession.

Constitutional implications

Mr. Piper contended in grounds 1 and 2 of the Notice and Grounds of Appeal, that by relying on the inherent jurisdiction of the Court the learned judge disregarded section 21 of the Act. This was impermissible, he further contended, as such a stance ran counter to the constitutional principle of the supremacy of Parliament. So it will be appropriate to show that Parliament recognized the inherent jurisdiction of the Court. A point against him is that in this jurisdiction the common law and statutory provisions must be consistent with the Constitution.

"The inherent jurisdiction of the Court" flows from section 97(4) of the Constitution which defines the Supreme Court as a superior court of record.

> "(4) The Supreme Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court."

One of the attributes of a superior court of record is that it is empowered to control its own procedure concurrently with specific statutory provisions where those statutory provisions do not deprive it of its inherent powers. In the case of the Legal Profession Act there is an express reference to the inherent jurisdiction of the Court in section 5 (1)(b) which demonstrates that it is preserved in relation to Attorneys-at-law as officers of the Court. This issue of inherent jurisdiction is illustrated in section 191 of the Code a pre-1962 law and the Supreme Court Practice 1967, Volume 1 Rule 18/19. Section 191 of the Code reads:

> "The Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client."

Also pertinent is section 686 of the Code which refers to the English position:

> "686. Where no other provision is expressly made by Law or by Rules of Court the procedure and practice for the time being of the Supreme Court of Judicature in England shall, so far as applicable, be followed, and the forms prescribed shall, with such variations as circumstances may require, be used."

The comparable English provision Rule 18/19 in the 1967 edition of the White Book reads:

> "19.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1) (a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

Then 18/19/10 deals extensively with Inherent Jurisdiction.

This statutory provision embodied in section 191 of the Code was an alternative way of exercising the Court's inherent power of setting aside a Statement of Claim for showing no reasonable cause of action. In the exercise of this inherent power resort may be had to affidavit evidence while there can be no such reliance if the statutory provision is prayed in aid.

In this context Mr. Piper cited **Wicks v. Wicks** [1997] EWCA Civ. 3050 (18th December, 1997) where at page 7 Ward L.J. said:

> "Mr. Wood's researches led him to Halsbury's Laws volume 37, para. 14 (dealing, it should be noted, with "Practice and Procedure") and thence to Sir Jack Jacob's trenchant article on "The **Inherent Jurisdiction** of the Court", 1970 Current Legal Problems 23 from which he develops his main argument. He begins with **Connelly – v- D.P.P.** [1964] A.C.1254 and the speech of Lord Morris of Borth-y-Gest at p. 1301 that:-
>
> 'There can be no doubt that a court which is endowed with a particular **jurisdiction** has powers which are necessary to enable it to act effectively within such **jurisdiction.** I would regard them as powers which are **inherent** in its **jurisdiction.** A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process'."

At page 17 Peter Gibson L.J. said:

> "But in my judgment the **inherent jurisdiction,** valuable and beneficial though it is in its proper procedural sphere in relation to litigation, cannot be invoked by the court to arrogate to itself the power to give substantive relief, particularly so in an area so much controlled by statute."

Another useful statement on the "inherent power" which is in the "inherent jurisdiction" of the Court is to be found in the speech of Lord Diplock in **Bremer v South Indian Shipping Corporation** [1981] 2 W.L.R. 141.

The Code, "an existing law" or a "law in force," was in conformity with the Constitution. Since the "appointed day" 6 August 1962, the Constitution is the supreme law by virtue of section 2 which reads:

> "2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail

> and the other law shall, to he extent of the inconsistency, be void."

Since the Savings Clauses 4(1) of the Jamaica (Constitution) Order in Council 1962 and 26(8) of the Constitution provide the tools of construction to bring laws in force in conformity with the Constitution then the effect of section 2 the supremacy clause is that it is applicable to laws after the appointed day. This is so because all the laws in force must be brought into conformity with the Constitution once the issue is raised in litigation before the Court.

It will be shown that instead of staying the action on the Statement of Claim pending taxation it would have been better to strike it out pursuant to section 191 of the Code. To stay pending taxation gives the impression that there will be a trial. When the taxing officer reports to the judge the matter will be determined. Any further proceeding would be on appeal.

Provisions were made in the Constitution to preserve "existing laws" or "laws in force" such as the Code provided that they were brought into conformity with the Constitution or deemed to be consistent with it. If all "existing laws" or "laws in force" were consistent with the Constitution there would be no need to resort to the relevant saving clauses. The relevant clauses are section 4(1) of the Jamaica (Constitution) Order in Council 1962 (the "Order in Council") and section 26(8) of the Constitution. Section 4(1) reads:

Existing Laws

> "4.-(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after

> that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

This section has recently been construed by the Privy Council in **Director of Public Prosecutions v. Kurt Mollison (No. 2)** P.C. Appeal No. 88 of 2001 delivered 22nd January, 2003, which affirmed the majority decision of this Court in **R.v. Kurt Mollison (No.2)** S.C.C.A. 61/97, delivered 29th May 2000. The substance of section 4(1) of the Order in Council is that it empowers the three organs of government the Legislative, the Executive and the Judiciary to exercise their powers where necessary to bring existing laws into conformity with the Constitution. In the case of the Judiciary the laws are to be brought into conformity by resort to a mandatory rule of construction. This rule obliges the Judiciary "to adapt and modify" existing laws to conform with the Constitution.

Here is how Lord Bingham states the position in paragraph 10 of ***Kurt Mollison.***

> "It seems clear that section 4 had two complementary objects: to ensure that existing laws did not cease to have force on the coming into effect of the new legal order; and to provide a means by which existing laws could be modified or adapted to ensure their

> conformity with the Constitution and preclude successful challenge on grounds of constitutional incompatibility."

Of equal importance is section 26(8) of the Constitution which empowers the Judiciary to deem laws in force inconsistent with the Fundamental Rights and Freedom clauses to be consistent with them or to state it in the language of double negatives; nothing in the laws in force is to be inconsistent with Chapter III of the Constitution. The Judiciary is obliged to deem all laws in force to be consistent with Chapter III.

Section 26(8) of the Constitution reads:

> "**Interpretation of Chapter III**
>
> 26.(1)
>
> . . .
>
> (8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.
>
> ... "

There are two distinct provisions in section 26(8). The first deals with provisions contained in the laws in force. The second pertains to what was done pursuant to those Acts before the appointed day. As to the first part the use of double negativities for emphasis gave a mandatory directive to the Judiciary to deem any laws in force in contravention to the Fundamental Rights provision to be consistent with Chapter III of the Constitution. The judicial tools to achieve this are "to presume or to deem" them to be consistent with

Chapter III. This straightforward grammatical construction of "nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this chapter" means that they are to be held to be consistent with them. They can only be held to be consistent if they are "deemed to be or "presumed to be" consistent with them. This is the true construction of section 26(8) which has been generally misunderstood because of a misreading of **D.P.P. v. Nasralla** (1967) 10 J.L.R. 1 or [1967] 2 A.C. 238 to which I shall return. The particular provision in the Code i.e. section 191 is consistent with sections 20(2) and (3) of the Constitution which reads:

> "(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.
>
> (3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public."

As for section 20(3) the proceedings include proceeding in Chambers unless those proceedings fall within the exception stipulated in section 20(4) of the Constitution. The other aspect of section 20(3) is that it is connected to section 22 of the Constitution which guarantees freedom of expression which includes freedom of the press and other organs as the internet and legal

periodicals. Courts operate in the public domain and ought to be the subject of public scrutiny by the profession and the general public. These are the circumstances which have fostered the common law and they are necessary for its continued growth in a free society.

The court referred to in these two sub-sections is the Supreme Court to which section 191 of the Code refers. Additionally, the Supreme Court in exercising its powers of judicial review pursuant to section 1(9) of the Constitution ensures that inferior tribunals adhere to the standards laid down in sections 20(2) and (3) of the Constitution. If the provisions of the Code were not consistent ~~with Chapter III of the Constitution they~~ would be deemed to be consistent with them pursuant to section 26(8) of the Constitution. This canon of construction, implicitly recognized in section 26(8) of the Constitution, is known as the presumption of constitutionality. It is significant that section 26(8) is defined in the side note as one of the clauses relevant to the interpretation of Chapter III.

Section 26(9) illustrates this approach. It reads:

> "(9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of –
>
> (a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council, 1962, or
>
> (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or

> expedient by reason of its inclusion in such consolidation or revision."

The presumption of constitutionality must also be applied to laws in force to which section 26(9)(a) & (b) applies. The unique features of section 26(8) and section 2 is that they confer on the Judiciary the duty to ensure that the Fundamental Rights provisions which came in operation on the appointed day, are applicable both to laws in force and future judicial decisions and future legislation. It would be absurd if the astute framers of the Constitution intended the laws in force to deny anyone of the Fundamental Rights and Freedoms when those rights were the centerpiece of the Constitution. In this context it is necessary to state that if there is an amendment to a law in force the amendment is a new law and is not within the definition of section 26(9) above as a law in force.

A duality was recognized by Lord Devlin in **D.P.P. v. Nasralla** 10 JLR 1 (1967) or (1967) 2 All E.R. 161 in a passage which is often quoted. For example in **Baker v. R.** 13 J.L.R. 169 at 177 Lord Diplock said:

> "So in order to dispose of the appeal it was necessary for the Board to decide the preliminary question of law: whether Nasralla's rights were governed by s. 20(8) of the Constitution or by the common law rule. Upon this preliminary question LORD DEVLIN, who delivered the opinion of the Board, said this about the effect of s. 26(8) of the Constitution upon the applicability of s. 20(8).
>
> 'This chapter [sc. Chapter III of which section 20(8) forms part] . . . proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of

> Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into fore of the Constitution the individual enjoyed'."

It is clear that Lord Devlin's words are applicable to existing laws which were in actual conformity with Chapter III provisions, as it was a case of double jeapordy recognized in the wording in the Constitution at section 20(8), which reads:

> "20(8) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence."

As there are instances where existing laws are not in conformity with the Constitution, then the Judiciary must deem those laws to be consistent with Chapter III so as to give that Chapter its full force and effect. Such a situation arose in the case of **Lilia Neuman v. Delroye Salmon** S.C.C.A. 39 of 2000 delivered 23rd June, 2003. This is a judicial task to be handled on a case by case basis where Parliament has not amended those laws so as to be consistent with the provisions of Chapter III . The reason why **Nasralla** has

been misunderstood is that it has been treated as if it were the words of a statute, when it is the ratio decidendi which is binding.

The second part of section 26(8) pertains to acts done pursuant to laws in force before the appointed day. Those acts can never give rise to an action alleging breach of Chapter III provisions. It was an Indemnity Clause to preclude the courts from dealing with acts of the state or other parties before the appointed day under laws in force which would otherwise give rise to a cause of action after the appointed day.

The case of **Maloney Gordon v The Queen** (1969) W.I.R. 359 illustrates the silent workings of section 26(8) of the Constitution in relation to section 29(1) of the Juveniles Act as it then stood. The ratio is spelt out in the following passage at page 360. It reads thus:

> "The relevant restriction on punishment is contained in s. 29(1) of the Juveniles Law, Cap. 189 of the Laws of Jamaica and reads as follows:
>
> '29. (1) Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall notwithstanding anything in the other provisions of this Law, be liable to be detained in such place (including, save in the case of a child, a prison) and under such conditions as the Governor may direct, and while so detained shall be deemed to be in legal custody.'
>
> By the Jamaica (Constitution) Order in Council 1962, Second Schedule, s. 20 (7) it is provided:

> 'No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.'
>
> There was thus no jurisdiction in the court to pass sentence of death upon the accused if he was under eighteen at the time of the commission of the offence."

Section 26(8) was used to deem section 29(1) of the Juveniles Act consistent with section 20(7) of the Constitution.

As a Crown Counsel I misunderstood this case, see **R v. Wright** (1972) 18 W.I.R. 302. Like Saul I have now repented as I have seen the light. Once the Board ruled that the Court had no jurisdiction to pass the sentence of death, they had resorted to the Supremacy Clause in section 2 of the Constitution, as well as section 20(7), and section 20(1). Even if a sentence of death was permissible in the circumstances of **Moloney Gordon** pursuant to the unamended Offences against the Person Act a mandatory sentence was not, in light of the discretionary powers accorded the Judiciary in section 20(1) of the Constitution. That section reads:

> "20.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

As sentencing is imposed after a fair hearing, a mandatory sentence of death is incompatable with the above section.

There is a third limited Savings Clause in Chapter III of the Constitution. It is sufficient in this case to say that it is modeled on section 26(8) and has the same effect on laws in force pertaining to torture or to inhuman or degrading punishment or other treatment with the necessary adaptation in the case of section 14(1) of the Constitution which preserve the punishment of death.

To appreciate the force of the contention that after the appointed day all laws in force must conform to the provisions in Chapter III of the Constitution it is necessary to cite the preamble in section 13 which reads:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms on the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (c) respect for the private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those

> provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Every person can only be entitled to the fundamental rights and freedoms if the laws in force are made to conform to the provisions of Chapter III. It is section 26(8) which ensures that laws in force are compatible with Chapter III.

The enforcement provision in section 25(1) and (2) also reinforces the interpretation accorded to section 26(8).

Section 25(1) and (2) read:

> "25.-(1) Subject to the ~~provisions~~ of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

That some laws in force are compatible with Chapter III is evidence by the phrase in section 25(1) "without prejudice to any other action with respect to the same matter which is lawfully available." Equally relevant is the proviso to section 25(2). Where laws in force or future laws are in conformity with the Constitution it is not necessary to resort to section 25 for redress. The Constitution is the last resort.

These constitutional provisions with a Supremacy Clause, two general Savings Clauses, a special Savings Clause, and entrenched provisions in Chapter III are in marked contrast to the provisions of the unwritten British Constitution as illustrated by **British Railways Board v. Pickin** [1974] A.C. 208 cited by Mr. Piper, where Lord Reid stated the position thus at page 213:

> "The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution, but a detailed argument has been submitted to your Lordships and I must deal with it.
>
> I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete."

Lord Simon of Glaisdale compared the system of Parliamentary Government in the United Kingdom to that which obtains in this jurisdiction thus at pages 227-228:

> "The system by which, in this country, those liable to be affected by general political decisions have some control over the decision-making is parliamentary democracy. Its peculiar feature in constitutional law is the sovereignty of Parliament. This involves that, contrary to what was sometimes asserted before the 18th century, and in contradistinction to some other democratic systems, the courts in this country have no power to declare enacted law to be invalid."

There has been a significant change in the Constitutional system of the United Kingdom since the enactment of the Human Rights Act which would require some qualification to the language of Lord Reid and Lord Simon.

Under the Constitution of Jamaica, Parliament has wide law making powers but is limited by the provisions of the Constitution. Section 48 (1) reads:

> "48.-(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

It is the Constitution which is supreme in this jurisdiction. As previously explained both the pre-1962 laws and the post 1962 laws must be in conformity with the Constitution pursuant to section 4(1) of the Order in Council and section 26(8) and section 2 of the Constitution. With respect to pre-1962 laws generally they must be adapted and modified. With respect to those pre-1962 laws which contravene Chapter III provisions they are deemed to be consistent with the Constitution. It is the presumption that existing laws are consistent with Chapter 111 of the Constitution which saves those laws from being invalid. Once the laws in force are deemed to be consistent with

Chapter III, then both the laws in force and future laws are so construed as to ensure that the Fundamental Rights and Freedoms are applicable to all laws. On this issue Lord Salmon in the case of **Attorney-General of St. Christopher and Nevis v. Reynolds** [1980] 2 W.L.R. 171 at 182 demonstrates how savings clauses are to be construed to ensure laws in force are to be brought in conformity with Chapter III. Lord Salmon said:

> "If the Court of Appeal were right in concluding that no modification or adaptation or qualification or exception could bring the Order in Council into line with the Constitution, then they would have been plainly right in holding that the Order in Council was nugatory and the Emergency Powers Regulations 1967 invalid. Their Lordships cannot, however, accept that the Constitution would have preserved the life of the Order in Council of 1959 for any period if the Order in Council could not be construed under section 103 of the Constitution so as to bring it into conformity with the Constitution. It is inconceivable that a law which gave absolute power to arrest and detain without reasonable justification would be tolerated by a Constitution such as the present, one of the principal purposes of which is to protect fundamental rights and freedoms. Their Lordships do not consider that there is any difficulty in construing the Order in Council by modification, adaptation, qualification, or exception so as to bring it into conformity with the Constitution. As stated in the judgment of their Lordships' Board in **Minister of Home Affairs v. Fisher** [1979] 2 W.L.R. 889, a Constitution should be construed with less rigidity and more generosity than other Acts."

The foregoing analysis disposes of ground 1 in the Notice and Grounds of Appeal as it demonstrates that by relying on his inherent jurisdiction to refer the issue of professional fees to the Registrar, the learned judge did not

disregard sections 21 and 24 of the Act. He relied on section 5(1)(b) of the Act and section 43 of the Judicature (Supreme Court) Act although he did not mention it. Equally, he could have relied on sections 442 or 448 of the Code. Further, this analysis showed the inherent jurisdiction of the Court was recognized by the Constitution in section 97(4) and the laws in force before the appointed day as well as section 5(1)(b) of the Act. Section 191 of the Code, a law in force, which is a pre-1962 law, consistent with Chapter III and specifically section 20(2) of the Constitution empowered the judge and this Court to strike out the Statement of Claim. Staying the action as the learned judge ruled, was not as effective as striking out the Statement of Claim which is the stronger remedy. A "fair hearing" as envisaged by section 20(2) by the Constitution will proceed before the Registrar and thereafter before a Judge of the Supreme Court.

The Respondent's Notice

The other point made by the respondent is that the decision of Smith J. could also be justified by resort to section 22 of the Act. Section 22(1) reads:

> "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."

Having regard to the Bill of fees claimed by the appellants in Mr. Piper's affidavit in support of the Motion, it was contended on behalf of the respondent that this was the course open to them on the facts of this case. Further section 22(2) of the Act entitled the respondent to refer the Bill of fees to the Registrar. It reads:

> "22(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."

Then section 22(3) of the Act empowers the Court to refer the matter for taxation thus:

> "(3) If 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."

Additionally, by section 22(4) of the Act the appellant's counsel could have referred the matter to the Registrar. That sub-section reads:

> "(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."

Then section 23 reads:

> "23. In this part "taxing officer" means the Registrar or such other person as may be prescribed by rules of court."

Be it noted that whenever the Registrar is approached directly there is an appeal to a Judge in Chambers pursuant to section 6(1) of the Judicature (Supreme Court) Additional Powers of Registrar Act.

Since in the circumstances of this case section 21 of the Act was not applicable and section 22(4) was, it is appropriate to strike out the Statement of Claim pursuant to section 191 of the Code or on the basis of the inherent jurisdiction of the Court. The contention that the Statement of Claim discloses a triable issue is without merit. Taxation by the taxing officer will provide a Supreme Court judge with a proper fee, and it is open to the parties at that stage to persuade the judge as to whether that is the appropriate fee or that it should be adjusted. Such proceedings are within the "fair hearing" provisions of section 20(2) of the Constitution.

It was in reliance on section 22 of the Act that the D.Y.C. Fishing Ltd. filed a Respondent's Notice. It is not necessary to examine all the grounds filed to decide that this Notice must succeed. Grounds 3 and 4 read at pages 5-6 of the Record:

> "3. Having established that the Appellant's claim is not for a liquidated amount as determined in accordance with a written agreement, the Learned Judge erred in fact and in law in that he failed to make a finding that paragraph 4 of the Defence, which states: "By letter dated August 21, 2001 the Defendant's Attorneys-at-Law requested the Plaintiffs have their Bill of Fees prepared and taxed in accordance with the Legal Profession Act and to the date hereof the Plaintiffs failed, neglected or refused to comply with the said request", disclosed a reasonable defence and he ought properly to have dismissed the Appellants Motion for Judgment.
>
> 4. That the ~~application~~ before the Learned Judge was to strike out pleadings and enter judgment accordingly and ~~not~~ ~~an~~ ~~application~~ for a reference to taxation, as such the Learned Judge erred in that, as the Appellants application to strike out the Defence filed herein was unsuccessful, the Respondent was entitled to its costs on the Motion."

It is not true to say that Smith J. erred in relation to ground 3 above. Rather, he relied on his inherent jurisdiction pursuant to section 5(1)(b) of the Act to refer the matter to the Registrar and felt that was enough to dispose of the issue until the Registrar's computation was considered by the Court. With respect to **ground 4**, it has already been shown that the learned judge erred and should have awarded costs to the respondent.

The respondent also relied on grounds 1-3 at page 6 of the Record which reads:

> "1 The Learned Judge erred in law in failing to find that the Respondent was entitled to have the Plaintiff's Bill referred to a taxing officer

pursuant to S.22 (2) of the Legal Profession Act within one month of service of the Plaintiffs' Bill of fees

2. The Learned Judge erred in law in failing to find that the Bill relied upon by the Appellants is not a Bill in a format suitable for taxation and that the responsibility for laying an appropriate Bill, rests solely with the Appellants and that to the date hereof, no bill capable of taxation has been served on the Respondent and as such limitation period referred to in S.22(2) or the twelve months limitation period prescribed by S.24 of the Legal Profession Act has not yet begun to run.

3. Further or in the alternative, the Learned Judge erred in that he failed to find that special circumstances within the meaning of S. 24 of Legal Profession Act existed in this case as a result of the following:-

   (a) The Respondent being a lay person was not advised by its Attorneys-at-Law, the Plaintiffs, of his right under the Legal Profession Act to have the Plaintiff/Appellants Bill referred to taxation and the time frame within which such reference may be made.

   (b) The Respondent's new Attorneys upon receiving instructions as to the Defendant's various issues with the Bill, promptly advised the Respondent as to its aforesaid right and promptly invited the Appellants to lay a proper Bill with a view to taxation, which invitation to date has not been taken up by the Appellants."

These grounds are also successful as the reference pursuant to section 22 of the Act would be an equally appropriate reference and as good as a reference which relies on the inherent jurisdiction of the Court pursuant to section

5(1)(b) of the Act . It is the Registrar who will decide on the format of the Bill of Costs.

Conclusion

The issue of the fees for an Attorney-at-law is a matter of general public importance. It is fearless advocates who vindicate the rights of those seeking justice in criminal, civil and constitutional cases. The Legal Profession Act provides for this and the Registrars who are qualified, experienced and hardworking public officers are deputed to deal initially with such matters in most cases. I would not seek to diminish their role. So for my part the appellants have not been successful in any of their grounds of appeal. They have failed to prove that the learned judge was in error in referring the matter to the Registrar for taxation. When the Registrar remits the matter to a judge of the Supreme Court the fair and reasonable fee will be determined. They have failed to show that Smith J. as he then was ignored the provisions of the Act when he referred the issue of fees to the Registrar. There is an important issue here. The respondent contends that the fees claimed are unreasonable and the way to determine the fair and reasonable fees is by a reference to the taxing officer to ascertain the fees on an attorney and client basis. Such a finding will be remitted to a Supreme Court judge for final determination. In such circumstances, the Statement of Claim is superfluous and should have been struck out rather than stayed as ordered by the learned judge below.

If there were to be a trial on the basis of the Statement of Claim as Mr. Piper requests, the respondent D.Y.C. Fishing Ltd. could rightly claim that it was denied the protection of law provided for in section 43 of the Judicature (Supreme Court) Act, section 442 of the Code and section 20(2) of the Constitution. How could there be a fair hearing when with respect to the first appellant the contract as it stands does not conform to section 21 of the Act? With respect to the second appellant there is no written contract. How could there be a hearing? The solution the law provides for such circumstances is to have the matter determined on a preliminary point of law. It is in the light of these patent circumstances that the Statement of Claim should not be stayed as Smith J. ruled but struck out. The Registrar would tax the Bill of Fees on an Attorney and client basis as the learned judge rightly ruled.

In substance this appeal must be dismissed and the agreed or taxed costs of the appeal both here and below must go to the respondent. The respondent ought to have its costs below so that part of the Order of the Court below must be varied. The Respondent's Notice has been successful in that there were alternative and appropriate grounds for affirming the order of the Court below. The upshot is that the order below must be varied. So the order of this Court ought to be:

1. Appeal dismissed.

2. Order below varied
   (a) on the issue of Costs and
   (b) Statement of Claim to be struck out instead of stayed.

3. The agreed or taxed costs both here and below go to the Respondent D.Y.C. Fishing Ltd.

BINGHAM, J.A.

By a specially endorsed Writ of Summons dated 20th December, 2000 the Plaintiffs/Appellants in this matter (referred to hereinafter as the "appellants") brought an action against the Defendant/Respondent (hereinafter called the "respondent") to recover the sum of One Million Five Hundred and Seventy-three Thousand Six Hundred and Eighty-three Dollars and Fifty Cents ($1,573,683.50) for professional services rendered by them for the period 29th March, 2000 to 27th October, 2000, the particulars of which claim are set out in the Statement of Claim.

The respondent through their principal officer and Managing Director, Frank Cox, in their defence averred inter alia:

1. A denial that the said sums claimed by the plaintiffs/appellants were in fact owed/or at all.

2. While agreeing that the services of the Plaintiffs were in fact engaged by the defendant and undertaking to pay fair and reasonable fees for their services they denied having at any material time any written or oral agreement with the Plaintiffs in particular with respect to the quantum of their fees.

3. The defendant further averred that the fees now charged and/or claimed by the Plaintiffs appear to be unfair and unreasonable in the circumstances of the defendant's legal business with the plaintiffs.

Following upon the defence the appellants brought by way of a Motion for Judgment on their claim averring that the defence filed on 20th September, 2001, be struck out on the ground that the same does not reveal any reasonable cause of Defence or alternatively on the ground

that the Defence is frivolous and vexatious and an abuse of the process of the Court.

In support of the Motion for Judgment the appellants swore to two affidavits on 17th December, 2001. Appended to the affidavits are various exhibits relating to the manner in which the amount now claimed was arrived at.

The Motion for Judgment came on for hearing in the Supreme Court before Smith, J. (as he then was) on the 7th day of March 2002. After hearing from the attorneys-at-law for the parties he ordered that:

1. The claim ~~be referred~~ to the Registrar of the Supreme Court for taxation of client/own Attorney-at-law Bill of Costs.

2. The action be stayed pending taxation.

3. No order as to costs.

4. Leave to appeal if necessary be granted.

It is following upon this order that the appellants are now before this Court. The respondent not to be outdone has also filed a Respondent's Notice.

The Grounds of Appeal

"1. The Learned Judge erred in law or misdirected himself as to the law, by disregarding the provisions of sections 21 and 24 of the Legal Profession Act and invoking the inherent jurisdiction of the Court in referring the Attorneys' Bills of fees

to taxation by the Registrar of the Supreme Court.

2. Having disregarded the provisions of sections 21 and 24 of the Legal Profession Act and by invoking the inherent jurisdiction of the Court as aforesaid, the Learned Judge erred in law and misdirected himself by staying the Plaintiffs' action pending the taxation of their Bills of Fees.

3. The Learned Judge misdirected himself as to the Law and the facts and took into consideration matters which he ought not to have considered, namely that -

   a. the Defendant would be entitled to ask questions as to the Plaintiffs' Bills of Fees and

   b. the provisions of section 21 of the Legal Profession Act applies to agreements in which fees which were agreed were for a certain sum.

4. In determining that the said Bills of Fees should be the subject of a taxation the Learned Judge had clearly accepted that the Defence was frivolous and vexations and/or was an abuse of the process of the Court but assumed a discretion to refer the said Bills of Fees to taxation when no such discretion is given having regard to the facts and the provisions of Part V of the Legal Profession Act."

In the Respondent's Notice the respondent seeks to vary the orders made below by way of the following reliefs:

1. The Plaintiffs' Motion for judgment be dismissed.

2. Costs of the Motion to be the respondent's to be agreed or taxed.

The basis of the appellants' claim and the subsequent Motion for Judgment below rest on the "Terms of Engagement" entered into and executed by the appellants and the respondent through their principal officer, Frank Cox. It is common ground and not in dispute that up to the retainer being determined the terms embodied in that agreement formed the contract governing the relationship between the parties. The Terms of Engagement called for a fixed retainer of $100,000 and during the existence of the relationship between the parties such legal work undertaken by the appellants on behalf of the respondent was to be billed over time by means of invoices which were to be honoured by way of periodic payments made by Mr. Frank Cox on account.

As the balance due for outstanding fees increased, steps were taken by Mr. Cox to rearrange the payment schedules with a view to clearing its arrears; this with the approval of the appellants. It was following the determination of the retainer and a demand made for payment of the outstanding fees claimed, that upon a failure to make payment, this action followed.

The Submissions

Learned Counsel for the appellants, Mr. Piper, submitted that the question on appeal is whether, in the light of the provisions of the Legal Profession Act it was open to the learned judge to order that the

appellants' invoices be the subject of taxation. Section 21(1) of the Act while authorising an attorney to enter into an agreement in writing "as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney either by a gross sum or percentage or otherwise" also authorises the Court to reduce the amount agreed to be payable under such agreement "if in any suit commenced for the recovery of such fees the agreement appears to the Court to be unfair or unreasonable".

Counsel for the appellant submitted further that the "Terms of Engagement" executed by the parties was an agreement in writing within the provisions of Section 21 of the said Act. Section 21(2) while empowering the court in certain circumstances to refer bills of fees to taxation, this would not apply to fees payable under any agreement falling within section 21(1).

In support of the Motion for Judgment counsel argued that there was nothing unfair or unreasonable in relation to any of the bills which were submitted for payment to the respondent.

Mr. Piper cited a number of authorities in support of his submissions. As I do not consider an examination of these necessary for the purpose of disposing of the appeal, however, I do not intend to refer to them.

Learned Counsel for the respondent, Mr. Dunkley submitted that:

1. The "Terms of Engagement" created a Retainer and was not an "agreement within the provisions of section 21 (1)

of the Legal Profession Act. As such it did not preclude the matter being referred to the taxing master as permitted by section 22 of the Act.

2. It was therefore a matter of law as to the proper construction to be placed upon the effect of the "Terms of Engagement".

3. In any event as to the matter before Smith J, (as he then was) related to a Motion for Judgment, the defence to the Statement of Claim having raised a triable issue as to the fairness or reasonableness of the fees charged the learned judge, ought to have dismissed the Motion and awarded costs to the respondent.

In so far as the appellants have sought to contend that there was nothing unfair or unreasonable in relation to any of the bills submitted to the respondent for payment, I would take issue with this statement as once the question of fairness or reasonableness is raised in the defence as pleaded, it becomes a matter of evidence and the onus is on the respondent (the defendant) to satisfy the Court on a balance of probabilities that the fees charged are unfair and unreasonable per dictum of Carberry J.A. in ***W. Bentley Brown v Raphael Dillion and Sheba Vassell*** [1985] 22 JLR 77 at 112 (E.F). In this regard it is the court and not Counsel who is to determine whether the averment in the defence as pleaded raises a triable issue. Once, however, this become apparent from an examination of the pleadings, the Motion for Judgment which is a summary method of disposing of the case, and, could be seen as an attempt to circumvent a trial on the merits, ought to fail.

On a closer examination of the matters falling for consideration in this appeal the first question which arises is as to the nature of the Claim; whether and in what manner may an Attorney-at-law who renders professional services, on behalf of his client, take steps to recover such fees as he claims are owed to him. To answer this question one has to undertake an examination of Part V of the Legal Profession Act which for guidance is headed "Recovery of Fees". Section 21 in which the marginal notes state "agreements as to fees" reads:

> "(1) An attorney may in writing agree with a client as to the amount and manner of payments of fees for the whole or part of any legal business done or to be done by the Attorney, either by a gross sum or percentage or otherwise; so, however, that he Attorney making the agreement shall not in relation to the same matters, make any further charges than those provided in the agreement:
>
> Provided that if in any suit commenced for such fees the agreement appears to the Court to be unfair and unreasonable the Court may reduce the amount agreed to be payable under the agreement.
>
> (2) Fees payable under any such agreement shall not be subject to the following provision of this part relating to taxation nor any other provisions thereof." (emphasis added).

Section 21 makes it abundantly clear and beyond question that by virtue of subsection (2) that while clothing a judge of the Supreme Court with the jurisdiction to determine whether a claim for recovery of fees charged by an Attorney-at-law for legal services was fair and reasonable

with respect to the work undertaken by the Attorney, of whatever nature, the Court was without authority to refer such a claim to the taxing master for taxation.

In making the order of referral that he did, Smith J purported to act by exercising "the inherent jurisdiction of the Court." Such a power does not derive its existence from any statute, its origins and development, being grounded in the common law. On the enactment of the Legal Profession Act (1971) both branches of the legal profession became fused. Since the Act, there is now a statutory regime for the first time in Jamaica which addresses the problem both of recovery of fees and as well as the control of the same. From his reasons for judgment it does not appear that in making his referral to the taxing master that the learned judge took into consideration section 21 of the Legal Profession Act; for if he did, he would have discovered by the provisions therein the answer as to the correct approach to the questions raised before him. His resort to the exercise of his inherent jurisdiction, with respect, while it may have had legal currency prior to the coming into being of the Legal Profession Act was now displaced by the governing sections as set out in Part V of the said Act. In this regard it is by now a trite rule of construction of statutes that where a statute creates a new method of proceeding and defines the particular manner in which resort is to be had to it then that process is to be followed.

The authority to act, therefore was founded in Part V of the Legal Profession Act and not a resort to the exercise of the inherent Jurisdiction of the Court. In my opinion, therefore, in resorting to such an exercise the learned judge erred.

Conclusion

The effect of the proceedings below, therefore, is that in referring the claim for fees to the taxing master (the Registrar of the Supreme Court) the learned judge erred. That order must accordingly be set aside.

The Motion for Judgment, given the nature of the defence as pleaded in answer to the Statement of Claim raised a number of triable issues to be determined by the court below. Two important questions falling for determination are:

(1) were the fees charged fair and reasonable?

(2) was the document headed "Terms of Engagement" an agreement within the provisions of section 21(1) of the Legal Profession Act?"

In the result, the learned judge ought to have dismissed the Motion with costs to the respondent.

By their appeal in seeking to set aside the orders below and to have the Motion for Judgment restored that appeal also fails for the reasons indicated.

The way is now clear for the claim to be determined on its merits at a trial in the Supreme Court.

The appeal accordingly stands dismissed with costs both here and below to be the respondent's such costs to be taxed if not agreed.

PANTON, J.A.

1. On December 20, 2000, the appellants filed a specially endorsed writ of summons against the respondent seeking the recovery of $1,573,683.50 for professional services rendered over the period March to October, 2000. The respondent, on September 20, 2001, filed a defence in which it denied the debt and asserted that the fees appear to be unfair and unreasonable. By paragraph 4 of the defence, the respondent indicated that it had requested the appellants to "have their bill of fees prepared and taxed in accordance with the Legal Profession Act", but they had "failed, neglected or refused to comply with the said request".

1A. The undisputed facts show that interim fee invoices totalling $2,573,683.50 were presented by the appellants for legal services, disbursements on the respondent's behalf and General Consumption Tax (see exhibit CEP 4). The respondent acknowledged the amount of $1,866,957.00. Further, in a letter dated July 17, 2000, the respondent thanked the appellants for "a well prepared and argued appeal" and promised to "make every effort to clear" outstanding fees of $866,957 owed to the first appellant and $1,000,000 owed to the second appellant. The respondent also proposed a schedule of seven payments over the period 17th July 2000 to 16th October 2000. The letter ended thus:

> "In as far as monies to be held in account towards future fees, we hope that after successful completion of above schedule, the need for this will be negated.
>
> We hope this arrangement will be acceptable to both of you and we again extend our gratitude for excellent representation."

This payment schedule was amended by letter dated September 26, 2000. It provided for four payments as follows:

September 28, 2000	-	$300,000
October 16, 2000	-	$200,000
October 31, 2000	-	$300,000
November 14, 2000	-	$366,000

2. Against this background, the appellants filed a motion for judgment. In that motion, they sought an order that the defence be struck out "on the ground that same does not reveal any reasonable cause of defence or alternatively on the ground that the defence is frivolous and vexatious and is an abuse of the process of the Court"; and that judgment be entered in favour of the appellants with interest at 21% p.a. from December 18, 2001, until the date of the judgment.

3. The appellants based their motion before Smith, J. (as he then was) on a document entitled "Terms of engagement", signed by a director of the respondent. That document sets out the various rates of charges for work done by individual attorneys-at-law in the firm of Piper and Samuda, and provides for the presentation of interim fee invoices as the matter proceeds. It states also that there is an understanding that "it is not possible to accurately estimate the

frequency with which, or the amount for which such interim invoices will be issued".

4. On March 7, 2002, Smith, J. referred the matter to the Registrar of the Supreme Court for taxation. In doing so, he said that he was exercising his inherent jurisdiction. He also stayed the action pending the taxation, and granted leave to appeal.

Grounds of appeal

5. The appellants have challenged the referral and the stay of execution on the following grounds:

- That the learned judge erred by disregarding the provisions of sections 21 and 24 of the Legal Profession Act;
- That the learned judge took into consideration matters which he ought not to have considered, "namely, that the defendant would be entitled to ask questions as to the plaintiffs' bills of fees and the provisions of section 21 of the Legal Profession Act applies to agreements in which fees which were agreed were for a certain sum"; and
- That the learned judge in sending the matter for taxation was accepting "that the defence was frivolous and vexatious and/or was an abuse of the process of the Court but assumed a discretion to refer the said bills of fees to taxation when no such discretion is given having regard to the facts and the provisions of Part V of the Legal Profession Act".

6. The learned judge, in his brief reasons for judgment, said that when the documentary evidence was looked at, it was reasonable for the client to pose

questions as to the statement of account and as to the assignment of counsel to do the various aspects of the tasks to be performed.

Submissions

7. Mr. Piper, in commencing his submissions, said that he was not saying that the Legal Profession Act had taken away the inherent jurisdiction of the Court; however, where the Act makes specific provisions they should be followed. The question of the reasonableness of the fees was not a matter for the taxing master; rather, he said, it was for the Court. There was no provision for a judge on his own motion to refer a matter for taxation as that had to be on the application of a party to the proceedings. If it was the intention of Parliament that a judge could so act without a request from a party, Parliament would have said so, continued Mr. Piper. He said that the agreement in this case was protected from taxation by virtue of section 21(2) of the Legal Profession Act, and there was nothing unfair or unreasonable in relation to any of the bills. The appeal, he submitted, ought to be allowed with judgment being entered in favour of the appellants as prayed and the respondent's cross appeal being dismissed with costs in the Court below and in this Court to the appellants.

8. The respondent, in a Notice dated and filed May 7, 2002, sought firstly a variation of the decision of Smith, J. It called for the motion to be dismissed with costs to the respondent. The grounds for this call may be summarized thus:

- The learned Judge erred in allowing the appellants to rely on affidavit evidence in

support of the motion to strike out the defence;

- The learned Judge erred in failing to find that there was a reasonable defence and so should have dismissed the motion;

- The application before the learned Judge was for the defence to be struck out so there was an error in the referral of the matter for taxation.

As an alternative to the above, the respondent sought affirmation of the decision on the ground that the learned Judge erred in law in failing to find that the respondent was entitled to have the bill referred to a taxing officer pursuant to section 22 of the Legal Profession Act.

9. In his oral submissions, Mr. Dunkley, for the respondent, said that section 21 did not apply, and that the parties were unwittingly dealing with section 22. He further said that the matter should not have been before the Court on a motion, and that the respondent could have taken out a summons with a view to having the matter taxed. For completeness, if not for necessity, it is appropriate to state that section 22 of the Legal Profession Act has as its marginal note, "Bill of fees". Subsection (1) thereof provides that an attorney shall not be entitled to commence suit for recovery of his fees until the expiration of one month after serving the party involved a bill of those fees. Subsection (2) permits the party chargeable with such fees to refer the bill to the taxing officer for taxation within one month after the date on which the bill was served on him. Subsection (3)

provides for a reference by the Court on the application of the attorney or the party chargeable, and subsection (4) provides that an attorney may without making application to the Court under subsection (3) have the bill of fees taxed by the taxing master after service of notice on the party chargeable.

The Legal Profession Act –section 21

10. It is my view that section 22 has no bearing on the matter before us. The determination of the matter rests on the interpretation and application of section 21 which reads thus:

> " (1) An attorney may in writing agree with a client as to the amount and manner of payment of fees for the whole ~~or part of any legal business done~~ or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:
>
> Provided that if in any suit commenced for the recovery of such fees the agreement appears to the Court to be unfair and unreasonable the Court may reduce the amount agreed to be payable under the agreement.
>
> (2) Fees payable under any such agreement shall not be subject to the following provisions of this Part relating to taxation nor to any other provisions thereof."

11. The language of the section is very clear. It seems to me that the agreement in this case falls under the section. I hold this view as all the conditions of the section have been met. There was clearly an agreement as to the amount of fees to be charged, depending on the attorney in the firm who did

the particular work. The dispute which has given rise to the suit is in respect of the amount being charged as, apparently, the respondent has been charged at the highest possible rate in respect of each item of work that has been done. Consequently, the respondent has challenged the fairness and reasonableness of the agreement and is seeking a reduction of the amounts charged.

12. Due to the fact that section 21 (1) applies, there is no room for taxation as section 21 (2) excludes taxation in such circumstances. The learned judge was therefore incorrect in thinking that he had the power to refer the matter to the taxing master. In my view, ~~he~~ had no such authority, given the legislative restriction ~~in the circ~~umstances.

13. This is not the first time that this Court has had to consider section 21 of the Legal Profession Act. Nearly twenty years ago, the section was scrutinized in the case **Brown v. Dillion and Vassell** (1985) 22 J.L.R. 77. In that matter, a Jamaican attorney in practice in Jamaica had sued for the recovery of fees for representing Dillion in criminal proceedings in Bermuda. Vassell had acted as Dillion's agent in securing the services of Brown. Subsequently, a written agreement was prepared by Brown who contended that Dillion had signed same. Dillion denied that there was any agreement, and asserted that no fees were due. Alternatively, according to the defence, there was an illegal consideration, namely, a promise by the attorney to bribe a juror. Incidentally, the attorney who was a barrister-at-law, trained in England, had styled himself in the agreement as "QC" which he certainly was not. The trial judge, Downer, J. (as he

then was) found that there was an agreement but deemed it unconscionable, void and unenforceable. He therefore dismissed the attorney's claim, set aside the contract and entered judgment in favour of Dillion and Vassell. It should be noted that the Legal Profession Act was never mentioned in the proceedings before the learned judge.

14. Having reviewed the pleadings, the evidence, the judgment and the arguments presented on appeal, Carberry, J.A. pinpointed the "central problem" in the case as being "what control if any do the courts in Jamaica have over the fees demanded or agreed to be paid to attorneys at the private bar by their own clients" (p. 88 I). He left no historical stone unturned in setting out the legal position. In the end, he arrived at the conclusion that section 21 applied to the situation and that there was no room for taxation by the Registrar although that would have been his choice, if he had one to make. He agreed with Kerr, J.A. that it was for the Court itself to determine whether the agreement was fair and reasonable; and, if it was not, to fix the appropriate fees. Indeed, the Court went on to fix the fees in an effort to secure " finality in respect of these unhappy proceedings"(p.115F). Kerr, J.A., in settling the matter, said:

> "... the legislature in its wisdom in granting a right of action to an attorney to recover fees based upon an agreement in writing, conferred on the court the discretion if the agreement appeared unfair and unreasonable to reduce the amount payable thereunder (section 21 (1) of the Legal Profession Act)" (p.119 D).
>
> "... On the other hand, in assessing what would be fair and reasonable, due regard must be given to

> the length of the trial – the gravity of the charges and the jurisdiction in which the cases were tried" (p.119 H).

Carberry, J.A. and Ross, J.A. expressed themselves as being in agreement with Kerr, J.A.

At this point, I should add that I have seen the draft of the reasons for judgment of Downer, J.A. in this matter. I am unable to agree with his statement as to the ***ratio decidendi*** in the cases **Brown v. Dillion** and **Vassell,** (supra) and **Frankson v. Longmore** (Motion 13/99 delivered July 31, 2000). Further, so far as the **Frankson v. Longmore** case is concerned, I am respectfully and humbly of the ~~view that it is~~ irrelevant in the context of this case.

Conclusion

15. In the instant case, the error of the learned judge in referring the matter to the taxing master, and thereby postponing a determination of the suit, cannot benefit the appellant so far as the outcome of the appeal is concerned. The pleadings indicate quite clearly that the defence is saying that the agreement is unfair and unreasonable. That requires a trial of the issues; not a hearing by the taxing master. The fact that there is need for a trial means that the Motion that was before Smith, J. was ill-conceived. The learned judge ought to have dismissed it. By sending it to the taxing master, he has kept alive an issue that ought not to have been born. I would therefore dismiss the appeal with an order that the Motion itself be also dismissed. The order staying the action pending the taxation is to be rescinded, and the matter tried as early as possible. The

respondent is to have the costs of the Motion below as well as of the appeal to be agreed or taxed.

ORDER

DOWNER, J.A:

Appeal dismissed. Costs of the Amended Motion for Judgment and of the appeal to be the respondent's; such costs to be agreed or taxed.

By majority (Bingham and Panton JJA; Downer, J.A. dissenting), Motion for Judgment struck out.

Order staying the action pending taxation rescinded. Trial to proceed.