[2014] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 114/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE MANGATAL JA (AG)

BETWEEN	**LILIETH TURNQUEST**	**APPELLANT**
AND	**HENLIN GIBSON HENLIN (A FIRM)**	**1ST RESPONDENT**
AND	**CALVIN GREEN**	**2ND RESPONDENT**

Ransford Braham QC, Abraham Dabdoub and Miguel Palmer instructed by Livingston Alexander & Levy for the appellant

Mrs Nesta-Claire Hunter and Miss Taniesha Rowe instructed by Ernest A Smith & Co for the respondents

14, 15 May, 31 July and 24 October 2014

PANTON P

[1] The appellant, an attorney-at-law, sought a reversal of the order of Paulette Williams J made on 27 June 2012, declaring that she had breached her irrevocable professional undertaking to pay to the first named respondent a certain sum of money upon completion of a sale in exchange for the photocopy of the duplicate

certificate of title with the transfer endorsed thereon. On 31 July 2014, having considered the submissions made to us, we ordered as follows:

> "1. Appeal allowed.
>
> 2. Judgment of Paulette Williams J set aside.
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> 3. The fixed date claim form is dismissed.
>
> 4. Costs of the appeal and in the court below to the appellant, such costs to be taxed if not agreed.
>
> 5. Counter notice of appeal dismissed.
>
> 6. No order as to costs. "

We now give our reasons for our decision.

The facts

[2] Calvin Green agreed to sell to Wynlee Trading Co Ltd premises registered at Volume 1188 Folio 971 of the Register Book of Titles. The appellant represented Wynlee, in the sale transaction. Wynlee and Green were involved in litigation in the Supreme Court and the Court of Appeal arising from the agreement. The appeal ended in favour of Wynlee on 11 May 2009 and costs were eventually taxed on 29 December 2009 in the sum of $1,125,145.35. Subsequent to the appellate proceedings, the first respondent was retained to complete the sale on behalf of the vendor.

[3] On 23 October 2009, the appellant wrote to the first respondent confirming receipt of the "purchaser's balance due to complete", and advised thus:

> "Accordingly, this serves as our irrevocable professional undertaking to pay over to you the aforesaid sum of Six Million Three Hundred and Eighty-six Thousand Six Hundred and Forty Dollars (6,386,640.00) upon completion of sale and in exchange for the following:
>
> (i) Photocopy of Duplicate Certificate of Title with transfer duly endorsed thereon in the name of Wynlee Trading Company Limited free from encumbrances save and except the Restrictive Covenants, if any, endorsed thereon;
>
> (ii) Letters of possession and Letters to utility companies, N.W.C and J.P.S;
>
> (iii) Up to date Certificate of Payment of Property Taxes and N.W.C. receipts evidencing payment.
>
> We await completion of the sale."

It is this letter that has given rise to the instant action.

[4] On 9 February 2010, the first respondent received the duplicate certificate of title with the transfer duly endorsed in the name of Wynlee. On 11 February 2010, the first respondent addressed an electronic communication to the appellant in the following terms:

> "Dear Mrs Turnquest,
>
> We refer to your letter of undertaking dated October 23, 2009. A copy of which is attached hereto for your ease of reference. Attached also is our letter of February 11, 2010 requesting a cheque in the sum of $6,386,640.00 and forwarding the documents which you requested in your October letter.
>
> The original documents will follow by hand.
>
> Kindly acknowledge receipt of this e-mail."

[5] The letter of 11 February 2010, listed the documents that were enclosed as being:

> (i) a photocopy of the duplicate certificate of title;
>
> (ii) a copy of an up-to-date certificate of payment of taxes;
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> (iii) a copy receipt of up-to-date payment of NWC bill; and
>
> (iv) letters of possession and letters to the utility companies.
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> The letter continued thus:
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> "The above documents are sent to you on the basis of your irrevocable undertaking not to part or deal with the same in any manner prejudicial to our client's interest and to send to us upon our demand and in exchange for sum of Six Million Three Hundred and Eighty Six Thousand Six Hundred and Forty Dollars ($6,386,640.00) being the Purchaser's balance due to complete save and except the amount due for the apportionment of taxes. We will advise you of the amount as soon as it is verified.
>
> In the circumstances kindly let us have your cheque in the sum of $6,386,640.00 and in no event should it be later than the 15th February 2010."

[6] It is important to note that this letter indicated that an amount was due for taxes and that the appellant would be advised as soon as the amount was verified. The letter also gave a four day deadline for the undertaking to be fulfilled. There was no response to the e-mail, nor was there compliance with the request in the letter for the cheque to be paid by 15 February 2010. Consequently, on 16 February, the first

respondent faxed the documents including the letter that had been attached in the e-mail to the appellant's office. The appellant thereupon asked for the original documents in order to take action in relation to the undertaking. The appellant stated in an affidavit dated 14 April 2010 and filed on 15 April 2010 that she was unable to carry out her undertaking until the original documents were received, as conveyancing practice in Jamaica requires the production of the original documents in exchange for the balance of the purchase price.

[7] On 16 February 2010, that is, the date on which the documents were faxed to the appellant, she was served with two provisional attachment of debt orders which had been filed in the Supreme Court – one on 9 February 2010 and the other on 12 February 2010. The orders were in relation to unsatisfied costs debts of $1,125,145.35 in one case and the sum of $1,566,175.00 in the other case. Each sum attracted interest at the rate of 6% per annum from 11 May 2009 and 30 April 2008, respectively.

[8] The provisional attachment of debt orders required the appellant to appear to be examined touching the property of the second respondent "which may have been attached in [her] hands by virtue of [the] Order". It threatened the appellant with "attachment" and liability in damages if she disposed of the monies in her hands. The appellant was required to attend at the Supreme Court on 5 March 2010 to be examined by a Judge or Master in Chambers in respect of the funds being held.

[9] On 19 February 2010, the appellant wrote to the first respondent confirming that her firm Naylor & Turnquest was in possession of $6,386,640.00 and was "ready willing and able to fulfil [their] undertaking". She advised the first respondent that they had been served with provisional debt attachment orders, copies of which were attached to the letter. A cheque for $3,914,991.56 was enclosed "subject to the leave or order of the court, in satisfaction of [the] letter of undertaking of October 23, 2009". This was the sum that was calculated as remaining after the total attached sum of $2,471,648.44 was deducted in keeping with the attachment orders. The first respondent returned the cheque and advised the appellant that proceedings would be instituted. This was done by the filing of a fixed date claim form on 1 March 2010.

[10] The appellant, writing on behalf of Naylor & Turnquest, responded on 23 February 2010 indicating that as garnishee they were bound to comply with the attachment order and hold the funds. The letter concluded:

> "We therefore have no option but to throw ourselves to [sic] the mercy of the court and are prepared to abide by the decision of the court on March 5, 2010."

The decision of the court was not long in coming as on 8 March 2010, Donald McIntosh J ordered that the provisional attachment of debt orders made on 16 February 2010, be "made final". On 1 March 2010, the appellant and the second respondent had filed affidavits which were placed before McIntosh J. The letters and other documents that had passed between the parties in respect of the undertaking

were attached to those affidavits. Having considered the facts and the submissions, the learned judge ordered that the provisional orders be made final. The second respondent was ordered to pay Wynlee's costs as well as the garnishee's costs. The learned judge gave leave to appeal. Apparently that appeal is pending.

[11] On 15 April 2010, the appellant filed an application seeking the following orders:

> i. that there be summary judgment in her favour dismissing the claim brought against her;
>
> ii. further or in the alternative the claim be struck out pursuant to the Civil Procedure Rules and/or under the inherent jurisdiction of the court as showing no cause of action, being an abuse of the process of the court and/or being frivolous and/or vexatious.

She supported this application with an affidavit stating her position on the issues and detailing that which had taken place in the proceedings before McIntosh J.

The issues and how P Williams J determined them

[12] The parties stated the issues as:

> i. whether the appellant had breached her professional undertaking; and
>
> ii. (as seen by the appellant) whether the respondents' claim amounted to an abuse of process in that the matter of the undertaking had already been determined by McIntosh J.

The abuse of process

[13] The learned judge felt that there was a need to address the matter of the abuse of process and, or, estoppel, first. In her examination of the evidence presented before McIntosh J she found that "much of the matters on which the parties now rely were included therein". She noted however that the appellant had not mentioned in her affidavit as garnishee that she had received the e-mail of 11 February which had first made her aware of the respondents "being in a position to call on her to honour her undertaking". She found it significant that the appellant had been called on to honour the undertaking four days prior to the service of the provisional orders, and had not replied to the e-mail or offered any explanation for her failure to do so. She noted that McIntosh J had "in effect decided that some of the money held by the defendant for the 2nd Claimant was to be used to settle his debt – now as against in time". Having referred to ***In Re H A Grey*** [1892] 2 QB 440, the learned judge stated the following:

> "65. In effect the question now becomes whether the inherent supervisory jurisdiction of the Court over its officers is to be ousted because a Court of concurrent jurisdiction has ordered that some of the sums subject to an undertaking be used to settle debts of the one to whom the sums are owed. It would seem to me that a pronouncement on whether there was an undertaking which had been breached would involve considerations different from how the sums subject of the undertaking should be used.
>
> 66. Although the parties before the Court in determining the Provisional Attachments of debts order were largely the same as presently before this Court, and the issue presented then overlapped the issues now for consideration, this

> application to my mind cannot be viewed as a re-litigation of the application heard by Mr Justice McIntosh. The issue of estoppel and abuse of process are not applicable and I will certainly not be seeking to comment on or speculate about the reasons Mr Justice McIntosh reached the decision he did."

The undertaking

[14] The learned judge was not impressed by the fact that the appellant, while not acknowledging receipt of the e-mail of 11 February, relied on the statement therein that the original documents would follow by hand. She formed the opinion that "the fact that … the original documents would follow … did not prevent the defendant from acknowledging receipt of the e-mail". In examining the undertaking, she noted that it did not expressly make receipt of the original documents a condition precedent to the payment of the balance. The learned judge was of the view that if there was an ambiguity in this regard, the appellant did not seek to clear it up. In any event, she said, the undertaking had to be construed against its giver. In her judgment, the appellant was in breach when the date for honouring the undertaking had passed, and the service of the charging orders did not prevent the enforcement of the undertaking.

The grounds of appeal

[15] The appellant filed the following grounds of appeal:

> "a) The learned trial judge failed to apply or to properly apply the principles of *res judicata*/issue estoppel, abuse of process and/or cause of action estoppel.

b) Having regard to the fact that the relevant parties were before McIntosh J before whom evidence concerning the undertaking was placed, and the fact that McIntosh J ordered that the provisional charging order be made final despite the evidence before him, Paulette Williams J erred in making the declaration she did in respect of the subject of this appeal.

c) The learned trial judge failed to properly interpret and/or appreciate the nature of the undertaking contained in the Appellant's letter dated 23rd October 2009.

d) The learned trial judge failed to appreciate that the said undertaking required the Respondents to provide original documents as well as a photocopy of the Duplicate Certificate of Title duly registered in the name of Wynlee Trading Company Limited and that it was only upon the production of these documents, in their stated form, that the Respondents were entitled to payment pursuant to the said undertaking.

e) Having found that the provisional charging order excused the Appellant's action, the learned trial judge was wrong to have made the declaration, the subject of this appeal.

f) The learned trial judge in coming to the decision that the Appellant breached the undertaking, failed to take into account that the Appellant had a reasonable time within which to perform the undertaking and that a reasonable time had not elapsed as at the date of the service of the provisional charging order.

g) The learned trial judge misconstrued and/or misapplied the facts and as a consequence she erred in law in making the Declaration that she did in respect of the subject matter of this Appeal.

h) The learned trial judge failed to consider and/or appreciate that the effect of her finding, that there was a breach of undertaking by the Appellant, would require the Appellant to satisfy the undertaking

> thereby resulting in the unjust enrichment of one or other of the Respondents."

The submissions

Abuse of process

[16] Mr Ransford Braham QC submitted that the provisional orders prohibited the appellant, who had money in hand for the second respondent, from paying out same. The appellant could not have breached the "command" in the provisional orders for her to appear before the Supreme Court to be examined in respect of the money which had been "attached in [her] hands" by virtue of the orders. The money, he submitted, "was frozen until the court made its final determination". He referred to the affidavits that were filed in the garnishee proceedings, and submitted that McIntosh J "had squarely before him" the fact that the appellant was under an undertaking to pay over the money, the subject of the garnishee to the first respondent. He therefore could not have come to the decision to make the provisional orders final without having considered whether the appellant was required to honour her undertaking. It is inescapable, he said, to conclude that making the provisional order final is "a clear finding that the appellant was not required to honour the undertaking".

[17] Mr Braham relied on the case ***Stephenson v Garnett*** [1898] 1 QB 677 in submitting that the issue as to whether the appellant should be required to honour the undertaking was determined in the garnishee proceedings and ought not to have been permitted to be retried by P Williams J. The headnote of that case reads:

> "In an action in a county court judgment was recovered for a sum of money and costs, but before the costs were taxed the plaintiff agreed, on a representation of the poverty of the defendant, to accept a smaller sum than that for which judgment had been given, and executed a deed releasing the defendant from the judgment debt and costs. Subsequently the plaintiff carried in his bill of costs, and applied to the county court judge for an order to tax, upon the ground that the release had been obtained by misrepresentation. The judge, after hearing evidence, found that the execution of the deed had been obtained by misrepresentation, and made an order that the costs should be taxed, and should be paid together with the balance remaining due under the judgment. The defendant in that action thereupon brought the present action in the High Court for a declaration that he had been released from the judgment debt and costs, and for an injunction to restrain further proceedings to enforce payment thereof:
>
> *Held*, that as the question raised in this action was identical with that decided by the county court judge upon the interlocutory application, and had been decided by a court of competent jurisdiction, the action ought to be stayed as frivolous and vexatious and an abuse of the process of the Court."

[18] A L Smith LJ in his judgment, said:

> "In my opinion the learned judge at chambers ought to have exercised the inherent jurisdiction which he undoubtedly possesses of staying the action on the ground that it is frivolous and vexatious and an abuse of the process of the Court. I do not rest my decision upon the ground that the matter is res judicata, for I do not think it can be said that it is. I put my decision on the ground that the identical question raised in this action was raised before the county court judge upon an application for an order to tax the costs of the action in the county court, and was heard and determined by him. The county court judge had jurisdiction to hear and determine the question upon that application, and it is perfectly clear from the evidence before him that

> the question there was the same as that now raised in this action, namely, whether the deed of release was obtained by fraud. The plaintiff was present at the hearing before the county court judge, and had every opportunity of putting forward his case. The judge heard evidence upon the question and decided it."

Chitty and Collins LJJ delivered concurring opinions.

[19] Mrs Hunter for the respondents submitted that the provisional attachment of debt order was subsequent to the request for the honouring of the undertaking. Consequently, she asked us to say that it ought not to be used as an excuse for not fulfilling the undertaking. "Counsel", she said, "cannot supplement the orders of the court by ignoring the undertaking". She relied on the case ***In re H A Grey*** in which a solicitor had committed a breach of professional duty by failing to pay over money received by him for his client. In a civil action, the client recovered judgment for the money. It was held that the success of the suit did not oust the disciplinary jurisdiction of the court. Lord Esher MR said:

> "… 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 ***In re Freston*** [11 Q.B.D. 545] and recognized and approved of in ***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" (p 443).

Likewise, Mrs Hunter argued, the appellant ought to be held liable on her undertaking notwithstanding the decision of McIntosh J. The jurisdiction of the court over the attorney remains untouched, she contended.

[20] According to Mrs Hunter, what was before McIntosh J was whether the provisional orders were to be made final. If he had intended to pronounce on the undertaking, she submitted, he would have made it clear in the final order, he having been advised that there was an action. In the circumstances, she said, this court should not endorse the appellant's behaviour.

Reasoning and conclusion

[21] In my view, there were several impediments to the honouring of the undertaking. These impediments were in no way created or caused by the appellant. Firstly, the first respondent, unwittingly perhaps, placed conditions on the execution of the undertaking by –

1. indicating in the e-mail that the original documents would follow by hand; and
2. stating in the letter of 11 February 2010 (which requested the sending of the cheque) that the amount was subject to the apportioning of taxes due, and promising to advise the appellant when the amount had been verified."

The condition in relation to the original documents gains heightened significance when the appellant's affidavit of 14 April 2010 is considered. In paragraph 10 of that affidavit, the appellant swore as follows:

> "…it is the practice in Conveyancing in Jamaica that there would be an exchange of original documents for the balance purchase price. In any event copy letters to the utility companies would not be acceptable by the utility companies and neither would copy letter of possession be acceptable to those whom it would in the usual course be presented."

There has been no challenge to the appellant's statement in respect of the Jamaican conveyancing practice. Mr Herbert Grant, an attorney-at-law, who has practised in the area of conveyancing since 1971 has confirmed the appellant's statement. In an affidavit dated 22 July 2010, Mr Grant stated that:

> "…in Conveyancing matters, it is, the accepted practice that only the original of letters of possession, letters to utility companies and up-to-date Certificate of Payment of Property Taxes are acceptable for the completion of a sale. In the normal course of practice, photocopies are not acceptable in satisfaction of an undertaking in a Conveyancing matter.

In giving his expert opinion, he added that an attorney opens himself to serious risk when he accepts photocopies of such documents. In the circumstances, the first respondent could not properly have expected the appellant to fulfill the undertaking without having received the original documents. Incidentally, the documents were received on 18 February 2010 – three days after the rushed deadline set by the first respondent.

[22] Secondly, it is clear that there was uncertainty as regards the apportionment of taxes that were due. The first respondent promised to verify the amount and to communicate with the appellant thereafter. It was therefore unreasonable for the first respondent to have expected the appellant to send it a cheque, knowing that

the amount would be incorrect, given the fact that a sum, yet to be determined, would have to be deducted for taxes.

[23] Thirdly, the service of the provisional orders on the appellant prevented the honouring of the undertaking. These orders commanded the appellant not to dispose of monies in her hands, lest she be held liable in damages. It would have been most unwise for her to have disobeyed that judicial injunction. Consequently, obligations connected to the undertaking had to be regarded as having been suspended until the court made a determination as to the fate of the provisional attachment of debt orders.

[24] Fourthly, I am of the view that McIntosh J gave due consideration to the undertaking prior to making the provisional orders final. The parties who appeared before him were involved in the suit that has given rise to this appeal. They presented detailed affidavits covering the entire history of the proceedings. No significant fact was withheld from the attention of the learned judge. He would have become aware of the fact that the monies involved (as described by the learned Queen's Counsel, Mr Braham) "were all part of the same transaction". Therefore, he could not have avoided considering the matter.

[25] In my view, the making of the order by McIntosh J effectively put an end to the instant suit which, it should be remembered, was commenced after the first respondent had become aware that provisional attachment orders had been served

on the appellant. In the circumstances, there was no good reason to have continued with the suit before P Williams J.

[26] It has long been recognized that there ought to be finality to legal proceedings. Re-litigation of matters is an abuse of the process of the court – except of course, where there has been a judicial order for a re-hearing, or in a case such as ***In re H A Grey*** where disciplinary powers were exercised over an attorney-at-law in a matter where a client had already successfully sued the attorney-at-law for monies held on behalf of the client. However, the court will always be anxious to ensure that the doctrine is only applied "when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation" - ***Brisbane City Council and another v Attorney General for Queensland*** [1978] 3 All ER 30 at 36.

[27] A good example of the abuse of process is the case of ***Hunter v Chief Constable*** [1981] 3 All ER 727. There, the plaintiff and others who came to be known as "the Birmingham bombers", confessed to, and were subsequently convicted of murder. On appeal, no complaint was made of the trial judge's ruling that the confessions were admissible. The appeal was dismissed. The plaintiff then sued the chief constable in charge of the police officers who had recorded the confession, claiming that the police officers had beaten him thereby extracting the confession. The chief constable applied to have the action struck out on the ground that it raised an issue identical to that which had been finally determined by the

jury's verdict. The trial judge refused the application but the English Court of Appeal held that the action should be struck out ([1980] 2 All ER 227) because it would be an abuse of the process of the court to allow the plaintiff to litigate again the identical issue that had been decided against him in the criminal trial.

[28] There was a further appeal to the House of Lords which held that the invitation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision, adverse to the intending plaintiff, reached by a court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the court. Although the facts in ***Hunter*** may have been quite different from these in the instant matter, the principle is clear. In his speech in the House of Lords, Lord Diplock described the case as being concerned with:

> "…the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people." (p. 729 f)

[29] Lord Diplock expressed the view that a "collateral attack on a final decision of a court of competent jurisdiction may take a variety of forms" (p. 733h), and added that it was not surprising that there was no reported case to be found in which the facts presented a precise parallel with those in the ***Hunter*** case. He cited (saying it

deserved repetition) a passage from the speech of Lord Halsbury, LC, in ***Reichel v Magrath*** 14 App Cas 665 at 668:

> "I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

[30] The form of abuse of process discussed in the instant case has the origin in ***Henderson v Henderson*** [1843-60] All ER Rep. Sir James Wigram V-C described it thus:

> "I believe I state the rule of the court correctly, when I say that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." (p 381-382)

[31] In one of the modern cases on the point, ***Johnson v Gore Wood & Co*** [2002] 2 AC 1 at 30H – 31A, Lord Bingham of Cornhill said:

> "It may very well be … that what is now taken to be the rule in ***Henderson v Henderson*** has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But ***Henderson v Henderson*** abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there

> should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

Earlier at 23D - E, the Law Lord had said:

> "Thus the abuse in question need not involve the re-opening of a matter already decided in proceedings between the same parties, as what a party is estopped in law from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings, but, as Somervell LJ put it in ***Greenhalgh v Mallard*** [1947] 2 All ER 255, 257 may cover:
>
> > 'issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them'."

[32] In my opinion, this case required:

i. a proper assessment of the facts and the legal position as regards the giving of the undertaking and the demand for its fulfillment; and

ii. a proper interpretation of the decision of McIntosh J to make the provisional attachment of debt orders final.

If the learned judge had approached the matter in this way, there is no doubt that she would have concluded that the appellant had not breached her professional undertaking. She would also have concluded that this was a clear case of an abuse of the process of the court. It is for the foregoing reasons that I agreed with my learned colleagues that the appellant was entitled to summary judgment, with the fixed date claim form being dismissed and that the appeal ought to be allowed.

[33] After we made the order set out in paragraph [1] the respondent requested to be allowed to make submissions on costs. We acceded to the request and ordered that written submissions be sent by the parties to us by 29 August 2014. Having received and considered those submissions, we decided that the order made earlier should not be disturbed.

DUKHARAN JA

[34] I have read the reasons for the judgment of my learned brother Panton P. I agree with his reasoning and conclusion.

MANAGATAL JA (Ag)

[35] I agree with reasoning and conclusion of Panton P and have nothing to add.