[2015] JMSC Civ 251

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2015 HCV 02354

BETWEEN	**BAILEY TERRELONGE ALLEN (A Firm)**	**CLAIMANT**
AND	**NATIONAL TRANSPORT CO-OPERATIVE SOCIETY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Patrick Bailey, Mr. Alando Terrelonge and Kristina Exell instructed by Bailey Terrelonge Allen for the Claimant.

Miss Tosya Francis and Mr. Oraine Nelson instructed by Austin Francis & Co. for the Defendant.

Heard: 21st May 2015 & 18th December 2015.

Recovery of Attorney's costs – Contingency Agreement - Application for an Interim Declaration – Application for a Charging Order - Solicitors Act – Part 48 of Civil Procedure Rules – Section 28D of the Judicature (Supreme Court) Act - Whether Charging Order and/or Interim Declaration can be granted in the circumstances – Abridgement of time to hear application – Does the circumstances warrant an abridgment of time – Application for Interim Declaration granted – Application for a Charging Order refused – Application for Abridgement of time refused.

CAMPBELL J,

[1] The Claimant, Bailey Terrelonge Allen, is a Law Firm with its principal office in Kingston at 28 Herb McKenley Drive, Kingston 6.

[2] The Defendant, National Transport Co-Operative Society Limited (NTCS) is a registered Co-Operative Society under the **Cooperative Societies Act** and at all material times had an exclusive franchise from the Government of Jamaica, to operate public passenger transport throughout the Kingston Metropolitan Transport Region and Portmore, St. Catherine.

[3] In or around March 2001, Mr. Ezroy Millwood (now deceased), the then President and Chief Executive Officer of the NTCS retained the Applicant to undertake legal proceedings on behalf of the Defendant against the Attorney General of Jamaica. The government of Jamaica had breached the franchise agreement which it had entered with the Defendant.

[4] The Applicant contends that the Defendant was unable to pay for the legal fees and as a result entered into a contingency agreement dated 7th March 2001 to pay the Applicant 33 1/3 percent of the sum awarded. The Applicant has rendered professional services between 7th March 2001 and 3rd December 2013.

[5] The essence of the work conducted by the Applicant in relation to work done under the retainer includes, but not limited to:

a. Numerous meetings prior to Arbitration hearings of the Defendant's claim;

b. Visit to Miami, Florida, United States of America to meet with Mr. Justice Ira Rowe (then retired and now deceased) for discussions for his acceptance of the role of Chairman of the Arbitration Panel to consider the dispute between the Defendant and the government of Jamaica;

c. Numerous advances made by the Applicant on behalf of the Defendant because it was cash strapped;

d. Preparation for and attendance at the Arbitration Hearings;

e. Preparation for and attendance at Supreme Court (when Government of Jamaica had Arbitration award in favour of the Defendant set aside by the Supreme Court);

f. Preparing and arguing the appeal to the court of Appeal from the Supreme Court decision setting aside the award;

g. Further advances made by the Applicant on behalf of the Defendant;

h. Preparing appeal to Judicial Committee of Privy Council (after the Court of Appeal dismissed the Defendant's appeal);

i. Attendance at the Privy Council in London, and receiving a Privy Council judgment in favour of the Defendant;

j. Negotiations with Government to accept Privy Council award;

k. Further numerous meetings with National Transport Co-operative Society Limited (almost on a weekly basis);

l. Preparation for an attendance at the Court of Appeal when Government of Jamaica appealed for clarification of scope of referral from the Privy Council;

m. Further advances made by the Applicant on behalf of the Defendant;

n. Preparation for and attendance at the Court of Appeal for Assessment of award to which National Transport Cooperative Society was entitled;

o. Further negotiations to get Government of Jamaica to accept award and pay same;

p. Attendance at Court of Appeal when Government of Jamaica sought leave to Appeal to Judicial Committee of Privy Council;

q. Numerous conferences with Lord Anthony Gifford, Q.C. in preparation of legal proceedings at all stages;

r. Further meetings and negotiations in furtherance of determination of legal proceedings;

s. Perusing terms of Deed of Release and Discharge, and advising the Defendant in relation thereto;

t. Perusal of numerous and voluminous documents at all stages;

u. Numerous meetings, correspondence, telephone call and email communications, research and preparation at all stages.

[6] The Deed of Release and Discharge dated and signed on the 3rd December 2013 by Mrs. Blossom, President of NTCS and Mr. Hugh Coore, Acting Treasurer, provided in part that the National Transport Co-operative Society Limited (NTCS) hereby releases and forever discharge the Attorney General and the Government of Jamaica from any and all action, causes of action, claims and demands made by the said NTCS regarding the said arbitration and suits. There was a settlement agreement in full and final settlement of a sum of $1,100,000,000.00.

[7] The schedule of payment is that NTCS shall be allowed immediate access to the sum of $370,434,402.41. In addition, the Government of Jamaica shall pay to the NTCS a sum of $729,565,597.59 by way of three equal tranches of $243,188,532.53 over the financial years 2014/2015, 2015/2016 and 2016/2017. These tranches are to be paid by June 30th of the financial year. In the event the tranche is paid late, it shall be paid together with simple interest of 3% per annum from July 1st of the financial year that it was due, calculated to the actual date of payment.

[8] The sum of $370,434,402.41 was paid by the Government of Jamaica pursuant to the Court of Appeal on the grant of conditional leave for the Government of Jamaica to return to the Privy Council. To date, there has been two payments made to the Applicant namely; (a) the sum of $370,434,402.4; (b) on June 30, 2014 the further sum of $243,188,532.53 from which the Defendant has received their two third's portion pursuant to the contingency fee agreement.

[9] The Applicant in its Notice of Application for Court orders filed 4th May 2015 is seeking to attach a lien and a charging order on an award of damages paid to the Defendant. The essence of this court proceeding is that the Defendant is taking issue with the application for a charging order to be attached.

The Application

[10] The Claimant/Applicant by way of a Notice of Application for Court Orders filed 4th May 2015 is seeking the following Orders;

1. *An interim declaration that the claimant is entitled to a lien over the proceeds of settlement pursuant to Deed of Release and Discharge between the defendant and the Honourable Attorney General of Jamaica dated December 3, 2013, in the sum of $183,150,000.00.*

2. *A charging order was over the sum of $183,150,000.00 from the amount payable to the defendant by the government of Jamaica pursuant to the Deed of Release between the*

defendant and the Honourable Attorney General of Jamaica dated December 3, 2013.

3. *Costs and Attorney costs.*

- It is important to note that the Applicant indicated to the court that the actual sum owed is $162,125,688.35 and not $183,150,000.00 as stated in the Notice of Application of Court Orders.

The grounds on which the Applicant is relying are as follows;

i. The firm of Bailey Terrelonge Allen (formerly known as Patrick Bailey & Co.) rendered professional services in respect of the arbitral and court proceedings against the Attorney General of Jamaica on behalf of the Government of Jamaica, in respect of breach of a franchise agreement between the Defendant and the Government of Jamaica, for approximately fifteen years.

ii. The said services were rendered pursuant to a contingency fee agreement between the firm and the Defendant.

iii. That a Deed of Release and Discharge was executed by the Defendant in settlement of its claim against the Government of Jamaica.

iv. The Deed specifically provides that all payments due in the matter were to be paid to Bailey Terrelonge Allen and any cheques issued in respect of the aforesaid payments to be in the name Bailey Terrelonge Allen.

v. The Defendant has in the past made attempts to circumvent the terms of the Deed and the contingency fee agreement and escape its obligations to the firm for payment under the contingency fee agreement.

vi. That on April 16, 2015, the Defendant terminated the services of the Claimant and has failed to make any provision for the payment of the Claimant's fees.

vii. That a further payment pursuant to the Deed is due in June 2015.

viii. That by its conduct the Defendant seeks to circumvent the said Deed and dishonor the terms of the contingency fee agreement.

ix. The Claimant requires the Court's urgent intervention to protect the Claimant for its fees.

x. This application is being made pursuant to Rule 17.1 of the Civil Procedure Rules.

The Applicant's Case

[11] The Applicant contends that by terminating its services; the Defendant has failed to make any provision for the payment of the Applicant's fees. The Applicant is entitled to a lien at common law and in equity by way of a charging order for those sums of money which are due for payment.

[12] The lien relates to work and services already rendered by the solicitor and as such it would be unjust and monstrous for the Applicant not to be put in receipt of fees or to continue to be denied fees for work already done. There would have been no sums due and payable to the Defendant but for the exertions of the Applicant. There is a settled public interest test. Litigants should not be allowed to dishonor the terms of the contingency agreement made with the solicitor, as solicitors would then withhold service, thereby keeping poor cash strapped litigants outside the realm of justice.

[13] The purpose of the lien is to ensure the Attorney who has done work is not deprived of the agreed fee because the former client received fruits of litigation without paying the Attorney. (See; **Campbell v Campbell and Lewis** [1941] 1 All E.R. 274).

[14] Counsel argued that from the first tranche the Attorney's costs was due and payable for work completed. The Defendant having been granted a settled sum arriving from a settlement, which was arrived by the skills and expertise of the Attorney. Counsel relied on **Re Tots and Teens Sault Ste. Ltd. et al** 1975 CanLII 535 (ON SC), where it was held that the courts have always had an inherent jurisdiction to declare that a solicitor's claim for costs was a charge upon funds which represent the fruits of his diligence on behalf of the client. The court

indicates that the inherent jurisdiction of the court in equity is sufficient for the purpose should it be appropriate for the Applicant to seek to invoke that jurisdiction.

[15] **In Re Meter Cabs, Limited** [1911] 2 Ch. 557, the court held that solicitors already have a common law lien for their costs and that in granting a charging order to the solicitors the court was not giving the solicitors any new right but merely enabling the solicitors to enforce a right they already had. It would be monstrous if this was not so because the Defendant would not have recovered money without the exertion of the solicitor. Convenience, good sense and justice require that an Attorney ought to have a lien and charging order, where the Attorney has already done work or cause recovery of settled proceeds, judgment sums arbitration award or such proceeds payable to the Defendant.

[16] In this case there is no dispute that the lien and charging order relates to proceeds come to be due by the Defendant by way of settlement proceeds in litigation, which relates to the exertion of the Attorney. There is no dispute that the Applicant since 2001 and 2013 skillful represented the Defendant.

[17] In **Hughes v Hughes** [1958] P. 224 it was highlighted that it would be odd if a client were in effect able to get a solicitor to work for nothing by the simple expedient act as often as he chose. It was enumerated that liens must be preserved in public interest in order that litigation may be properly conducted with due regard to the interest, not only of litigants, but also of the officers of the court who serve those interest.

[18] In addition to professional legal services provided by the Applicant, the Applicant made several cash advances on behalf of the Defendant which had been cash strapped for several years. These payments were confirmed by the Accountant of the Defendant's company.

[19] In the circumstances, it is clear that the Applicant has established not just a good prima facie case, but a strong clear case, and is entitled to a lien and a charging

order. There is no reasonable basis for the Applicant not to invoke the inherent jurisdiction of the court, both in common law and equity. The recent termination of the Applicant's services, without the provision of the Applicant's fees, is a clear intent to bypass the Applicant, to divert the funds and refuse to pay the Applicants fees.

[20] The strong contractual principles espoused within the declaration of the Deed of Release and Discharge, where the Defendant's instructions to the Attorney General to make payment directly to the Applicant, ought not to be breached. The declaration of this court in relation to the deed and charging order, followed by a lien, to preserve the status quo hither before, is not questioned by the Defendant.

[21] The Applicant further submitted that the Defendant ought not to decline from the contingency fee agreement and be released of terms and agreement, as the work of the Attorney has been completed and the Defendant seeks the fruit of the settlement.

[22] There is a real danger were the Defendant is to pay fees directly, that the fees will be dissipated with no hope of recovering the sum. The member society has no source of income. Thus, in all the circumstances, the Applicant is entitled to be protected of its fees which have become due.

[23] A lien arises whether or not the amount of fees has been ascertained, and in this case, the fees are ascertainable by reference to the contingency fee agreement executed by the NTCS in March 2001. The court in **Intellibox Concepts Inc v Intermec Technologies Canada Ltd et al** 2005 CanLII 13787 (ON SC) noted that, one of the principal rationales for allowing contingency fees is that they increase access to justice for parties that would not otherwise be able to proceed with a claim.

The Defendant's Case

[24] The Defendant accepted that a lien can be placed on the funds, as all the monies have not been paid out. However, before a lien can be placed on the Defendant's monies, an ascertainable sum will have to be determined. The Defendant is challenging the amount due to the Claimant pursuant to the Contingency Agreement. (See; **Campbell v Campbell and Lewis** [1941] 1 All E.R. 274, where the court refused to set-off for a wife. See also; **In Re Meter Cabs, Limited** [1911] 2 Ch. in which there was no dispute as to the fees to which counsel was entitled).

[25] Albeit the sum of $162,125,688.35 is not being challenged for purposes for this application, the extent of the sum outstanding is in dispute. The contingency agreement, is not a true representation of the statement of accounts between the parties. There is an issue as to whether the retainer of 33 1/3% is settled. The basis of this departure is that the Board's instructions were not followed in relation to the settlement.

[26] In the case of **Re Tots and Teens Sault Ste. Ltd. et al** 1975 CanLII 535 (ON SC), the court distinguished between restraining lien and charging lien. The charging lien, may be enforced against the property, not in possession of the Defendant.

[27] A charging order is governed by Section 28D of the **Judicature (Supreme Court) Act**, 1880 and Part 48 of the **Civil Procedure Rules**. Both require for a charging order to be made by the court. There has to be a judgment for the payment of money. There has to be a judgment debt.

[28] In case of **Re Tots and Teens Sault Ste. Ltd. et al** 1975 CanLII 535 (ON SC), it was noted that a solicitor's lien on the proceeds of litigation is a secured claim under the **Bankruptcy Act**, 1970. In this present case, in asking for a charging order the Applicant is seeking to invoke a provision outside of the relevant Rules and statutes.

[29] The application for charging order is misconceived. There has to be a judgment for the payment of money, which is clear and precise. In **Jennifer Messado and Company v North America Holdings Company Limited**, (unreported) Claim Nos. 2011 HCV 04943 and 2011 HCV 04669, (delivered 20th June 2014). In this case the judgment debtor failed to pay the judgment debt, as a result ex parte applications were made before the Registrar of the Supreme Court for the property of the judgment debtor to be charged.

[30] There is a difference between retaining lien and charging lien. The Applicant cannot obtain a charging order pursuant to the statute. It is a charging lien that the court has to consider. In order to be eligible for the charging lien, the Applicant must show credibly that the Defendant is deliberately seeking to keep the Applicant out of its fees. (See; **In Re Meter Cabs Limited**, [1911] 2 Ch. 557). There is no such risk demonstrated, to assuage any such concern. The Defendant has asked that the money be paid into court, in order to determine an issue as to how much the Applicant is entitled to. The sum is jointly managed by the nominee of the Applicant. If there is no conduct on the part of the Defendant from which the court can infer an attempt to avoid obligation of paying the fees, the charging lien ought not be granted. Counsel also relied on **Ross v Buxton** (1889) LR 42 Ch D 190, Stirling J, at page 201.

[31] An action for charging order is applicable where the claimant or former claimant seeks to deliberately keep counsel out of his fees. This would be specifically a charging lien. The lien or retaining lien would allow for counsel to retain possession of any personal property in his custody belonging to the client. The lien that is being sought is not directed to the documents, it relates to the money.

[32] The Applicant has said that the Defendant has terminated the retainer, but the Defendant is permitted to do so. It is denied that there has been no arrangement for the payment of the fees. A meeting had been sought to discuss how the remaining tranches are to be paid, but it was not asked for monies to be paid to the Applicant. The Defendant will say:

1. The Defendant has shown bona fides; that monies are to be paid into court.

2. In so far as the Defendant is an Applicant in another suit, the Defendant is saying among other things, they have not been provided with timely instruction as to payments themselves.

[33] It is clear that all of the authorities convey that a charging lien is payable if the conduct is contriving. The inherent jurisdiction of the court is to grant a charging lien but not a charging order. The court has to be satisfied of the requisite condition to make that order.

[34] In reply, the Applicant argued that nowhere in the authorities, has it been shown that there is need to demonstrate some deliberate act on the part of the client to keep the Attorney out of his fees. The same consideration applies for the grant of a lien or charging order, that is, the solicitor has done the work and no provision has been made to pay for the work done. In **Re Tots and Teens Sault Ste. Ltd. et al** 1975 CanLII 535 (ON SC), there is no distinction between the terms "charging lien" and "charging order". In **Campbell v Campbell and Lewis** [1941] 1 All E.R. 274, charging order is the term used. Regardless of statutory provisions, the court has an inherent jurisdiction to grant the order sought.

[35] The **Judicature (Supreme Court) Act**, 1880 and Part 48 of the **Civil Procedure Rules**, refer to enforcement of judgment made by the Supreme Court. These are different considerations from a solicitor invoking the power of the Court in both common law and equity. It is merely coincidental that the **Jennifer Messado** case involved an Attorney who sued and got costs certificates. The question for the court's consideration in that matter, was whether or not a Registrar of the Supreme Court had the inherent jurisdiction pursuant to Section 28 of the **Judicature (Supreme Court) Act**, to sign a provisional charging order. The Registrar's powers were ministerial. Any dispute, is among the Board members, as the fees were properly authorized.

Findings and Analysis

[36] Can a charging order can be granted in respect of work done by counsel, based on fees, fixed in a Contingency Agreement, and the issues between the parties resolved in a Deed of Release and Discharge? The **Legal Profession Act**, outlines the regime under which an Attorney-at-Law may agree with a client to pay fees for work done via a contingency agreement. Section 21(1) of the **Legal Profession Act** states that;

> *"An attorney may, subject to any regulations made by the Council under subsection (7), 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."*

[37] There was no question raised before this court as to any lack of fairness and reasonableness in the contingency agreement. The Court of Appeal in the matter of **Norman Bowen v Shanine Robinson** 88/2013 (delivered on the 6th November 2015) considered the term unfair and unreasonable in relation to the Registrar's function, in taxing costs. The court found that a failure to consider relevant considerations, of fairness and reasonableness, was a reason to overturn the Registrar's decision. Given the Registrar's obligations under Rule 65.17 of the **CPR** and Section 28 of the **Election Petitions Act**, she would have failed to properly exercise her discretion when she allowed the recovery of all the sums claimed for professional services claimed.

[38] Section 21(8) of the **Legal Profession Act** which provides a definition of contingency fees states;

> *"In this section 'contingency fees' means any sum (whether fixed or calculated either as a percentage of the S. 14(b) proceeds or otherwise) payable only in the event of success in the prosecution of any action, suit or other contentious proceedings."*

[39] In the United Kingdom charging orders, are granted pursuant to the **Charging Orders Act**, 1979, and are defined as an order imposing on any such property as may be specified in the order, a charge for securing the payment of any money due or to be come due under a judgment or order. The learned author, Stuart Sime, in the booked entitled**, A Practical Approach to Civil Procedure**, Ninth Edition, (2006) says at page 495;

> "*A charging order therefore secures a judgment debt: it does not itself produce any money. By Section 3(4) a charge imposed by a charging order has the same effect, and is enforceable in the same way, 'as an equitable charge created by the debtor by writing under his hand.' "*

[40] According to **Osborn's Concise Law Dictionary** (2013), 12th Ed. by Mick Woodley a 'charging order' is a court order imposing charge on a debtor's property to secure payment of any money due or to become due by virtue of a court order (Charging Order Act, 1971, s. 1). See also, Gilbert Kodiliyne and Vanessa Kodilinye in **Commonwealth Caribbean Civil Procedure**, 3rd Ed., (2009) which states a judgment debt may be enforced by obtaining an order imposing a charge on specified property belonging to the judgment debtor for the purpose of securing the amount of the debt. Property affected by a charging order may consist of (a) land; (b) stock, including shares, securities and dividends arising therefrom, and (c) other personal property.

[41] **In Jennifer Messado and Company v North America Holdings Company Limited**, Claim Nos. 2011 HCV 04943 and 2011 HCV 04669, (delivered 20th

June 2014), a judgment debtor failed to pay the judgment debt, as a result ex parte applications were made before the Registrar of the Supreme Court for the property of the judgment debtor to be charged. Brown J at paragraph 57 of the judgment said;

> *"A charging order is granted by the Court to secure payment of money pursuant to a judgment or order. Although the charging order has been described as a form of compulsory mortgage (see* ***Land Law, Elizabeth Cooke****) it differs from a mortgage… The charging order is therefore a security for a judgment debt and is imposed on property in which the judgment debtor is beneficially entitled (see rule* ***48.3(2)(h).*** *A charging order extends to cover the judgment debt, interest and costs even without being expressly so stated;* ***Eziekiel v Orakpo*** *[1971] 1 WLR 340."*

[42] This principle was reiterated in paragraph 59, where Brown J, stated; "*So, the charging order is a court imposed equitable charge for securing a money judgment or order*". The court must have imposed a judgment or order.

[43] There was no opposition to the Applicant's submission that an Attorney has a lien or common law right to the fruits of a judgment or settlement that has come about through his exertions. Bryan A. Garner in **Black's Law Dictionary**, 9th Ed., states that a 'charging lien' is an Attorney's lien on a claim that; (1) An Attorney has helped the client perfect, as through a judgment or settlement; (2) A lien on specified property in the debtor's possession.

[44] The question of retention of money, papers or other property does not arise in this case, but was accepted by both sides that such a right exists. In addition to the right of retention, is the right that personal property recovered stands as security for his costs, for such recovery. These are common law rights of the attorney-at-law which are called "liens". **Cordery on Solicitors** 1, Issue 5, November 1997, '*Division L, Renumeration*' states that at common law a solicitor has a general lien to retain any money, papers, other property belonging to his client which properly comes into his possession until payment of his costs,

whether or not the property was acquired in connection with the matter which the costs were incurred. The solicitor may retain property, other than money, to any value even if it greatly exceeds the amount due, until payment of his costs; but he cannot hold money in excess of the amount due. A solicitor is not entitled to sell property held under a lien or to transfer it into his ownership without an order from the court. The learned author of **Cordery on Solicitors 1**, further pointed out that the charging order is discretionary and is not granted to relieve the client of the liability to pay out his own pocket and was refused where the costs had already been paid in part by a set off of the client's debt.

[45] It is clear that an Attorney has a common law lien to recover outstanding fees owed by a client. A charging lien is a claim to the equitable intervention of the court for the Attorney's protection, when, having obtained judgment for his client, there is a probability of the client depriving him of his costs.

[46] Counsel for the Applicant, relied on **In re Meter Cabs, Limited**, which approved, the judgment **In re Born** [1900] 2 Ch. 433, and stated at page 562;

> *"But though this application is under the statute, it is very material to consider whether, if I make a charging order, I am thereby giving the applicants a new right, or merely enabling them more cheaply and speedily to enforce a right they already possess…It would be monstrous if this was not done were not done so, as the company would never have recovered the money without their exertion."*

[47] It appears that, the court was not acting under statutory requirements, of a court order or judgment debt for the grant of a charging order. Swinden Eady J, expressly states; *"in this case the proceedings were by arbitration, so there is no question of any statutory charge under the Solicitors Act,1860.*" The view of the learned judge is that the common law lien, is capable of enforcing either a fund or the fruits of judgment, which the efforts of the Attorney-at-law has secured.

[48] To my mind, the judgment In **Re Meter Cabs** case, does not support a submission that the considerations for charging orders and charging liens are the

same. The case demonstrates the requirement of the statutory base of a judgment debt, for a charging order. On the other hand, it supports the contention that the common law lien will enforce either a fund or judgment debt, which the efforts of the attorney have secured. The primary consideration being, the court will act to right a wrong that would flow from denying the client getting the benefit of the attorney's service without paying for them.

[49] In **Re Meter Cabs**, the court relied on **In Re Born**. There was an application for a charging order by solicitors who had established a claim on behalf of a company. The claim was admitted and certified but not paid. The company for whom the solicitor worked went into liquidation, and the solicitor sued for a charging order on the company's share of the fund. Farwell J, dealt with the contention that he should not act pursuant to the statute, by acknowledging the common law right of the attorney to a lien, and opined; "*It is clear that justice calls for such a lien*" Swinden Eady J, **In Re Meter Cabs**, thought the reasoning was, "*entirely applicable to the present case*" and importantly, made an order for a lien, not for a charging order.

[50] The UK Court of Appeal decision, of **Campbell v Campbell and Lewis**, in which a solicitor acting for a wife in divorce proceedings applied for a charging order to secure a balance that remained after he paid into court an amount for the wife's security of costs. The application was in terms sufficiently wide to cover an application at common law and under the **Solicitors Act** 1932, Section 69. The Court held, that the solicitor was entitled to a charge at common law. The editorial note indicated that although the application pursued was for a statutory charge the court indicated that it was open to the solicitor to be granted a charge at common law. There was an order by the court against the respondent to pay the wife's costs. Whether or not there was an entitlement to a statutory charge was not decided, and left open by the Court of Appeal. In the exercise of its jurisdiction, the court mentioned that the wife had no means of her own, and the husband against whom costs was awarded, had caused cross liabilities between

himself and his wife, may be with a view of defeating the solicitors claim for his costs.

[51] It is clear that there is a distinction in the requirements for the grant of the charging order under the statute and at common law. One of the distinctions would be that invoking the inherent jurisdiction of the Supreme Court, is in the discretion of the court.

[52] The Court of Appeal, in the matter of **Norman Bowen v Shanine Robinson** 88/2013 (delivered on the 6th November 2015) examined the exercise of the discretion of the Registrar, in taxing costs, and disallowed the appeal against an order of the Supreme Court, which held that the Registrar had improperly exercised her discretion. In doing so the Court of Appeal followed their decision in **Pan Caribbean Financial Services Ltd. v Sebol Ltd. and Selective Homes and Properties Ltd**. [2010] JMCA App 19. The Court found that the Registrar's decision could be impugned for taking into determination irrelevant considerations and not considering relevant issues.

[53] It would be open to the court in the instant matter, to examine all the circumstances in exercising its inherent jurisdiction. However, the basis of the authorities on which the Applicant relied, is that this area of law was governed by statue, which allowed the court to grant a charging order. I find it difficult to say that the court has the jurisdiction to grant such order, in the absence of a similar statute in Jamaica granting such power.

[54] The circumstances where a charging order may be granted is explicitly stated in the **Civil Procedure Rules**, 2002. Part 48 states that;

(1) This Part deals with the enforcement of a judgment debt by charging

(a) Land; includes any interest in land;

(b) Stock (including stock held in court); includes shares, securities and dividends arising therefrom

(c) Other personal property.

Part 48.3(2) particularly (b) and (c), of the **Civil Procedure Rules**, states the affidavit supporting this application must identify the judgment or order to be enforced; state the Applicant is entitled to enforce the judgment, inter alia. Based on this Rule it is clear that there has to be a judgment to be enforced, inter alia in order to evoke the jurisdiction of the court to grant a charging order.

[55] The lien of an attorney-at-law will attach to funds received by way of a settlement agreement, where such funds is in substance the fruits of the exertions of counsel. In **Ross v Buxton** (1887) Ch D. Vol 42. 190, the defendant had made payment to comprise an action in agreement with his attorneys and the Plaintiff, by himself. The comprise entailed an undertaking on the part of the defendant to assist in the getting the funds disposed as a part of the comprise out of court. The plaintiff solicitor had given express notice of his claim to a lien for his costs, in disregard of the notice the funds were paid to the plaintiff.

[56] It was submitted on behalf of the solicitor that the facts, (a) of the express notice and, (b) the collusion between the plaintiff and the defendant's solicitors entitled the solicitor to an order for referral to the taxing master to tax the solicitor bill of costs against the plaintiff in the action, to ascertain the balance due in respect of such costs and the amount of the solicitor's lien in the sum paid to the plaintiff in compromise of the action.

[57] It was submitted on behalf of the plaintiff and the defendant's solicitors, there was nothing upon which the lien attached. Which I understand is what the Defendant is saying before me. No judgment or verdict was ever obtained, so nothing was recovered or preserved (*words lifted from the statute)* by the exertions of the Plaintiff's solicitor.

[58] Further, unless the plaintiff can show collusion, that is, an intention both by the plaintiff and the defendant to fraudulently deprive the plaintiff's solicitor of his inchoate lien, there was nothing on which the lien would attach. In all cases cited,

there was either a verdict or a judgment or something equivalent thereto. When anything has been recovered or preserved by the exertions of the solicitor there is a fund *in medio*. This is not an equitable assignment of the proceeds of judgment. When the whole matter is uncertain no lien attaches to what the parties may settle, as such the lien is lost unless there is collusion.

[59] Sterling J, after an exhaustive examination of the authorities, concluded there was no ground on which to find that the cases examined were questioned or overruled. He found that the cases divided themselves into two classes. Firstly, the solicitor's lien is merely in truth, a claim for the equitable interference of the court on behalf of the solicitor. The judgment approved a passage from Chitty's Archbold's Practice; "*This Court will exercise this equitable interference where the solicitor has given the opposite party, or his solicitor, notice of his lien, that he claims the amount payable to his client; to be paid to him in the first instance, in which case the opposite part will, at his own peril, pay the client or release the claim, or compromise it without the assent of the solicitor*."

[60] The second class of cases, the court will intervene though there was no notice given, in cases where it is clearly made out that there was some collusion or fraudulent conspiracy between the parties to cheat the solicitor of his costs. The court held that; where money is received or paid as a compromise, and that money is in truth and substance the fruits of the actions, the solicitor's lien for costs extend to it. Further if notice is given to the defendant that he has a solicitor's lien for costs, it will be at the defendant's peril if in the face of that notice he pays over the money which has been agreed to be paid to the plaintiff by way of compromise.

Application for Interim Declaration

[61] The Applicant has sought an interim declaration in relation to fees owing for work done. In **Caribbean Cement Co. Ltd v Attorney General et al**, (unreported) Claim No. 2008 HCV 05710, delivered 16th July 210, the Jamaican Court

approved the statement in “English Civil Procedure” (at page 1035, per Neil Andrews), that;

> *“Interim declarations should be granted only where the claimant has a prima facie case… when considering the balance of convenience test; relevant factor and the strength of the claimant’s case and the respective detriment to the parties should the interim declaration be granted or denied.”*

The court further noted;

> *“… the court can grant an interim declaration against the Crown in circumstances in which it could have granted an interim injunction against a subject in proceedings between subjects. It does not mean that the court is concerned only or indeed at all, with declarations of final rights. It simply means that the court can make a declaration of the rights of the parties governing the interim situation and circumstances before trial…the matter may well have much to do with how carefully the terms of the interim declaration are fashioned… in my judgment, the same sort of issues as arise considering the Claimant’s application for an interim injunction against the 2nd Defendant, subject, arise in considering the Claimant’s application for an interim declaration…in particular in this case an interim declaration along the lines sought by the Claimants would assist in preserving the status quo, which is one of the more common uses to which an interim declaration may be justly put.”*

[62] The Applicant submits that an interim declaration may be made on the basis of some evidence to support the claim, and that in the absence of any clear juristically delineated rules, the issues that arise in the granting of an interim injunction may be a useful guide in the grant of an interim declaration. It is argued that it would be appropriate to grant an interim declaration because a prima facie case has been established. The law is clear as to the circumstances in which a lien may arise. The parties have agreed for the legal fees to be taken from the proceeds of the award to NTCS as they Defendant were impecunious and not in a position to pay their legal fees out of pocket.

[63] It is therefore submitted that if the Court does not grant the interim declaration, the NTCS having purported to bypass the firm by terminating them, in an effort in all likelihood to divert the funds and refuse to pay over the sums owed, there is a risk that they may dissipate the funds. The firm was hard-pressed to take legal steps to recover its fees, if not, it is likely that it will not be able to recover anything further. In this case there is no other means to secure their fees, save that the court grants a declaration and charging order on the funds paid pursuant to the Deed.

[64] There was no challenge proffered before this court as it relates to an interim declaration being granted. The main contention is that a charging order cannot be obtain in the present circumstances. I find that in the circumstances that the Applicant has made out a prima facie case. It appears based on the evidence before the court that there has been a contingency agreement between the parties for a payment of 33 1/3 percent of the award. As such this is an ascertainable sum. Even if I am wrong, allowing the interim declaration would be the most just approach balancing the interest of both parties. The unchallenged evidence before the court is that the Applicant has done work and was successful in obtaining a judgment. In the Defendant's oral submission it was noted that other professionals were integral in obtaining the award.

[65] I find that the Applicant has a lien over the proceeds of settlement payable to the NTCS, in the sum of $162,125,688.35. However, I find no basis to attach a charging order to the sum outstanding.

Application of the Abridgment of Time

[66] There was a second application before the court where the Defendant/Applicant by way of a Notice of Application for Court Order filed 14th May 2015 is seeking the following Order, inter alia;

1. That time be abridged for the service of this application.

The ground is that Rule 11.11(3) of the CPR empowers the Court where notice of an application has been given, but the period of notice is shorter than the period required, the Court may nevertheless direct that, in all the circumstances of the case, sufficient notice has been given and may accordingly deal with the application.

[67] The circumstances of the case which the court was urged to consider are as follows;

a. The Defendant when served with the Applicant's Notice of Application for Court Orders was given exactly seven days notice (served on May 8, 2015 for hearing on May 19, 2015);

b. Having been given exactly seven days notice the Defendant would not have been able to at all take instructions, prepare its Notice of Application in Response, file and serve same on the Applicant within seven days before the hearing of the application;

c. The Applicant was at all material times aware that the issue (which was the substantive issue in the Applicant's Notice of Application for Court Orders) between it and the Defendant was being challenged. The Applicant was served with a Fixed Date Claim Form and Particulars of Claim in Claim No. HCV 2301/2015, in which National Transport Cooperative Society Limited was the Applicant and Bailey Terrelonge Allen the Defendant, as also a Notice of Application for Court Orders and supporting Affidavit in Claim No. HCV 2301/2015 both of which documents (pleadings and application) set out the Defendant's contentions in respect to fees claimed.

d. Further, the Applicant was at all material times aware that the issue of fees which was its substantive issue was being challenged by the Defendant who filed, and served on the Applicant, Written submissions in response to the Applicant's said application wherein the Defendant's submissions (relating to the lien and charging order sought by the Applicant) were mirrored in the Defendant's Notice of Application.

e. The Applicant being aware that the issues of fees between it and the Defendant were being challenged and the subject of litigation would not have been embarrassed in its application by the Defendant's service of the Notice of Application for Court Orders of May 14, 2015 - which

application on the issue of fees merely asked that said fees claimed be paid into court.

f. The Applicant would not be prejudiced by the application for the fees claimed to be paid into court. This is so since the moneys would not be in the hands of the Defendant.

[68] Based on all the circumstances outlined above and which show that the Applicant were at all times fully apprised of the dispute as to issue of fees with the Defendant and that same would ultimately be litigated and that Written Submissions were filed in respect of same on the Applicant's application it is submitted that there exists more than abundant evidence before the Court to rule that "sufficient notice was given" and for the Court to "accordingly deal with the Defendant's application."

[69] The Applicant has not shown that it had no knowledge as to the issues joined and was not served with Written Submissions by the Defendant in similar terms as the Notice of Application for Court orders. The Court must seek to give effect to the overriding objectives when exercising any power under the rules. (See; Rule 1.2).

[70] The Applicant objects to the abridgement of time for the Defendant's Application for court Orders filed May 14, 2015 which was for hearing on May 19, 2015, on the basis that the application was short served to the prejudice of the Applicant. The Applicant contends that the Affidavit in support of the said Application seeks to refer and rely on all pleadings filed in the Defendant's claim. There is no evidence before the court that the claim has been served or acknowledged as being served.

[71] The Defendant in anticipation of the May 19, 2015 hearing filed a Judge's Bundle dated May 18, 2015 to include court document in their said claim, documents numbered 18-26 on Index to Judge's Bundle. Hence, the court ought properly to disregard these documents, and not take into account matter not before this court for adjudication.

[72] Further, by its application the Defendant seeks to have this Court vary the Deed of Release and Discharge, which sets out the terms and conditions on which the Attorney General was prepared to settle the matter. Accordingly, the Court cannot make an Order which would have the effect of changing those terms and conditions which bind the Attorney General.

[73] I have read the written submissions of counsel on both sides, on the issue of whether the court should abridge the time to hear the Defendant's application. I have examined Rule 11.11 which explicitly outlines the rules in relation to service of a Notice of Application for Court Orders. Part 11.11(1) of the **Civil Procedure Rules** state that:

> "The general rule is that a notice of an application must be served
>
> (a) as soon as practicable after the day on which it is issued; and
>
> (b) at least 7 days before the court is to deal with the application.
>
> Subsection 2 states that however the period in paragraph 1(b) does not apply where any rule or practice direction specifies some other period for service.
>
> Importantly, subsection 3 states;
>
> Where –
>
> (a) notice of an application has been given, but
>
> *(b) the period of notice is shorter than the period required, the court may nevertheless direct that, in all the circumstance of the case, sufficient notice has been given and may accordingly deal with the application."*

[74] The Defendant has argued that the Applicant only served them with their Notice of Application for Court Orders exactly seven days before the hearing. The Rules state, that it must be served as soon as practicable after it was issued; it must be served at least seven days before the hearing of the Application. It is clear the Applicant was in compliance with the Rules. The court is mindful of the circumstances of the case.

[75] I accept the submission of learned counsel for the Applicant. Essentially the Orders being sought by the Defendant is to vary the Deed of Release and Discharge, which sets out the terms and conditions the parties, were willing to contract in settling the matter. There is no allegation of misconduct of the Applicant, any new compelling evidence or any exceptional circumstance(s) that would render such a variation based on the evidence before the court. In light of the adjudication of the Notice of Application of Court Order filed on 4th May 2015 by the Applicant, the application for abridgment of time to hear the application is refused.

The court hereby orders;

1. An interim declaration that the Applicant is entitled to a lien over the proceeds of settlement pursuant to the Deed of Release and Discharge between the Defendant and the Honourable Attorney General of Jamaica dated December 3, 2013, in the sum of $162,125,688.35.

2. Application for abridgement of time to hear the Defendant's Notice of Application of Court Orders filed 14th May 2015 is refused.

3. Costs to the Applicant/Claimant to be agreed or taxed.