



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013 HCV 00999**

**BETWEEN CLOUGH LONG & CO. ATTORNEYS-AT-LAW**

**AND ADOLPHY DeCARDOVA SAMUELS 1ST PURCHASER**

**AND EUGENIE ADASSA SAMUELS 2ND PURCHASER**

**AND COURTNEY LIVINGSTON SAMUELS 3RD PURCHASER**

**AND LORAINÉ VINETTE SAMUELS 4TH PURCHASER**

**Representation:**

**Mr. Maurice Long and Mr. Lawrence Phillpotts-Brown, Attorneys-at-Law  
instructed by Clough Long & Co., for the Attorneys-at-Law**

**Mr. Vincent Chen, Attorney-at-Law instructed by Chen Green and Co., for the  
Purchasers**

**HEARD: NOVEMBER 12, 2013**

***“Taxation of Costs – Clients and Attorneys costs – S. 22 of The Legal Profession  
Act – Rule 65 of Civil Procedure Rules 2002***

Coram: King J.

Background

[1] On the 4th day of November 2009 a sale agreement was made between Ked Investments Limited (the vendor) and Adolphy DeCardova Samuels, Eugenie Adassa Samuels, Courtney Livingstone Samuels and Loraine Vinette Samuels and or their nominees (the purchasers and also the Paying Parties in this matter). The purchasers at the time were represented by Hamaty and Co., Attorneys-at-law.

[2] In the said agreement under the heading of "costs of agreement and transfer" the agreement stated:

The purchaser shall pay to the Vendor's Attorneys-at-Law on the execution hereof one half of:

- (i) The costs of this agreement fixed at the sum of Sixty-five Thousand dollars (\$65,000.00) together the General Consumption Tax of Ten Thousand Seven Hundred and Twenty-five Dollars (\$10,725.00);
- (ii) The stamp duty and registration fee in respect of the transfer;
- (iii) The costs of survey and the subdivision application of the said lands, thereof;
- (iv) The costs of issue of Title for the said land;

Each party shall be responsible for his or her Attorneys-at-Law Costs of Transfer.

[3] Under the heading "Special Conditions" Item 5 states:

***It is hereby agreed and understood that the Vendor shall grant to the Purchasers a first legal mortgage for \$22,500.00 on the security of the said land for a period of two (2) years to be repaid in full by of quarterly installments without interest but it is hereby understood and agreed that should be (sic) the Purchasers not repay the***

***mortgage in full within the two (2) year period, then interest will accrue and be payable on the unpaid balance at six percent (6) per annum until payment but without prejudice however, to any other right or remedy available to the Vendor.***

[4] The same parties entered into an Agreement for sale and purchase of Cane Crop dated the 25th of November 2009 which under the heading "Costs of Agreement and Transfer" stated:

(a) The purchaser shall pay to the vendor's attorneys at law on the execution hereof one half of:

(1) The costs of this agreement fixed at the sum of fifty thousand dollars (\$50,000.00) together with General Consumption Tax on the signing of this Agreement;

(2) The stamp duty in respect hereof;

[5] Carriage of Sale of both Sale Agreements was held by the Receiving Party, Clough Long & Co., Attorneys-at-law for the Vendor.

[6] A mortgage document was also executed by the said parties.

[7] The Receiving Party sent a statement of account based on the agreements to the Paying Parties. Not having received payment, the Receiving Party had its bill of costs filed on the 22nd of February 2013 and served on the 7th of March 2013.

[8] Included at the end of the bill of costs was a notice for the Paying Parties to file Points of Dispute within 28 days and stating the consequences of not so doing, namely the possibility of a Default Cost Certificate being issued. The Paying Parties' Attorneys, Chen Green and Co. filed an Acknowledgement of service of the bill of costs, confirming receipt on the 7th of March 2013.

[9] The Paying Parties responded by filing on the 24th of April 2013, a notice of application for an order to strike out the "matter filed herein as claim HCV 00999/2013 pursuant to rule 23(1) of the Civil Procedure Rules 2002"

[10] Apparently unknown to the Paying Parties, the Receiving Party had by then on the 17th of April 2013 filed an affidavit in support of an application for default cost certificate. In the absence of Points of Dispute of the Paying Parties. The Default Cost Certificate was issued on the 17th of April 2013 and served on all Paying Parties on the 13th of June 2013.

[11] An order for Seizure and Sale of goods in execution of the order for payment of costs in the Default Cost Certificate was granted by the Registrar of this Court on the 26th of June 2013.

[12] The Paying Parties filed on the 2nd of July 2013, an ex parte notice of application for an order to stay execution of the Default Cost Certificate. The stay was granted until the hearing of the "substantive application to set it aside".

[13] In response, the Receiving Party filed a notice of application on the 7th October 2013 that the order for stay of execution be set aside and that the application to "dismiss the default cost certificate" itself be dismissed and the execution of the order for Seizure and Sale be allowed to proceed. It should be noted that no such application to dismiss the default cost certificate has ever been filed.

#### **The Paying Parties' Application for Court Orders**

[14] Before me is an application made by the Paying Parties to have the matter, namely that filed herein as Claim HCV999/2013 struck out.

The grounds upon which the applicants relied were:

1. Non compliance with CPR part 8
2. Non compliance with part 65.1
- 3 The Receiving Party has wrongly proceeded under 65.17
- 4 The costs were disputed and were not arrived at by order of the court or by mutual consent.
5. The attempt to recover costs used by the receiving party constitutes an abuse of the process of the court and discloses no reasonable ground.

[15] These grounds are cited on the assumption that the Paying Parties can make this application directly to a Judge but the correctness of that assumption must first be determined.

**Can the Paying Parties apply to a Judge of the Court to set aside a bill of costs?**

[16] If Paying Parties do not agree with a Bill of costs, which in this case they most assuredly do not, the rules make provisions as to the route available to those Paying Parties.

**Civil Procedure Rule 65.20**

(1) *The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on:*

- (a) *the receiving party;*
- (b) *every other party to the taxation proceedings.*

(2) *Points of dispute must:*

- (a) *identify each item in the bill of costs which is disputed;*
- (b) *state the reasons for the objection and*
- (c) *state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item*

(3) The period for filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1)

[17] The rules provide that Points of Dispute are the sole means by which the Paying Party may respond to a bill of costs. There is no provision in the Civil Procedure Rules or the Legal Profession Act for a Paying Party to counter with a Notice of Application for Court Orders. The failure of these Paying Parties to file point of dispute has resulted in the Receiving Party having an opportunity to apply for a Default Cost Certificate with an order to pay costs. The Receiving Party seized this opportunity and has been granted an Order for Seizure and Sale of goods which it now seeks to have executed.

[18] The Paying Parties, having ignored the rules, cannot bypass the entire taxation procedure and seek to have the Bill of Costs struck out.

[19] If the Paying Parties had filed its Points of Dispute (even if they did so outside of the prescribed time limit) the Receiving Party would not have been able to successfully apply for a Default Cost Certificate. {Civil Procedure Rule 65.20(5-6)}

[20] Civil Procedure Rule 65.20(5 to 6) provides that:

- (5a) *the receiving party may file a request for a default costs certificate if*
  - (b) *the period set out in paragraph (3) for serving points of dispute has expired; and*
  - (c) *no points of dispute have been served on the receiving party.*
- (6) *If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate.*

[21] Despite the ultimate procedural downfall of the Paying Parties, I will briefly consider the grounds of the Paying Parties' application.

## **GROUND**

### **1. Non compliance with CPR part 8 of the Civil Procedure Rules**

[22] Part 8 of the Civil Procedure Rules stipulates how a claim is to be started. 8.1 states:

*"A claimant who wishes to start proceedings must file in the registry of the Court at the Supreme Court, King Street, Kingston...*

*The original and not less than one copy for each Defendant (for sealing):*

- (A) the claim form; and*
- (b) unless either rule 8.2(1)(b) or 8.2(2) applies*
  - (i) the particulars of claim; or*
  - (ii) where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this Part. "*

[23] Rule 8.2 further states that proceedings are started when the Claim form is filed.

[24] The Legal Profession Act is the appropriate starting point when considering the bill for fees of an Attorney against a Paying party. The Legal Profession Act section 22 (1) states that 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.

[25] Within the month, the Paying Party may ask for the bill to be referred to a taxing officer for taxation of the bill according to section 22(2). A "taxing officer" is defined in Section 23 of the same Act as the Registrar or such other person as may be prescribed by rules of Court.

[26] The Receiving Party may thereafter, if taxation has not already been initiated by the Paying Party, sue for his fees by a claim in court.

[27] In this case the Receiving Party has not opted to proceed by way of suit but has chosen an alternative procedure. That alternative procedure to filing claim is taxation. By section 22(4) the Receiving Party may refer the bill to taxation after a month has elapsed after presenting the bill. Not having chosen to proceed by commencing a suit, part 8 of the Civil Procedure Rules would not apply.

## **2. Non compliance with Civil Procedure Rule 65.1**

[28] The Civil Procedure Rule 65 deals with the quantification of costs. The scope of the part as described by rule 65.1 states:

*This part deals with the ways in which any costs awarded by the Court are quantified.*

[29] The scope of part 65, however does not conflict with the taxation of an attorneys bill for fees as the Legal Profession Act gives referrals of bills of costs the same effect as a reference which has been ordered by the Court. Section 22(4) of the Legal Profession Act states:

*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.** (Own emphasis)*

[30] In this case, the Receiving Party **has** referred the bill for taxation to the taxing master and **has** given notice of this to the paying parties. Accordingly, the bill of costs does not fall outside of the scope of 65.1 of the Civil Procedure Rules.

### **3. The Receiving Party has wrongly proceeded under Civil Procedure Rule 65.17**

[31] The paying parties have provided no particulars of the assertion that the Receiving Party has "wrongly proceeded with its purported claim under rule 65.17"

[32] Civil Procedure Rule 65.17 deals with the basis of quantification of costs on taxation. If the matter is properly referred to taxation then 65.17 must be applicable in determining how those costs should be quantified. In any event the right to dispute any charges in the bill is conditional on the filing and serving of points of dispute.

### **4. The Costs were disputed**

[33] The Paying Parties cited as one of their grounds that the Receiving Party is "well aware that at all times the costs being claimed we're being disputed and that the purchasers were not in agreement with the costs that the attorneys were claiming which costs were not arrived at by way of an order of the court or by mutual consent"

[34] As considered above, when outlining the procedure for disputing a bill of costs, the law does not recognize other means of dispute, be it by orally disagreeing or by letter or even by a Notice of Application for Court Orders.

### **5. Abuse of process of the Court and disclosure of no reasonable grounds**

[35] The Receiving Party was entitled to utilize the procedures provided for in the Legal Profession Act and the Civil Procedure Rules to pursue taxation. Therefore there is no abuse of process in this case. There is no requirement to disclose reasonable grounds in the spirit of a classic claim for costs but only to comply with the requirements for taxation, which the Receiving Party has done.

## **Conclusion**

[36] The application of the Paying parties filed on the 24th of April 2013 is refused.

## **The Receiving Party's Application for Court Orders**

[37] The Receiving Party asked for a number of orders to be made by this Court.

[38] They asked to be dismissed, the application of the Paying Parties to have the Default Cost Certificate set aside. There is no such application to set aside the Default Cost Certificate as that application was never made. Consequently, there is no requirement to make any determination in this regard.

[39] The application made by the Receiving Party to set aside the stay of the order for Seizure and Sale is granted thus the Receiving Party is now free to enforce its order for payment of costs by way of Seizure and Sale.

[40] Costs of these Applications are awarded to the Receiving Party to be agreed or taxed.