



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00019

BETWEEN	JENNIFER MESSADO	FIRST CLAIMANT
AND	LANZA TURNER BOWEN	SECOND CLAIMANT
AND	PLANTATION HOLDINGS LIMITED	FIRST DEFENDANT
AND	PLANTATION DEVELOPMENTS COMPANY LIMITED	SECOND DEFENDANT
AND	CHRISTOPHER KERR	THIRD DEFENDANT

IN CHAMBERS

Nigel Jones and Kashina Moore instructed by Nigel Jones & Co., for the claimants.

Defendants absent and unrepresented.

HEARD: June 14th, 20th & 27th September, 2016

**CIVIL PROCEDURE – APPLICATION FOR SUMMARY JUDGMENT – RULE 12.10
(4), (5) OF THE CIVIL PROCEDURE RULES**

SYKES, J

- [1] The claimants are a firm of attorneys at law. The defendants were the clients of the claimants. The claimants say that they represented the defendants in various legal matters including a real estate development and other land matters. In particular, the claimants allege that they did legal work in respect of a property located at 54 Norbrook Drive, Kingston 8. Fees were presented to the defendants for work done in respect of the transactions including the Norbrook Drive property.
- [2] The claimants state that they and the defendants signed a settlement agreement dated March 10, 2015 for the payment of fees. The agreement was said to be 'a compromised position arrived at by the parties after discussions and mediation' (para 8 of the particulars of claim). According to the claimants the relevant terms are:
4. *The parties agree that the said accountants will review the fee, bills and disbursements presented by Jennifer Messado & Co which said accountants shall examine the fees, bills, disbursements along with any objections raised by the clients, and determine the amount owing to Jennifer Messado & Co.*
 5. *The parties agree to pay the fees and costs said (sic) accountants in equal shares.*
 6. *The parties shall present all papers, documents, bills, receipts and evidence to the said accountants within (30) days of the date of this agreement and shall be binding on the parties.*
- [3] It has been pleaded that the agreement stipulated 'that a letter of undertaking be given by Gordon/McGrath secured by [\$20.5m] held in joint account (sic) between the firm and Clough, Long and Co in a National Commercial Bank account to pay balance of fees, bills and disbursements' (para 10 of particulars of claim).

- [4] The claimants say they have waited and waited for word from the defendants to proceed with the agreement for the payment of fees but the defendants have failed to respond to the claimants' overtures. The claimants sought and received a quotation of \$500,000.00 from BDO accountants. This was communicated to the defendants who have not to date paid the half share of the costs or presented 'any papers, documents, bills and receipts to the accountant' (paragraph 13).
- [5] The claimants are ready to send their documents to the accountant as agreed and are ready to sign the BDO quotation. This is a matter of great importance to the claimants because the agreement stipulates that 'the balance of fees due to [the claimants] for work done based on the findings of the accountant and the claimant's are unable to recover the sums due to them because of the defendants' inaction' (paragraph 14).
- [6] The defendants have failed to make payment. It is said that the defendants have breached the agreement by failing to present the accountant 'with any and all documents challenging the claimants' fees' and 'failing and refusing to pay the half share of the accountant's fees.'
- [7] The claim form and particulars of claim were issued on February 22, 2016. According to the defendants' acknowledgment of service filed by their attorneys at law, they were served with the claim form and particulars of claim on March 11, 2016. The defendants indicated that they intended to defend the claim and made no admissions.
- [8] No defence has been filed. The claimants have now filed an application under rule 12.10 (4) and (5) seeking a declaration and an order for specific performance.

The application

- [9] There is an affidavit from Mrs Jennifer Messado in support of the application. Rule 12.10 (4) states:

(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the particulars of claim.

(5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 (service of application where order made on application made without notice) does not apply.

[10] An examination of the entire rule shows that it is only in one instance that notice is required to be given to the defendant against whom judgment has been sought. The requirement to serve the defendant with this application only arises if there is an application under rule 12.10 (1) (c) (iii) which is a judgment 'requiring the defendant to deliver goods without giving the defendant the alternative of paying their assessed value.'

[11] All this led Miss Kashina Moore to submit that notice is not required under rule 12.10.

The evidence in support

[12] The affidavit in substance repeated what was asserted in the particulars of claim. The additional information comes in the form of the exhibits which included the agreement and the letters.

[13] The recital to the agreement tells of

- (a) work done 'in several and various matters and transactions' including the Norbrook Drive property;
- (b) fees and disbursements are owed;
- (c) the exercise of a solicitor's lien over files, documents and certificates of title for unpaid fees, bills and disbursements for work done;
- (d) negotiations.

[14] This led to the defendants agreeing to pay \$12,500,000.00 to the law firm of Jennifer Messado and Co followed by a letter of undertaking to be given by

Gordon|McGrath which shall be secured by \$20,500,000.00 held in an account at National Commercial Bank Jamaica Ltd. The purpose of this arrangement was to have a source of funds available to meet the balance of fees, bills and disbursements as determined by BDO Accountants.

- [15] It was also agreed that any objections by the defendants be reviewed by BDO Accountants. The agreement sets out the details of how the process involving the accountants would work.
- [16] On January 17, 2016, Nigel Jones and Co, attorneys at law for Jennifer Messado and Co, wrote to Mr Christopher Kerr, the third defendant, reminding him of the agreement in general and clause 4 in particular. He was asked to indicate 'whether [he was] read to submit or have submitted any documents to BDO Accountants as our client is ready to proceed.'
- [17] There is a letter, dated January 22, 2016, from BDO Accountants to Jennifer Messado and Co setting out the terms of engagement, the terms of the reference and the scope of engagement.
- [18] Nigel Jones and Co wrote a second letter dated January 29, 2016 to Mr Christopher Kerr informing him of the cost indicated by the accountants. He was asked, a second time (the first being in the letter dated January 17, 2016) whether he was ready to proceed.
- [19] No response was forthcoming. Three weeks later the claim was filed. The defendants were served. They have filed an acknowledgment of service but no defence. This means that the defendants are fully aware of the claim, the basis of the claim, the relief sought and why.

The decision

- [20] Miss Kashina Moore relies on the case of **Hart v Hart** (1881) 18 Ch D 670. In that case the wife who was respondent in a petition for divorce filed a claim

seeking specific performance of a separation deed agreement entered into between her and her husband upon a compromise of the divorce petition. Both parties signed the agreement. The agreement was arrived at after the husband had presented his case and before the wife commenced hers. The decree was granted. Since that time the case has not been overruled or received unfavourable comment.

[21] From reviewing this and other cases when considering whether to grant specific performance the court should be concerned to see:

- (a) that the agreement sought to be enforced is in fact an enforceable agreement;
- (b) that the agreement is not too vague;
- (c) specific performance is appropriate and the contract will not require constant monitoring by the court.

[22] In this case the claimants are owed fees and there is an agreement to determine the balance owed. The agreement appears to be valid. The seal of both companies is affixed to the document and there is the signature of a director of both companies, namely, Mr Christopher Kerr. Mr Kerr also signed in his personal capacity. The claimants signed the agreement through Miss Lanza Turner-Bowen. There is nothing vague in the agreement and having regard to the fact that the fees are dependent on the process outlined in the agreement being followed this is an appropriate case for specific performance.

[23] The order is granted in the terms sought by claimants with costs to the claimants to be agreed or taxed.