

**IN THE SUPREME COURT OF BELIZE, A.D. 2014**

**CLAIM NO: 485 OF 2013**

**BETWEEN**

**SAMUEL KIM**

**CLAIMANT/APPLICANT**

**AND**

**M.E.L. INVESTMENTS LIMITED  
RENDEZVOUS ISLANDS LIMITED**

**1<sup>st</sup> DEFENDANT  
2<sup>nd</sup> DEFENDANT**

**Keywords:** Attorneys costs; Common Law Lien on Monies recovered by Attorney's exertion.

Discontinuance of Claim and Application; Part 37 of CPR 2005.

Legal Profession Act, Chapter 320 Revised Edition 2000, Laws of Belize.

Attorney's Retainer Agreement; Attorney's Contingency Fee Agreement.

**Before the Honourable:** Mr. Justice Courtney A. Abel

**Hearing Dates:** 31<sup>st</sup> March 2015;  
3<sup>rd</sup> June 2015.

**Appearances:**

Mr. Denys Barrow SC and Ms. Namia Barrow for the Applicant Barrow & Co. LLP.

Mr. Kevin Arthurs for the Claimant/Applicant.

Mr. Yohhahnseh Cave for the Defendants.

Mr. Kareem Musa is the Escrow Agent.

**DECISION**  
**Delivered on the 3<sup>rd</sup> day of June 2015**

**Introduction**

- [1] Barrow and Company, a firm of Attorneys which previously acted for the Claimant, Samuel Kim, have applied for an order directing that monies recovered in this claim, by the Attorneys' exertions, stand as security for the Attorney's costs of such recovery.
- [2] The monies recovered by Barrow and Company was at least US\$3,500,000.00.
- [3] Barrow and & Company then billed Samuel Kim for 15% of the monies recovered (US\$3,500,000.00) based on a contingency agreement which Barrow & Co claimed they had with Samuel Kim.
- [4] Samuel Kim alleges that there was a contingency agreement under which Barrow & Co had agreed that the attorney's fees would be claimed from the Defendants, if, and contingent upon, a judgment being entered against and paid by the Defendants.
- [5] He therefore denies that Barrow & Co is entitled to the assistance sought.
- [6] The central question for decision is whether, on the facts, this court should use its undoubted powers to assist Barrow & Co. to collect the fees which it is claiming.

**List of Issues**

- [7] Whether Samuel Kim by changing his Attorneys and discontinuing the present claim can discontinue or stop Barrow & Co's present application for assistance; or should Barrow & Co have filed a separate claim which could not be discontinued by Samuel Kim?
- [8] Whether there was a contingency agreement between Barrow and Co. and Samuel Kim in relation to the collection of the debt from the Defendants and if so what were its terms?
- [9] Should this court, on the facts of the present case, assist Barrow & Co by granting them a charge on the monies which Barrow & Co recovered from the Defendants for Samuel Kim?

## **Background**

- [10] In September 2013 the Claimant retained Barrow & Co. to commence legal action against the Defendants for the recovery of US\$3,650,000.00.
- [11] The terms of the retainer agreement is in issue; but Barrow & Co., on or about 16<sup>th</sup> September 2013, commenced the present claim against the Defendants on behalf of Samuel Kim for the total sum (including interest) of US\$4,323,185.45
- [12] Eventually Samuel Kim, through the efforts of Barrow and Co., before trial, obtained judgment on part of its claim against the Defendants in the sum of US\$3,500,000.00<sup>1</sup>.
- [13] Thereafter, following a disagreement with Barrow & Co., (much of which took place in an exchange of emails) Samuel Kim took over further negotiations with the Defendants and in fact settled the entire claim without consulting Barrow & Co., and without their further involvement. The settlement of the whole claim was in the sum of US\$4,562,000.00 including legal costs of US\$50,000.00.
- [14] There does not appear to be any dispute that only the settlement of US\$3,500,000.00 was obtained by Barrow & Co. exertions; although it is certainly arguable that the full amount of the eventual settlement could be so considered.
- [15] Shortly afterward Barrow & Co delivered a Revised Pro Forma invoice dated 27<sup>th</sup> May 2014 to Samuel Kim claiming US\$525,000.00 based on a contingency fee of 15% of the amount recovered (US\$3,500,000.00.).
- [16] Samuel Kim refused to pay although, as already noted, it obtained US\$50,000.00 from the Defendants in relation to legal costs of the claim.
- [17] Samuel Kim accepts that he is liable to pay some costs to Barrow & Co., but is unclear what that sum should be<sup>2</sup>. There is therefore no issue that Samuel Kim is liable to pay Barrow & Co. legal fees in relation to the present litigation; the question is the amount and when it is due.
- [18] During the course of the argument of this case Counsel for Samuel Kim, in my view, correctly conceded that the US\$50,000.00, obtained from the Defendants in

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<sup>1</sup> Judgment in the present claim of Abel J. delivered on 27<sup>th</sup> May 2014.

<sup>2</sup> In any event it is clear that on the facts of the present case, with the agreement advanced by Barrow & Co has been repudiated by Samuel Kim, the Barrow & Co are entitled to recover costs for work done under the retainer agreement. See Halsbury's Laws of England, 4th Edition, Volume 44, and Paragraph 100.

relation to its legal costs of the claim, should be paid over to Barrow & Co. As a result I made a consent order that: “*Samuel Kim do pay forthwith Barrow & Co the sum of US\$50,000.00 (or its Belize dollar equivalent) received from the Defendants on account of legal fees*”.

- [19] The present application therefore relates to any amount which may be due to Barrow & Co in excess of this US\$50,000.00.
- [20] Samuel Kim’s new Attorney on the 23<sup>rd</sup> January 2015 filed in this court a Notice of Acting (change of Attorneys) and also purported to file a notice of discontinuance. Samuel Kim now asserts that this notice of discontinuance also brings Barrow & Co’s present application for assistance to an end.
- [21] On the 26<sup>th</sup> January 2015 this court, on the application of Barrow and Co., made an interim charging order upon the judgment made herein on the 27<sup>th</sup> May 2014 and any compromise thereof for its costs of US\$590,625.00.

**Whether Samuel Kim by changing his Attorneys and attempting to discontinue the present application can stop the present application or should Barrow & Co have filed a separate claim?**

- [22] Under **Part 37 of CPR 2005** a claimant is allowed to discontinue all or part of a claim with or without the permission of the court depending on stipulated circumstances<sup>3</sup>.
- [23] The result of such discontinuance of the claim is that it “*takes effect on the date when the notice of discontinuance was served on him*” but does not apply to “*any proceedings relating to costs*”<sup>4</sup>.
- [24] A claim is however not the same as an application in relation to proceedings and both of them are indeed governed by separate provisions of **CPR 2005**<sup>5</sup>. Also a claimant and an applicant may be two different persons; and an applicant might not even be a party. A person may merely be (as appears to be the case of Barrow & Co in the present application) “*a person who seeks a court order by making an application*”<sup>6</sup>.

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<sup>3</sup> Part 37.2 of CPR 2005

<sup>4</sup> Part 37.5 of CPR 2005

<sup>5</sup> Claims are defined and governed by Part 8 and applications by Part 11.

<sup>6</sup> Part 11.2 of CPR 2005.

- [25] An ‘application’ post CPR 2005, replaced a ‘summons’ under pre CPR 2005 rules.
- [26] Samuel Kim argues that the effect of their Notice of Discontinuance is to bring an end to the application against them brought in the present claim by Barrow & Co., as Attorneys for Samuel Kim, for a charging order against their client’s interest and without their client’s authority and approval.
- [27] In my view this argument by Counsel for Samuel Kim is misplaced for the following reasons:
- (1) The legal provisions under which the present application by Barrow & Co. is brought, is a right of lien conferred by common law and confirmed by statute which allows such an application provided that it is done in the course of litigation, on the client’s behalf, in respect of and for the attorney’s costs in connection with the litigation.
  - (2) The application is not brought by a claimant against a defendant. It is brought by an attorney against its own client in an existing proceeding for security for the Attorney’s costs.
  - (3) The notice of discontinuance, having not been brought by a claimant in relation to his claim (or part of a claim), cannot be discontinued by the claimant. It is an application brought in a claim by the claimant’s attorney for a specified legal relief.
  - (4) In any event the application in question is a proceeding relating to costs which the relevant provision of CPR 2005, expressly exclude from any such notice of discontinuance<sup>7</sup>.
  - (5) Further, the application brought by Barrow & Co against Samuel Kim is not a claim but an application and therefore cannot be discontinued by a Notice of Discontinuance under **Part 37 of CPR 2005**.
  - (6) The procedure for the present application is permitted by the established case law which related to a summons which have not been replaced by applications<sup>8</sup> .

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<sup>7</sup> Part 37.5 of CPR 2005(3)(b).

<sup>8</sup> See *Campbell v Campbell and Lewis* [1941] 1 All ER 274, at 276. Which refers to an application by summons in the proceedings the present day equivalent of which is an application.

[28] Samuel Kim therefore by the device of changing its Attorneys and discontinuing the present claim, cannot discontinue the present application. In any event, it is not necessary, in my view, for Barrow & Co to have made the present application by filing a separate claim as the law allows such an application in the present claim.

**Whether there was a contingency agreement between Barrow and Co. and Samuel Kim in relation to the collection of the debt from the Defendants and if so what were its terms?**

[29] Under **Section 33 of the Legal Profession Act**, an attorney and his client may make an agreement, including for contingency fee, as to amount and manner of payment of remuneration for legal business to be done by the attorney. Such an agreement “*shall be in writing and signed by the client or his agent in that behalf*”<sup>9</sup>. I am not satisfied that any such contingency agreement may be made otherwise than under **the Legal Profession Act**. On the facts of this case I am not satisfied that any such agreement was indeed so made. I will therefore now consider the case on the basis of the provisions contained in the **Legal Profession Act**.

[30] Under applicable law any such fees is not liable to taxation<sup>10</sup> and the attorney is not entitled to any further remuneration for the matters to which the agreement relates, other than those stipulated for in such agreement<sup>11</sup>.

[31] Further, in the absence of any such written agreement, where, as appears to be the present case, it is undisputed that Samuel Kim is liable to pay a bill of fees, or a proper invoice, either Samuel Kim or the court on the application of either Samuel Kim or Barrow & Co., may refer such bill or invoice for taxation with such directions and subject to such conditions as the court thinks fit<sup>12</sup>.

[32] Barrow and Co. has argued that there was such a written agreement for a contingency fee of 15% of the monies collected.

[33] Barrow & Co. rely on email correspondence between the Claimant and Ms. Naima Barrow of Barrow & Co., which took place between 27<sup>th</sup> May 2014 and 12<sup>th</sup> June 2014 and also on the Revised Pro Forma Invoice dated 27<sup>th</sup> May 2014 (containing

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<sup>9</sup> See Section 33(5) Legal Profession Act, Chapter 320 Revised Edition 2000, Laws of Belize.

<sup>10</sup> See Section 33(7) Ibid.

<sup>11</sup> See Section 33(3) Ibid.

<sup>12</sup> See Section 35(2) Ibid.

a detailed narrative description of work done and an agreed fee of 15% of the sum of US\$3,500,000.00 awarded as against the Defendants).

- [34] Barrow and Co. have argued that there was contained in such email correspondence such a written agreement for a contingency fee of 15% of the monies collected.
- [35] Principally, Barrow & Co. rely on an email of the 12<sup>th</sup> June 2014 from the Claimant to Ms. Naima Barrow in which the Claimant states “*Please understand we are not questioning the attorney fees, but the timing*”.
- [36] I have carefully examined the correspondence and I have concluded that that in the context of the whole correspondence, such correspondence do not amount to evidence of an agreement in writing, signed by the Samuel Kim or otherwise, for a contingency fee of 15% of monies to be recovered, as required by the **Legal Profession Act**.
- [37] I have concluded, however, that such correspondence does establish and provide evidence that there was some confusion about the terms of engagement of Barrow & Co.; and specifically that there was confusion about what was the nature of any contingency agreement and the amount and manner of payment of the remuneration in question.
- [38] This kind of confusion was, in my view, specifically the kind of confusion that the **Legal Professions Act** was trying to avoid by its provision that any such agreement should be in writing and signed by the parties.
- [39] In my view, a carefully crafted agreement in writing between Barrow & Co and Samuel Kim, which made clear provisions for all aspects of the costs arrangements between them, would have prevented the kind of confusion which, subsequent to the Attorneys’ engagement, arose in this email correspondence.
- [40] I therefore concluded that there was no such written contingency agreement between Barrow and Co. and Samuel Kim as alleged by Barrow and Co. in relation to the collection of the debt from the Defendants and setting out its terms as required by the **Legal Profession Act**.
- [41] I also do not accept, on the evidence before me, and I have therefore concluded, that there was no contingency agreement between Barrow & Co and Samuel Kim

which would or could allow Barrow & Co to recover legal fees from the Defendants.

[42] The only person that could recover such legal fees from the Defendants was Samuel Kim.

[43] Barrow & Co did not therefore, on the facts of the present case, have any agreement with the Defendants; nor indeed could Barrow & Co have had any such agreement to recover legal fees from the Defendants. There was indeed, in my view, clearly a misunderstanding and indeed evident miscommunication, which resulted, between Barrow & Co and Samuel Kim about the nature of any contingency arrangement/agreement.

[44] Also having seen the Pro Forma Invoice I do not consider that it is a satisfactory bill of fees, under the **Legal Profession Act**, which can be referred to taxation, as it relies on the contingency agreement which I have now found did not exist, and though it does provide a detailed and itemised narrative account of the work undertaken, it does not provide any time information or costing in relation to each item which can be assessed by a taxing or assessment court officer.

[45] In the circumstances of the present case I consider that it may therefore be necessary for Barrow and Co., to prepare a new bill of costs or amend its Pro forma Invoice to remedy the defect which I have just outlined – the Invoice should not rely on the contingency agreement to which Barrow & Co referred. Barrow & Co may now therefore have to serve or reserve the bill of costs or Amended Pro Forma Invoice so as to constitute a proper statutory bill of fees.

[46] On the facts and circumstances of the present case, as I have determined them to be, I would consider that such facts, specifically the misunderstanding and miscommunication which I have found to exist, may likely constitute and may indeed amount to exceptional circumstances for this court to permit Barrow & Co to now serve or re-serve such a bill of fees or Amended Pro-Forma Invoice<sup>13</sup>.

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<sup>13</sup> As required by Section 35(3) if the Legal Profession Act.

**Should this court, on the facts of the present case, assist Barrow & Co by granting them a charge, by way of lien, on the monies which Samuel Kim recovered from the Defendants?**

- [47] In law the only direct and legal source that Barrow & Co can look to for the recovery of its costs, which they may have funded on behalf of Samuel Kim, is Samuel Kim; as it is with Samuel Kim with whom Barrow & Co. had an agreement and not the Defendants<sup>14</sup> .
- [48] Also it is uncontested, indeed common ground, between Barrow & Co. and Samuel Kim that at common law an Attorney is entitled to ask the court, as a kind of protection of the Attorney's right to such sum, to direct that monies recovered for the client by the Attorney's exertions in the course of litigation under a judgment obtained by such Attorney's exertions, to stand as security for the Attorney's costs of such recovery<sup>15</sup> (a "lien on property recovered").
- [49] This lien on property recovered is certainly only in respect of the US\$3,500,000.00 as this is definitely a sum which was unquestionably recovered by Barrow & Co. by their exertions by way of the present litigation (although I do not now decide the question whether the full amount of the eventual settlement should be so considered).
- [50] The position which Samuel Kim has taken in the present application (including the disingenuous attempt to discontinue the application), in my view, does establish the need by Barrow & Co for this court's assistance and protection, to direct that monies recovered under the judgment for US\$3,500,000.00 for Samuel Kim by Barrow & Co exertions in the course of the present litigation, to stand as security for the Attorney's costs of such recovery. By Samuel Kim's conduct in not earlier paying Barrow & Co., the US\$50,000.00 recovered from the Defendants, there is clearly a risk that Samuel Kim will seek to evade payment.
- [51] However I do not now consider that the amount in relation to which this court should provide its assistance to Barrow & Co should be on the basis of the

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<sup>14</sup> See *Cobbett v Wood* [1908] 2 KB 420 & *Cook On Costs* Paragraph [2.3] Page 25 & 26.

<sup>15</sup> *Halsbury's Laws of England*, fourth Edition, Volume 44 Paragraph 236 – 237.

contingency fee as alleged by Barrow & Co, being a contingency fee of 15% of the monies collected (US\$3,500,000.00) amounting to US\$525,000.00.

[52] In all the circumstances of the case I consider that the maximum amount in relation to which I would be prepared to charge the judgment sum is up to US\$175,000.00 which together with the sum of US\$50,000.00 would be the amount which this court is prepared to provide as security to Barrow & Co, pending resolution of this matter. The total of US\$225,000.00., being 5% of the monies recovered as a result of Barrow & Co.'s exertions, would therefore be charged.

[53] In arriving at this figure I have considered all the facts and circumstances of the case, the basis of quantification of costs (what may be fair to both Barrow & Co and Samuel Kim and reasonable) as provided by applicable rules<sup>16</sup>, and that the parties had agreed that Barrow & Co would be charging a contingency fee which would have entailed Barrow & Co being in the position to negotiate the final settlement (including its own fee). I have also taken into account the fact that Samuel Kim took over the negotiations and in fact settled the claim without consulting Barrow & Co and without their involvement. Further, that learned Senior Counsel was involved in obtaining the judgment of US\$3,500,000.00 and that his involvement was not unreasonable.

[54] I have not, however, determined the final figure of the legal costs which is due to Barrow & Co by Samuel Kim and consider that this should be arrived at by assessment (or taxation) in due course.

## **CONCLUSION**

[55] I have therefore determined that Barrow & Co. LLP, attorney-at-law for Samuel Kim shall succeed in their application and will order:

- (1) That Barrow & Co. LLP, attorney-at-law for Samuel Kim Claimant in this claim, shall have a charge on the judgment sum of US\$3,500,000.00 for its cost of and in reference to this claim up to a total amount of US\$225,000.00. (including the US\$50,000.00 which I have already ordered should be paid by Samuel Kim).

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<sup>16</sup> Part 64.2 (2) & (3) of CPR 2005.

- (2) The Claimant shall in addition pay Barrow & Co. LLP's costs of this application such costs to be agreed or assessed.

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**The Hon. Mr. Justice Courtney A Abel**