

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 6/2018

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA**

BETWEEN	BALLANTYNE BESWICK & COMPANY	APPELLANT
AND	MOSSELL (JAMAICA) LIMITED	RESPONDENT

Ms Terri-Ann Guyah and Ms Gina Chang instructed by Ballantyne, Beswick & Company

B St Michael Hylton QC and Kevin Powell instructed by Hylton Powell for the respondent

24, 25 June 2019 and 5 June 2020

PHILLIPS JA

[1] This is an appeal from the decision of Sykes J (as he then was) contained in a judgment delivered on 17 January 2018. It concerns the principles applicable to the taxing of a bill of costs filed by the appellant, Ballantyne, Beswick & Company (BBC), against its former client, the respondent, Mossell (Jamaica) Limited (otherwise known as Digicel). BBC sought to set aside the orders made by Sykes J on the grounds that, *inter alia*, the learned judge had failed to properly interpret a retainer agreement it had with Digicel; and had erred in failing to order brief and refresher fees.

Background

[2] BBC were attorneys-at-law for Digicel over a protracted period of time. Throughout that period, BBC had conducted several matters for Digicel in relation to different kinds work. BBC acted for Digicel pursuant to a letter of retainer dated 30 April 2002, which was accompanied by an exemption agreement. The latter had been duly signed by the representative of Digicel but the letter of retainer did not bear their signature. The absence of a signature to the letter of retainer was not an issue in dispute, however, as in his affidavit before the court filed 25 March 2016, Mr Richard Fraser, Director of Legal and Regulatory for Digicel, acknowledged that the terms set out therein were applicable to the matters before the court.

[3] BBC represented Digicel in a claim against Cable & Wireless Jamaica (CWJ). Trial dates in that claim were set for 26 and 27 October 2011. However, on 24 October 2011, CWJ applied to vacate those trial dates. That application was heard by K Beckford J, who, *inter alia*, vacated those trial dates; set new trial dates for 29 and 30 March 2012; and awarded costs of the application and one day's trial costs to Digicel to be taxed if not agreed, with taxation being authorised.

[4] On 27 and 28 March 2012, McDonald-Bishop J (as she then was) heard an application on CWJ's behalf for permission to amend its defence and counter claim. That application was granted, the trial dates that had been fixed for 29 and 30 March 2012 were vacated, and new trial dates were set for 18-22 March 2013 for five days. Costs of that application were also awarded to Digicel, with a special costs certificate

being granted and costs thrown away to Digicel to be agreed or taxed, with taxation also being authorised.

[5] Subsequently, disputes arose between BBC and Digicel which led to Digicel terminating its agreement with BBC in April 2013, and obtaining new representation, Hylton Powell. Thereafter, BBC sought permission from Digicel to tax costs awarded to Digicel in the applications mentioned above. Digicel, in response, indicated that the costs ordered by the court belonged to Digicel, and therefore, BBC should prepare an invoice for work done attendant on those applications, and submit the same for payment. In my view, Digicel was correct in its interpretation of costs awarded to it by the court.

[6] A stalemate occurred between BBC and Digicel with regard to BBC's request to proceed to taxation on behalf of Digicel against CWJ. As a result, BBC laid a bill of costs on 6 January 2015. It was stated to be an attorney-at-law and own client bill of costs pursuant to orders made by K Beckford and McDonald-Bishop JJ. It stated that all amounts claimed were stated in United States currency and listed the hourly rates of US\$425.00 for Captain Paul Beswick, and US\$175.00 for the other participating attorneys. It claimed many items under certain heads, namely: service and common attendances; drafting and perusing correspondence and pleadings, and preparation of documents; conferences; and hearings.

[7] Counsel for Digicel filed points of dispute on its behalf on 3 February 2015. Digicel objected to BBC's bill of costs pursuant to rule 65.20 of the Civil Procedure Rules 2002 (CPR) on grounds that:

- (i) BBC was not entitled to commence taxation proceedings as it had not served Digicel with a bill for its fees;
- (ii) the orders made by K Beckford and McDonald-Bishop JJ do not entitle, allow or permit BBC to commence taxation proceedings;
- (iii) pursuant to the retainer agreement, BBC's fees were chargeable on an hourly basis for time actually and reasonably spent doing work for Digicel, and BBC would not charge or be reimbursed for common attendances, associated with, for instance, filing and serving documents, or for photocopying and binding;
- (iv) the agreed hourly rate to be paid to Captain Beswick was US\$325.00 and not US\$425.00; and
- (v) the claim for "trial costs" should be excluded in its entirety, and there was no agreement to charge brief and refresher fees.

[8] BBC subsequently sent an invoice to Digicel dated 1 April 2015. It was in similar vein to the bill of costs filed 6 January 2015, with a grand total of US\$1,019,739.60. No

agreement was reached on the modus operandi for the assessment and/or payment of amounts due, if any, and so BBC filed another bill of costs on 11 May 2015, with contents comparable to those in the bill of costs it had filed previously on 6 January 2015.

[9] On 8 June 2015, counsel for Digicel also filed points of dispute to the 11 May 2015 bill of costs. Digicel maintained the grounds stated in its previous points of dispute as summarised at paragraph [7] herein, nos (ii)-(v). Additionally, Digicel argued that:

- (i) BBC's bill of costs, filed 11 May 2015, did not comply with the Legal Profession Act and was an abuse of the court's process, as it was filed in a claim for which BBC was not a party, and which, in any event, had been discontinued;
- (ii) no notice of withdrawal of the previous bill of costs filed 6 January 2015, for which a taxation hearing was already fixed, had been filed, and taxation had not yet occurred;
- (iii) the orders made by K Beckford and McDonald-Bishop JJ did not permit the taxation proceedings as sought by BBC; and
- (iv) the rate had been agreed for senior counsel at US\$325.00 per hour and for junior counsel at US\$225.00 per hour.

[10] On 21 January 2016, costs were taxed by the registrar of the Supreme Court. A final costs certificate was issued in the sum of US\$7,040.85 with interest from 24 October 2011, and continuing, and in the sum of US\$32,637.50 with interest from 28 March 2012 and continuing. Digicel was ordered to pay these costs to BBC. Both parties filed appeals against the registrar's decision.

[11] Digicel filed its appeal first, on 28 January 2016, challenging the award by the registrar to BBC of "[c]ounsel's trial costs, 1 day 26/10/2011"; "[c]ounsel's fees for trial cost thrown away, 2 days: 29.3.2012 – Brief fee and 30/3/2012 – Refresher fee"; and interest from the date of the orders dated 24 October 2011 and 28 March 2012. Digicel indicated that these sums were not payable under its agreement with BBC; they did not relate to any work done by BBC; and were excessive and unreasonable in the circumstances. This was particularly relevant to the claim for brief and refresher fees and costs thrown away. Additionally, the date from which interest was made payable was incorrect, as the registrar had ordered interest payable from the date of the orders of the court which had no relevance to the fees payable by Digicel to BBC. The earliest date from which interest could be charged was from the date the invoice had been received by Digicel, having been sent from BBC.

[12] BBC, in its appeal filed 22 February 2016, challenged the registrar's award with respect to: (i) preparation for, and attendance at the hearing, on 24 October 2011 before Beckford J, of CWJ's application to vacate the trial and file supplemental witness statements, and one day's trial costs for senior and junior counsel; and (ii) the fees on attendance for the application before McDonald-Bishop J for two days' trial costs thrown

away in respect of brief and refresher fees for senior and junior counsel. The grounds of that appeal are that the registrar failed to properly consider the volume of work required to prepare for those hearings; and had erred in her award of the sums ordered, as they had been calculated on an hourly basis, and not on a brief and refresher fee basis.

The decision of Sykes J

[13] Both appeals were heard by Sykes J on 18 May 2016. The learned judge described the main issue before him as:

“...whether a judicial order awarding costs to one party against the other party can be used as the basis of determining costs between an attorney at law and his client in circumstances where there is a written agreement between the attorneys at law and his client which sets out the terms and conditions under which fees will be quantified and paid.”

[14] He examined the affidavits of Mr Richard Fraser of Digicel and the bills exhibited to his affidavit, and that of Miss Georgia Buckley, counsel at BBC, filed 13 November 2015 exhibiting, *inter alia*, the retainer agreement. He captured the chronology of events and referenced the submissions made before him.

[15] Sykes J made it clear that the relationship between an attorney and his client was based on contract. He stated that the relationship may be influenced by legal and regulatory framework, but the costs recovered are for the client. “Costs are not damages”, he said, they are “sums of money that become payable by the paying party

to the receiving party if the court makes an order for costs". He stated further that "[n]o litigant had any right to costs", it was in most cases dependant on a judicial order. The learned judge also stated that once the client is relying on the written retainer, if the attorney contends that the certain terms were changed, he must prove that assertion to the satisfaction of the court. Sykes J accepted Digicel's position that the relationship between BBC and Digicel was governed by the retainer.

[16] I will set out below paragraphs [39]-[41] of Sykes J's judgment where he resolved the issues before the court. This is what he said:

"[39] The law of contract governs the relationship between attorney and client subject to any statutory or regulatory addition. As in all contracts the terms are interpreted having regard to the background and matrix of facts in which the parties were when the contract was concluded. The retainer agreement in this case does speak to brief and refresher fees. The proposition advanced that brief fees or refresher fees are based on the right to be represented by counsel cannot avail BBC because the terms of the contract set out the condition precedent for them to be incurred. The condition precedent to the recovery of brief and refresher fees is stated: the parties are to agree brief fee and refresher fee before the appearance. This means that as between BBC and its former client Digicel, it is only entitled to payment on the basis of what was agreed between them.

[40] This means that those items of the Registrar's final costs certificate that were based on brief fees and refresher fees are not permitted. The express terms of the agreement are that for appearances on motion or open court a separate brief fee and daily refreshers **'will be charged which will be indicated and agreed before the appearance.'** There is no evidence that Digicel and BBC agreed the brief fee or refresher fee in advance. This was a condition

precedent to liability and it was not met, therefore no liability for Digicel arose.

[41] The court orders cannot be used as a basis to determine the sums payable as between attorney and client because those orders were directed to party and party costs. The party and party costs are not for BBC's benefit but for Digicel and if Digicel decide not to pursue those costs then there is no legal foundation for BBC to use those orders to recover its fees. BBC's only lawful source of payment is the retainer agreement between itself and Digicel." (Emphasis as in original)

[17] He therefore found that the party and party costs were not BBC's although such a situation could have been arranged by agreement. That, however, he said, had not been done in this case. He also allowed BBC's appeal on the basis that the registrar, in her assessment, had taken irrelevant matters into consideration, namely, the two costs orders of the court. He also found that interest could only be charged from the date of the invoice and not from the date of the costs orders of the court.

[18] He therefore set aside the orders of the registrar and remitted the matter therefore for her to re-hear it afresh "taking into account the principles outlined" in his reasons for judgment.

The appeal

[19] BBC did not return before the registrar for the assessment to be reheard as ordered by Sykes J. Instead, it filed an appeal in this court. In its notice of appeal, BBC sought orders setting aside, in part, the decision of Sykes J. It also sought an order remitting the matter to the registrar of the Supreme Court for re-hearing with

consideration being given to hourly billing, various charges stated in the bill of costs, and brief and refresher fees. BBC also sought a declaration that the client is still liable to pay brief and refresher fees, once the work was done by an attorney, even though it was not agreed, and it also sought costs in the appeal and in the court below to be taxed if not agreed.

[20] BBC's notice of appeal contained nine grounds. Counsel for BBC, Miss Terri-Ann Guyah, stated that, for convenience, all nine grounds would be argued together. Unfortunately, the result of this approach was not convenient to the court. It was not helpful, and the practice of rolling up submissions and grounds together should be discouraged. It should not be left to the court to sieve through the grounds and submissions to assess whether any particular ground has merit and therefore should succeed. Indeed, for example, there was no mention of the doctrine of quantum meruit in the grounds, but this doctrine was argued extensively. There was also no submission made on the principle of legitimate expectation, although it formed the basis of ground of appeal (vii). No more will therefore be said on that ground. I have, therefore, determined that the best approach in the circumstances was to identify the issues which, in my view, have arisen on this appeal, and have proceeded accordingly.

Issues

[21] The issues I have identified are as follows:

1. Whether the learned judge erred in failing to:
 - (i) properly interpret the terms of the retainer agreement (grounds (i) and (ii));

- (ii) order that brief and refresher fees be assessed by the registrar in the new taxation process, even if they had not been agreed previously, based on the expected intense preparation for trial (grounds (iii), (vi), (viii) and (ix));
- (iii) order that the costs orders made by K Beckford and McDonald-Bishop JJ be used in the attorney and client taxation, as trial costs and trial costs thrown away must mean work done for trial (ground (iv)); and
- (iv) recognise that no prior agreement for brief and refresher fees did not mean no liability for the same, and that assessment ought to be done on a quantum meruit basis (ground (v)).

Submissions for BBC

[22] In written and oral submissions for BBC, counsel indicated that they took no issue with Sykes J's decision concerning the method to be employed by the registrar in taxing BBC's bill of costs in keeping with the terms of the retainer agreement. Their real issue was with paragraph [40] of Sykes J's decision (quoted at paragraph [16] herein), which, counsel argued, seemed to suggest that as there was no prior agreement for brief and refresher fees, before appearance, which was a condition precedent to liability, and therefore no liability for Digicel arose. Counsel submitted that it was clear

on the evidence that BBC's claim for the same could be justified. It was justifiable, counsel argued, based on the nature and complexity of the case; senior counsel's qualification, expertise and experience. Counsel also maintained that Digicel was aware of and familiar with the circumstances in which brief and refresher fees would be charged, given the terms of the retainer agreement, and certain items of correspondence, namely, a letter dated 17 November 2002.

[23] Counsel further argued that costs thrown away ought to have been assessed by the taxing master, since BBC would lose significant earnings as a result of a rescheduled trial date, as it would have undertaken preparation for the trial. She stated that those considerations were also relevant when assessing brief fees, and when and in what circumstances they are payable.

[24] Relying on **Loveday v Renton and Another (No 2)** [1992] 3 All ER 184, counsel submitted that brief fees could also be paid on a restitutionary basis as the contract was terminated preventing BBC from performing its services. She stated that since much time, effort and research had been done, fees and expenses incurred by way of brief fees must be recovered to place BBC in the position it would have been in if the contract had never been entered into.

[25] Accordingly, counsel submitted that, in the alternative, BBC would be entitled to have its brief and refresher fees determined on a quantum meruit basis. She relied on a statement made in an article published in the Louisiana Law Review, Volume 49, Number 1, September 1988, entitled "The Application of Quantum Meruit to Attorney

Fee Litigation” by H David Vaughn II that “where no express contract fixes an attorney’s fee, ‘he is entitled to remuneration for services rendered on quantum meruit’”. Reliance was also placed on **Maltby and Another v D J Freeman & Co (a firm)** [1978] 2 All ER 913 and **Hornsby and Others v Clarke Kenneth Leventhal (a firm) and others** [2000] 4 All ER 567 for details on the factors to be considered in assessing sums due on a quantum meruit basis.

[26] She submitted that based on these authorities, the relevant and important factors to be considered in the instant case were: the time and labour required; whether it would preclude the attorney from doing other work; the fees customarily charged for similar legal services; the amount involved; the results obtained; the nature and length of the professional relationship; the experience, reputation and the ability of the attorneys involved; and whether fees were fixed or contingent. Counsel argued that had all these factors been considered, it would have resulted in brief and refresher fees being payable to BBC, on a quantum meruit basis.

[27] As a consequence, counsel argued, the judgment of Sykes J ought to be set aside, and the matter remitted to the registrar of the Supreme Court to determine the brief and refresher fees payable, in keeping with the aforementioned principles.

Submissions for Digicel

[28] Mr Hylton QC, for Digicel, submitted that BBC were relying on three myths in the instant case, which were that:

- "a. [BBC] did trial preparation work for which they have not been paid;
- b. The brief fees claimed in the bill of costs were meant to cover that work; and
- c. The parties agreed that brief fees were to be paid and only the amount was not agreed."

[29] He stated that email exchanges demonstrate that trial preparation work had already been billed by BBC and paid by Digicel. Queen's Counsel further submitted that, based on correspondence sent by BBC to Digicel, it was evident that BBC never intended to claim brief fees for preparatory work. BBC instead intended to rely on costs orders made by the court to recover what they called "profit costs" from CWJ which they proposed to keep for themselves. As indicated, Digicel did not agree to this process, and so BBC laid a bill of costs.

[30] Queen's Counsel referred to section 21 of the Legal Profession Act which precludes the attorney from claiming any charges other than those set out in the agreement made between the parties, and submitted that BBC is governed by the retainer agreement. As a consequence, whereas the invoice submitted claimed "brief and refresher fees, and trial costs", there was no agreement for these costs. Moreover, BBC would not have been entitled to these costs, since it had not conducted the trial, nor had they attended any hearings in open court.

[31] Counsel submitted that the English authorities relied on by counsel for BBC were inapplicable, as in that jurisdiction, barristers are only remunerated on the basis of brief

fees, and never on the basis of time spent, so the situation as to which method to use would never be an issue. He also stated that the cases of **Maltby** and **Hornsby** were distinguishable. The former, he said, related to the determination of fees in a non-contentious probate matter which was considered under the United Kingdom (UK) Rules of the Supreme Court (Non-Contentious Probate Costs) 1956, which has since been repealed. In the latter, he maintained, counsel's fees were considered under the UK Rules of the Supreme Court 1965 (for the determination of solicitors' fees) which has also been repealed.

[32] Queen's Counsel argued that it had never been BBC's case in the court below that although brief fees were not agreed, they should nevertheless be awarded on a quantum meruit basis. Nonetheless, he stated, that that argument along with the claim for brief and refresher fees on a restitutionary basis, must fail, because: (i) BBC did not bring a claim, and a claim for quantum meruit requires the court to determine factual issues; and (ii) the work done by BBC, which is the subject of the bill of costs, was completed long before termination of the agreement. Queen's Counsel further submitted that a "quantum meruit claim can only be advanced on the basis that there is no contractually agreed method for determining the fee payable". However, since BBC had always accepted that its relationship with Digicel was governed by contract, the two arguments were "mutually exclusive".

[33] Queen's Counsel concluded that BBC had misunderstood the ruling of Sykes J wherein the learned judge had stated that brief and refresher fees had not been agreed and were, therefore, not allowed, to mean that BBC was not entitled to fees for work

done under the terms of the retainer agreement on the hourly agreed rates. However, that was not the effect of Sykes J's decision, Queen's Counsel stated, which is why the learned judge had remitted the matter to the registrar to re-hear the taxation.

[34] In all those circumstances, Queen's Counsel urged this court to dismiss the appeal, with costs awarded to Digicel.

Discussion and analysis

Issues 1(i) and (ii)- The proper interpretation of the retainer agreement and whether brief and refresher fees are to be charged in any event (grounds (i), (ii), (iii), (iv) and (ix))

[35] As indicated, the letter embodying the retainer agreement was dated 30 April 2002. It was sent to Digicel over the signature of Captain Paul Beswick of BBC. The first paragraph referred to previous discussions/meetings in respect of Digicel's dealings with the Office of Utilities Regulation (OUR) and Digicel's request that BBC represent them in those matters. BBC confirmed its agreement to act in current regulatory matters raised by the OUR, as well as other general corporate legal matters. BBC also confirmed that the principal attorney assigned to Digicel would be Captain Beswick. The second and third paragraphs of that letter are important for the resolution of this matter, and are set out in their entirety below:

"Our billing rate will be US\$300.00 per hour chargeable in 0.5 hour increments or part thereof. This rate will apply to all conferences, office and meeting attendances documentation and necessary administrative preparatory work, research, care and management of your matter, as well as for appearances in Chambers and before administrative tribunals such as the Office of Utilities Regulation. **For appearances in the Supreme Court on**

motions or open court hearings, a separate brief fee and daily refreshers will be charged which will be indicated and agreed before the appearance.

You will also be billed separately for any expenses and/or miscellaneous direct costs such as Xerox charges, search charges, etc. With the exception of Xerox charges, when these items individually are not greater than J\$1,000.00 we will assume your authority to disburse or incur such charges and if greater than this amount such disbursement will only be made with your approval.” (Emphasis added)

[36] It is important for the resolution of this matter that this document be properly construed. It is clear that conferences, office and meeting attendances, documents, administrative preparatory work, research, care and management of matters, as well as appearances in chambers and at other administrative tribunals such as the OUR, would be charged based on hourly rates of US\$300.00, chargeable in 0.5 hour increments. However, in respect of appearances in the Supreme Court, on motion or in open court hearings, separate brief fees and daily refreshers would be charged, which must be communicated and agreed before the appearance.

[37] On examination of the agreement, one can discern that separate brief fees and daily refreshers must be agreed before appearances if Digicel is to be required to pay the same. As stated previously, there is no dispute that a retainer agreement existed between BBC and Digicel, or that BBC had appeared on a motion in the Supreme Court or in an open court hearing, and had not been paid on the terms as agreed. Indeed, the parties agree that with regard to the invoice and bill of costs before the court, the separate brief fees and daily refresher fees had not been agreed. What BBC contends is

that the legal services set out in both those documents have been provided but have not been paid. BBC also contends that pursuant to the relationship between the parties and the retainer agreement, the work done, as reflected in those documents, would and should be acknowledged by Digicel to attract an assessment by way of brief fees and daily refreshers. That method of payment, BBC said, was not a new concept to Digicel, bearing in mind how similar matters had been conducted and dealt with in the past.

[38] However, it is clear that there is no mention in the retainer agreement to payment of "trial costs" or "costs thrown away". I think it is important for these purposes, to recognise that there were no motions or open court hearings conducted by BBC, but instead there were two chamber applications relating to respective adjournments of trial fixtures. The applications were granted with the costs orders as previously set out. On the face of it, therefore, BBC would only be entitled to fees pursuant to the retainer agreement on the basis of the hourly charges as agreed.

[39] Section 21(1) of the Legal Profession Act, provides as follows:

"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.”

[40] I agree with Queen’s Counsel for Digicel that by virtue of the above section, BBC is only entitled to fees based on the retainer agreement. The case of **Wells v Devani** [2019] UKSC 4, on which counsel for BBC relied, is inapplicable, as it concerned issues as to whether the parties intended to create legal relations; had entered into a binding agreement; and were uncertain as to what the terms were, which do not arise in the instant case.

[41] That case related to a vendor (the appellant) who owned certain flats which he was having difficulty selling. Having mentioned this to a neighbour, he was subsequently introduced to the respondent, an estate agent, who after a telephone conference with him, agreed to obtain a purchaser for the said lots, which he did. The seven outstanding flats were sold to that purchaser. The estate agent (the respondent) claimed his commission. The vendor claimed he was not so entitled due to the fact that, *inter alia*, there was no enforceable agreement triggering an obligation for him to pay any commission to the respondent. The estate agent then issued proceedings against the vendor.

[42] In those circumstances, a question could arise as to whether, objectively, one could conclude that the parties intended to create legal relations, and had agreed all the terms which the law regards as essential for the formation of legally binding relations. But as indicated that is not the situation in the instant case. Counsel for BBC

also relied on the dictum of Lord Kitchin on behalf of the court in that case, as to the bases on which the law would imply a term in the contract. Lord Kitchin stated that “[i]n most cases, it is only after the process of construing the express words of an agreement is complete that the issue of whether a term is to be implied falls to be considered”. He stated that Lord Neuberger had made it clear in the Court of Appeal below that “a term will only be implied where it is necessary to give the contract business efficacy, or it would be so obvious that “it goes without saying”. The court agreed with the learned judge at first instance who had decided that a term to pay the commission on completion of the contract “must be implied to make the contract work and to give it practical and commercial coherence. In carrying out this exercise of implication the court would be reading into the contract that which its nature implicitly requires”.

[43] With the greatest respect to the submissions of counsel for BBC, this principle of implying a term in the contract has no application in this case. The argument stated by counsel for BBC in their later written submissions filed 19 June 2019 at paragraph 11 ran thus:

“...It follows therefore that the various pieces of communication between the parties which has been put before the Court conclusively determines that the parties intended that brief and refresher fees would be payable, due to the very nature and complexity of the matter, and we submit that it goes without saying that though although [sic] the said brief and refresher fees were not agreed on that specific instance, they were agreed in previous occasions and the client would have expected that the firm being in advanced preparations for the case would have been entitled to assess the client for brief and refresher fees...”

[44] Without such an implication, counsel submitted, the terms of the retainer agreement would be incomplete or too uncertain, and would render the attorney out of pocket, which would be "inconsistent with establishing business relations in a commercial transaction".

[45] In my view, to the contrary, the terms in the retainer agreement are very clear. One either charges hourly rates for certain work as agreed, or charges brief fees and daily refreshers as agreed, and in the latter case, the agreement must take place before the appearances occur. Once those terms are construed, an implied term does not fall to be considered. And, in any event, in this case, such a term would be unnecessary to give either business efficacy or commercial coherence to the agreement. There are no terms or words that could or need to be added, so that it could be said that they "go without saying".

[46] There is no doubt that if the consolidated claim before the court involved millions of dollars, it might necessarily be a case of some complexity, and require senior counsel of some experience, expertise and knowledge in the area, who might be required to spend much time on the matter with intense preparation of trial. It would therefore be a matter which would, no doubt, be appropriate for the charging of brief fees and daily refreshers. Other similar matters conducted previously by BBC for Digicel may also have required that modus operandi in the past.

[47] That does not, however, take away from the fact that the parties have agreed certain terms and should be made to abide by them. Equally, if the parties have agreed

an hourly rate, which is reflected in the retainer agreement, although they can agree other terms orally (see **Fladgate LLP v Lee Harrison** [2012] EWHC 67 (QB)), once there is a dispute as to what those alleged changed rates are, then the attorney is bound by the terms as agreed in the retainer agreement, or other agreed documentation. The powerful words of Lord Denning in this regard in **Griffiths v Evans** [1953] 2 All ER 1364, at 1369 are instructive:

“...On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last hundred years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it: see *Crossley v Crowther*, per Sir George J Turner V-C; *Re Paine*, per Warrington J. The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.”

[48] Given this principle, it would be difficult for BBC to claim the changed rate of US\$425.00 for Captain Beswick and US\$175.00 for other junior counsel. The rates are governed by the retainer agreement. In arriving at this conclusion, Sykes J cannot be faulted. He also cannot, in my view, be faulted for saying, as he did in paragraph [39] of the judgment, that BBC are only entitled to payment on the basis of what was agreed between them. The same applies to paragraph [40] where he stated that there was no evidence that Digicel and BBC had agreed the brief fees or refresher fees in advance. The only question one could ask is, did the learned judge imply or state that having not agreed the brief and refresher fees in advance, that being a condition

precedent, no liability arose. Counsel for BBC has argued vehemently that that was the case, which brings me to discuss and assess issues 1(iii) and (iv).

Issue 1(iii)-Whether costs orders made in Digicel's favour should be used in the attorney/client taxation

[49] As indicated at paragraph [3] herein there were two separate costs orders made in Digicel's favour in this matter: (i) costs of the application and one day's trial costs on 24 October 2011; and (ii) costs of the application made on 29 and 30 March 2012, with a special costs certificate and costs thrown away. The question that arises under this issue is, ought these costs orders to form the basis of the attorney/client invoice and later the bill of costs on taxation, bearing in mind the history of the matter, the events as they have occurred, and the contents of the retainer agreement between the parties, particularly with regard to the termination of the services of BBC to Digicel.

[50] Rule 64.3 of the CPR speaks to the power of the court to make orders about costs including the power to make orders requiring persons to pay the costs of another person arising out of or related to all or any part of any proceedings, namely, party and party costs. For a litigant to recover costs it usually requires an order of the court. In this case, based on the two applications for adjournments by CWJ, the order for costs was made in favour of Digicel to be paid by CWJ. Sykes J made the point that in certain cases, costs can be ordered to be paid to a third party, and in other cases, a party can agree to transfer those costs to his attorney. However, as Sykes J so eloquently stated in paragraph [41], with which I agree, these orders cannot be used as a basis to determine sums payable between attorney and client. The costs orders were not for the

benefit of BBC, but for Digicel, and there is no legal foundation for BBC to use those costs orders to recover its fees.

[51] On perusal of the invoice dated 1 April 2015, the items described therein appear to relate to the two applications by CWJ in chambers before the Supreme Court in preparation for the respective adjournments, in respect of the additional witness statement to be filed, and the amendment to CWJ's defence. There were no items described as time spent in the preparation of the trial. That can only be discerned in the bill of costs by the claim for brief fees for one day's trial costs, and the brief fees for two days' costs thrown away. This seems to be supported by the correspondence leading up to the invoice and bill of costs of BBC.

[52] By letter of 28 April 2014, Captain Beswick wrote to Digicel's counsel indicating that he had not billed Digicel for any of the work associated with the two chamber applications. He further stated that it was BBC's desire to tax those costs but Mr Fraser indicated that they were not at liberty to do so. He, therefore, acting upon a referral from Mr Fraser, sought advice from Digicel's counsel as to how to proceed, as his position was that, in lieu of taxation of '[BBC's] costs' against and payment by CWJ "it will be necessary to bill Digicel for these costs at the same rates and on a party and party basis as if the costs were taxed". Counsel for Digicel, in response, indicated, *inter alia*, that in respect of those costs orders in Digicel's favour, they would be happy to tax the same, once instructed to do so.

[53] In a letter dated 2 June 2014, Captain Beswick wrote to Digicel and confirmed again that Digicel had never been billed in respect of the court orders referred to above. He stated, *inter alia*, that he intended to do so shortly and he also intended to serve Digicel with a bill of costs “for this work in the same format and for the same amounts which [BBC] proposed to tax [Digicel’s] opponent [CWJ].” He stated that if the bill was not settled, he proposed to lay it in the Supreme Court for taxation on an attorney and own client basis, “as provided for by the relevant legislation and rules governing taxation”. He indicated further that the costs would be taxed as if they were being taxed against Digicel’s opponent (CWJ), in that, interest would be claimed from the dates of the respective orders. He also stated that the bill of costs would be taxed on the basis of the orders obtained for the taxation, “and as these costs included trial costs thrown away, the brief fees of counsel will be charged instead of the usual hourly charges with which [BBC] facilitated [Digicel] for years”.

[54] In my view, therefore, there is no doubt that the bill of costs filed by BBC was based on the costs ordered by the court in favour of Digicel, and was not in keeping, in the main, with specific work done by BBC. Trial appearances having not occurred, the charges associated therewith would be inapplicable. It would also be contrary to rule 65.17(2)(a)–(c) of the CPR relating to costs to be taxed, claimed by an attorney-at-law from his client, which *inter alia*, ought to have been reasonably incurred, in a reasonable amount, with the express or implied consent of the client. This was clearly not done in this case, but is the approach which is to be assumed particularly when one appreciates the difference between party and party costs, and attorney and own client

costs, which is, that the latter are to be paid by way of a full indemnity. On taxation, it is almost an irrefutable presumption that all costs incurred, with the express or implied approval of the client, evidenced in writing, are presumed to have been reasonably incurred. The amount charged is presumed to be reasonable where that amount has been expressly or impliedly approved by the client. The attorney is therefore entitled to be paid all costs claimed for, other than such costs that may be found to be unreasonable.

[55] As a consequence, bearing in mind what occurred in the instant case, it would therefore be incorrect to attempt to pursue and claim party and party costs in an attorney and own client taxation, thus warranting Sykes J's clear statement, that BBC cannot use the costs orders to determine sums payable to them. This is because any sums due to BBC would be governed entirely by the retainer agreement. BBC must therefore pursue taxation of its fees accordingly. I entirely agree with Sykes J.

Issue 1(iv) – Without prior agreement for brief fees and daily refresher fees are they nonetheless payable to BBC on a quantum meruit basis

[56] I have already indicated that by virtue of the retainer agreement, BBC and Digicel having not agreed the brief and refresher fees prior to appearances, those fees would not be due. The question that arises under this issue is whether brief and refresher fees could yet be payable by way of quantum meruit. This argument was not put before the court below. It was raised for the first time on appeal. Based on the discussion and analysis above, it remains of significance that BBC made no appearance on behalf of Digicel in any trial. As indicated previously, there is no agreement for "trial

costs” or for “costs thrown away” in the retainer agreement. One can understand why these costs have been referred to by counsel for BBC as “profit costs”, as they do not seem to be describing costs relating to events which have occurred and can specifically be billed for. However, I am not familiar with that concept, either at common law or in the rules. The real question would, therefore, be whether, in these circumstances, any fees are payable at all.

[57] There is provision in the retainer agreement for the payment of work done to be paid by way of hourly rates, as well as payments for “any expenses and/or miscellaneous/direct costs such as Xerox charges, search charges, etc...”. But disputes exist as to whether, *inter alia*, all preparatory work for the upcoming trial had been done, for example, submissions in relation to the respective applications, and whether expenses associated with “common attendance, filing and serving documents, and photocopying and binding” had ever been rendered or paid. In my view, these are matters governed by the terms of the retainer agreement, and would ultimately have to be determined in taxation by the registrar.

[58] With regard to whether the principle of quantum meruit is applicable in the circumstances, and whether any work done ought to be assessed by way of quantum meruit, **Craven-Ellis v Canons Ltd** [1936] 2 All ER 1066, from the English Court of Appeal, is instructive.

[59] In that case, the plaintiff, an estate agent, was employed to W E Ltd and worked on the development on an estate for three years. On 15 April 1928, a company was

formed which purchased the estate. The plaintiff and others were made directors of the company. The plaintiff, without any agreement between him and the company, continued to work in connection with the estate. The company accepted his services. The plaintiff and the other directors did not have the necessary qualifications to act as directors and became incapable of acting as such. Subsequently, on 14 April 1931, the plaintiff worked as managing director of the company by an express agreement which set out the terms of his deployment as such. The plaintiff performed the services as set out in the agreement. The company later purported to put an end to his engagement. He therefore brought an action for remuneration for his services pursuant to the agreement, or alternatively, by way of quantum meruit.

[60] The court held (as stated in the headnote) that:

“(i) up to 14 April 1931 the services were rendered by the plaintiff not as a director, but as an estate agent, and there being no contract, the plaintiff could recover on a *quantum meruit* for services rendered and accepted.

(ii) the agreement of 14 April 1931 was a nullity, and the plaintiff could recover on a *quantum meruit* for services rendered and accepted after that date, notwithstanding that the parties supposed that there was an agreement in existence.”

Indeed, Greer LJ said in his judgment that the inference of a promise by the person accepting goods or services to pay for them believing that an agreement is in existence, but where it is not, is not an inference of fact, but one which “the rule of law imposes on the parties where work has been done or goods have been delivered under what purports to be a binding contract, but it is not so in fact”. So, if work is done under a

contract which is a nullity, which work is accepted, the law imposes a duty on the person receiving the benefit to pay a reasonable price. Therefore, the question would be whether the parties proceeded under the assumption that there was a binding contract between them, but in reality there was not.

[61] In the instant case, there was an express binding contract which the parties acknowledged existed. There was an express term in respect of when brief and refresher fees would be paid, and what was necessary as a precursor for the payment. There is no need, therefore, for any implied obligation to be imposed by rule of law on any party. The parties ought to comply with their express agreement, as in respect of work done, a reasonable price by way of hourly rates has been stated.

[62] I do not think that **Hornsby**, relied on by BBC, is applicable to the circumstances of this case. It related to non-contentious probate costs. The case at bar does not concern what are the elements of brief fees and how one ought to go about assessing them. The issue is whether, bearing in mind the existing binding agreement between the parties, brief and refresher fees are payable to BBC.

[63] With regard to **Maltby**, also relied in by BBC, that case also examined the various elements of brief fees in the practice of law dealing with the administration of an estate. There is no doubt, that the relevance of assessing brief fees in probate matters would generally involve, *inter alia*, the weight of the matter as a whole, and the skill and labour related to the matter. But **Maltby** is really not helpful, as the instant case is not about the relevant ingredients for assessing brief fees, but more about the

work the parties had expressly agreed to do, and the manner and the amount they had expressly agreed to pay for it.

[64] In my view, brief and refresher fees were not payable in the circumstances of this case either pursuant to the retainer agreement or by quantum meruit. Sykes J was therefore correct and there is no merit to this ground of appeal and the submission on quantum meruit.

Conclusion

[65] In all these circumstances, the appeal against Sykes J's decision ought to be dismissed with costs to Digicel to be taxed if not agreed.

SINCLAIR-HAYNES JA

[66] I agree and have nothing to add.

EDWARDS JA

[67] I too agree and have nothing useful to add.

PHILLIPS JA

ORDER

1. The appeal is dismissed.
2. Costs to Digicel Mossell (Jamaica) Limited to be taxed if not agreed.