COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2013/CLE/gen/00134

BETWEEN

LOCKHART & CO
(formerly Lockhart & Munroe)
(A Firm)

Plaintiff

AND

KENNETH HIGGS
(In his personal capacity and as Executor and Trustee of the Estate of the late Clothilda Higgs, deceased)

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Damian Gomez KC with Mr. Norwood Rolle for the Plaintiff
Mrs. Bridget Francis-Butler for the Defendant

Hearing Dates: 27, 28, June 2017, 30 July 2018, 6 December 2022, 28 December 2022, 30 December 2022

Contract - Breach of contract – Limitation Act – Statute of Limitation – Running account – Time runs afresh from date of last payment on account –Unaccounted payments

The Plaintiff, a firm of attorneys, sued the Defendant for bills allegedly owing as a result of the firm's representation of the Defendant and his late mother in proceedings both in the Supreme Court and the Court of Appeal.

The Defendant alleges that he paid all fees as he was billed. The Defendant further says that Plaintiff's claim is barred by the Limitation Act and, in any event, even if the claim is not statute-barred, the Plaintiff has not properly accounted for fees paid by him and, if any fees are owing, it should be taxed by the Registrar. The Plaintiff contends that, as this is a running account, it is entitled to recover its fees for work done from the date of the last payment which was on or about 18 January 2010.

HELD: Finding that the Plaintiff's Writ of Summons filed on 31 January 2013 is not statute-barred since time began to run afresh from the date when the last payment was made on or about 18 January 2010, however, the Amended Writ of Summons filed on 21 November

2016 is statute-barred since more than six years have elapsed since the date of the last payment. Finding also that the sum of $43,000.00 was received by the Plaintiff but was unaccounted for in the Statement of Accounts, that sum is deducted leaving a balance of $57,187.50 to which the Plaintiff is entitled for legal work done. The Plaintiff is also entitled to interest at the statutory rate of 6.25% from the date of judgment to the date of payment and 50% of its costs to be taxed if not agreed given the divided success of each party.

1. He who asserts must prove. On a balance of probabilities, the Plaintiff has proved that fees of $57,187.50 are outstanding for work done.

2. The Plaintiff represented the Defendant both in his personal capacity and as one of the Executors of the Estate of his deceased mother.

3. In the case of current account, where the debtor-creditor relationship of the parties is recorded in one entire account into which all liabilities and payments are carried in order of date as a course of dealing extending over a considerable period, the true nature of the debtor's liability is a single and undivided debt for the amount of the balance due on the account for the time being without regard to the several items which as a matter of history contribute to that balance: **Re Footman Bower and Co. Ltd** (1961) 2 All ER 161 and **Woodside v Show Off Ltd** [1998] BHJ J. No. 10 relied upon.

4. The Writ of Summons filed on 31 January 2013 is not barred by limitation since the last payment on account of $24,462.50 was made on or about 18 January 2010. This being a running account, time begins to run afresh from the date of that payment. However, the Amended Writ filed on 21 November 2016 is statute-barred as it is outside the six-year period for pursuing any claim in contract:

5. The sum of $43,000.00 which was received by the Plaintiff but unaccounted for, has been deducted from the Plaintiff's entitlement of $100,187.50.

6. Parties are bound by their pleadings and a party cannot seek to advance a case that is not expressly pleaded: **Glendon Rolle t/a Lord Ellor & Co. v Scotiabank (Bahamas) Limited** 2017/CLE/gen/01294 (Bahamas Judiciary website) (now on appeal) relied upon. A party cannot raise, in submission, issues which have not been pleaded.

JUDGMENT

Charles Snr. J:

Introduction

[1] This is a claim in contract in which Lockhart & Co. ("the Plaintiff"), a firm of attorneys-at-law, claims the sum of $272,927.00 for services rendered to Kenneth Higgs ("the Defendant") at the Defendant's request in various matters before the Supreme Court and the Court of Appeal. The Defendant denies that he owes the Plaintiff the sums alleged or, at all. He says that the Plaintiff did not account for all payments made and has breached the retainer agreement and instructions. The

Defendant further alleges that the Plaintiff's claim is statute barred under section 5(1)(a) of the Limitation Act, 1995 ("the Act").

[2] The trial commenced in June 2017 but there was a hiatus before the parties returned to Court on 6 December 2022 to resume it. Part of the delay was due to the Defendant's attorneys trying to obtain some transcripts of what took place before the Court of Appeal about two decades ago. During the intervening period, the Defendant sadly passed away on 6 June 2020 in the midst of the deadly Covid-19 pandemic. The Court extends its condolences to his family.

The pleadings

[3] By Amended Writ of Summons indorsed with a Statement of Claim filed on 21 November 2016, the Plaintiff alleges that, by contracts made orally between the period/year 2000 to 2007, it was agreed that the Plaintiff would represent the Defendant in the Supreme Court and, where necessary, in the Court of Appeal in the following actions:

1. Kenneth Higgs v Leshelmayas Inv. Co. Ltd.;
2. Leshelmayas Inv. Co. Ltd. v Kenneth Higgs;
3. Highpoint Estates Ltd. v Kenneth Higgs et al;
4. Imperial Mattress v Kenneth Higgs and;
5. Neely's of Nassau v Kenneth Higgs

[4] It was an express or alternatively an implied term of the agreements that the Defendant would pay the Plaintiff a reasonable sum for the work done. Further, it was an implied term of the agreement that those sums would be paid within a reasonable time after the completion of the work. The work was completed at various times ending in 2007. The Defendant, in breach of the agreements, failed and/or refused to pay the balance of sums due in the amount of $242,927.00. The particulars of the work done are set out in paragraph 4 of the Statement of Claim. The Plaintiff asserts that the invoices were delivered to the Defendant in the respective Bills of Cost under cover of letter dated 18 October 2016 and a statement dated 19 January 2010.

[5] Pursuant to the Defendant's request, the Plaintiff provided Further and Better Particulars of the work performed over the period 2000 to 2007 on 1 April 2016. Comprehensive Bills of Costs in respect of the work done were also provided to the Defendant's Counsel, Mrs. Butler, under cover of letter dated 18 October 2016.

[6] In his Amended Defence filed on 28 November 2016, the Defendant admitted that the Plaintiff represented him but asserted that the Plaintiff represented him solely in his capacity as one of the executors of the Estate of his late mother, Clothilda Higgs.

[7] In paragraph 4, the Defendant alleged that the Plaintiff never provided him with the statement dated 19 January 2010. The Defendant maintained that the Plaintiff was paid all funds that were requested of him during the course of any such representation. The Defendant put the Plaintiff to strict proof of its allegation.

[8] In paragraph 5, the Defendant averred that, by letter dated 31 December 2012, he received from the Plaintiff a request for payment of a statement of account outlining a final billing. According to the Defendant, the Plaintiff has not accounted for all monies paid by him and is in breach of the Bahamas Bar (Code of Professional Conduct) Regulations, Rule X and, to date, the Plaintiff has not provided to him full particulars of the said billing despite a request to do so. The Defendant therefore put the Plaintiff to strict proof and requests that any bill of costs be taxed if not agreed.

[9] The Defendant further alleged that, pursuant to section 5(1)(a) of the Limitation Act, 1995, the Plaintiff is barred from pursuing any claim for breach of contract.

Agreed facts

[10] In a Statement of Facts and Issues filed on 2 May 2017, the parties have agreed to the following facts:

1. By oral contracts made between the period 2000 to 2007, the Plaintiff provided legal services to the Defendant in the Supreme Court and where

necessary, in the Court of Appeal in the 5 matters referred to in paragraph 2 of the Amended Statement of Claim.

2. The Plaintiff tendered "interim statements" of account which the Defendant paid.

3. The Plaintiff tendered its "final" statement of account under cover of letter dated 11 November 2011, in the amount of $100,187.50 which the Defendant disputed. By letter dated 24 August 2012, the Defendant, by his son, Albert Higgs ("Albert"), wrote and, I selectively quote:

> **"At this time your firm held the sum of forty six thousand ($46,000.00) dollars on behalf of my father, Mr. Kenneth Higgs by way of a sale transaction. I am advised that the sum of twenty three thousand ($23,000.00) dollars was forwarded to the chambers of Dennis Gomez & Co.; and the balance retained by your firm. Despite the acknowledgement, your firm now claims to be owed in excess of one hundred thousand dollars."**

4. The Defendant admits that there were contracts made between them but says that he was represented "*solely in his capacity as one of the Executors of the Estate of the late Clothilda Higgs deceased."*

5. The Defendant says that *save for Bills provided pursuant to the order of the Court dated 27 July 2016,* he has not been provided with full particulars in respect of work done or completed on his behalf, nor has *"the Plaintiff accounted for all the monies paid by the Defendant."*

The issues

[11] The parties agreed on the issues to be determined. In my opinion, the following issues fall for consideration namely:

(1) In what capacity was the Defendant represented by the Plaintiff?

(2) Is the Plaintiff debarred from pursuing its claim pursuant to section 5(1)(a) of the Limitation Act, 1995?

(3) When does time begin to run; alternatively, when does time stop running?

(4) Were there unaccounted fees which were paid by the Defendant to the Plaintiff?

(5) Whether the Defendant authorised or caused a payment to be made to the Plaintiff or any other firm or person on or about 28 January 2010?

(6) Is the Plaintiff entitled to the sum of $242,927.00 in circumstances where it has provided to the Defendant its "final billing" in the sum of $100,187.50?

Issue 1: In what capacity was the Defendant represented by the Plaintiff?

[12] In paragraph 2 of his Amended Defence, the Defendant denied the capacity in which the Plaintiff represented him in the actions. He repeated this denial in his witness statements and also in his oral evidence.

[13] In her written submissions, Mrs. Butler acting as Counsel for the Defendant, accepted that while the various actions were pursued against the Defendant personally he has always instructed Counsel to defend the actions in his capacity as executor and trustee of the estate of his late mother.

[14] Mr. Gomez KC, representing the Plaintiff, quite correctly submitted that the fact of the capacity or capacities in which the Plaintiff represented the Defendant is a matter of public record and can be gleaned from the heading of the respective actions. In the actions mentioned in the Amended Writ at paragraph 2(b) and (d), the Defendant was sued solely in his personal capacity.

[15] In paragraph 2 of his witness statement filed on 19 May 2017, Albert stated that the Plaintiff was retained to represent the Defendant in his capacity as one of the executors of the Estate of the late Clothilda Higgs in various matters. During Albert's testimony to the Court on 6 December 2022, he was questioned about that. After a bit of meandering, he was asked by the Court to answer the question and he hesitatingly admitted that the Plaintiff represented the Defendant **both** in

his personal capacity and in his representative capacities. He said "*Mr. Rolle appeared for Kenneth Higgs in his two capacities*."

[16] Further, at paras 12 and 14 of his Affidavit exhibited to the Affidavit of Albert Higgs filed on 12 February 2018, the Defendant himself stated that the appeal in the matter involving Leshelmaryas Investment company Limited was brought "*by me both in my personal capacity and in my representative capacity as one of the Executors of my late mother's estate*." Still further, at para 7 of that same Affidavit, the Defendant asserted:

> **"I was sued in the original partition proceedings [meaning the matter with Leshelmaryas] at first instance in two capacities, namely:**
>
> **(1) personally (as First Defendant); and**
>
> **(2) as one of the Executors of the will of my late mother, Clothilda Higgs (as Second Defendant)."**

[17] I therefore find as a fact that the Plaintiff represented the Defendant **both** in his personal capacity and as one of the Executors of the estate of his late mother. But, as Mrs. Butler correctly stated, regardless of whether the Plaintiff represented the Defendant in his personal capacity or otherwise, the Defendant had agreed to pay reasonable fees for services that were rendered.

Issues 2 and 3: Limitation: when does time begin to run?

[18] The Defendant contended that, pursuant to section 5(1)(a) of the Act, the Plaintiff is statutorily-barred from pursuing any claim for breach of contract.

[19] Section 5 (1) of the Act provides:

> **"5 (1) <u>The following action shall not be brought after the expiry of 6 years from the date on which the cause of action accrued, that is to say</u>-**
>
> **(a) <u>Actions founded on simple contract (including quasi contract)</u> or on tort;**
> **(b) ……..;**
> **(c) …….;**
> **(d) ……..."**

[20] Mr. Gomez KC argued that when the Plaintiff's instructions were terminated, the Plaintiff's cause of action accrued on that date which is on or about 22 August 2007. Therefore, the Writ of Summons which was filed on 31 January 2013 was well within the period prescribed by section 5(1)(a) of the Act. So too, is the fact that the account was a running account and time runs afresh from the date of the last payment on account which is on or about 18 January 2010.

[21] The evidence of the sole witness for the Plaintiff, Mr. Wayne Munroe is helpful in this regard. Mr. Munroe stated that the Plaintiff provided representation to the Defendant both in the Supreme Court and in the Court of Appeal. The latest matter, Leshelmaryas was concluded in the Court of Appeal in or about 22 August 2007. In the matter involving Neely's of Nassau, the Defendant was sued personally and also in his capacity as Executor and Trustee of the Estate of his mother. In the matter involving High Point Estates, he was sued in his personal capacity; in the matter of Leshelmaryas Investment Company Limited, the Defendant was sued as a representative of the Estate of his mother.

[22] The Defendant through their main witness, Albert, who was/is responsible for conducting most of the financial affairs of his father (who was blind and had other disability challenges) stated, at para 10 of his witness statement, filed on 19 May 2017, that the Defendant's retainer with the Plaintiff was terminated sometime in 2007.

[23] In my analysis of the evidence, I find as a fact that the Defendant's retainer with the Plaintiff was terminated on or about 22 August 2007.

[24] The Plaintiff also sought to invoke section 38 of the Act and submitted that since a payment on account was made on 18 January 2010, the effect of that payment would have extended the limitation period pursuant to section 38(4) of the Act. Section 38(4) provides:

> **"Where any right of action has accrued to recover any debt of other liquidated pecuniary claim … and the person liable or accountable therefore acknowledges the claim and makes any payment in respect**

> **thereof, the right shall be deemed to have accrued on and not before the date of acknowledgement of the last payment."**

[25] And section 38(5) provides:

> **"Subject to the proviso to subsection (4), a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgement or payment."**

[26] In the present case, the Plaintiff claims as against the Defendant the sum of $272,927.00 representing the total sum of various invoices in respect of diverse matters to which the Plaintiff represented the Defendant between the period 2000 to 2007. The Plaintiff claims that the payment on the account on behalf of the Defendant on 18 January 2010 would have revived the various retainers and entitle them to amend their final billing amounts and to pursue their claim in respect of all outstanding fees due and owing.

[27] The issue as to whether the payment on account on or about 18 January 2010 (relied on to extend the limitation time pursuant to section 38(4) of the Act) was agreed upon by the parties is much in dispute by the Defendant. It is undisputed that the Plaintiff conducted a transaction on behalf of the Defendant in the sale of property to Kevin Ferguson from which they held the proceeds of sale in the sum of $44,925.00 by money order dated 10 January 2003. According to Albert, a meeting was held with Mr. Norwood Rolle on behalf of the Plaintiff, the Defendant, Eric Higgs and himself whereby the Plaintiff was instructed to pay the proceeds of sale to Eric Higgs, the other executor of the Estate of their grandmother.

[28] The Plaintiff, on the other hand, stated that they negotiated the cheque with Mr. Dennis Gomez, now deceased, that 50% of the proceeds be applied to the Plaintiff towards their outstanding accounts and the other 50% be paid to Mr. Gomez on his account. This is contained in a letter that Mr. Gomez wrote to the Plaintiff on 14 January 2010 which stated:

> **"<u>Re: Kenneth McKinney Higgs Sr. and the Estate of Clothilda Higgs deceased, Sale of Lotto (sic) Kevin Ferguson</u>**
>
> ***I write to confirm my instructions from my captioned clients*** **which I previously conveyed orally to Mr. Elliot B. Lockhart and Mr. Norwood Rolle of your firm.**
>
> **<u>The net proceeds of the sale which I am informed by Mr. Norwood Rolle, to be in the amount of $44,925.00 be applied as to *50% thereof to outstanding accounts of my clients with your firm* and the other 50% thereof to be paid to me on account of my said clients outstanding fee accounts due to my firm.</u>"**

[29] The Defendant alleges that he nor his son were aware of this agreement between counsel.

[30] Mr. Munroe was cross-examined on this money order in the sum of $44,925.00 made payable to Lockhart & Munroe on 10 January 2003, the remitter being Kevin Ferguson. He acknowledged that, on the face of it, Lockhart & Munroe would have received the remittance of $44,925.00. Mr. Munroe was further asked whether he was in any position to say whether or not there would have been any instructions from the client with respect to $44,925.00 deposited in the client's account. He stated that "*I know they were disbursed, some towards fees and some to, I think, Mr. Gomez (Dennis)*" and there would have been instructions from the client in respect of the disbursement. He further stated that he could not recall if the actual amount of the money order was sent to his (the Defendant) incoming counsel, Dennis Gomez and $23,000.00 which was the balance, would have been retained by Lockhart & Munroe towards fees.

[31] On a balance of probabilities, I prefer Mr. Munroe's evidence in this regard which is supported by documentary evidence. The letter from Mr. Gomez who was the Defendant's new attorney is very clear. In addition, in the Defendant's letter dated 24 August 2012 to Mr. Rolle, the Defendant did not state that 50% of that cheque was meant for Eric Higgs. The Defendant was simply querying the large sum of money owed to the Plaintiff despite retaining the sum of $23,000.00.

[32] I therefore find that the Defendant acknowledged that the sum of $23,000.00 was paid to the Plaintiff and consented to it since he never requested that that money be handed over to Eric Higgs.

[33] With respect to the law on running accounts, the Plaintiff relies heavily on the judgment of Osadebay J (as he then was) in **Woodside v Show Off Ltd** [1998] BHS J. No. 10 where the learned judge, referring to the judgment of Buckley J in **Re Footman Bower and Co. Ltd.** (1961) 2 All E.R. 161, quoted extensively from the judgment with respect to the principles relating to account cases. At para 26 of the judgment, Osadebay J stated:

> **"In Clayton's Case Sir William Grant, M.R., was in fact dealing with a current account between banker and customer, but the rule known as "the rule in Clayton's Case" applies to any current account and is, in my judgment, applicable to the present case. Consequently, in accordance with that rule, the various credits are prima facie to be treated as applied in the order in which the debits and credits are set against each other in the account, each new credit being treated as discharging the earliest outstanding debit. This method of analyzing the account may be of great importance for the purpose of ascertaining various incidental matters affecting the debt; for instance, to what extent it is secured or guaranteed, where the security or guarantee extends to some only of the items in the account, or to what extent a former partner in a debtor firm is liable where there has been a change of the firm during the period covered by the account. It may also be of importance in ascertaining how far the balance in the account is contributed to by statute-barred items. It does not, however, in my view, affect the true nature of the debt itself. In the case of a current account, where the debtor-creditor relationship of the parties is recorded in one entire account into which all liabilities and payments are carried in order of date as a course of dealing extending over a considerable period, the true nature of the debtor's liability is, in my judgment, a single and undivided debt for the amount of the balance due on the account for the time being without regard to the several items which as a matter of history contribute to that balance. This was, I think, Sir William Grant's view of the matter, for in Clayton's Case, he said:**
>
> > **"But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the GBP 500 paid in on Monday, and this other to the account of the GBP 500 paid in on Tuesday. There is a fund of GBP 1,000 to draw upon, and that is enough. In such a case, there is no room for any other**

appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts."

It was also, I think, the view of Lord Cranworth L.C., when, in the passage I have cited from Nash v. Hodgson, he referred to a single debt consisting of several items. In the present case, the debits for goods supplied correspond to the sums paid in to which Sir William Grant, M.R., referred and, in my judgment, they constitute one blended obligation the parts of which have no longer any distinct existence. The rule in Clayton's Case merely provides a method of discovering how far the debtor is behindhand in discharging his obligation which accrued piecemeal over a period of time, and which elements of that obligation remain in operation.

When, as in the present case there is an account running between the parties which to the knowledge of both parties is of that kind and kept in that way, then if the debtor makes a payment "generally on account" it appears to me that he must be taken to be making it on account generally of whatever is owing on the balance of the account. A payment "on account" imports an acknowledgment of a liability for a larger sum (see Friend v. Young per Stirling, J.). When a payment is merely stated to be "on account" without the liability on account of which it is made being specified, one must first inquire what liabilities on the part of the payer to the recipient exists. If, on inquiry, it is found that the only liability is in respect of a balance due on current account, the natural conclusion to reach is, in my judgment, that the payment is made on account of that balance generally, not on account of any particular items contributing to that balance. Where, as may well have been the case as regards payments by the company to the applicant, a payment would, in accordance with the rule in Clayton's Case, be taken to discharge, say, three items on the debit side of the account entirely, and a fourth in part, it appears to me that it would be an abuse of language to describe the payment as made "on account" of those particular items. It would be still more fanciful, if at the date of payment the oldest outstanding debits were statute-barred. If (which has not yet, so far as I know, been decided) the inference that the debtor intended to appropriate the payment to non-statute-barred items to the exclusion of statute-barred items, is applicable in the case of a current account (the point left open by Lord Cranworth, L.C., in Nash v. Hodgson) an analysis of the account would be required before the particular item or items on account of which the debtor is to be supposed to have made the payment could be identified. If, on the other hand, that inference would not arise, it would follow that the debtor would be supposed to have made the payment on account of statute-barred items. Either position would, in my opinion, be very artificial.

> **The much more acceptable view seems to me to be that by making a payment generally on account the debtor makes it on account of the whole of his indebtedness, that is to say, on account of the balance outstanding and due at the date of payment….**
>
> **Consequently, in my judgment, on the occasion of each of the payments, time started to run afresh in respect of the balance then left outstanding."** [Emphasis added]

[34] Osadebay, J continued at para 27:

> **"It is my opinion that the statement of Buckley J. cited above accurately reflects the law applicable in cases on "Account" in the Bahamas and I so hold."**

[35] There was yet another assertion from the Defendant that the bills were final bills and they were paid when they were submitted. However, when one scrutinizes the bills, for example, NAR 287, NAR#1259 and NAR#1260, they are all Interim bills. On NAR 287, it is boldly written "*PLEASE NOTE THAT THIS IS AN INTERIM BILLING*". On NAR#1259 and NAR#1260, the words inscribed on those bills are "*Our fees on Interim Bill*." Despite Albert being hesitant in accepting that fact, it is manifestly clear that the bills were interim bills.

[36] Now, in accordance with the principles adumbrated by Osadebay, J in **Woodside**, the payment of $24,462.50 on 18 January 2010 and indeed other payments prior to that date imported an acknowledgment of a liability for a larger sum and was made on account of the whole of the Defendant's indebtedness, that is to say, on account of the balance outstanding and due at the date of the payment. That payment therefore reduced the acknowledged indebtedness.

[37] The principle derived from **Re Footman** and **Woodside** is that, in the case of current account, where the debtor-creditor relationship of the parties is recorded in one entire account into which all liabilities and payments are carried in order of date as a course of dealing extending over a considerable period, the true nature of the debtor's liability is a single and undivided debt for the amount of the balance due on the account for the time being without regard to the several items which as a matter of history contribute to that balance.

[38] Further, as to the question of whether the claim is statute-barred, the case of **Leisure Farm Corporation v Chow Tat Chow & Anor** [2019] 1 LNS 169, though persuasive authority originating from Malaysia, decided that the date of transactions within that running account does not matter for the purposes of limitation. A running account will only become statute-barred if more than six (6) years elapse between the supply of the last article under it and the last payment made on the account.

[39] Applying the above principles to the present case, it is clear that Writ of Summons filed on 31 January 2013 (for professional work done) is not barred by limitation since the last payment of $24,462.50 was on or around 18 January 2010. The Plaintiff tendered its "final" statement of account under cover of letter dated 31 December 2012 in the amount of $100,187.50. However, the Amended Writ filed on 21 November 2016 to increase the final billing to $242,927.00 is statute-barred as it is outside the six (6) year period for pursuing any claim in contract.

[40] I therefore find that the Plaintiff is entitled to claim the amount of $100,187.50 as time began to run afresh when the Defendant made a payment on account on or around 18 January 2010.

Issue 4: Were there non-accounting for fees paid by the Defendant to the Plaintiff?

[41] In para 2 of its Statement of Claim, the Plaintiff asserts that it represented the Defendant in five (5) actions, both in the Supreme Court and, where necessary, in the Court of Appeal. The Plaintiff further asserts, in para 4, that the work was completed at various times ending in 2007 and the Defendant breached the agreements in failing and/or refusing to pay the balance of the sums due in the amount of $242,927.00.

[42] In para 6 of his witness statement filed on 19 May 2017, Albert stated that throughout the retainer, he made regular payments on account, either by way of cash payments, personal cheques or by way of manager's cheques to the Plaintiff

for services rendered and the Plaintiff failed to provide receipts for payments made and failed to provide regular statements of accounts for the services rendered.

[43] The Plaintiff relied on the evidence of Mr. Munroe. He was a Partner in that Plaintiff's Firm until August 2010. He was in charge of the matters involving the Defendant, most of which were appealed to the Court of Appeal. He stated that the Plaintiff provided representation to the Defendant both in the Supreme Court and in the Court of Appeal.

[44] Mr. Munroe stated that the Firm provided representation for the Defendant and it tendered interim bills and received payments on those interim bills submitted to the Defendant. The last payment of $22,462.50 being paid on account of the balance outstanding on or about 18 January 2010. Under cover of letter dated 6 June 2017, the Plaintiff tendered a Statement of Account (estimated) in an attempt to settle the matter without analyzing each account requesting payment.

[45] Mr. Munroe asserted that, on all of the Statements of Account rendered to the Defendant, it was indicated that they were "Interim Bill". At no time did the Plaintiff represented that the Statements of Account were final.

[46] Mr. Munroe stated that it was only after the Defendant insisted on a detailed Bill of Costs, which he was entitled to do, was a detailed analysis of each step performed in the actions conducted which was provided to his Counsel under cover of letter dated 18 October 2016.

[47] Mr. Munroe further stated that the Defendant admitted in his Amended Defence that there was an agreement that the Plaintiff will provided representation to him and the only issue before the Court is the amount of the sums due and owing for providing legal representation to the Defendant.

[48] Mr. Munroe was extensively cross-examined by Mrs. Butler. He stated that he represented the Defendant. He could not recall the exact date but sometime in 2001 or 2002.

[49] He accepted that whenever the Defendant were provided with any bills, it would be paid. Cash payments would have been made to the Plaintiff but not exceeding $5,000.00 and receipts were always provided. He was cross-examined on the Statement of Account dated 31 December 2012. With respect to High Point Ltd, Mr. Munroe accepted that the invoice No. 287 in the sum of $35,000.00 was paid. The invoice No. 1257 would have already been paid. He could not say whether High Point was completed on 19 August 2003 and hence the Final Billing of $75,000.00. By letter dated 31 December 2012 from the Plaintiff to the Defendant which accompanied the Statement, it reads:

> **"<u>We advise that the amount claimed ($100,187.50) was based on our final billing as shown on the attached statement</u>.**
>
> **Your allegation or assertion that there was communication that "there was only a small sum outstanding" is categorically denied. We note the content of your aforementioned letter and we shall take the steps necessary to protect the firm's interest.**"

[50] Mr. Munroe stated that clients would get a receipt for payment so the allegation that the Defendant did not receive receipts for all payments made is a curious thing.

[51] Mr. Munroe was referred to a number of cheques which the Defendant says was not accounted for in the Statement of Account ending 31 December 2012.

[52] With respect to Imperial Mattress, there was an interim bill of $10,000.00 dated 19 August 2003 and the Defendant paid $10,000.00 leaving a balance of $0.00. There is an indication on the Statement of Account that there was a final billing of $40,000.00 with an amount of $30,000.00 due. Mr. Munroe agreed that only if the Defendant received the Statement of Account, he will realise that there is some kind of billing with respect to Imperial Mattress. By letter dated 18 October 2016, there was no detailed billing for Imperial Mattress. It was suggested to him that the detailed billing was never forthcoming. The billing for 1258 of $10,000.00 would an interim bill tendered in 2003. According to Mr. Munroe, there was a gross bill and

when asked whether this bill was statute barred, he stated that he was not in court to give evidence as a matter of law.

[53] Mr. Munroe acknowledged that the Plaintiff provided interim bills to the Defendant for various matters and that, by letter dated 31 December 2012 with the Statement of Account, that was when the request would have been made for payments of the remaining balance although it must have been made before that date because of the letter dated 24 August 2012 which spoke about the $23,000.00 to be applied. Mr. Munroe acknowledged that his representation of the Defendant terminated in 2007.

[54] Albert was the first witness called by the Defendant to refute Mr. Munroe's evidence of the amount that is owing by the Defendant. He filed his witness statement on 19 May 2017 which stood as his evidence in chief. Due to the Defendant's blindness and his disability, Albert was/is responsible to a great extent for conducting most of the financial affairs on his father's behalf and in accordance with his instructions. He stated that, throughout the retainer, he made regular payments on account, either by way of cash payments, personal cheques or by way of manager's cheques to the Plaintiff for services rendered. However, the Plaintiff failed to provide receipts for payment made and failed to provide regular statements of accounts for the services rendered.

[55] During cross-examination of Mr. Munroe, Mrs. Butler was able to demonstrate that a number of payments were made to the Plaintiff but are not reflected in the Statement of Account dated 31 December 2012 namely:

1. Manager's Cheque No. 00100406	$ 3,000.00
2. RBC Cheque No. 83	$10,000.00
3. RBC Cheque 973	$20,000.00
4. RBC Cheque 1102	$ 5,000.00
5. RBC Cheque 22	$ 5,000.00
Total paid and not accounted for	**$43,000.00**

[56] Mr. Higgs also stated that payment of cheques to his son, Albert, were also paid to the Plaintiff by way of cash payments in the course of services rendered. I agree with Mr. Munroe that it would be curious that Albert would not have received a receipt if he had paid cash to the Plaintiff. I also find it strange that Albert, whose demeanour I observed, and who, in my estimation, is an intelligent man, would not have requested that he be provided with a receipt.

[57] As mentioned before, the Plaintiff tendered its "final" statement of account under cover of letter dated 31 December 2012 in the amount of $100,187.50. I just found that the sum of $43,000.00 was unaccounted for. Therefore, the Plaintiff's entitlement for work done is $100,187.50 minus $43,000.00 = $57,187.50.

Issue 5: Whether the Defendant authorized or caused a payment to be made to the Plaintiff or any other firm on 28 January 2010

[58] In my considered opinion, this issue ought to have been challenged long ago but it might have been a hopeless attempt in any event for reasons set out below.

[59] I already alluded to the letter that the Defendant's then attorney, Dennis L. Gomez wrote to Attorney Gia C. Moxey of Lockhart & Co. on 14 January 2010 stating that "*I write to confirm my instructions from my captioned clients*…." The captioned clients were Kenneth McKinney Higgs and the Estate of Clothilda Higgs, deceased.

[60] Further on 24 August 2012, as is evident in a letter that Albert wrote to the Plaintiff, the Defendant was also aware that the cheque for $46,000.00 was disbursed in a manner where $23,000.00 was forwarded to the Chambers of Dennis Gomez & Co. and the balance retained by the Plaintiff. Albert did not say that that should not have occurred. Instead, he stated that "*despite the acknowledgment (receiving $23,000), your firm now claims to be owed in excess of one hundred thousand dollars.*"

[61] This issue lacks merit.

Other issues raised but not pleaded

[62] In their witness statements and written submissions, the Defendant raised a number of other issues including conflict of interest, transfer of files, confidential information and instructions. None of these were pleaded.

[63] Time and again, the courts have admonished parties with respect to the need for proper pleadings. In **Glendon Rolle t/a Lord Ellor & Co. v Scotiabank (Bahamas) Limited** 2017/CLE/gen/01294, this Court emphasized the importance of pleadings:

> **"[41] In Montague Investments Limited v Westminster College Ltd & Another [2015/CLE/gen/00845] – Judgment delivered on 31 March 2020 (Reported on BahamasJudiciary.com Website), this Court applied the principles emanating from Bahamas Ferries Limited v Charlene Rahming (SCCivApp No. 122 of 2018) and emphasized the necessity for proper pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what the issues between the parties are.**
>
> **[42] Shortly put, parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his (her) pleadings."**

[64] Since these issues have not been pleaded, there is no need for me to consider them any further.

Conclusion

[65] In this claim in contract, the Plaintiff claims as against the Defendant the sum of $272,927.00 representing the total sums of various invoices in respect of diverse matters to which they alleged that they represented the Defendant, in his personal capacity and/or in his capacity as executor and trustee under the Estate of his late mother between the periods 2000 to 2007. The Court finds that the last payment on account on behalf of the Defendant was made on or about 18 January 2010 which, according to the principles emanating from the cases of **Re Footman Bower and Co. Ltd** and **Woodside** (supra), revived the various retainers from that

date. Unfortunately, even though the account is called a running account, it became statute-barred if more than six (6) years elapse from the date of the last payment. In this case, the last payment was made on or about 18 January 2010. Therefore any claim after 17 January 2016 is statute-barred. The Amended Writ of Summons was filed on 21 November 2016 making it statute-barred. However, the Defendant is unable to run from the Writ of Summons filed on 31 January 2013 for $100,187.50 since the last payment was made less than six (6) years ago.

[66] Having also found that the sum of $43,000.00 was unaccounted for, I will deduct that sum from $100,187.50 leaving a balance of $57,187.50 representing the outstanding fees due to the Plaintiff for work done.

[67] There will be judgment for the Plaintiff in the sum of $57,187.50 with interest at the rate of 6.25% from today's date (date of judgment) to the date of payment.

[68] On the issue of costs, both parties have been successful on different issues: the Defendant in reducing the claim of the Plaintiff and the Plaintiff for successfully arguing that the account was a running account and time runs afresh from the date of the last payment as well as some other related issues. Given the divided success and, in the exercise of my discretion, I will make an order that the Plaintiff will get 50% of its costs to be taxed if not agreed.

Dated this 23rd day of February 2023

Indra H. Charles
Senior Justice