[2013] JMCA App 19

JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO 155/2011

APPLICATION NO 14/2012

BETWEEN	**HUGH LEVY**	**APPLICANT**
AND	**MERNEL COX** **YVONNE FORBES** **PEARL MCLAREN**	**RESPONDENTS**

Donald Scharschmidt QC instructed by Hugh Abel Levy & Company for the appellant

Mrs Sandra Minott-Phillips QC and Mrs Alexis Robinson instructed by Myers, Fletcher & Gordon for the respondent

28 May and 8 July 2013

IN CHAMBERS

PHILLIPS JA

[1] This is an application in which Mr Hugh Levy seeks to stay the execution of the decision of the Disciplinary Committee of the General Legal Council made on complaints No 180/98, 181/98 and 197/98 in the matters of Mernel Cox, Yvonne Forbes, Pearl McLaren vs Hugh Abel Levy, respectively, and in the matter of the Legal Profession Act 1971. In the decision delivered on the 10th December, 2011

the committee unanimously ordered that:

> "Pursuant to section 12(4) of the Legal Profession Act
>
> (a) The Attorney Mr Hugh Abel Levy is to pay a fine of Four Hundred thousand Dollars ($400,000.00)
>
> (b) The Attorney Mr Hugh Abel Levy is also to pay costs of FOUR HUNDRED THOUSAND DOLLARS ($400,000.00) of which Two Hundred and Fifty Thousand Dollars ($250,000.00) is to be paid to the Complainants and One Hundred and Fifty Thousand Dollars ($150,000.00) is to be paid to the General Legal Council
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> (c) The Attorney Mr Hugh Abel Levy is also to pay to the Complainants the sum of One Hundred and Forty-Four Thousand, Five Hundred and Twenty-Nine Dollars and Eighty-six cents ($144,529.86) held on deposit for them as at the 29th October 2012 and interest thereon to 31st December 2011."

[2] The application emanates from an appeal filed by Mr Hugh Levy ("the Appellant") which states that it is against Mernel Cox, Yvonne Forbes and Pearl McLaren (the complainants in the matter before the Disciplinary Committee (DC) of the General Legal Council (GLC)). The appeal is however against the decision of the DC and the parties should endeavour to have the notice of appeal regularized.

[3] The decision of the DC of the GLC meticulously states the facts in issue and the reasoning for their decision and will be summarised briefly in the paragraphs below.

[4] Mr Hugh Levy was retained to prepare the application for Probate of the Will of the deceased, Joseph Phillips. The deceased left the premises located at

277 Spanish Town Road to his daughters, Pearl McLaren, Yvonne Forbes and Mernel Cox (the complainants), who then decided to sell the premises and retained Mr Levy for that purpose. A tenant of the premises Josephine Reece expressed an interest in purchasing the property and in 1984 or 1985 Mr Levy prepared an agreement for sale that contained a provision making time of the essence. The agreement and transfer were executed by the complainants and returned to Mr Levy. However, Mr Levy for whatever reason did not stamp the agreement and the transaction came to a standstill. He made no distinct effort to move the matter forward. The purchasers' attorneys Messrs Orville Cox & Company wrote to Mr Levy requesting a closing statement, however he did not comply with this request. The complainants showed no interest in the progress of the sale, as they made no effort to contact Mr Levy for five years until January 1990. Ms Yvonne McGregor, the daughter of Ms McLaren, visited Jamaica and her mother indicated to her that she should check on the sale; it was at that point that Mr Levy renewed his efforts to make progress on the transaction.

[5] Mr Levy then contacted the purchaser to enquire if she was still interested in the sale and she indicated that she was so interested. He then proceeded to abandon the old agreement, which was late for stamping, and then drafted a new sale agreement without obtaining the permission of the complainants. He had the purchasers sign it and without obtaining the authority of the vendors he signed it on their behalf, and dated it 10 February 1990 and subsequently completed the sale. Mr Levy made no attempt to pay the purchase money to the

complainants. On 29 May 1990 the applicant sent a closing statement to Ms McLaren who wrote him a letter in response with "points needing clarification" and he failed to give a proper response to the letter. After making some unsuccessful efforts to get effective legal representation the Complainants eventually laid a complaint against Mr Levy in 1997.

[6] The DC found that Mr Levy's conduct amounted to professional negligence. They found that this oversight or failure by Mr Levy to act for a period of approximately five years was a breach of Canon IV(s) of the Legal Profession (Canons of Professional Ethics) Rules which states that:

> "in the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."

It also amounts to a breach of Canon IV (r) which reads as follows:

> "An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with all information as to the progress of the client's business with due expedition."

The committee found that Mr Levy had demonstrably failed to deal with his clients' business with all due expedition and failed to provide them with all information as to progress of their business with due expedition.

The DC stated that it was his professional responsibility as attorney for the complainants to drive the transaction through its various stages and bring it to a timely conclusion. Further, in taking on himself the authority to prepare and sign

a new agreement, which differed in a material respect from the old agreement in that the new agreement did not make time of the essence, and based on his unauthorised signing of the new agreement without notifying the complainants of his intention to do so and obtaining their instructions, his conduct amounted to professional misconduct.

[7] The DC based their orders upon the following:

> "1. Mr Levy having decided to prepare a new Agreement for Sale ought to have consulted the Complainants and obtained their instructions particularly as the new Agreement omitted a material term and he was now the only Attorney acting in the transaction. Perhaps time was no longer of the essence when the new agreement was made as the purchaser may have by then paid the balance of the purchase money to Mr. Levy.
>
> 2. Given all those circumstances and particularly the 5 to 6 years of inactivity in the transaction, Mr Levy ought to have first consulted the Vendors and make them aware of the present position and get their instructions in relation to the transaction generally and inform them that he was now acting for both parties.
>
> 3. We find that having taken it on himself to represent both parties in the later stages of the transaction Mr. Levy's judgment in the matter was impaired as he was no longer able to give his undivided attention to the Vendors' interests and this put him in breach of Canon IV (k).
>
> 4. Mr Levy having completed the transaction in 1990 made no attempt to disburse the purchase money following liberalisation of the Bank of Jamaica regulations buy rather chose to let the money remain in a savings account.

5. The complainants having not received the purchase money in 1985 have been deprived of its use for not only the period of the initial 5-year delay but also the subsequent ten years to the present time during which the impact of inflation has depleted it value to the complainants that has not been off-set by the interest which has been earned in the Savings account.

6. We find that Mr Levy did not act dishonestly in that there is no evidence that he benefitted in any way from the delay the complainants have suffered. There is no evidence he received the balance of the purchase money before 1990. Had he received it then it is unlikely that the Purchaser and her Attorneys would have remained silent and not demanded Title. Furthermore it is not likely the Purchaser would have continued to pay rent had Mr Levy received all of the purchase money. Mr Levy's failure to act was born purely out of neglect or oversight of the matter."

[8] The amended notice and grounds of appeal were filed on 16 January 2012 and the grounds are as follows:-

"1. The finding that Mr Levy in taking on himself the authority to prepare and sign a New Agreement for Sale dated 10th February, 1990 and one which differed in a material respect from the 1984 Agreement in that it did not make Time of the Essence completely exceeded his authority and to compound matters he then used five (5) year old [sic] Transfer to effect the Transfer pursuant to the 1990 Agreement is contrary to the evidence given in that Time was not of the Essence in the first Agreement as found by the Panel.

2. The Appellant was obliged to complete as a Contract had been signed by the Complainants.

3. The finding that the Appellant signed a New Contract in 1990 is in conflict with the evidence.

4. The failure of the Appellant to communicate with the Complainants between 1984 and 1990 does not amount to negligence as the evidence disclosed that the Complainants were at all times aware that the sale had not been completed as they were collecting rent.

5. The finding that the Panel cannot take any account of Mr Levy's opinion that the area around No. 227 Spanish Town Road, was deteriorating and falling in value as he is not a Real Estate Valuer and is therefore not competent to give an opinion in that regard – fails to appreciate that the Doctrine of Judicial Notice would apply.

6. The Appellant appeals against the Orders of the Panel in relation to the Costs and Fines ordered to be paid by the Appellants."

The Application for Stay

[9] Rule 2.11 (1) (b) Court of Appeal Rules 2002 (CAR) permits a single Judge of this court to order a stay of execution of a judgment pending the hearing of an appeal. The rules have not sought to fetter the discretion of the court. The well known case of **Wilson v Church No 2** (1879) 12 CHD 454, is a good starting point with regard to consideration of the principles relevant to a stay of execution pending appeal. In that case, it was held that:

> "When a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory;..."

The question of whether the appeal could be rendered nugatory is certainly an

important matter for consideration in all applications for stay of execution, particularly when a party is exercising his undoubted right of appeal. In considering whether to grant or refuse a stay, the traditional approach of the courts as established by **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887 was to apply a two-fold test which required that the applicant demonstrate that (i) he had some prospect of succeeding in his appeal and (ii) without the stay he would be ruined. **Hammond Suddard Solicitors v Agrichem International International Holding Limited** [2001] EWCA Civ 2065 is however instructive. In that case, Clarke LJ proposed the adoption of a balancing exercise within the context of the interests of justice in granting or refusal of a stay. At paragraph 22 he said:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

[10] In the cases of **Reliant Enterprise Communications Limited & Another v Infochannel Limited** SCCA No 99/2009 Application Nos 144 & 181/2009 delivered 2 December 2009; **Cable and Wireless Jamaica Ltd v**

Digicel Jamaica Ltd SCCA No 148/09 Application No 169/09 delivered 16 December 2009; and **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Paul Lowe** Application No 103/2010 [2011] JMCA App 1, this court has given approval and support to the proposition that the interests of justice is an essential element in a decision to grant or refuse a stay.

The prospect of success

[11] I turn now to consider whether the applicant has presented a good arguable appeal. Six grounds of appeal have been filed. I will consider grounds 1, 2 and 4 together. Mr Levy as reported in the notes of evidence stated that he prepared and signed a new agreement for sale without receiving authorisation from the vendors. Further, he stated that he omitted a material aspect of the old agreement and did not make time of the essence in the new agreement. Mr Levy also asserted before the DC that as the complainants signed the old agreement, he was therefore obliged to complete the sale and that his lack of communication with the complainants for five years did not amount to negligence as the complainants were aware that the sale had not been completed, particularly since they were still collecting rent. In the decision of the DC the case of **Midland Bank Trust Company Ltd v Hett Stubbs & Kemp** [1979] Ch. 384 was cited for the proposition that among the duties of a solicitor is the obligation to devote to his client's business that reasonable care and skill to be expected from a normally careful and competent practitioner. Among these

duties are: (a) a duty to consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him, and (b) a duty to keep his client informed to such an extent as may be necessary according to the same criteria. Indeed the following quote, was referred to in one of the leading texts on professional negligence, namely Jackson and Powell, 4th edition at paragraph 4.119 speaking to the further obligations of the solicitor;

> "A client needs to be informed of material developments in order to decide whether he should give further instructions to the solicitor or modify his existing instructions."

[12] In consideration whether the applicant had the authority to sign the agreement on behalf of his client, the case of **Gavaghan v Edwards** [1961] 2 All ER 477 was referred to in detail by the DC, citing the speech of Danckwerts LJ where he stated:

> "it is no doubt correct (and there are cases in which it was so held) that the mere fact of the relationship of solicitor and client being constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum….. But that is not a hard and fast rule which is not capable of alteration on the facts of the case, as it seems to me from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client. There are cases where such an authority has been implied from the terms of the particular relationship created on the facts of the case."

Having canvassed several other authorities dealing with the scope of the attorneys' authority in representing a client in conveyancing matters the DC

concluded that the cases established that signing an agreement for sale as agent for the client was outside the normal role of the attorney. Specific authority should be conferred, and authority for attorneys to act outside the normal role of their profession and to enter into a binding agreement for sale should not be lightly inferred from vague or ambiguous language.

[13] Based on the foregoing authorities, Mr Levy may have a difficulty endeavouring to show that the ruling that he was guilty of professional conduct, can be successfully challenged as he has not put anything before me to show that any authority was given to him by the complainants, to act as he did.

[14] Mr Levy in ground of appeal 1 states that the finding by the DC that time was not of the essence in the old agreement is contrary to what was the actual reality. I have not had sight of the old agreement, as it was not in the bundle of documents, however the new agreement, located on page 6 of the bundle does not bear the time of the essence clause. It would not be a difficult matter to discern whether the old agreement contains the clause which the new agreement does not, which could determine grounds 1, 2 and 4.

[15] In relation to ground of appeal 3, the finding that the applicant had not signed a new contract in 1990 and which was in conflict with the evidence, on page 10 of the notes of evidence, Mr Levy stated that:

> "The first one they signed but the second one I signed because they were all over the place."

The evidence as stated above appears to conflict with ground 3 as expressed.

[16] With regard to ground of appeal 5, the applicant stated that the finding of the DC that it could not take any account of Mr Levy's opinion that the area around no 227 Spanish Town Road, had deteriorated and had fallen in value, failed to appreciate the doctrine of judicial notice. The DC had noted that the Court's approach to judicial notice is stated in a decision of this Court, **R v Armstrong and Smith** (1971) 12 JLR 302, in that:

> "...the Court will not take judicial notice of a fact which is disputable or controvertible, nor will it take judicial notice of particular as opposed to general facts."

It does appear that the best way to have obtained the value of the property in 1990 may have been to obtain the services of a real estate valuator. On the face of it, these do not seem to be circumstances in respect of which a court would take judicial notice.

In the light of the foregoing there does not appear to be an arguable appeal.

Financial Ruin

[17] If one were to consider the second limb of the **Linotype-Hell Finance Limited** test as to whether Mr Levy would be in ruined without a stay, it is necessary to consider the evidence presented by him in his affidavits in support of the application. In his affidavit filed on 27 January 2012, he merely stated the particulars of the complaint of Ms Yvonne McGregor where she alleged that he was in breach of Canon IV(s) and IV (r) of the Professional Ethics Rules, and that

he had acted with inexcusable or deplorable negligence in the performance of his duties.

[18] On 13 February 2013 when the application came before Dukharan JA, he ruled that the affidavit in support, filed at that time, did not state the reasons why a stay of execution should be granted until appeal. He indicated that "a more fulsome affidavit is necessary".

[19] In his supplemental affidavit filed on 13 March 2013, the applicant stated that he opened a blocked account with the proceeds in CIBC First Caribbean International Bank, Duke Street Branch and sent each respondent signature cards that would afford them access to the money and effectively denied himself any ability to access the money in that account. He stated that the complainants never signed and returned them as requested with the result that the money remained untouched in the account and the bank then declared it an inactive account and refused to give Mr Levy information concerning the account.

[20] In the applicant's further supplemental affidavit filed on 24 May 2013, he stated that the verdict of the DC was manifestly inconsistent with the evidence and excessive in the circumstances as at no material time did he convert the purchase money to his own use and once the balance of purchase money was paid it was immediately deposited into an interest bearing account for the use of the three complainants who lived outside the island of Jamaica. He also stated that they live in diverse parts of the world and they are subject to changing their

addresses without notifying the applicant and that therefore it would prove difficult to retrieve the money and he would experience great hardship and find it near impossible to obtain a refund from the complainants in the event of the verdict being reversed.

[21] It is important to note however, that this matter is not one in relation to misappropriation of client's money. The decision by the DC concerned, as stated previously, breach of canons IV(r) and (s) of the Rules, relating to the performance by the attorney in respect of his duties, and providing the client with information about the due progress of his business.

[22] In my opinion, the abovementioned affidavits do not provide any information whatsoever as to whether the applicant would be likely to suffer any financial ruin, or experience any hardship if the stay is not granted. A mere statement by the applicant to that effect is insufficient. Additionally, there is no evidence of any risk of the applicant not being able to recover any amount paid to the GLC, it being a statutory body, whether by way of fine or costs. However, the applicant did express a serious concern that any amounts paid to the complainants in costs before the appeal was heard, who are scattered all around the globe may be difficult to recover if the applicant were to be successful on appeal. Mrs Sandra Minott-Phillips, QC on behalf of the GLC submitted that the funds payable in the judgment of the DC to the complainants could be paid to the GLC, which could hold the money in an escrow account on behalf of the

complainants, until the determination of the appeal. In **Wilson v Church**, referred to earlier, Cotton LJ on page 458 stated that:

> "I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit; they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund."

I agree those funds ordered to be paid to the complainants should be paid to the GLC and held until the determination of the appeal. Also during the hearing of the application it did not appear to be in dispute that the funds held on deposit and referred to in paragraph (c) of the order could be paid out forthwith to the complainants.

[23] Further, it is of importance to note that the applicant did not explore the option available to him under section 12A of the Legal Profession Act. The section reads: -

> 12A. —1) The Committee shall have power, upon the application of a party against or with respect to whom it has made an order, to suspend the filing thereof with the Registrar.
>
> 2) The filing of an order may be suspended under this section for a period ending not later than-
>
> (a) the period prescribed for the filing of

an appeal against the order; or

(b) where such an appeal is filed, the date on which the appeal is determined.

3) Where the filing of an order is suspended under this section, the order shall not take effect until it is filed with the Registrar and if the order is an order that an attorney be suspended from practice, the period of suspension shall be deemed to commence on the date of the filing of the order with the Registrar."

Having not made this application at the time of the delivery of the decision of the DC, the applicant would have been constrained to make this application before a single judge of appeal. Had he made the application under section 12A he may have obtained an order suspending the filing of the decision with the registrar and had an appeal already been filed the order would have been suspended until the determination of the appeal, as the order would not have taken effect until then. However, that not having been done, the applicant as indicated was required to pursue this approach if wishing to stay execution of the judgment of the DC.

[24] In the circumstances, there is nothing submitted by the applicant to show a good arguable appeal nor a risk of injustice to him, nor that he would suffer irremediable harm to warrant a stay of execution of the orders.

Conclusion

[25] Accordingly, the application for a stay of execution of the judgment is refused with costs to the respondent. The costs ordered by the DC to be paid to the complainants, in the sum of J$250,000.00 should be paid to the GLC to be held pending determination of the appeal. The funds held in the deposit account should be paid over to the complainants and/or their agent with interest as ordered, at the earliest possible opportunity. Also, I recommend that the matter be determined with urgency, and that the appeal be set down for hearing in the following term.