[2013] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO 147/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**ELSIE TAYLOR**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Joseph Jarrett instructed by Joseph Jarrett & Co for the appellant

John Vassell QC and William Panton instructed by DunnCox for the respondent

13 November 2012; 18 January and 11 November 2013

PANTON P

Introduction

[1] On 18 January 2013, we dismissed the appeal herein, affirmed the order of the General Legal Council and awarded costs to the respondent, to be agreed or taxed.

[2] The appeal was against a decision of the disciplinary committee of the General Legal Council ("the disciplinary committee") made on 30 October 2010 whereby the

appellant was found guilty of professional misconduct. The order of the disciplinary committee was in the following terms:

> "(i) The Respondent is guilty of professional misconduct having breached Cannons I (b), VI (a) and VIII (b) of the Cannons [sic] of the Legal Profession (Cannons [sic] of Professional Ethics) Rules, 1978.
>
> (ii) The Respondent is ordered to pay to Messrs, Nunes, Scholefield, Deleon & Co. for the account of Mr. and Mrs. Patrick Anderson, the sum of $151,500.00 with interest thereon at the rate of 15% per annum from May 7, 1992 to the date of payment.
>
> (iii) The Respondent is suspended from practice as an Attorney-at-Law entitled to practice in the Courts of Jamaica for a period of one (1) year from the date of this order.
>
> (iv) The costs of these proceedings fixed in the sum of $200,000.00 are to be paid by the Respondent $100,000.00 of which is to be paid to the Complainant and $100,000.00 to the General Legal Council."

The Canons

[3] The relevant canons are as follows:

> I (b) "An attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behavior which may tend to discredit the profession of which he is a member."
>
> VI (a) "An Attorney's conduct towards his fellow Attorneys shall be characterized by courtesy and good faith and he shall not permit ill-feeling between clients to affect his

relationship with his fellow Attorneys or his demeanour towards the opposing party."

VIII (b) "Where in any particular matter explicit ethical guidance does not exist, an Attorney shall determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

The complaint

[4] The complaint against the appellant was laid as far back as 30 July 1998 by Mr Patrick Brooks, who is now a judge of appeal, but was then a partner in the law firm of Messrs Nunes, Scholefield, DeLeon & Co. The complainant filed an affidavit in support of his complaint which was that:

> "…neither Mrs Taylor nor A. Freddie Brown & Co. have sought to explain what has occurred with the deposit paid to Mrs. Taylor or to set out the status of Mr. & Mrs. Anderson in respect of the said land and my requests to Mrs. Taylor have gone unanswered."

The factual background

[5] In his affidavit supporting the complaint, the complainant stated that in 1992, he acted on behalf of the purchasers, Patrick and Diana Anderson, in respect of an agreement for sale whereas the appellant acted on behalf of the vendor. The complainant alleged that by letter dated 22 April 1992, on the appellant's letterhead, the appellant sent him the draft agreement for sale for execution by the purchasers. The letter reads thus:

"Re: Sale of Lot 16 Belgrade Heights, Havendale, Kingston 19 – B.A. Watkis to Patrick Anderson et ux

Find enclosed Agreement for Sale in duplicate for execution by your client after your perusal [sic].

The Title to this Lot will be ready within the time specified.

Intrastruture [sic] to this Sub-Division is already well under way and will soon be completed. Copy of the Parent Title is also enclosed.

Yours faithfully,
ELSIE A. TAYLOR

Per:
Elsie A. Taylor (Mrs.)"

[6] The agreement for sale was amended and duly executed by the purchasers and returned under cover letter dated 29 April 1992 to the appellant at her address at 60 Laws Street, Kingston. A cheque in the sum of $150,000.00 representing the deposit was also sent to the appellant under cover letter dated 1 May 1992. By letter dated 5 May 1992, the appellant informed the complainant that she was in possession of an instrument of transfer that had been duly signed by the vendor, Mr Bertram Watkis. By the said letter, the appellant sent to the complainant a photocopy of the agreement for sale which was signed on behalf of the vendor by Mel Brown & Company as agents for the vendor.

[7] The complainant further alleged that between 5 May 1992 and 5 April 1993, he wrote eight letters to the appellant and made several telephone calls in respect of the said agreement for sale. On the latter date, the complainant sent to the appellant a

copy of a notice, dated the said day, requiring completion of the sale agreement. Due to a failure to complete the sale, the complainant "caused a suit to be filed against the Vendor for specific performance of the Agreement for Sale".

[8] The vendor, in his defence to the action, denied that he had entered into the agreement or had authorized any person to sign an agreement for sale on his behalf in respect of the said land. On 16 October 1997, the complainant wrote to the appellant informing her of the vendor's position and sought clarification on the matter. The letter reads:

> "We write to inform you that we have filed a Writ against Mr. Watkis claiming Specific Performance of the Agreement for Sale in the captioned matter.
>
> Mr. Watkis has through Ms. Marina Sakhno filed an Appearance to the Writ and has denied knowledge of:-
>
> (a) Messrs. Brown & Co., acting as his agents for the purposes of the sale, and,
>
> (b) anything concerning a sale to Mr. & Mrs. Anderson.
>
> Interestingly, Ms. Sakhno has alleged that in an Affidavit filed by you in Suit No. W. 114/96 you disclosed to the Court what was said to be all the Agreements in which you acted for Mr. Watkis and that this Agreement was not included in those listed. We are completely baffled by that allegation concerning:-
>
> (a) the correspondence in this matter between you and us since April, 1992;
>
> (b) the deposit being paid to you;
>
> (c) the undertaking for the payment of the

> balance of the purchase price being made to you by the Bank of Nova Scotia Jamaica Limited.
>
> We therefore ask for your explanation of the situation within seven (7) days of the date hereof."

This letter was copied to all the relevant parties. It prompted a response from the appellant by way of a letter dated 31 October 1997, which was copied to the General Legal Council. It reads thus:

> "We refer to your letter dated 16th October, 1997 on the captioned matter.
>
> As far as the writer hereof is aware Mr. Watkis had signed over completed Agreements for Sale and signed Transfer to Mr. A. Freddie Brown, Attorney-at-Law for two (2) lots at Belgrade Manors including Lot 16. If these lots were sold subsequently they were not sold by me or anyone on my behalf.
>
> We attach hereto a copy letter addressed to you from Mr. A. Freddie Brown which informed you that he had Carriage of Sale for Lot 16.
>
> All correspondence from the Bank of Nova Scotia were passed over to A. Freddie Brown, Attorney-at-Law who had the Carriage of Sale for Lot 16.
>
> We also attach hereto copy letter regarding the subdivision which was sent to you by Mr. A. Freddie Brown.
>
> We regret the delay in responding to your letter."

[9] The letter from A Freddie Brown to the complainant, mentioned in the appellant's response above, informing that he had carriage of sale of the land was dated 20 March 1996 and reads as follows:

> "In response to the above, I am the Attorney-at-Law, A. Freddie Brown, who is responsible for Lot 16 Title due to Mr. Patrick Anderson.
>
> We had difficulty getting final approval for this sub-division. However, it has now been approved, and Mr. Richard Haddad, the Commissioned Land Surveyor is preparing the pre-check Plan which will be forwarded to the Titles Office soon by Mrs. Elsie Taylor, the Attorney-at-Law responsible for splintering the Title.
>
> In a short while Title will be ready."

[10] In response to the letters from the appellant and A Freddie Brown, the complainant, on 4 November 1997 wrote thus to the appellant:

> "We have your letter of October 31, 1997.
>
> Your letter fails to acknowledge that you had carriage of sale since 1992 and that the deposit was paid to you.
>
> We are obliged to ask you specifically:-
>
> (a) whether the Agreement for Sale was stamped for the sum representing stamp duty and transfer tax;
>
> (b) whether the letters of April 22, 1992 and 5th May, 1992 (copies attached) were prepared in your office;
>
> (c) whether the said letters were issued from your office with your authority;
>
> (d) what you did with the sum of $150,000.00 paid to you on account of this Agreement.
>
> Your continued insistence of ignorance of this matter is, frankly, very frightening considering the level of correspondence between us (including telephone conversations between yourself and the undersigned) and needs some prompt forthright clarification from you.

> We wish to point out that the letter from A. Freddie Brown to us is dated March 20, 1996. Our first contact with you was in April, 1992.
>
> We are genuinely quite puzzled by your position and need your explanation."

This letter was copied to Mr and Mrs Patrick Anderson, Mel Brown, Freddie & Company and A Freddie Brown & Co.

[11] Based on the correspondence from the attorneys-at-law, the complainant formed the view that he and his clients had been misled by the appellant "as to the execution of an Agreement for Sale on behalf of the Vendor", and into believing that she acted on behalf of the vendor in respect of this land. The complainant also alleged that on the basis of the letters from the appellant "it seems that she secured the payment to her of a deposit in respect of the said land without having any authority to do so".

[12] The appellant filed an affidavit in response to the affidavit of the complainant dated 29 August 2000. In that affidavit, the appellant denied that she "acted on behalf of or represented the Vendor regarding the Sale/Purchase" of the said land. She also denied that she had sent the draft agreement for sale to the complainant for execution by the purchasers. She deponed that she had several printed agreement for sale forms in her office, on which her name appeared in the carriage of sale section. These, she said, were kept on the secretary's desk. "Neither at the material time or at any other time did FREDDY BROWN/MEL BROWN & COMPANY work [sic]

for me and specifically he did not work for me in relation to this transaction in question", asserted the appellant. She further said that Freddie Brown had rented two rooms from her at 60 Laws Street, from which he conducted his "legal business" and that they had separate practices.

[13] The appellant denied receiving the letter of 1 May 1992 from the complainant stating, in part, that the sum of $150,000.00 was being sent on her "undertaking not to negotiate same until the Agreement has been sent to us duly executed by the vendor". However, she admitted that the said cheque was handed to her by her secretary and she (the appellant) endorsed it "payable to Mel Brown & Company and handed same to Freddy Brown". The appellant also denied that she wrote the letter of 5 May 1992, to the complainant stating inter alia, that a copy of the agreement for sale duly executed on behalf of the vendor was enclosed. She said that she only became aware of the said letter in June 2000. She further denied receiving a copy of the notice dated 5 April 1993 requiring completion and said that she saw that letter for the first time in June 1998 after a copy had been sent to her along with other documents by the complainant. She was also unaware that a suit had been filed against the vendor for specific performance of the agreement for sale.

[14] The appellant asserted that she had not given Mr Freddie Brown or anyone else permission to use her letterheads. She said she was not present at any conversation between the complainant and Mr Freddie Brown in her office about this matter and that in late 1996, Mr Brown vacated the premises rented from her and left no

forwarding address nor contact number. She said the shared secretary also left with him. The appellant deponed that she did nothing that could reasonably be held to have misled either the complainant or his clients and that she verily believed that the proceedings are an abuse of the facilities of the General Legal Council.

The disciplinary committee's findings

[15] The appellant did not give oral evidence before the disciplinary committee. Furthermore, she spurned the invitation of the committee to make closing submissions. However, the committee performed its task by considering the evidence, oral as well as documentary, and arrived at a conclusion. Its findings were comprehensive. They included the following which are to be found in paragraph 92 of the "Reasons for Judgment":

> "hh) The existence of the Respondent's signature in critical documents in which she responded to the complaint, in the absence of an explanation to the contrary, demonstrates that she caused, permitted and/or was aware that her name and her position as an attorney-at-law was being used in connection with the carriage of sale of the Agreement for Sale.
>
> ii) The Respondent took no steps whatsoever to disabuse the Complainant, the proposed purchasers, the proposed mortgagee or anyone else legitimately connected with the transaction of any fact that would lead them to believe that she was not the Vendor's Attorney-at-Law until after she had been accused by the Complainant of acting in breach of the Code of Ethics.
>
> jj) The purchasers, the Andersons, lost their deposit, the legal costs involved in pursuing the transaction and the bargain. They have been put

to considerable inconvenience in circumstances in which an attorney, properly and prudently conducting her practice ought properly to have avoided.

kk) Having spoken to the Complainant; having accepted the deposit on the undertaking indicated; having endorsed the cheque as indicated; having issued the receipt for the cost of preparing the Agreement for Sale; having neglected or refused to communicate with the Complainant on critical matters; having failed to alert the Purchasers, the Complainant and the proposed mortgagees of the true circumstances in which she was involved in the transaction, the Respondent led all of the other persons involved in the transacting [sic] to rely upon the terms of the Agreement for Sale, which said that she was the person having carriage of sale."

[16] In paragraph 93, the committee declared that it did not accept "that the Respondent knew nothing of the matter as stated in her letter dated January 20, 1998 to the General Legal Council".

[17] In paragraph 94, the committee stated that on the basis of the facts found, it was satisfied beyond reasonable doubt that the appellant was guilty of unprofessional conduct. It found in particular that:

1. The appellant, "having signed the Agreement for Sale witnessing the signature of the person signing as agent for the Vendor was alerted to the existence of all of the terms of the Agreement for Sale".

2. The appellant was aware of the nature of the transaction when she witnessed the

agreement for sale and endorsed the cheque representing the deposit.

3. The appellant accepted that she was the attorney-at-law having carriage of sale.

4. The appellant caused or permitted her letterhead to be used for the purpose of the sale, and by the nature of the communications with the complainant and the mortgagee, accepted that she acted for the vendor.

5. By her conduct the appellant represented to the complainant and the mortgagee that she was the vendor's attorney-at-law.

6. The appellant, on receipt of the deposit, had a duty to place it in an interest-bearing account in her name and to use same only for the purpose of paying stamp duty and transfer tax in respect of the sale.

7. As the attorney-at-law having carriage of sale, the appellant was under a duty to manage and monitor the sale through to completion.

8. The appellant failed to account to the purchaser or their attorneys-at-law for the sum of $150,000.00 paid to her as a deposit.

9. The purchasers were put to unnecessary and considerable inconvenience.

[18] Paragraph 95 of the reasons for judgment gives a good picture of the sentiment of the disciplinary committee. It reads:

> "The conduct on the part of the Respondent was inconsistent with acceptable conduct on the part of an Attorney-at-Law and was deceitful. An attorney-at-law who witnesses the signature of an agent to an Agreement for Sale of land or any similar document ought properly to be satisfied,

at the time of execution of the document, that the purported agent has the authority of his/her principal to execute the document. In addition, with knowledge that the Agreement for Sale stated that she was the person with carriage of sale, it was unacceptable and deceitful for the Respondent to endorse the cheque for the deposit to another attorney and, thereafter, fail, neglect or refuse to inform the Complainant that there had been a change of representation. This is compounded by the fact that the Respondent permitted the transaction to progress to the stage that a Letter of Commitment had been sent to her and a request for the Instrument of Transfer had been made. Even then the Respondent failed to advise the Mortgagee and the Complainant of the alleged change in representation."

The grounds of appeal

[19] Six grounds of appeal were filed by the appellant, on 10 December 2010, challenging the disciplinary committee's findings and decision. They are as follows:

"(1) The Committee/Panel of the General Legal Council caused substantial injustice to the **Respondent/Appellant** by failing to address and/or consider:

(A) The clear statement of Mr. Freddie Brown that:

(A1) A. Freddy Brown had Carriage of Sale for Lot 16 Belgrade Heights being part of land registered at Volume 1057 Folio 522 and 355.

(A2) Lot 16 Belgrade Heights, Belgrade Manor, was sold to Mr. and Mrs. Anderson by A Freddie Brown & Company.

(A3) The "shared" Secretary had used one of Mrs. Taylor's pre-prepared Agreement for Sale for

Mr. Freddy Brown and failed to note that he had carriage of Sale and not Mrs. Taylor.

(A4) The "shared" Secretary had used typing paper with Mrs. Taylor's letter head without her knowledge.

(B) The Honourable Mr. Justice Patrick Anthony Brooks' clear admission that he knew A. Freddy Brown & Company, Attorneys-at-Law, were the Vendor's Attorney-at-Law for Lot 16 Belgrade Heights.

(C) The clear admission of Mr. Patrick Anderson, the purchaser, that he knew Freddie Brown was the only Attorney-at-Law who was going to "handle the matter".

(2) The decision and sanction of the Respondent be quashed on the grounds of apparent bias and prejudice.

(3) The panel erred in finding that the **Respondent/Appellant** was deceitful".

(4) The findings of the Committee that the **Respondent/Appellant** is guilty of professional misconduct and breached the Canons of the Legal Profession (Canons of Professional Ethics) Rules cannot be supported by the evidence.

(5) Failure by the **Respondent/Appellant** to give reasons why the sanctions were chosen from the range of penalties under Section 12 of the Legal Profession Act as Amended by the Legal Profession (Amendment) Act 2007.

(6) The Respondent's decision in suspending the **Respondent/Appellant** from practice as an Attorney-at-Law for one (1) year is manifestly excessive and/or unwarranted."

Counsel for the appellant sought the leave of the court to amend ground two, to read:

"(2) The decision and sanction of the Respondent be quashed on the grounds of apparent bias, prejudice, unfairness and procedural irregularity."

Mr William Panton on behalf of the respondent objected to the amendment; reason being that it was made far "too late in the day". Besides, he stated, he would be arguing, in any event, that there is no merit in that ground. The court, however, refused the application to amend the ground.

The submissions

[20] Before this court, no oral argument was advanced, Mr Jarrett being content to rest on his written submissions.

[21] In his submissions, Mr Jarrett on behalf of the appellant did not argue the grounds separately. He contended that a proper review of the evidence showed that the appellant had maintained a consistent position from the outset, namely that she did not have the carriage of sale for the property in question and that it was Mr Freddie Brown, who had the carriage of sale at all material times. The appellant was never the initiator of the sale; that person was Mr Freddie Brown, aided and assisted by the secretary he shared with the appellant. An examination of the evidence, he argued, will show that Mr Freddie Brown operated his own practice separate and apart from that of the appellant's. He also submitted that in their one and only telephone conversation on 20 November 1992, the appellant informed the complainant that it was Mr Freddie Brown who had conduct of the matter. The appellant never accepted that she had the carriage of sale and the panel's findings in this regard are completely at odds with the evidence presented, thereby rendering their decision unsafe.

[22] Relying on the case of **Derry v Peek** (1889) LR 14 App Cas 337, Mr Jarrett submitted that not all the elements of the tort of deceit, as laid down in that case, had been satisfied in that; there was no representation of fact made by words or conduct; the representation was not made with the knowledge that it was false; the representation was not made with the intention that it should be acted upon by the complainant in a manner which resulted in damage to him. All the material representations, he argued, were being made by another party and not the appellant.

[23] Counsel submitted that the evidence must establish, beyond reasonable doubt, conduct unbecoming of the legal profession or where it falls below the standard prescribed by the canons.

[24] Mr Jarrett cited the case of **McCalla v Disciplinary Committee of the General Legal Council** (1993) 49 WIR 213, submitting that breach of canon I (b) requires the standard of proof to be proof beyond reasonable doubt. The ruling of the panel, he contended, was arrived at in circumstances where there was a failure to adhere to the higher standard of proof required in finding the appellant guilty of professional misconduct.

[25] Mr Jarrett referred to paragraph 10 of the 4th schedule of the Legal Profession Act which provides that the disciplinary committee may in their discretion proceed and act upon evidence given by affidavit and submitted that once the disciplinary committee allowed the complainant to rely on affidavit evidence, it was obligated to extend the same courtesy to the appellant and a failure to do so rendered their

decision unsafe and it therefore ought to be set aside. He argued that there were several instances in giving their reasons for judgment where the panel indicated that it did not take proper account of the explanation provided by the appellant in her affidavit evidence.

[26] In relation to the sanction imposed by the disciplinary committee, Mr Jarrett submitted that suspending the appellant from practice when the evidence shows that she is not guilty of any deceit, and if there is deceit it lies elsewhere is particularly harsh and/or oppressive and goes against what is fair, reasonable and/or proportionate.

[27] On the other hand, Mr Panton on behalf of the respondent submitted that the disciplinary committee was entitled to reject Mr Brown's affidavit because prior to his letter of 20 March 1996 (in which he stated that he had carriage of sale) he had several opportunities to indicate to the complainant that he had carriage of sale but declined to do so. It must have been clear to Mr Brown, following the sending of the deposit cheque payable to the appellant that the complainant was laboring under a misunderstanding as to who had carriage of sale. Both the appellant and Mr Brown failed to correct that misunderstanding. He submitted further that the "shared" secretary could not explain the many opportunities provided to the appellant by the correspondence from the complainant, to deal with any errors by the "shared" secretary using the prepared agreement for sale and typing paper in the name of the appellant. He pointed to the evidence of the complainant that up to 20 March 1996,

he still regarded the appellant as being the attorney-at-law for the vendor and that he had no doubt about that. It is implicit, he argued, from the evidence of the complainant that as of 20 March 1996, Mr Brown became the attorney-at-law for the vendor.

[28] It was submitted that the evidence against the appellant was overwhelming. The appellant did not give evidence or explain her conduct in relation to the transaction in question. Further, the committee applied the correct test in stating that it was satisfied beyond reasonable doubt that the appellant was guilty of the matters set out in its decision.

[29] The appellant failed to identify any evidence in support of the allegation of bias and prejudice. There was no evidence that the members of the disciplinary committee had either a direct pecuniary or proprietary interest in the outcome of the matter, or could otherwise by reason of a direct personal interest be regarded as being a party. Further, he argued, there were no allegations concerning the conduct of the disciplinary hearing or the behaviour of the members of the disciplinary committee to suggest that there was a "real danger" of bias. The hearing was conducted in a fair manner, the appellant was given every opportunity to question the witnesses and test the evidence against her. She declined the opportunity to call witnesses or give evidence on her own behalf or provide the disciplinary committee with an explanation for her conduct.

[30] In defending the disciplinary committee's decision to suspend the appellant, Mr Panton submitted that the breaches found proven by the disciplinary committee were very serious. In particular, the finding that the appellant was deceitful merited a substantial period of suspension from practice in order to mark the gravity of the conduct. The matters were so serious, he argued, that the disciplinary committee was entitled to suspend the appellant from practice for the period it did. He also submitted that it was right that the purchasers were compensated for their loss and the costs imposed after the very considerable period in dealing with the complaint.

Decision

[31] It is not correct to say that the disciplinary committee did not apply the requisite standard of proof in their deliberations. The fact is that they explicitly stated that they were satisfied beyond reasonable doubt, based on the facts they found, that the appellant was guilty of unprofessional conduct.

[32] We found that the disciplinary committee gave very careful consideration to all the circumstances of the case. They were very thorough in their analysis of the facts, and arrived at a conclusion that was inevitable in the circumstances.

[33] The appellant failed miserably to provide the complainant with an explanation for her actions. She, having signed various documents involved in the land transaction, was obliged to explain the situation to the complainant. She did not do so. When she faced the disciplinary committee, she did no better. In the circumstances, the committee was not in a position to assume that she had acted in

an unintended robotic manner. Her behaviour clearly tended to discredit the legal profession in no small way. Her conduct shook the confidence of the complainant and his clients, Patrick and Diana Anderson, in the integrity of the system. It will be recalled that the Andersons paid monies and secured a letter of commitment from a bank with a view to purchasing real estate. The appellant featured centrally in the process. Mr and Mrs Anderson failed to have the transaction completed due mainly to the conduct of the appellant in misleading the complainant. In the end, there was little wonder that Mr Anderson had a "suspicion about something funny … going on."

[34] The grounds of appeal were wholly without merit. As regards the sanction, we were content to be guided by the decision in ***Bolton v Law Society*** [1994] 2 All ER 486. We took the view that the sanction was appropriate in the circumstances. Accordingly, we dismissed the appeal.

Postscript

[35] When our decision was handed down earlier this year, there was an unfortunate unintended occurrence. Through an administrative error, Brooks JA was a part of the panel that handed down the decision. As we have already explained in open court Brooks JA took no part in the deliberations and was not even aware of the decision to be handed down. It was sheer inadvertence that caused the decision to be handed down in his presence. We apologize to the parties, particularly to the appellant, for this error.