

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 21/2010

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE HIBBERT JA (Ag)**

**BETWEEN OSWALD JAMES APPELLANT
AND THE GENERAL LEGAL COUNCIL RESPONDENT**

Brian Barnes instructed by Wilson, Franklyn, Barnes for the appellant

Gavin Goffe instructed by Myers, Fletcher and Gordon for the respondent

12 and 13 July, 23 September 2011 and 26 April 2013

HIBBERT JA (Ag)

[1] On 23 September 2011 we allowed the appeal and set aside the decision of the General Legal Council which was made on 20 February 2010. We also awarded the costs of the appeal to the appellant to be taxed if not agreed. We now put our reasons, for so doing, in writing.

Background

[2] Auto Village Limited, a company owned by Mr Paul Afflick obtained loans from Dehring Bunting and Golding (DB&G), a financial institution. As security for these

loans, Mr Afflick and his wife mortgaged to DB&G property jointly owned by them at 7 Stilwell Road in St Andrew. Mr Afflick also mortgaged to DB&G property owned by him at 8 Portmore Town Centre in St Catherine. Auto Village defaulted in its loan repayment and was put into receivership. Arising from this, Auto Village filed an action against DB&G. Both mortgaged properties were put up for auction. The Stilwell Road property was sold by public auction. This provided the sum of \$6,091,755.00 towards the repayment of the debt owed to DB&G. Thereafter, on 8 June 2001, in order to resolve the issues between them, a settlement agreement was made between Auto Village and DB&G whereby DB&G would accept the sum of \$13,500,000.00 in full settlement of the debt owed and Auto Village would discontinue its suit against DB&G.

[3] Auto Village was also indebted to Mr Raphael Douglas who, in 2000, sued Auto Village and subsequently obtained a default judgment. Auto Village applied to set aside the judgment and sought a stay of execution of the judgment. On 24 July 2001, Reid J extended an order for a stay of execution until 27 September 2001, pending an application to set aside the judgment on condition that:

"A sum not exceeding \$2,500,000 be paid in by the Defendant to the Defendant's attorneys-at-law Messrs. Nunes, Scholefield, DeLeon & Company within 7 days from the date of the completion of the sale of premises registered at Volume 1203 Folio 187 for land part of Portmore in the parish of Saint Catherine [to] be placed in an interest bearing account in the Bank of Nova Scotia in the joint names of the Attorneys-at-law for the parties."

[4] On 7 August 2001, the Portmore property was sold. Although the appellant had the carriage of sale, the exercise was carried out by Hart Muirhead Fatta. Following the sale, Hart Muirhead Fatta paid the sum of \$8,169,351.00 to the appellant as the balance due to Mr Afflick. The appellant thereafter, on Mr Afflick's instructions, disbursed the sum of \$7,627,351.00 to him. The sum of \$2,500,000.00 was never paid to Nunes, Scholefield, DeLeon & Co in keeping with the condition for a stay of execution which was extended by Reid J. On 23 August 2001, the appellant submitted a statement of account to Nunes, Scholefield, DeLeon & Co who represented Mr Afflick. This statement of account became the genesis of the complaint made by Mr Douglas against the appellant.

The complaint

[5] On 19 February 2003, Mr Douglas applied to the disciplinary committee of the General Legal Council requesting that the appellant be required to answer certain allegations contained in an affidavit which accompanied his application. In the affidavit the allegations were stated as follows:

"He has misled me/my attorney-at-law in relation to the amount of money paid by Paul Afflick to Dehring, Bunting & Golding and as a consequence a sum of \$2,500,000.00 which should have been paid to me pursuant to an order made in the Supreme Court has been lost."

At the commencement of the hearing on 1 December 2007, the complaint against the appellant was amended to add the following:

"That the attorney knowingly made a false statement of fact.
Canon V (o).

The attorney knowingly assisted Mr. Paul Afflick to break the law and facilitated his disobedience of the order of the court by providing inaccurate information concerning the net proceeds of the sales from the sale of land in Portmore Registered at Volume 1203 Folio 187 of the Register Book of Titles in breach of Canon III (f)."

[6] The complaint therefore was that the appellant had breached Canons I (b), V (o) and III (f) of the Legal Profession (Canons of Professional Ethics) Rules. The relevant Canons state:

"I(b) An attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member.

V (o) An attorney shall not knowingly make a false statement of law or fact.

III(f) An attorney shall not act contrary to the laws of the land, or aid, counsel or assist any man to break those laws."

[7] At the hearing, Mr Mark Golding, who was then an attorney in the firm Hart Muirhead Fatta, gave evidence of the indebtedness of Auto Village to DB&G which his firm represented. He spoke of the sale of the Stilwell Road property and the receipt of money from the proceeds by DB&G. He also stated that he represented DB&G in relation to the transaction involving 8 Portmore Town Centre. He further stated that based on the agreement between DB&G and Auto Village whereby DB&G would accept the sum of \$13,500,000.00 in full settlement of the debt owed to it, DB&G received \$6,091,755.00 from the sale of the Stilwell Road property and \$7,408,245.00 from the sale of the Portmore property. Under cross-examination, he stated that Mr Clarke Cousins had the carriage of sale in relation to the Stilwell Road property and that none

of the payments to DB&G came from the firm Oswald James & Co. He also stated that he was, at the time, not aware of any litigation between Mr Afflick and Mr Douglas or of any court order requiring the withholding of any part of the proceeds or the making of any payments therefrom.

[8] Mr Douglas also gave evidence. He stated that he was then 75 years old and had known Mr Afflick since they were boys. He said he had introduced Mr Afflick to the appellant in order that the appellant would assist Mr Afflick with difficulties he was experiencing with DB&G. He stated that he did not know whether or not the order of Reid J made on 24 July 2001 was served on DB&G, neither did he make the appellant aware of it.

[9] In his evidence, the appellant spoke of his introduction to Mr Afflick by Mr Douglas and his assistance in securing an arrangement between Mr Afflick and DB&G. He stated that after the sale of the Portmore property he, on 8 August 2001, received a statement of account from DB&G in relation to the Stilwell Road and Portmore properties. He thereafter submitted a statement to Nunes, Scholefield & DeLeon who then represented Mr Afflick. He admitted that on reflection, there were inaccuracies in the statement but denied that they were intended to mislead either Nunes, Scholefield DeLeon & Co or Mr John Graham who represented Mr Douglas and to whom the statement was subsequently sent. The statement, he said, was prepared at the request of Mr Afflick in order to reconcile with him the proceeds of the sales of the two properties.

[10] Mr Warren Clarke Cousins gave evidence that he acted on behalf of DB&G in the sale of the Stilwell Road premises. He did not recall telling the appellant about the suit between Mr Douglas and Mr Afflick.

[11] After considering the evidence which was presented, the committee made several findings which included the following:

- (xxiv) The Respondent delivered to Nunes Scholefield DeLeon & Co. two Statements of Accounts identified as being in relation to the sale of the Portmore Centre property both of which are dated August 23, 2001 and both of which contain false and misleading information.
- (xxv) The Statements of Account contained information which was false and misleading in several material respects including the following:
 - a) They purported to relate to the sale of the Portmore Centre property only, when in fact, the funds dealt with therein included funds realized from the sale of the Stillwell Avenue property;
 - b) They understated the consideration for the purchase of the Portmore Centre property and did not provide the consideration for the Stillwell Avenue property;
 - c) They were set out and detailed in a manner that created the impression that the sale was conducted by the Respondent's firm when it was well known to the Respondent that the sale of the Portmore Centre property was conducted by Messrs. Hart Muirhead Fatta;
 - d) They purported to account for funds that were not received by the Respondent and for payments that were not made by the Respondent; and

- e) They failed to reflect the amount of \$7,627,351.29 that accrued as a surplus to Mr. Afflick after deducting realtor's commission from the sum of \$8,169,351.00 received from Hart Muirhead Fatta. (Exhibit 1 page 45).
- (xxvi) These Statements of Account were prepared and delivered to Messrs. Nunes Scholefield DeLeon & Co.'s in response to requests for same from Messrs. John G. Graham & Company made on or about August 10, 2001.
- (xxvii) The Statements of Account were prepared for the purpose of demonstrating that only minimal surplus funds were realized upon the sale of Mr. Afflick and Auto Village Limited's assets.
- (xxviii) It was known to the Respondent that a surplus of \$8,169,351.00 had been realized from the sale of those assets and that most of that sum accrued from the sale of the Portmore Centre asset.
- (xxix) At the time of preparing the Statements of Accounts dated August 23, 2001 the Respondent knew of the order requiring Mr. Afflick to effect payment of the sum of \$2,500,000.00 to Messrs. Nunes Scholefield DeLeon & Co. to be placed in an interest earning account with the Complainant's Attorneys as the condition for the grant of the stay of execution
- (xxx) The surplus funds of \$48,500.00 accounted for in one of the Statements of Account dated August 23, 2001 were disbursed by the Respondent to Nunes Scholefield DeLeon & Co. in late August or early September, 2001, pursuant to a request from the latter firm made on or about August 24, 2001 (Exhibit 2 - pages 30 and 36).
- (xxxi) That payment was made with knowledge of the existence of Mr. Justice Reid's order.
- (xxxii) The sum of \$48,500.00 was the subject of a claim for payment thereof made by the Complainant's

Attorneys-at-Law of Messrs. Nunes, Scholefield, DeLeon & Co. (Exhibit 2 pages 41 and 42).

(xxxiii) The Respondent failed to render a true and accurate account of the funds received and disbursed by him or for the sale of the said assets, until on or about June 23, 2008 (Exhibits 6 and 6A).

[12] Accordingly, the committee stated:

"For the reasons given we find that by presenting the Statements of Account dated August 23, 2001 with false and misleading information therein the Respondent conducted himself in a manner that is inconsistent with the honour and dignity of the profession and that this conduct tends to discredit the profession of which he is a member. We find the Respondent to be in breach of Canon 1 (b) and Canon V (o) of the Canons of Professional Ethics. Pursuant to Section 12(4) of the Legal Profession Act we impose the following sanction:

- a) The Respondent is suspended from practicing as an Attorney-at-Law for a period of one (1) year from the date of this order.
- b) The Respondent is to pay to the Complainant costs in the sum of \$150,000.00.
- c) The Respondent is to pay to the General Legal Council the sum of \$50,000.00 for costs."

[13] Notice and grounds of appeal were filed on 1 March 2010. An amended notice and grounds of appeal was however filed on 31 March 2011. The grounds of appeal which were relied on were stated as follows:

"1 The Statements of August 23, 2001 expressly dealt with the sale of Lot 8 Portmore Town Centre. The sale of the 7 Stilwell Avenue was conducted by Warren Clarke Cousins on behalf of DB&G in public auction and no detailed statement proffered on the Respondent. The Complainant's Attorney-at-Law

acted for the Purchaser in the 7 Stilwell Avenue transaction. The Complainant's Attorney-at-Law knew that 7 Stillwell Avenue was not a part of the Statements of Account and the said Attorney-at-Law had full knowledge of the sale, having acted for the purchaser; Mr. Oswald Williams, in the public auction. Therefore the Statements could not, on any construction, be said to mislead the Complainant's Attorney-at-Law.

- 2 The Statements of Account were delivered to Messrs. Nunes, Scholefield, DeLeon & Co. on the request of Mr. Afflick. They were never delivered by the Respondent to John G. Graham & Co and they were never delivered as a consequence of a request by the Complainants Attorneys-at-Law to the Respondent. The Statements of Account were for Mr. Afflick and were not specifically prepared at the request of Nunes, Scholefield, DeLeon & Co. or John G. Graham & Co. They were not used to procure any action by the Complainant or to cause any detrimental reliance by any Attorneys-at-Law.
- 3 With respect to 7(a), of the findings, above, the Statements dealt exclusively with the Portmore Centre property. There is no funds dealt with therein that was realized from the sale of 7 Stilwell Avenue.
- 4 Regarding 7(b), of the findings, again, the Statements dealt with the Portmore Centre property only. The consideration for the Portmore Centre property was understated in equal amount to the advance from DB&G and, consequently, there was no excess or surplus that was unaccounted for.
- 5 With respect to 7(c) of the findings, the sale of the Portmore Centre property was not conducted by Messrs. Hart Muirhead Fatta on behalf of Mr. Afflick and Auto Village Limited. The Respondent was, by contract, responsible for carriage of sale of the Portmore Centre property and has a duty and obligation to set out the transaction to his client. The conduct of the Attorneys-at-Law for DB&G, who were also the attorneys-at-law for the purchaser of the

property; National Commercial Bank (Jamaica) Limited, as Trustees for the Gleaner Superannuation Fund, had to be seen in the context of DB&G's advance and forbearance with Mr. Afflick.

- 6 With respect to 7(d) of the findings above, the purpose of the Statements of Account was to set out the Respondent's understanding of the sale of Portmore Centre to his client, Mr. Afflick, and in as much as a number of the payments made and sums disbursed were not done by the Respondent, he had a duty to set out the information to his client.
- 7 Regarding paragraph 7(e) of the findings of fact, the Statements of Account reflected only the sale of Portmore Centre, which was clearly stated in the caption of the Statements as "Sale of Lot 8 Portmore Town Centre ..." and, again, no funds from the sale of 7 Stilwell Avenue was dealt with in the Statements.
- 8 At the time the statement of account came into the hands of Douglas' attorneys-at-law, the condition upon which Reid J's order was based, was no longer in force. Reid J's order was spent prior to the submission of the impugned statement of account of the 23 August, 2001. The statement rendered by the appellant was therefore of no effect.
- 9 No order was made for the payment of the judgment debt from the proceeds of sale of the Portmore property which would require Afflick, a director of Auto Village Limited to pay Douglas the judgment debt from the proceeds of sale of the Portmore property. The question of providing any statement of account to Douglas or to his attorney-at-law did not arise. It could not be said that Douglas had been misled [sic] and that the failure of the Appellant to render a proper statement of account of the receipts and disbursements from the sale of the Portmore property amounted to him knowingly aiding Afflick to contravene the law.

10 The finding of professional misconduct was not open to be made by the Respondent on the matters of facts disclosed in the affidavit of the complainant.”

[14] Relative to grounds one to seven, Mr Barnes submitted that although the statement prepared by the appellant contained inaccuracies, that did not, by itself, mean that it was made with the intent to deceive. Further, he submitted, the statement was prepared merely to supply information to Mr Afflick and was not intended to be utilised by others such as Nunes, Scholefield DeLeon and Co and John G Graham & Co. He also submitted that the committee misled itself in finding that both Mr Douglas and Mr Graham were misled by the statement when no evidence was forthcoming either from Mr Douglas or Mr Graham to support such a finding.

[15] In addressing grounds eight to ten, Mr Barnes submitted that the order of Reid J, which was made on 24 July 2001, was merely a condition of the grant of a stay of execution and could not confer any right on Mr Douglas to a sum of \$2,500,000.00. It was not an order which was capable of being enforced by Mr Douglas, therefore, he lost nothing as a result of the non-payment by Mr Afflick of \$2,500,000.00 to Nunes Scholefield DeLeon & Co to meet the condition set out in the order of Reid J.

[16] In capping his submissions, Mr Barnes submitted that a finding of professional misconduct must be based on proof of a complaint against an attorney by a person aggrieved. After the case is proved, the committee must ask the question: Does the conduct complained of, and proven, amount to misconduct in the professional sense? In support of his submissions Mr Barnes relied heavily on the decision of this court in

Leslie L Diggs-White v George R Dawkins (1976) 14 JLR 192. He also cited the decisions in **Rajasooria v Disciplinary Committee** [1955] 1 WLR 405 and **Georgette Scott v The General Legal Council** SCCA No 118/2008 the judgment in which was delivered on 30 July 2009.

[17] Mr Goffe, in reply, commenced by stating that there was no challenge to the findings of the committee at xxiv and xxix, neither were the findings at paragraph 67 challenged. He submitted that from the evidence of the appellant contained in pages 51 and 53 of the record of appeal, it was evident that on 23 August 2001, the appellant was aware of the suit between Mr Douglas and Auto Village.

[18] Mr Goffe further submitted that there being no dispute that the statement from Mr James to Nunes, Scholefield DeLeon & Co contained false statements of facts, the question to be resolved was whether or not the appellant knew or ought to have known of the falsity. To answer this question, Mr Goffe submitted that the appellant could not have prepared his statement without the statement from Hart Muirhead Fatta and therefore must have been aware that the sale of the Stilwell Road property was not reflected in his statement. He further submitted that the errors in the statement were not merely accounting errors as there was no explanation for the omission of the sum in excess of \$6,000,000.00 realised from the sale of the Stilwell Road property, or the omission from the statement of \$7,600,000.00 which was paid to Mr Afflick prior to the preparation of the statement. He further submitted that receipts were understated and expenses overstated. From this, he submitted, it was reasonable to infer that the

purpose was to reflect that a minimal surplus was realised from the sale of the properties.

[19] In urging the court to accept the committee's findings that the appellant knowingly presented a false statement with the intention that it should be acted upon and that there was an evidential link between the statement of account and the action of Mr Graham, Mr Goffe relied on the decisions in **Diggs-White** and **Rajasooria** as well as **Bhandari v Advocates Committee** [1956] 3 All ER 742.

Analysis

[20] This court was asked to make a decision as to the correctness of findings and conclusions arrived at by the disciplinary committee of the General Legal Council. As has been often stated, courts exercising appellate jurisdiction should not lightly interfere with findings of facts made by an inferior tribunal before which witnesses appeared and gave evidence. Occasions, however, do arise when an appellate court is obliged to interfere. In **National Commercial Bank Limited (Jamaica) Ltd v Raymond Hew and Ors** [2003] UKPC 51 (30 June 2003) Lord Millet at paragraph 41 stated:

"Their Lordships conclude that it has not been shown that the Bank took unfair advantage of the relationship of trust and confidence which must be taken to have existed between Mr Cobham and Mr Hew. They recognise that in reaching this conclusion they are departing from what may be said to be concurrent findings of fact below; but where they are satisfied that those findings are not supported by the evidence they are not only entitled but bound to reject them: See **Lee Ting Sang v Chung Chi-Keung** [1990] 2 AC 374."

[21] The real crux of the complaint made by Mr Douglas was not merely that he and his attorney-at-law were misled, but more significantly, that as a result, he suffered the loss of \$2,500,000.00. Having accepted this as the first ground of complaint at paragraph 56 of its findings and having, at paragraph 57, recognised that the order of Reid J was not capable of being enforced, and that it gave no rights to Mr Douglas, the committee seemed to have found itself in an awkward position as was evidenced in paragraph 61 where it stated:

“... although we are unhappy with the formulation of the first ground of complaint, we are satisfied that, in so far as it asserts that the Respondent’s conduct misled the complainant or his Attorney-at-law, same has been proven to the requisite standard.”

Implicit in this is an acceptance by the committee that the second part of the complaint that “as a consequence a sum of \$2,500,000.00 which should have been paid to me pursuant to an order made in the Supreme Court has been lost” which this court considered to be the gravamen of the complaint, was not proved. It was our opinion that the committee could not properly, as it sought to do, fragment the ground and hold that since a part of it had been established that was sufficient.

[22] This court has also found it difficult to accept several other findings of the committee. The committee found at xxvi that the statements of accounts were sent to Nunes, Scholefield DeLeon & Co in response to requests for them from John G Graham & Co. We found no evidence to support this finding. The only evidence of the reason for furnishing the reports came from the appellant when he said this was done at the request of Mr Afflick, for whom he acted, to provide an accounting to Nunes, Scholefield

DeLeon and Co, which also acted on behalf of Mr Afflick, in respect of the sale of the Portmore property. Not even during the cross-examination of the appellant was anything suggested to the contrary. No doubt this erroneous finding lent itself to the next finding that the purpose of the inaccuracies was deliberate and were to mislead Mr Douglas and for Mr Graham into believing that only a minimal surplus was realised from the sale of the two properties. Again we found no evidence which was placed before the committee that either Mr Douglas or Mr Graham was misled. There was no evidence from Mr Douglas that he even saw the statements nor was there any evidence at all from Mr Graham.

Conclusion

[23] In order for there to be a finding that an attorney-at-law is guilty of professional misconduct, there must be evidence capable of providing proof beyond a reasonable doubt of the complaint made by an aggrieved person against the attorney-at-law. In **Bhandari v Advocates Committee**, Lord Tucker who delivered the decision of the Board of the Privy Council at page 744 paragraph I – page 745 paragraphs A and B stated:

“With regard to the onus of proof, the Court of Appeal said:

‘we agreed that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities’

This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee ...”

We found that this standard was not met. If that first hurdle is cleared the committee should then go on to decide whether or not the conduct complained of amounted to misconduct in a professional sense. We found that the facts of this case are clearly distinguishable from those in **Rajsooria** and **Scott** where in each case there was clear evidence of professional misconduct. Hence we found for the reasons stated, that the disciplinary committee of the General Legal Council erred in holding that the charge made against the appellant had been established.