

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 8/04

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.**

BETWEEN ELSIE TAYLOR APPELLANT

**AND THE GENERAL LEGAL COUNCIL RESPONDENT
(Ex parte Fredrick Scott)**

Dr. Diana Harrison and Amery Huntley for the appellant

**Mrs. Sandra Minott-Phillips and Robert Collie instructed by Myers,
Fletcher & Gordon for the respondent**

January 13 and July 30, 2009

PANTON, P.

1. The appellant Elsie Taylor was found guilty as long ago as November 28, 2003, by the Disciplinary Committee of the General Legal Council for breaches of The Legal Profession (Canons of Professional Ethics) Rules, namely Canons IV(r), IV(s) and VII(b)(ii). These Rules were made in exercise of powers conferred upon the General Legal Council by section 12(7) of the Legal Profession Act. The Committee expressed the view that the complaint against Mrs. Taylor had been proven beyond reasonable doubt, and ordered as follows:

"(1) That the Respondent pay to Complainant the sum of \$232,000 being the balance of the sum due to the Complainant

- (2) Interest on the said sum from 19 November 2000 to 20 October 2001 at the rate of 12% per annum.
- (3) Costs in the amount of \$25,500 to be paid to the Complainant."

Mrs. Taylor, being aggrieved by this decision taken by the three-member panel of her colleagues, appealed to the Court of Appeal as provided for by section 16 of the Legal Profession Act.

2. On January 13, 2009, we heard oral arguments in the matter. These had been preceded by written skeleton arguments which had been presented in keeping with an order made by the single judge in July 2008. Having concluded that there was absolutely no merit in the appeal, we dismissed it and awarded costs to the respondent. We also adjusted the date to which interest was payable.

The complaint

3. Mr. Frederick Scott, an insect sprayer, made an application under the Legal Profession Act for Mrs. Elsie Taylor, attorney-at-law, to answer allegations contained in an affidavit that he swore to before a Justice of the Peace at Yallahs, St. Thomas, on January 13, 1997. In the affidavit, he stated that he had engaged the services of Mrs. Taylor on July 10, 1996, handed over a cheque to her for \$375,000.00 with instructions to act on his behalf to purchase a house in Harbour View. Between August 12 and 29, 1996, Mr. Scott visited Mrs. Taylor's

office several times in respect of the transaction, only to be told that she was on vacation overseas. On September 2, 1996, upon Mrs. Taylor's return to office, Mr. Scott requested a refund of the money but Ms. Taylor told him that she had handed over the cheque to a Mr. Fred Brown on July 11, 1996, for him to endorse and return to her. Mr. Brown did not return the cheque.

4. On the basis of those allegations, Mr. Scott complained that the appellant:
 - (a) had not dealt with his business with due expedition;
 - (b) had acted with inexcusable or deplorable negligence in the performance of her duties; and
 - (c) had not accounted for all monies in her hands for the client's account or credit.

The evidence before the Disciplinary Committee

5. The evidence presented to the Disciplinary Committee was to the effect that in 1996, Mr. Scott, in response to an advertisement in a Sunday newspaper for the sale of a house in Harbour View, called the real estate agent and indicated an interest in purchasing the house. The purchase was on behalf of his sister, Beverley Scott, who had asked him to do so. According to Mr. Scott, everything that he did in this purchase was done with his sister's knowledge and approval. The money used to effect the purchase was hers.

6. Mr. Scott, along with his sister Beverley and the real estate agent a Mr. Porter, visited the property during late June, 1996. It was decided to proceed with the transaction as the house met with the approval of Miss and Mr. Scott. They decided to retain the appellant for the purpose of doing the legal work necessary. They proceeded to her office on Laws Street, Kingston, and she agreed to accept the retainer. On July 10, 1996, Mr. Scott took a manager's cheque for \$375,000.00 to the appellant in respect of the purchase. The cheque was made payable to Mr. Fred Brown, attorney-at-law for the vendor. The appellant issued a receipt for the cheque, and gave Mr. Scott a sales agreement for signature. Mr. Scott went away with the agreement and signed it on behalf of his sister. He returned to the appellant, who took the signed agreement. She told Mr. Scott that he should check back with her in two weeks. This he did, only to be told that the appellant was on vacation. A sum of \$25,000.00 was to be paid on August 3, 1996, but this payment was missed as another attorney whom the appellant's secretary said had been left to "oversee business" advised against making that payment before the return of the appellant.

7. Mr. Scott returned to see the appellant in September, 1996, but she told him she was busy and he should return on another day. She also told him that the vendors had not signed. Mr. Scott demanded a refund of the money. The appellant said she was not in a position to refund the money as she had paid it over to Mr. Brown. She also advised Mr. Scott to go to Mr. Brown for the money

as she, the appellant, was fearful that if she went to Mr. Brown for it, he would "bring gunmen on her". The cheque had been cashed.

8. In view of the state of affairs, Mr. Scott sought the intervention of the police. Thereafter, the appellant advised him that Mr. Brown had endorsed and encashed the cheque. This had taken place before any documents had been signed. Under cross-examination by Mr. Huntley for the appellant, Mr. Scott said that he had expected that the cheque would have been handed over by the appellant to Mr. Brown when the agreement was signed. He had taken the cheque to the appellant as she had instructed him to do.

9. Miss Beverley Scott also gave evidence. She confirmed that her brother had told her that the appellant had instructed that the cheque should be made payable to Mr. Brown. The balance of the purchase price was to be paid on August 13 but when they went to the appellant's office, she was away. She said that she did not get the house nor did she recover all of her money.

10. At the completion of the evidence, Mr. Huntley submitted to the disciplinary committee that there was no case for the appellant to answer as Mr. Scott was not the party who should have made the complaint. The committee took time to consider the submission. On resumption, the committee ruled that there was a case for the appellant to answer. The appellant did not give evidence; nor did she call any witnesses. However, she had filed an affidavit prior to the disciplinary hearing in which she stated that her services had been

engaged by Mr. Scott and that she had handed over the cheque to Mr. Brown before the agreement had been signed by Mr. Brown's client. She had been earlier advised by the real estate agent of Mr. Brown's involvement in the transaction, and had actually said that she was not prepared to act in the matter because of Mr. Brown's involvement.

The findings of the Disciplinary Committee

11. The Committee's findings were recorded in two separate sets of reasons, one by one panel member and the other by the other two members. The two sets complemented each other, and were in no way contradictory.

(a) *Locus standi of Mr. Scott*

Panel member Morgan found that the complainant, Mr. Scott, was an aggrieved person within the meaning of section 12(1) of the Legal Profession Act and was therefore entitled to lay the complaint. He expressed himself thus:

"It was he who contacted the Realtor. It was he who met with Mrs. Taylor. It was he who handed her the cheque. It was he who received the receipt, which was made out in his name. It was he who saw to the signing of the Agreement by the Purchasers. It was he who returned the Agreement to Mrs. Taylor. It was almost as if he had Power of Attorney to conduct the business on behalf of the Purchasers who appeared to know very little of the transaction. In cross-examination by Mr. Huntley, Mr. Scott stated that it was he who retained Attorney C.J. Mitchell to communicate with Mrs. Taylor about the matter."
[p.58, record]

The reasons for decision, signed by panel members Phillips and Samuels state:

"In our view ... Mr. Scott was clearly a 'person aggrieved'. He acted throughout as the agent of the person who was also the purchaser in the transaction. Mrs. Taylor accepted the deposit for (sic) him and gave him a receipt in his name. He would have been entitled to a refund of those moneys (sic) paid if they had become available. Mrs. Taylor never at any time doubted his authority at (sic) act. She certainly never said so. Further, Mr. Scott personally suffered as he has felt obliged to refund his sister funds which had been misappropriated whilst he acted for her and on her behalf. Mr. Scott had more than sufficient nexus to this transaction. He was not merely a messenger as Mr. Huntley would wish to have the Tribunal believe." [p.84, record]

(b) *Inexcusable or deplorable negligence*

The Disciplinary Committee was of the view that the appellant's obligations were to ensure the delivery of the funds to the vendor's attorneys-at-law in exchange for an executed and binding agreement for sale. The appellant, the Committee said, ought not to have given the cheque to Mr. Brown until she was satisfied that it was safe to do so. [p.59, 87, 88 record] In acting otherwise, the appellant had acted with inexcusable or deplorable negligence, and as such was guilty of professional misconduct.

(c) *Failure to act with due expedition*

The Committee found that the nature of the transaction was such that it ought not to have taken more than ninety days to complete. However, the appellant was tardy in this regard without there being any explanation by her. She even

misled Mr. Scott by having him attend at her office at a time when she was on vacation overseas.

(d) Failure to account for client's funds

The Committee accepted the evidence that the appellant had expressed reservations as to Mr. Fred Brown's handling of monies belonging to clients. Notwithstanding this situation, the appellant entrusted the purchaser's money to Mr. Brown without taking the precaution of having the vendor sign the agreement for sale. Needless to say, the Committee said, "Mr. Brown appeared to have converted the money to his own use". When Mr. Scott requested a refund, it was not available. It is due to her actions, the Committee found, that the appellant was not able to refund the monies to Mr. Scott when called upon to do so. At the date of the decision of the Committee, the sum of \$232,000.00 was outstanding to Mr. Scott.

The grounds of appeal

12. The amended notice of appeal filed on June 19, 2008, gives the following as the grounds of appeal:

"(a) The Respondent being the Agent of his sister Beverley Scott and Denise Lewis falsely claimed in his Affidavit dated 13th January, 1997, to have engaged the services of the Appellant without stating that she (sic) did so as agent of the two ladies abovementioned. I refer the Court to P.C. Appeal No.8 of 2005 General Legal Council *exparte* Basil Whitter (at the instance of Monica Whitter) v Barrington Earl Frankson and in particular paragraphs 2 and 3 thereof and submit that

the Panel fell into error in accepting the abovementioned affidavit as an acceptable complaint...

There being no evidence that Beverley Scott and/or Denise Lewis were off the Island or incapacitated, the Panel fell into error in entertaining the application by Frederick Scott.

The cheque handed over to Elsie Taylor by Frederick Scott was supplied by Beverley Scott and Denise Lewis. Frederick Scott claims to have sold his house and used the proceeds thereof to re-imburse his sister. If that is so, he is a victim of his own generosity and the Panel fell unto (sic) error in making an Order for Elsie Taylor to pay the sum of \$232,000.00.

Also the Appellant claims that the Panel fell into error in ordering interest in favour of Frederick Scott from 19th November, 2000 to 20th October, 2001 at 12% per annum.

Also the Appellant claims the Panel erred in awarding costs of \$25,500.00 to Frederick Scott.

The Panel has done violence to language when they state that Mrs. Taylor recognized Frederick Scott as her client. The Sales transaction identified Beverley Scott and Denise Lewis as the Purchasers and Beverley Scott was one of those who visited Elsie Taylor with her brother and Mr. Porter. One does not have to be overburdened with grey matter to realize that the intending Purchasers would be the client not the person merely bringing the cheque. This is so notwithstanding Mrs. Taylor stating in her affidavit of 19th January, 1998, "In July, 1996, Frederick engaged my services re: the proposed sale to him of a property at 27 Reef Avenue, Harbour View". Also Beverley Scott was present."

13. The "grounds of appeal" then proceed to detail certain questions posed by the panel to, and the answers given by, Frederick Scott. The following paragraphs complete the notice and grounds of appeal:

"In the first paragraph starting on page 24 of the Panel's decision, it is stated inter alia. 'He (Frederick Scott) acting throughout as the agent for the person who was also the Purchaser in the transaction.' I submit that whenever in this matter, there is a departure or attempted departure from this position, this position should prevail including inter alia the commencement of the proceedings herein.

Consequently only Beverley Scott and Denise Lewis should be permitted to initiate proceedings in this matter."

The hearing in the Court of Appeal

14. Before us, Mr. Huntley for the appellant contended that the complainant Mr. Scott was not a victim in this matter. He said that Mr. Scott had misled the tribunal into thinking that he had good or sufficient grounds to institute the proceedings on his own behalf. Mr. Scott, he said, was "an illegitimate applicant". Any loss that may have been suffered was at the expense of his sister. Mr. Scott had no jurisdiction to go to the tribunal, argued Mr. Huntley, as he had no authority; he (Scott) was not the one who was buying. In the absence of written permission, Mr. Scott had no authority, contended Mr. Huntley.

15. So far as the question of Mr. Scott's standing was concerned, the respondent submitted that as the person who engaged the services of the appellant, and who handed over money out of which in the ordinary course of events, legal fees would have been paid, Mr. Scott was indeed a person aggrieved. In any event, the respondent submitted, the evidence provided by one of the prospective purchasers was that Mr. Scott was the prospective purchasers' duly authorized representative.

16. Both parties in this appeal sought to rely on the Privy Council case **General Legal Council ex parte Basil Whitter (at the instance of Monica Whitter) v Barrington Earl Frankson** [PC App. No. 8 of 2005 - delivered on the 27th July 2006]. It is very difficult to understand how the appellant could have sought solace in this decision as it is fully against the position that Mr. Huntley has sought to advance. In that case, the minority view expressed in the Court of Appeal was upheld by the Privy Council in relation to the right of Monica Whitter's son to lay the complaint against the attorney. Basil Whitter had acted at his mother's request in respect of her dealings with the attorney. Paragraph 4 of the judgment of the Privy Council reads:

"The general principle is that when a statute gives someone the right to invoke some legal procedure by giving a notice or taking some other formal step, he may either do so in person or authorize someone else to do it on his behalf ..."

The judgment continues thus in paragraph 10:

“There is therefore no reason ... which requires the affidavit to be sworn by the complainant personally. Indeed, the lack of any such reasons of policy is indicated by the fact that section 12(1) goes on to allow a similar complaint to be made by the Registrar or a member of the Council, neither of whom would be expected to have personal knowledge of the circumstances of the alleged misconduct. It is difficult to see what consistency of policy there is in a construction which leads to the conclusion, as it did for the majority of the Court of Appeal, that the Act requires an affidavit sworn by Mrs. Whitter personally but that the same complaint can be made by the Registrar.”

17. In view of the pivotal role of Mr. Scott in the proceedings, the clear approval by the Privy Council of the role of someone like him, and the fact that Mr. Huntley indicated that he had no other point that he could usefully urge on appeal, it was clear that there was nothing of merit in the appeal. The findings of the Committee were based on unequivocal evidence which showed that the breaches alleged were indeed proven. On the question of the respondent's standing, it appears that Mr. Huntley had overlooked the affidavit of the appellant which stated that she had been retained by Mr. Scott. In the circumstances, the appeal had to be dismissed.

HARRISON, J.A.

I agree.

DUKHARAN, J.A.

I agree.

ORDER

PANTON, P.

Appeal dismissed. Decision of the Disciplinary Committee affirmed. Costs of the appeal awarded to the respondent, to be agreed or taxed. Order in respect of interest varied to January 13, 2009.