

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 61/09

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE DUKHARAN, J.A.
THE HON. MRS. JUSTICE McINTOSH, J.A. (Ag.)**

BETWEEN	GILLIAN GLEAN-WALKER	APPELLANT
AND	THE GENERAL LEGAL COUNCIL	1st RESPONDENT
AND	HILARY PHILLIPS	2nd RESPONDENT

Appellant in person

**Ransford Braham, instructed by Livingston, Alexander & Levy for the
1st respondent**

Michael Hylton, Q.C. for the 2nd respondent

July 6 and 13, 2009

PANTON, P.

1. This appeal is from a decision of the Disciplinary Committee of the General Legal Council contained in a letter dated 4th May, 2009. The letter, addressed to the appellant, reads:

"Your complaint was considered at the general meeting of the Disciplinary Committee on 25th April, 2009 and was dismissed.

The allegations submitted did not disclose a prima facie case of professional misconduct against the attorney.

The Committee is of the opinion that Miss Phillips gave a conditional undertaking to the attorney and if your attorney was not satisfied that the undertaking was fulfilled, she ought to have returned the cheque to Miss Phillips in keeping with Canon VI (e) of the Legal Profession (Canon of Professions Ethics) Rules 1978."

2. By letter dated November 14, 2008, addressed to the General Legal Council, the appellant submitted an affidavit setting out the circumstances which she said formed the basis of her complaint that Miss Phillips, Q.C., had breached her undertaking in terms of the disbursement of funds to which she the appellant was entitled. The letter reads in part:

"Ms. Phillips gave an undertaking to my Attorney to pay her my share of the proceeds of the sale of premises at 40 Shortwood Rd. pursuant to the Deed of Arrangements signed by both parties. That Deed provided that I was to be paid 25% of the net proceeds of the sale. Instead, in breach of the undertaking, \$350,000 was taken out of my 25% share of the net proceeds of sale. At no time did I give permission or consent to this money being taken out."

In her affidavit, the appellant claimed that Miss Phillips has breached Canon 1(b) of the Legal Profession (Canons of Professional Ethics) Rules 1978, which reads:

"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 she is a member."

The facts

3. The relevant facts are that the appellant and her former husband have been involved in "a bitterly contested property dispute" in the Supreme Court. The suit number is 2005 HCV 1191, and the parties are Gillian Glean-Walker (claimant) on the one hand and Errol Walker and Moltov Ltd.(defendants) on the other. Miss Carol Davis, attorney-at-law represents the appellant in that suit, and Miss Hilary Phillips, Q.C., represents the defendants. The parties eventually arrived at a settlement agreement which they have called a "Deed of Arrangements" which provided for, among other things, the sale of a property known as Unit 2, Shortwood Professional Centre, 40 Shortwood Road. That property was owned by Dr. Patrick Robinson and Moltov Ltd. a company in which the appellant and her former husband held shares. The agreement provided that on completion of the sale, the appellant was to receive 25% of the net proceeds of sale.

4. On May 2, 2008, Miss Davis sent certain documents to Miss Phillips on the latter's undertaking to pay the appellant's share of the proceeds of the sale of the property pursuant to the Deed of Arrangements between the parties. Miss Phillips accepted the documents on that undertaking.

5. The sale of the property was conducted by Alfred McPherson & Co., the attorneys-at-law for Dr. Robinson. On completion of the sale, Alfred McPherson & Co. sent the sum of \$2,663,965.00 to Miss Phillips along with a statement of

account indicating that the sum represented half the net proceeds of sale. Miss Phillips duly sent a copy of the letter from Alfred McPherson & Co. and the statement of account along with her firm's cheque in the sum of \$1,331,982.50 to Miss Davis, the appellant's attorney-at-law, stating:

"This is sent in satisfaction of my professional undertaking in respect of this matter and we will proceed to file and serve the joint Notice of Discontinuance." (p.19 record)

6. A dispute arose as regards the deduction of the sum of \$700,000.00 for maintenance payments to the Strata Corporation. This deduction, it should be noted, was made by Alfred McPherson & Co. The appellant accepts that no deductions were made by Miss Phillips but contends, in her written submissions, that it was Miss Phillips' responsibility to ensure that she "received sums in keeping with what was due in the Deed". She continued:

"If my ex-husband gave instructions to Mr. McPherson to deduct sums which were clearly in breach of the Deed of Arrangements, then I contend that it was Ms. Phillips' responsibility to advise him that this could not be done."

Her submissions mentioned other forms of advice that she thought the learned Queen's Counsel should have given to Mr. Walker, and concluded thus:

"Even if Ms Phillips did not do these things, she could at least have called my lawyer to advise me, through her, of these unauthorized deductions. Ms Phillips did none of these things."

The Grounds of Appeal

7. It was against this background that the appellant filed her complaint with the General Legal Council. The grounds of appeal on which she relies in seeking to overturn the decision of the Disciplinary Committee are as follows:

- a. The Disciplinary Committee ought not to have dismissed my complaint, because they found that Ms. Phillips gave an undertaking, and the undertaking was clearly breached because I did not receive 25% of the net proceeds of sale of Shop #2, 40 Shortwood Road, less costs directly related to the sale.
- b. The Disciplinary Committee was wrong because if there was a complaint that my attorney had breached Canon VI (e) of the Legal Profession (Canons of Professional Ethics) Rules, then such complaint should have been directed to my Attorney, and she and not me should have to answer to it.
- c. The Disciplinary Committee of the General Legal Council was wrong because Canon VI (e) of the Legal Profession (Canons of Professional Ethics) Rules relates to the receiving Attorney receiving on an undertaking to do or refrain from doing some act, and in this case the cheque was not sent to my Attorney expressed to be on any undertaking."

8. Miss Phillips, Q.C., as is her right, filed a counter-notice of appeal. It reads:

"There was no breach of the undertaking given by the 2nd Respondent because:

- a. As a matter of law, a vendor of a unit in a strata plan is required to pay any sums levied by the strata corporation in respect of that unit ('maintenance payments');
- b. The 2nd Respondent did not have carriage of sale of the relevant property, and made no deductions from the sum she received from the attorney who had carriage of the sale;
- c. On a proper construction of clause 2 of the Deed of Arrangement between the Appellant and the Defendants in claim no. HCV 1191/2005, the sums payable or paid for maintenance payments should be deducted in calculating the net proceeds of sale."

The Hearing

9. The appellant appeared in person. The matter had been scheduled for hearing on June 22 but due to what she described as her "unavoidable absence from Jamaica" an adjournment was granted to July 6. Before us, she expressed surprise that the General Legal Council had not given her the opportunity to give evidence. No doubt, she would also have been surprised if this Court had decided to dispense with an oral hearing and determine the matter on the basis of written submissions.

10. It needs to be recognized that not all complaints will merit an oral hearing. For example, where, in the opinion of the Council, the complaint does not disclose a prima facie case of a breach of professional ethics, the Council may, without requiring the attorney to answer the allegations, dismiss the applications (rule 4 -The Legal Profession (Disciplinary Proceedings) Rules. This is a useful provision aimed at saving time and unnecessary expense and

inconvenience. In the instant case, it is clear that this is the provision that guided the Disciplinary Committee which is appointed by the General Legal Council (section 11 of the Legal Profession Act).

11. The Court of Appeal Rules, it should be pointed out, provide for the Court to "deal with a matter without the attendance of any parties" [rule 1.7(2)(i)] and also "instead of holding an oral hearing, deal with a matter on written representations submitted by the parties" [rule 1.7(2)(j)]. The instant case may well have qualified as one that could have been determined in keeping with these particular rules.

12. In making her oral presentation, the appellant said that her written submissions had covered "just about everything". She mentioned that she was pursuing the matter, not for the money, but for the principle. She expressed pride in what she categorized as "Miss Phillips' achievements", but said that she had had a lapse of judgment and it was to her that she was looking for the sum of \$350,000.00 that, in her view, had been wrongly deducted by Alfred McPherson & Co. The deduction, she said, was supposed to be between Dr. Robinson and her former husband. Although she said that she did not dispute the fact that monies may have been due, in the same breath she said that the sum was not necessarily owed by her former husband. We were not able to get an understanding of what she really meant in this regard.

13. The appellant, who was allowed approximately three quarters of an hour to present her appeal (compared with the allotted quarter hour) challenged the fact that learned Queen's Counsel Mr. Michael Hylton had filed a counter-notice on behalf of Miss Phillips. She submitted that this was a sign that the General Legal Council had erred, making it necessary for further grounds to be advanced to bolster the decision. In order to inform the appellant and other appellants who appear in person, it is apt to refer to that part of the Court of Appeal Rules that deal with the matter.

"Counter-notice

2.3 (1) Any person upon whom a notice of appeal is served may file a counter-notice in form A2.

(2) The counter-notice must comply with rule 2.2.

(3) A respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds.

(4) The counter-notice must be filed at the registry in accordance with Rule 1.11 within 14 days of service of the notice of appeal.

(5) The party filing a counter-notice must serve a copy on all other parties to the proceedings in the court below who may be directly affected by the appeal."

In relation to an ordinary notice of appeal, it has to be served on all parties to the proceedings in the court below who may be directly affected by the appeal (Rule 1.15 (2)(a) of the Court of Appeal Rules). Hence, Miss Phillips would have

been served with the notice of appeal from the decision of the Disciplinary Committee.

14. Although the appellant filed what appears to be three grounds of appeal, the complaint is really contained in the first ground which she labeled ground of appeal (a). Therein, she has challenged the dismissal of her complaint by contending that the Disciplinary Committee, having found that Ms. Phillips had given an undertaking, should have found that she was in breach of it, considering that she (the appellant) had not received 25% of the net proceeds of sale of the property, less costs directly related to the sale. In order to understand this ground properly, it is important to refer to the documentary evidence relating to the undertaking. The relevant documents are the Deed of Arrangements, the letters passing between the attorneys-at-law, the statement of account from Alfred McPherson & Co. and the affidavit of Dr. Patrick Robinson.

15. On January 15, 2008, Miss Phillips wrote to Miss Davis "entirely without prejudice to (her) client's rights and interest" in the following terms:

"Following a meeting with our client we are instructed to advise you that our client is prepared to settle this matter on the following terms:

1 ...

2. The sale of Unit 2...is presently being negotiated at a purchase price of \$8,500,000.00. It is expected that an

agreement will be signed in the course of this week.

3 ...

4 ...

5 ...

6. The parties will execute a Deed of Arrangements in full and final settlement of all matters and claims, present and/or future, relating to all and any property, real and personal, held by both or either of them, including any future claim for maintenance by either of them, under any Act presently in force or any Act that may come into force and will file a joint notice of discontinuance in the suit indicating that the matter has been fully settled.

7 ...

We look forward to hearing from you in due course.”

16. Miss Davis responded thus:

“My client is actively considering the proposals put forward.

...

Further with regard to item 2 of your letter, I would much appreciate being provided with a copy of the draft agreement referred to. Your client’s offer speaks of the “net” proceeds of sale. As is usual, I would expect the deductions from the purchase price to relate to the usual costs associated with sale – e.g. legal costs, including attorneys costs, transfer tax and stamp duty. Please confirm that it is only the costs of sale that your client would be intending to deduct in order to arrive at the ‘net’ proceeds.”

To this, Miss Phillips responded on January 17, 2008, thus:

"We are not yet in possession of the draft agreement for sale in respect of Unit 2 ...but will forward the same to you as soon as we are in receipt thereof. We confirm that the only deductions from the sale proceeds would be those in respect of any outstanding mortgage, legal costs including attorney's costs, transfer tax and stamp duty."

17. There followed the Deed of Arrangements which was made on the 30th January, 2008. It states in paragraph 2:

"It is agreed that property known as Unit 2, Shortwood Professional Centre, 40 Shortwood Road Kingston 10 aforesaid is to be sold at a purchase price of not less than \$8,500,000. On completion of the said sale 25% of the net proceeds of sale will be paid to the wife. For the purposes of determining the net proceeds of sale, only costs such as outstanding mortgage payment, attorneys costs, transfer tax, stamp duty and registration fees, discharge of mortgage and costs attendant thereto, which are directly related to the sale will be deducted from the purchase price."

18. On July 30, 2008 Alfred McPherson & Co. sent to Miss Phillips a cheque for \$2,663,965.00 and the vendor's statement of account in respect of the sale of unit 2. The statement shows the deduction of \$700,000.00 owed to Patrick Robinson for advancing maintenance payments to the Strata Corporation on behalf of Moltov Ltd. for the period 1st January 2000 to 31st December, 2007. As indicated in paragraphs 5 and 6 above, Miss Phillips sent fifty percent of this sum to Miss Davis and a dispute arose in respect of the deduction of the sum for reimbursement of Dr. Robinson.

19. On August 8, 2008, Miss Davis responded to Miss Phillips' letter in terms which indicated that she and her client regarded the sum of \$350,000 as due and owing. She added that the cheque did not represent fulfillment of Miss Phillips' professional undertaking. She asked that Miss Phillips either hold or return the documents sent to her on her undertaking until the payment of the sum of \$350,000. Those documents were the ones sent to Miss Phillips on May 2, 2008 (referred to in para. 4 above and reproduced at page 59 of the record).

20. Miss Phillips, Q.C., responded promptly on August 11, 2008. She repeated that the cheque was sent in satisfaction of her professional undertaking in respect of the matter, as the appellant had received 25% of the net proceeds of sale. Her letter concludes thus:

"Suffice it to say, that unless you return the cheque payable to you in satisfaction of our professional undertaking within forty-eight (48) hours, we will proceed as stated, to assume satisfaction of our undertaking representing payment of all sums due to your client, and the Joint Notice of Discontinuance shall be filed as indicated. Please be guided accordingly." (p.61,62 record)

Miss Davis responded on August 18, 2008, saying that since Miss Phillips had not returned the documents, she (Miss Davis) was obliged to advise her client (the appellant) that Miss Phillips was in breach of her undertaking and of her (the appellant's) rights in relation to same (p.63 record). There was no mention of the return of the cheque.

The Decision

21. It is amazing that the appellant has made no mention of Miss Phillips' request of Miss Davis to return the cheque. In my view, the fact that the cheque was not returned determines the matter. The appellant cannot have her cake and eat it. By failing to return the cheque, the appellant has accepted that Miss Phillips has satisfied her professional undertaking. If Miss Davis did indeed advise the appellant that there had been a breach by Miss Phillips, it is my opinion that such advice would have been wrong. It is my view therefore that the Disciplinary Committee was perfectly correct in finding that there was no prima facie case.

22. The submissions advanced by Mr. Hylton Q.C. in respect of the counter-notice of appeal reinforce the Disciplinary Committee's decision that there was no prima facie case. Dr. Patrick Robinson filed an affidavit indicating that he made mortgage payments to Jamaica National Building Society on the understanding that he would be reimbursed eventually by Moltov Ltd. He attached copies of sixty-seven cheques paid by him to Jamaica National Building Society during the period August 2000 to September 2007. The appellant has expressed concern that the payments go too far back. That has nothing to do with the fact that they were due. The Deed of Arrangements makes specific provision for outstanding mortgage payments so they were properly deducted. The vendor, in order to be able to give a clear title to the purchaser, would have been obliged to clear all outstanding mortgage payments. The same principle

applies in respect of outstanding maintenance payments due to a strata corporation. Unless there is special agreement with a purchaser, he should not be saddled with the responsibility of settling maintenance payments due from a period when he was not the owner. Finally, as Mr. Hylton Q. C. pointed out, the deductions that have given rise to these proceedings were not made by Miss Phillips. She was a mere conduit for the monies paid over to her by Alfred McPherson & Co.

23. In the circumstances that have been presented, the Disciplinary Committee was correct in its decision. The complaint should never have been made. It was misconceived and has caused unnecessary waste of time and resources. There is absolutely no merit in the appeal. I would therefore dismiss the appeal, and award costs to the respondents to be agreed or taxed.

DUKHARAN, J.A.

I too am of the view that this appeal should be dismissed.

McINTOSH, J.A. (Ag.)

I agree with the learned President that the appeal is without merit and should be dismissed.

PANTON, P.

ORDER

The appeal is dismissed.

Costs are awarded to the respondents, to be agreed or taxed.