

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 72 OF 2004

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

BETWEEN: ARLENE GAYNOR APPELLANT

**AND THE DISCIPLINARY COMMITTEE RESPONDENT
 OF THE GENERAL LEGAL COUNCIL**

**Garth McBean for the Appellant instructed by Garth McBean & Company
John Vassell, Q.C., and Audre Reynolds for the Respondent,
instructed by Patrick Bailey & Company**

October 31, 2005 & July 28, 2006

PANTON, J.A.:

I have read in draft the reasons for judgment written by my learned brother, Karl Harrison, J.A. I agree with his reasoning and conclusion and have nothing to add.

SMITH, J.A.

I too agree and have nothing to add.

K. HARRISON, J.A.:

1. This appeal arises from an order made on the 12th June 2004, by the Disciplinary Committee of the General Legal Council ("The Committee"),

constituted under section 16 of the Legal Profession Act 1971 (hereinafter referred to as "the Act") to enquire into the complaint of Mr. A.E. Bragg (hereinafter referred to as "the Complainant") against an Attorney-at-law, Miss Arlene Gaynor (hereinafter referred to as "the Appellant").

2. It was ordered, that the Appellant be suspended from practising as an Attorney-at-Law for a period of six (6) months with effect from 1st July 2004. The Appellant was further ordered to pay the sum of \$55,220.00 to the Complainant by way of restitution. Costs were fixed at \$40,000.00.

The Background Facts

3. By an agreement in writing dated 12th February 2001, the Complainant and his wife agreed to purchase premises known as Lot 42 Torado Heights, Montego Bay, registered at Volume 995 Folio 616 of the Register Book of Titles from Leonie Woodbury and James Woodbury for \$8,000,000.00. Mr. Albert Morgan, Attorney-at-Law, of Albert S. Morgan & Company, acted for the purchasers. The Appellant, a partner of Williams & Gaynor, Attorneys at Law, acted on behalf of Mr. and Mrs. Woodbury.

4. The agreement provided for the sale to be completed within thirty days and time was made the essence of the contract. The agreement also stipulated that \$1,200,000.00 was payable by the purchasers on signing, with the balance payable on completion. The agreement was duly signed by the Complainant and his wife. The required deposit was paid and sent off by letter dated 5th January 2001 to the Appellant. Mr. Morgan had indicated in the letter of 5th January that

Canadian Imperial Bank of Commerce (CIBC) would give a letter of undertaking for the balance. Mr. Morgan had also requested the Appellant to send him a copy of the duplicate Certificate of Title.

5. Prior to the signing of the agreement by the purchasers, Mr. Morgan had discussed the terms of the proposed agreement with the Appellant. She had mentioned to him that there were two problems which could affect completion. First, there was an action against a tenant for recovery of possession of the premises. Secondly, there was an encroachment by a boundary wall for the premises upon a reserved road. Mr. Morgan consulted with the purchasers' agent and he informed the Appellant that the purchasers were nevertheless prepared to proceed with the sale.

6. The Appellant had failed however, to disclose to Mr. Morgan that she was acting for and on behalf of the vendors in legal proceedings brought against Garland Ferguson, the son-in-law of the vendors who had lodged a caveat claiming an interest in the property. The Appellant had also failed to disclose to Mr. Morgan that Ferguson had obtained an *ex parte* *mareva* injunction order restraining the sale of the premises.

7. A copy of a letter of undertaking dated 16th February 2001 was sent off to the Appellant. The Bank had undertaken to pay the sum of \$6,800,000.00 but this undertaking would expire on the 12th April 2001.

8. A closing statement dated 6th March 2001, was sent to Mr. Morgan by letter of even date. The Appellant requested her cheque for \$243,995.00. This amount represented the shortfall between the amount due as per statement and the Bank's undertaking. This sum was forwarded to the Appellant by letter dated 13th March 2001. Mr. Morgan took the opportunity of reminding the appellant that he was still awaiting copies of the duplicate certificate of title and the Sale Agreement. Mr. Morgan wrote to the Appellant on the 28th May 2001 expressing his concern over the delay. He also informed the Appellant that the purchasers were considering cancelling the sale.

9. In June 2001, Mr. Morgan, carried out a search at the Titles Office for the very first time. He discovered that caveats were lodged against the title. The tenant had by then vacated the premises. By letter dated 12th June 2001, Mr. Morgan informed the Appellant of the result of his search at the Titles Office and that the purchasers were seeking immediate possession. The Appellant responded by letter dated 13th June 2001 and confirmed inter alia, that the premises was vacant. She also advised Mr. Morgan that two caveats were lodged on the title and that she was seeking to discharge the Mareva Injunction. She asked for his clients' forbearance and informed him that the injunction would be discharged within thirty (30) days. In the interim, the stamped agreement for sale and a copy of the title were sent to Mr. Morgan.

10. By letter dated 27th June 2001, Mr. Morgan wrote to the Appellant and proposed that the purchasers be given a rent-free lease in respect of the

premises so that they could have immediate possession. The vendors had informed the appellant by fax dated 22nd June that a settlement had been arrived at with their son-in-law and that a copy of the settlement was forwarded to Mr. Morgan.

11. The settlement did not materialize, so the purchasers elected to cancel the agreement. That decision was communicated to the Appellant by letter dated 2nd July 2001 from Mr. Morgan. The Appellant responded by letter dated 3rd July 2001 informing Mr. Morgan that she rejected the cancellation and that a notice to complete was required. Mr. Morgan confirmed the cancellation of the sale by letter dated 9th July 2001 and demanded a refund of all monies paid by the purchasers together with interest.

12. On the 30th July 2001, the Appellant sent the keys for the premises and a letter of possession to Mr. Morgan who also received copy of a letter dated July 30, 2001 from the vendors which indicated that they had authorized their daughter to act on their behalf and to terminate the Appellant's services with immediate effect. Mr. Morgan was left with no choice but to return the keys to the Appellant under cover of letter dated 31st July 2001. By letter dated 3rd August 2001 the purchasers' daughter wrote to Mr. Morgan and informed him that the Appellant's services had been terminated.

13. The Appellant, in defiance of the termination of her services, wrote to CIBC on August 16, 2001, and called upon the Bank to pay her the sum of \$6,800,000.00 pursuant to the letter of undertaking that was given in January

2001. That undertaking had expired on 12th April 2001. The letter of August 16, states as follows:

"We refer to the captioned matter and to your letter dated January 16th 2001.

We have not forwarded to you the Duplicate Certificate of Titles Registered at Volume 995 Folio 616 in the name of Anthony Bragg et al because the Transfer is being held up by a Caveat lodged against the said Title by Garland Ferguson.

We now have instructions from our client the Registered proprietor Leonie Woodbury to settle with Mr. Ferguson and will do so from the proceeds of the transaction. Consequently, we are requesting that you forward to us your cheque in the **sum of Six Million Eight Hundred Thousand Dollars (\$6,800,000.00)** pursuant to your undertaking date January 16, 2001. **Upon our undertaking to forward to you the Duplicate Certificate of Title Registered at Volume 995 Folio 616 in the name of Emanuel Bragg and Aldith Bragg."**

14. It was not until August 24, 2001, that the Appellant finally accepted that her services were terminated by the vendors. On that date, she wrote to Mrs. Leonie Woodbury and informed her that she would be happy to hand over the files to her. A sum amounting to \$380,005.00 was refunded to Mr. Morgan. The stamped agreement for sale was also sent to him on the 25th March 2002.

The application and principal matters of complaint

15. In the "FORM OF APPLICATION AGAINST AN ATTORNEY-AT-LAW" signed by the Complainant on 26th September 2004, the Complainant asserted that he made his application "on the ground that the matters of fact stated in the

said affidavit constitute conduct unbecoming her profession on the part of (the Appellant) in her capacity of an attorney-at-law.”

16. The principal matters of complaint to the Committee are set out in the affidavit sworn to by the Complainant on the 26th September 2001 and are summarized as follows:

1. CIBC had issued an undertaking which had expired in the Month of April 2001 and that after the date of expiry of the undertaking and after the complainant had cancelled the contract, the appellant attempted to obtain funds from the Bank to close the sale on the property when she was no longer authorized by her clients to act.
2. Despite having been dismissed, the appellant had not only attempted to obtain money from CIBC but at the same time continued to retain the money paid by the complainant and had not refunded any of the money paid.
3. The appellant had not informed the complainant or his Attorney that there was a caveat lodged on the property until approximately three weeks prior to the cancellation of the contract to purchase the property.
4. The appellant was instructed by her clients to close on the said property without going to court with Garland Ferguson but refused to do so.
5. There was a shortfall reflected in the appellant's financial statement but the complainant had not received any cash from the appellant.

The Disciplinary Committee's findings.

17. Sworn evidence was heard from the Complainant, Mr. Albert Morgan and the Appellant over a period of four days. The Committee found that the evidence established beyond reasonable doubt that the Appellant was guilty of

professional misconduct and that she had failed to act with honesty and integrity in the discharge of her professional duties.

18. The main findings of the Committee are set out hereunder:

1) There were four impediments known to the appellant regarding sale of the property yet the purchaser's attorney was told of two. In the circumstances, there was deliberate withholding of crucial information from the purchaser's attorney when there was a duty to make full and frank disclosure instead of telling him "half-truth".

2) The appellant represented to the purchaser's attorney that the vendors were in a position to close when to the appellant's knowledge, there was then a Court Order in force restraining any transfer of the property.

3) The calling on the purchaser's bank's undertaking to pay the balance purchase price after the vendors had terminated her services and after the vendors and purchaser had agreed that the sale be cancelled.

4) The appellant had refused to pay over funds in her hands which belonged to the purchaser.

The Committee then made the orders noted earlier.

The Submissions

19. Several grounds of appeal were filed and argued on behalf of the Appellant. The central issue for determination however, in this appeal is whether or not the Appellant's conduct fell below the required standard of professional conduct prescribed by the Canons of the Legal Profession.

20. Mr. McBean submitted that the Committee had erred in finding that the Appellant was guilty of professional misconduct since she failed to act with honesty and integrity in the discharge of her professional duties, by failing to disclose to the purchasers' Attorney-at-Law the existence of the injunction restraining the sale of the property and the caveats lodged against the title. He argued that the Committee ought to have borne in mind that there was a legal duty on the part of the purchasers' Attorney to have conducted a title search and that the Appellant was entitled to assume that he had fulfilled that duty.

21. Mr. McBean also submitted that the Committee was in error in finding that the Appellant had induced the purchasers to execute and submit the sale agreement with the required part payment on the purchase price. He argued that for the common-law action of deceit to succeed a number of well-known critical elements had to be established. He submitted that these elements had not been established on the facts of this case.

22. It was further submitted by Mr. McBean that the Committee was also in error in finding that the Appellant had misrepresented that her clients were in a position to close the sale on March 6th, 2001, when she knew that the Mareva Injunction had not been discharged. He argued that there was evidence which would have provided reasonable grounds for the Appellant to have believed that she would have been in a position to close the sale. He relied on the following:

- (a) "Evidence from the Appellant that she had been in negotiations with the Attorney for Garland Ferguson at whose instance the injunction was ordered."

- (b) "Evidence from the Appellant that arising from the negotiations with Mr. Ferguson's Attorney at Law an agreement was reached and the summons to discharge the injunction was filed and set for hearing on the 2nd April 2001."
- (c) "Evidence from the Appellant that she felt that on the 2nd April 2001 the sale would have been completed once the order for discharge of the injunction had been perfected by the Court and filed" by the Registrar.
- (d) "Evidence from the Appellant to the effect that based on the evidence outlined in paragraph (b) above she was confident that the injunction would be discharged on the 2nd April 2001."

23. Mr. McBean submitted that the Committee also erred in finding that the Appellant chose to ignore instructions from her clients to act on their behalf for the following reasons:

- (a) There was evidence from the Appellant that there were several outstanding matters on the file which she was trying to clarify and rectify.
- (b) The evidence from the Appellant that she was awaiting her clients' instructions as to the identity of their new Attorney-at-Law to whom their file was to be sent.
- (c) The evidence from the Appellant that she did not act for or take instructions from Mrs. Ferguson.
- (d) The evidence from Mr. Morgan that after he learnt of the caveat and the injunction in June 2001 he believed that the transaction could proceed.
- (e) Evidence from the Complainant that up to the time when the letter of the 2nd July was written he intended to complete the sale.
- (f) Evidence which indicated that the purchasers had long after the 30 days set for completion expired showed an intention to complete the sale thereby waiving the term making time of the essence.

24. Mr. McBean submitted that the evidence referred to above provided a basis for the Appellant to believe on reasonable grounds that her clients were entitled to specific performance of the agreement.

25. Finally, Mr. McBean submitted that the penalty and sanction imposed by the Committee was excessive and unwarranted in the circumstances of the case.

26. Mr. John Vassell, Q.C., submitted on the other hand, that the decision of the Committee was correct for the reasons stated by it and that there were no reasonable grounds upon which the finding of facts could be faulted. He submitted that the matter was not one to be tested by examining the position in law relating to the civil action for misrepresentation and/or deceit. He argued that the Appellant's ethical duties rested upon different foundations and differed in scope and content from the actions in misrepresentation and deceit.

27. Mr. Vassel, Q.C., submitted quite forcefully that by preparing and procuring the vendors to sign an agreement for sale of the property at a time when to her knowledge there was in force a Mareva Injunction restraining the sale, the Appellant had arguably put her client in contempt of court and herself aided and abetted the contempt. In this event, he submitted that such conduct was in breach of the Canons of the profession so the sanctions imposed by the Committee would be justified.

The law

28. For the purposes of this appeal, two Canons of "The Legal Profession (Canons of Professional Ethics) Rules" are relevant. They are 1(b) and VI (a).

Canon 1(b) states as follows:

"1(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."

Canon VI (a) states as follows:

"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."

29. These Rules have been gazetted in The Jamaica Gazette Supplement No. 71 published on the 29th December 1978.

30. Canon VIII (d) provides inter alia, that a breach of Canon 1(b) by an Attorney "shall constitute misconduct in a professional respect and an Attorney who commits such a breach shall be subject to any of the orders contained in section 12(4)" of the Legal Profession Act.

31. In *Re A Solicitor, ex p. The Law Society* [1911-13] All ER Rep 202, Darling J, said at p 204:

"A definition (of professional misconduct) could not be more authoritative than one drawn up by such an authority as that, and adopted after careful consideration by those three learned judges. It was:

'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'."

32. Applying the above dicta to the present case, it comes to this, that the members of the legal profession are very good judges of what is professional misconduct as an Attorney-at-Law. Lord Esher MR, with his accustomed and commendable clarity, emphasized the true distinction between negligence and dishonourable conduct. In *Re Cooke* (1889), 5 TLR 407, at pp 407-408, the learned Master of the Rolls said:

"But in order that the court should exercise its penal jurisdiction over a solicitor it was not sufficient to show that his conduct had been such as would support an action for negligence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable in his profession. A professional man, whether he were a solicitor or a barrister, was bound to act with the utmost honour and fairness with regard to his client. He was bound to use his utmost skill for his client... If an attorney were to know the steps which were the right steps to take and were to take a multitude of wrong, futile, and unnecessary steps in order to multiply the costs, then if there were both that knowledge and that intention and enormous bills of costs resulted, the attorney would be acting dishonourably. A solicitor must do for his client what was best to his own knowledge, and in the way which was best to his own knowledge, and if he failed in either of those particulars he was dishonourable."

33. I adopt the foregoing dicta. The criteria laid down in the *Re Cooke's* case (supra) in respect of professional misconduct by an attorney-at-law in relation to his or her client are, I think, as valid today as they were in 1889. They point to the true standards and practices by reference to which professional misconduct by members of our profession is to be judged when complaints are made by clients to the Disciplinary Committee of the General Legal Council.

Was the decision arrived at by the Committee correct?

34. The findings of the Committee are comprehensive and are supported by the evidence adduced at the hearing. The members were well placed to assess the conduct of the Appellant. There is therefore no basis for this court to differ. I do agree with Mr. Vassell, Q.C., when he submitted that such conduct by the appellant, whether individually or collectively tend to discredit the legal profession and fell below the standard of professional conduct prescribed by the Canons.

35. I further agree with Mr. Vassell, Q.C., that the test to be applied in determining whether the conduct in this case falls within Canon 1(b) is not whether the appellant would be liable in an action in tort for deceit or negligence or innocent misrepresentation. The code of conduct which the Canon enshrined, requires that attorneys act with honour and propriety.

36. The Committee was correct in my view in not attributing any weight to the fact that Mr. Morgan should have checked to see if there were any caveats on the title. Mr. Morgan's failure to carry out a title search earlier than he actually did, was no excuse for the misrepresentations committed by the Appellant and

her failure to make full and frank disclosures as to the state of the title and the existence of the injunction known to her.

Conclusion

37. In my view, the appellant's conduct amounted to professional misconduct. Her conduct fell short of the standard that members of the public, were entitled to expect of practitioners of good repute and competency.

38. I see no valid reason therefore, to impugn the conclusion of the Committee or to alter the penalty imposed by them, and would dismiss the appeal with costs to the Respondent to be taxed if not agreed.

PANTON, J.A.

ORDER:

1. The appeal is dismissed.
2. Costs to the Respondent to be taxed if not agreed.