[2013] JMCA Civ 8

JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO 19/2011

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**CHANDRA SOARES**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

RNA Henriques QC and John Givans instructed by Givans and Co for the appellant

Michael Hylton QC and Sundiatta Gibbs instructed by Michael Hylton and Associates for the respondent

12, 13 March 2012 and 8 March 2013

HARRIS JA

[1] I have read in draft the judgment of my brother Dukharan JA and agree with his reasoning and conclusion. I have nothing to add.

DUKHARAN JA

[2] This appeal is from a decision of the disciplinary committee of the General Legal

Council ('the Committee') handed down on 20 February 2011 in which the appellant Chandra Soares was struck from the roll of attorneys-at-law entitled to practice in Jamaica.

[3] In 2008 the appellant was retained by the complainant Mr Kenneth Roy Chung regarding the sale of his property at 50 Barbican Road, St Andrew. The purchase price was $35,500,000.00. However, the appellant drafted the agreement for sale to indicate that the purchase price was $25,500,000.00. She did so with the knowledge that US$140,000.00 (the equivalent of J$10,000,000.00) had already been paid by the purchasers to the complainant and $25,500,000.00 was not the full purchase price. The sale was completed in September 2008. The complainant should have received $21,985,424.76 from the proceeds of the sale but the appellant paid him only $14,000,000.00 by cheque dated 22 September 2008, leaving a shortfall of $7,985,424.76.

[4] The appellant was unable to pay the full sum of $21,985,424.76 to the complainant because between 2006 and 2008 she had used funds entrusted to her by her clients to pay "sow seed" money to her church. When the appellant paid the $14,000,000.00 to the complainant she did render to him a statement of account showing the sum due to him. She also prepared a promissory note for the shortfall which was never shown to, or agreed to, by the complainant.

[5] On recognizing the shortfall, the complainant made a complaint to the General Legal Council ('GLC') by letter dated 24 September 2008. The appellant requested of

the complainant time in which to pay the balance of the net proceeds of sale as she was short. The complainant refused this request. The appellant paid the balance of the money to the complainant by cheque dated 19 December 2008 in the sum of $8,373,774.77 which comprised: (a) the shortfall of $7,985,424.76, (b) commercial interest at the rate of 15.875% and (c) legal costs.

[6] The complainant wrote two letters to the committee dated 29 January 2009 and 9 March 2009, advising that he had received his money and that he wished to withdraw the complaint.

[7] On 11 July 2009, the panel heard submissions from Mr Anthony Pearson, attorney-at-law for the complainant, and Miss Sandra Johnson, the appellant's attorney-at-law. Both submissions were in favour of the withdrawal of the complaint. The panel asked for more material on which to exercise its discretion to withdraw and adjourned the matter to 5 December 2009 for the requested material to be presented.

[8] On 5 December 2009, the complainant appeared and advised the committee that the matter had been satisfactorily settled. Miss Johnson submitted, on behalf of the appellant, that since the full proceeds of sale had been paid to the complainant together with interest and as he had sustained no loss, he should be allowed to withdraw his complaint. The panel ruled however, that having regard to the nature of the allegations and its duty, to allow the withdrawal of such a complaint would amount to an acceptance by the panel that the conduct disclosed in the complaint was

consistent with the standard of conduct to be expected by the public from an attorney-at-law. The panel directed that the hearing into the complaint should proceed.

[9] Evidence was heard by the committee on 6 March and 8 May 2010. The complainant, who was unrepresented at this hearing, told the committee that he had known the appellant since 1990 when he and his brother were in the business of property developers. The appellant did all the conveyances, mortgages and other documents associated with their business.

[10] The complainant, under cross-examination, said he had met with the appellant at her request at the UDC car park on Temple Lane in Kingston on 19 September 2008, at which meeting she requested six weeks in which to settle the total sum due to him. The complainant said that he had never seen the promissory note signed by the appellant.

[11] The appellant gave evidence on 8 May 2010. She said she had been in practice for 25 years. When she was asked about the difference between the actual sale price of $35,500,000.00, of which she was aware, and that of $25,500,000.00 quoted in the actual agreement, her explanation was that the instructions were to prepare an agreement for $25,500,000.00 with which she complied. She said she realized there would be a shortfall and as she had known the complainant for a long time she called him to speak to him about it. The meeting, she said, was in the car park which she had chosen. At the meeting, she asked the complainant for six weeks to make up the deficit as she would be seeking a bank loan. He told her he would think about it.

[12] The appellant explained to the committee that the reason for the shortfall was that "the matter is really church related. If I may say, I fell into a pit. I had gotten myself in a situation where demands were being made on me for funds and it led to a shortage". She further stated that she was demanded to "sow seed" by her church's Bishop and this was what caused her to have to resort to her client's funds.

[13] The complainant was invited to cross-examine the appellant but he made statements instead of asking her questions. He however refuted the appellant's assertion that he had agreed to lend her the money.

[14] The committee having given consideration to the oral evidence and written submissions of counsel for the appellant made the following findings:

> "(1) The panel finds all the undisputed facts to be proven to the standard of proof of beyond reasonable doubt.
>
> (2) The panel finds that the attorney knowingly and wrongly computed the costs payable on the sale on a purchase price of $25,500,000.00 instead of $35,500,000.00.
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> (3) The panel finds that the complainant did not agree to lend the sum of $7,985,424.76 to the attorney.
>
> (4) The panel finds that the attorney knowingly converted that sum to her own use and benefit and/or to the use and benefit of persons other than the complainant and without his consent."

[15] Consequently, the committee found that the appellant, by her conduct, had breached Canon V11 (b) (ii) of the Legal Profession (Canons of Professional Ethics)

Rules in that she "failed to account to the complainant Kenneth Chung for all the monies in her hands for his account or credit although reasonably required to do so". It was also found that the appellant had also breached Canon 1 (b) of the Legal Profession (Canons of Professional Ethics) Rules in that, by her conduct she had failed to maintain the honour and dignity of the profession and had not abstained from behavior which may tend to discredit the profession of which she is a member.

[16] The committee described the appellant's conduct as egregious, unacceptable and inexcusable. It found that her actions breached the trust her client had reposed in her and brought the profession's reputation into disrepute.

[17] It is against this background that the appellant, by this appeal, challenges only the order by the committee that she be struck from the roll of the attorneys-at-law entitled to practice in Jamaica. The amended grounds of appeal are as follows:

> "i. The sanction that the Appellant be struck from the Roll of Attorneys-at-Law is too harsh and severe.
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> ii. The Disciplinary Committee failed to accord sufficient weight to the facts that the complainant at the hearing had stated that he wished to withdraw the complaint and had written to this effect and that he had been refunded the balance of money with interest and costs and that the Appellant has hitherto had an unblemished career as an Attorney-at-Law.
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> iii. Other less severe sanctions could have been meted out to the Appellant which would have had effectively served the dual purpose of punishing the Appellant while preserving her means of livelihood.

iv. The panel failed to properly exercise its discretion to permit the Complainant to withdraw the complaint having regard to the facts in the matter. The Complainant several months before had twice in writing requested that the complaint be withdrawn, he having received his monies with interest and costs. He further retained Attorneys to appear before the Tribunal to have the complaint withdrawn at a time long before the hearing of the matter.

v. The Tribunal failed to take into consideration the relevant principles for the exercise of its discretion having regard to the fact and circumstances in this matter and erred when they refused the application to withdraw same."

[18] The orders sought are as follows:

i. That the order that the appellant be struck from the roll of attorneys-at-law entitled to practice in Jamaica be set aside.

ii. That an order that the respondent be fined and/or strongly reprimanded be substituted therefor.

[19] Mr Henriques QC for the appellant argued only grounds one and two, which basically contend that the complainant should have been allowed by the committee to withdraw the complaint and that the penalty imposed was excessive and wrong in principle.

[20] Mr Henriques submitted that the appellant had been in practice since 1985 and had been handling transactions for the complainant since 1990. She had never before been accused by the complainant of any wrong doing. He further submitted that without any compulsion or order or direction from anyone, the appellant voluntarily repaid to the complainant, not only the principal due to him but also interest within

three months. He argued that the disciplinary committee failed to accord sufficient weight to the fact that the complainant at the hearing had stated that he wished to withdraw the complaint and that he had been refunded the balance of money with interest. He further submitted that, had the committee accorded proper weight to these factors, it would have permitted the withdrawal of the complaint, since these factors tended to weigh more, in favour of, than against the withdrawal.

[21] On ground two, the learned Queen's Counsel again relied on the untarnished reputation of the appellant since 1985 and her previous dealings with the complainant and the fact that she had never been accused of wrong doing or dishonesty. Learned Queen's Counsel submitted that having repaid the money prior to the hearing, the appellant's case is readily distinguishable from that of **Georgette Scott v The General Legal Council** SCCA No 118/2008 delivered 30 July 2009, where the court held that the committee's decision not to withdraw the complaint could not be faulted, as at the time of the hearing in that case the attorney was yet to make restitution to the complainant. Counsel also cited **Kenneth McLeod v The General Legal Council** "an oral judgment delivered on 12 November 2003" and **Re Clarke** [2008] 73 WIR 43 where in those cases the attorneys were found to be dishonest and the penalties imposed were only two years and nine months suspension, respectively. Counsel further argued that these cases demonstrated far graver conduct than the appellant's, and as such, the complainant should have been permitted to withdraw his complaint. Counsel also referred to **Bolton v Law Society** [1994] 2 All ER 486 and **McCoan v General Medical Council** [1964] 3 All ER 143.

[22] Mr Hylton QC, for the respondent, submitted on ground one that the challenge to the committee's refusal to allow the withdrawal of the complaint was misconceived. He submitted that disciplinary matters are not private actions between party and party. The disciplinary committee is not only concerned with the interests of the complainant but it is also its duty to protect the public and ensure that the standards and integrity of the legal profession are maintained, he argued.

[23] Mr Hylton made reference to the authors of "Corderry on Solicitors" (8th Edition) at page 322; which states:

> "Reparation to the client made by the solicitor during the proceedings is no reason for the court to stay its hand (Re Holness (1875) 31 LT 730; Re A Solicitor (1877) 36 LT 113) and a matter once brought before the court is not allowed to drop by private arrangement ..."

Mr Hylton further submitted that the committee has a discretion which they must exercise and they in fact indicated why they exercised it as they did. He said there was no appeal against the finding of professional misconduct and the appeal is against sentence only. In those circumstances one cannot say that the panel ought not to have proceeded with a complaint that led to a finding of professional misconduct which has not been challenged. Counsel also made reference to **Georgette Scott v General Legal Council.**

[24] On ground two, Mr Hylton submitted that this court should only interfere if it is satisfied that the penalty imposed by the committee was plainly wrong or unreasonable. He emphasized the fact that section 12 (4) of the Legal Profession Act empowers the

committee, after hearing a complaint, to make one or more orders "as it thinks fit". Mr Hylton cited **Bolton v Law Society** for the principles that the court has applied in appeals against penalty in these matters. He further submitted that there were at least four breaches which the committee had to consider: (1) the terms of the agreement for sale; (2) the purpose and effect of the promissory note; (3) the appellant's use of the complainant's funds for her own purposes and (4) that this was not an isolated incident, but part of a course of conduct over a number of years. Counsel further submitted that the evidence was that the appellant knowingly drafted the agreement in a way that would deprive the revenue of its income, and although she gained no benefit, in light of section 3(1)(b) of the Legal Profession Act, this was a serious breach for the committee's consideration in determining the penalty. Mr Hylton submitted that, given the facts of this case, the sanction that is being appealed cannot be said to have been plainly wrong or irrational, and no extenuating circumstances exist on which the court could base its interference. Counsel also made reference to **McCoan v General Medical Council.**

Analysis

[25] The agreed statement of facts and issues filed on 1 September 2011 identified four issues for the court's determination. However, these can be narrowed down to two. They are:

(1) Should the disciplinary committee have refused to allow the withdrawal of the complaint?

(2) Was the disciplinary committee's decision to strike off the appellant so plainly wrong as to warrant the court's interference?

[26] On ground one, the appellant relies on her past unblemished record in support of the withdrawal of the complaint. Repayment of the shortfall was also relied on. There is no indication that the committee failed to consider those factors as well as the two letters by the complainant requesting withdrawal. There is evidence that the committee adjourned the hearing of 11 July to be presented with more material on which to exercise its discretion. This suggests that the committee approached the application with serious thought and consideration.

[27] The courts have consistently emphasised that the duty to protect the standards of the legal profession exists even if a complainant in disciplinary proceedings no longer wants to pursue the complaint. This principle was applied in **Georgette Scott v General Legal Council** as in the instant case, it was argued on appeal, that the panel hearing this complaint was wrong to disregard the complainant's request to withdraw. However, this argument was rejected by Panton P, who drew a parallel between the court's duty to ensure the proper conduct of its officers and the disciplinary committee's duty to ensure the proper conduct of members of the legal profession. He accepted the following words of Pollock, C.B. in **Re – (an Attorney)** [1863] Law Times Reports [Vol. 1X, N.S. -299], a case in which the parties, by arrangement, failed to appear when the case was called:

> "This is an application against an attorney, an officer of this court. The application was grounded upon alleged misconduct disclosed in certain affidavits filed, and which

> have been very carefully perused by one of my learned brothers. Grave charges are made against the attorney, which must be answered by him, and if not answered he ought to be punished. If the charges are not properly and fully explained, the attorney is a fit subject for a prosecution in some way. The court will therefore not discharge the rule which has been obtained, neither will it be struck out. If those whose duty it is to be here and proceed with the matter forget their duty, the court will not forget its duty, but take care that such steps are taken as will prevent a private settlement of the proceedings by smothering it and so getting rid of the matter. A rule with such charges as the present shall not be disposed of at the will of the parties themselves, and we hope these observations will be conveyed to the parties concerned in the rule."

Panton P commented by saying:

> "The words of Pollock CB are relevant to the instant situation. The nature of the allegations was such that it would have been clearly wrong for the complainant to have been permitted to withdraw the complaint."

[28] The committee, after considering the authorities, found that, "having regard to the nature of the allegations, we know that we would be remiss in our duty and would be failing to properly exercise our discretion were we to grant leave to withdraw the complaint".

[29] In my view, the panel cannot be faulted. The complainant's wish to withdraw the complaint did not justify the discontinuation of disciplinary action against the appellant. This ground, in my view, is without merit.

[30] On ground two, how should this court approach the complaint that the penalty imposed was severe? Section 12 (4) of the Legal Profession Act provides that after

completion of hearing a complaint "the committee may as it thinks just, make one or more of the following orders."

> "(a) striking off the Roll the name of the attorney to whom the application relates;
> (b) suspending the attorney from practice on such conditions as it may determine;
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> (c) the imposition on the attorney of such fine as the Committee thinks proper;
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> (d) subjecting the attorney to a reprimand;
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> (e) the payment by any party of costs of such sum as the Committee considers a reasonable contribution towards costs; and
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> (f) the payment by the attorney of such sum by way of restitution as it may consider reasonable."

There has to be material on which the court can conclude that the sentence was plainly wrong or manifestly unreasonable.

[31] Mr Hylton quite rightly referred to the principles set out in **Bolton v Law Society** which this court has consistently applied in considering appeals against penalties imposed by the disciplinary committee. In that case the court disapproved the approach by the divisional court of merely substituting its own view on penalty for the tribunals. In this regard we refer to the words of Sir Thomas Bingham MR, at page 492:

> "It is important that there should be a full understanding of the reasons why the tribunal make orders which might otherwise seem harsh. There is in some of these orders a punitive element ... In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does

> not have the opportunity to repeat the offence. This purpose is achieved for a limited purpose by an order of suspension, plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period and quite possibly indefinitely by an order of striking off. The second purpose is the most fundamental of all to maintain the reputation of the solicitors profession as one in which every member of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is necessary that those guilty of serious lapses are not only expelled to denied re-admission."

By way of reinforcing the point, the committee was well within its right to impose the penalty which it did because of the responsibility that it has. Moreover, these were more serious lapses than in **Bolton**.

[32] The Privy Council in **McCoan v The General Medical Council** accepted that although discretion exists in an appellate court, the court should be slow to set aside the professional body's decision on sentence, as the disciplinary committee are the best persons to weigh the seriousness of professional misconduct. **McCoan** approves of the approach of Goddard CJ in **Re A Solicitor**, that what is required is a very strong case to engage that discretion. This approach was adopted in this court by Harrison JA in **Georgette Scott's** case when he said at page 23:

> "... The appellant must have been fully aware of the duty placed on her when she was retained by the complainant in the sale of his property. She failed to discharge that duty. She had breached the provisions under the Act as they relate to the client's funds and was in my view, correctly found guilty of misconduct in a professional respect. I can find no extenuating circumstances in this case which this

court could use to vary the sentence recommended by the committee."

[33] What were the factors that the panel had to consider in determining the appropriate sentence in this case? The appellant relied on the repayment to the complainant with interest. The appellant also relied on her past unblemished record as well as cases in which less severe penalties were imposed for more egregious conduct. None of these factors by themselves or cumulatively amounts to a strong case or extenuating circumstances.

[34] On the issue of whether the appellant exhibited dishonest conduct, the committee made reference to the appellant's complicity in drafting an agreement for sale that would result in less money being remitted to the revenue, as it indicated that the purchase price was $25,500,000.00 instead of the actual purchase price of $35,500,000.00. In preparing a statement of account by the appellant, this additional sum of $10,000,000.00 related to the same transaction.

[35] The appellant produced a promissory note and submitted it to the committee which was dated 13 November 2008. However, the complainant denied that he had agreed to a loan and a promissory note was never given to him, nor did he agree to any terms of repayment of money due to him. It was the findings of the committee that the complainant had not agreed to lend any money to the appellant.

[36] It is clear that an attorney is not entitled to convert his clients' funds for his own purposes (without permission). Section 17 of the Legal Profession Act (Accounts and Records) Regulations 1999 provides that:

> a. Every attorney who receives clients' funds 'shall forthwith pay the money' into a clients' account."

The appellant admits that it was wrong to use the complainant's funds. However, this was not an isolated incident as the evidence revealed a course of conduct spanning at least two years in which the appellant gave clients' money to the church. This certainly was a serious, egregious case of professional misconduct, and in my view, the panel was entitled to view the matter seriously. As Sir Thomas Bingham MR said in **Bolton v Law Society** at page 492:

> "if a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor pending reinvestment in another house, he is ordinarily entitled to expect that the solicitor is a person whose trustworthiness is not and has never been seriously in question, otherwise the whole profession and the public as a whole is injured."

[37] In my view, given the totality of the facts in this case, the sanction imposed by the committee cannot be said to be plainly wrong. I see no reason for the court to differ. In the circumstances, I hold the view that the appeal should be dismissed and that the order of the committee be affirmed. Costs of the appeal should be awarded to the respondent to be taxed if not agreed.

MCINTOSH JA

[38] I too have read the draft judgment of Dukharan JA and agree with his reasoning and conclusion.

HARRIS JA

Order

Appeal dismissed. Order of the Disciplinary Committee affirmed. Costs to the respondent to be taxed if not agreed.