IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CHAMBERS

SUIT NO. C.L. 1983/F156

BETWEEN	DONALD FORRESTER	PLAINTIFF
A N D	RUDOLPH FRANCIS	DEFENDANT

Bert Samuels instructed by Knight, Pickersgill, Dowding and Samuels for the Plaintiff.

Bertham MaCaulay Q.C. and Mrs. M. MaCaulay for the Defendant.

HEARD: OCTOBER 8, 1992, FEBRUARY 3, 15, 17, 18, AND MAY 30, 1994.

WALKER J.

These are ancient proceedings. They were commenced more than a decade ago by the plaintiff's Writ of Summons which was filed on December 22, 1983. That writ was accompanied by a Statement of Claim the main body of which reads as follows:

> " The Plaintiff was at the material time unemployed and lived at 2 Park Avenue, Kingston 5 in the parish of St. Andrew.
>
> 1. The Defendant is an Attorney-at-Law with chambers located at 18a Duke Street in the parish of Kingston
>
> 2. On the 13th day of February 1978 the Plaintiff retained and employed the Defendant as his Attorney-at-Law by a contingency agreement dated the 13th day of February 1978 and the payment of $50.00 for expenses to advise and act for him in the continuation of an action Suit No. C.L.F.131/75 commenced by another Attorney-at-Law.
>
> 3. In the premise the Defendant was at all material times under a duty to exercise all due professional care skill and diligence as an Attorney-at-Law in relation to the Plaintiff's said business and affairs.
>
> 4. The Defendant was guilty of negligence and/or breach of duty in that he failed to check or peruse the relevant legislation or Acts to determine whether the Plaintiff's action was maintainable in law.
>
> 5. On the 14th and 15th days of June 1979 the said Suit No. C.L.F131/75 came on for hearing before his Lordship and Honourable Mr. R.O.C. Whyte in the Supreme Court of Judicature of Jamaica and it was then discovered that the wrong Defendant had

been named in the action and the said action was dismissed with costs to the defendants.

6. On the 21st day of September 1979 a Bill of costs was taxed against the Plaintiff in the same action Suit No. C.L. F.131/75 at $528.55.

7. In or about the 15th day of June 1979 the Defendant advised and induced the Plaintiff to commence a second action to replace Suit No. C.L. F.131/75 and a new Suit No. C.L. F048 of 1979 was commenced by the Defendant against the University Hospital Board of Management as the 1st Defendant, the University Hospital of the West Indies as the 2nd Defendant and O.D. Scott as the 3rd Defendant.

8. On the 10th day of October 1979 the 2nd and 3rd Defendants in Suit No. C.L. F No. 48 of 1979 were ordered by the Honourable Master to be struck out from the said action with costs to be agreed or taxed.

9. On the 27th day of November 1979 the Honourable Master in chambers made an order that the action Suit No. C.L. F048/79 should be stayed until the cost incurred by the Plaintiff in Suit No. 131 of 75 be paid.

10. The Defendant appeared before the court on the 12th day of January 1981 in an application for an extension of time to lodge an appeal against the said order referred to above and the matter was adjourned sine die with cost to be agreed or taxed and to be paid to the University Hospital Board of Management.

11. The 20th day of May 1981 the cost referred to above were taxed by the Registrar of the Court of Appeal in the sum of $457.00.

12. The Defendant advised and induced the Plaintiff to continue Suit No. 131/75 and to commence Suit No. C.L. F048 of 1979 by representing to him orally,

    (a) that the Plaintiff had a good case against his employers and a very good chance of success, and

    (b) that all that was necessary to remedy the defect of the previous Suit No. C.L. F131/79 when this action was dismissed on the 15th day of June 1978 was to substitute the correct names of the Defendants in a new action.

13. Each and every of the said representations was untrue since the Defendant knew or ought to have known that the Defendant in a new action the University Hospital Board of Management would be protected under Section 2 of the Public Authorities Protection Act.

14. Further and in the alternative in inducing and advising the Plaintiff to continue Suit No. C.L.F.131/79 and subsequently to commence a new action the Defendant was guilty of negligence and/or breach of duty in that he failed to check or peruse the relevant legislation or Acts to determine whether the Plaintiff cause of action was maintainable in law.

15. Further or in the alternative in so advising and inducing the Plaintiff to commence a new action against the University Hospital Board of Management the University Hospital of the West Indies and O.D. Scott the Defendant negligently and in breach of duty omitted to make due and proper inquiry as to the relevant parties to the action and/or which were the relevant statutes that governed any action between the Plaintiff and his former employers. The Defendant knew or he could by due and proper inquiry have ascertained that any new action against the University Hospital Board of Management was statute barred under Section 2 of the Public Authorities Protection Act and further that the University Hospital of the West Indies was not a legal entity and had no capacity to sue or be sued and O.D. Scott was only an agent of the University Hospital Board of Management.

16. By reason of the premises the Plaintiff has incurred loss and expenses and costs were awarded against the Plaintiff in Suits No. C.L. F.131/75 and C.L.F.048 of 1979 and he is liable to be called upon to pay and satisfy same.

Particulars of Loss

(1) Taxed cost for Suit No.C.L.F.131/75	$988.55
(2) Taxed cost for Suit No.C.L.F.048/79	529.26
(3) Taxed cost for C/A No.71/80	457.00
	$1,974.81

And the Plaintiff claims
(1) Damages and

(2) Such other relief as the court may think just

Dated the 19th day of Dec 1983.

(Sgd.) D. Forrester
D. FORRESTER"

There are now before me two summonses which by consent are being heard together. The first is a summons dated January 31, 1984 and filed by the defendant. This is a summons to strike out the plaintiff's pleadings on the grounds that:

> " (a) they disclose no reasonable cause of action;
>
> (b) the action is frivolous and vexations (sic);
>
> (c) the action is an abuse of the process of the Court."

The second summons dated July 16, 1992 and filed by the plaintiff seeks to strike out the defendant's summons just mentioned in effect essentially on the basis that it is frivolous. The broad issue for determination at this time is, therefore, whether the plaintiff's pleadings disclose a cause of action against the defendant. If so, the plaintiff's pleadings must be allowed to stand. If not, they ought to be struck out and the plaintiff's action brought to an end.

Well over one hundred years ago it was established by the highest judicial authority that an attorney at Law is only responsible in damages to a client where he has demonstrated a want of reasonable skill or has been guilty of gross negligence in the performance of his professional services (vide Purves v Landell, The English Reports, Vol. 8 at p. 1332). In this case in explaining the legal principles involved Lord Campbell said (at p.1337).

> " In an action such as this, by the client against the professional adviser, to recover damages arising from the misconduct of the professional adviser, I apprehend there is no distinction whatever between the law of Scotland and the law of England. The law must be the same in all countries where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice. I am sure I should have been sorry when I had the honour of practising at the Bar of England, if barristers had been liable to such a responsibility. Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions; and I think it was

> Mr. Justice Heath, who said that it was a very difficult thing for a gentleman at the Bar to be called upon to give his opinion, because it was calling upon him to conjecture what twelve other persons would say upon some point that had never before been determined. Well then, this may happen in all grades of the profession of the law. Against the barrister in England, and the adovcate in Scotland, luckily, no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee, binding themselves, in giving legal advice and conducting suits at law, to be always in the right.
> Then my Lords, as crassa negligentia is certainly the gist of an action of this sort, the question is, whether in this summons that negligence must not either be averred or shewn? This is not any technical point in which the law of Scotland differs from the law of England. I should be very sorry to see applied, and I hope this House would be very cautious in applying, technical rules would prevail in England to proceedings in Scotland. But I apprehend that, in this respect, the laws of the two countries do not differ, and that the summons ought to state, and must state, what is necessary to maintain the action; this summons must either allege negligence, or must shew facts which inevitably prove that this person has been guilty of gross negligence."

For his part (at p.1335) Lord Brougham put the matter this way:

> " My Lords, I apprehend it to be by no means a technical question, depending upon the rules of pleading;it is of the very essence of this kind of action that it depends, not upon the party having been advised by a solicitor or attorney in a way in which the result of the proceeding may induce the party to think he was not advised properly, and may, in fact, prove the advice to have been erroneous; not upon his having received,

> if I may so express it in common parlance, bad law, from the solicitor; nor upon the solicitor or attorney having taken upon himself to advise him, and, having given erroneous advice, advice which the result proved to be wrong, and in consequence of which error, the parties suing under that mistake were deprived and disappointed of receiving a benefit. But it is of the very essence of this action that there should be a negligence of a crass description, which we call crassa negligentia, that there should be gross ignorance, that the man who has undertaken to perform the duty of an attorney, or of a surgeon, or an apothecary (as the case may be), should have undertaken to discharge a duty professionally, for which he was very ill qualified, or, if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer or deprive him of the benefit which he had a right to expect, from the service. That is the very ground Lord Mansfield has laid down in that case (Pitt v. Yalden, 4 Burr. 2060) to which my noble and learned friend on the woolsack has referred a little while ago, and which is also referred to in the printed papers. It was still more expressly laid down by Lord Ellenborough in the case of Baikie v. Chandless (3 Camp.17), because there Lord Ellenborough uses the expression, "an attorney is only liable for crassa negligentia;" therefore, the record must bring before the Court a case of that kind, either by stating such facts as no man who reads it will not at once perceive, although without its being alleged in terms, to be crassa negligentia something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that it was crassa negligentia."

In the instant proceedings the burden of the plaintiff's case, as I apprehend it, is to establish that one or both actions filed on his behalf failed as a consequence of negligence on the defendant's part. Therefore, the broad question is whether the plaintiff has, in his pleadings, specifically alleged gross negligence (which is the standard of negligence required by the law) or, alternatively, whether he has shown facts that raise a necessary inference that such negligence existed on the part of the defendant. A careful

scrutiny of these pleadings show that they do not contain anywhere a positive averment of gross negligence on the part of the defendant. The Statement of Claim does in fact expressly aver "negligence and/or breach of duty" but nowhere does it aver gross negligence in so many words. That being so, the further question arises as to whether, in the alternative, there are any facts disclosed in these pleadings, facts from which gross negligence resulting in the failure of either one of the two actions brought on the plaintiff's behalf may necessarily be inferred. Taking first the proceedings in Suit No. C.L.F.131 of 1975, this action was commenced by Writ of Summons dated November 10, 1975. It named as the sole defendant "University Hospital of the West Indies" and was filed by Mr. L.H. Bunny McLean, Attorney at Law. Here it must be noted that the defendant was not retained by the plaintiff until February 13, 1978. Thereafter the defendant represented the plaintiff along with Mr. McLean whose name remained at all times on the record. Eventually the action came on for trial on June 14 and 15, 1979. On the latter date the action was dismissed with costs to the defendant. These costs were on September 21, 1979 taxed in an amount of $528.55. This action was dismissed on the ground that "the wrong defendant had been named in the action (see paragraph 5 of the Statement of Claim). As they bear on the fate of this action the plaintiff's pleadings are essentially self-defeating inasmuch as they speak to facts which, in my judgment, absolve the defendant of any blame for the failure of the action. They show that the action was filed more than two years before the defendant's retainer became effective; and they show that in the form in which the action was filed (with the sole defendant named therein being a legal non-entity) it was a nullity from the outset. In such a situation the action was incapable of

resurrection by any action which the defendant might have taken ex post facto.

Secondly, as regards the proceedings in Suit No. C.L. F048 of 1979, this action was filed by the defendant, acting on the plaintiff's behalf, on or about June 15, 1979. It was filed subsequent to the dismissal of the proceedings in Suit No. C.L. F131 of 1975. It named the University College Hospital Board of Management as the first defendant, the University Hospital as the second defendant and Mr. O.D. Scott as the third defendant. On October 10,1979 by order of the Court the second and third defendants were dismissed from this action, but the action remained pending as against the first defendant. Subsequently, on November 27, 1979, the Court ordered that this action should be stayed until payment of the costs taxed against the plaintiff in Suit No. C.L. F131 of 1975. Finally, on March 17, 1980, by and with the consent of the parties the Court ordered that the action should be dismissed for want of prosecution unless within 14 days of that date the plaintiff proceeded with it. The records show that the plaintiff refused and/or neglected to pay the costs ordered against him in Suit No. C.L. F131 of 1975 with the result that the court order for stay of the action in Suit No. C.L. F048 of 1979 effectively barred him from proceeding with the latter action. In the event the plaintiff's action in Suit No. C.L. F048 of 1979 stood dismissed as of April1,1980. It was submitted to me by counsel for the plaintiff, relying on the authority of Millen v The University Hospital of the West Indies Board of Management (S.C.C.A. No.43/84)(unreported), that the action of the defendant in instituting fresh proceedings in Suit No. C.L. F048 of 1979 after the dismissal of the original proceedings is prima facie evidence of negligence on the part of the defendant. This was so, Mr. Samuels argued, because the defendant ought professionally to have been aware that the plaintiff's

claim against the University College Hospital Board of Management (the proper party to be sued) was already statute barred under the provisions of the Public Authorities Protection Act. Incidentally, as Mr. MaCaulay pointed out, Millen's case was not finally decided until the year 1986, up until which time the question whether or not the Public Authorities Protection Act applied to the University College Hospital Board of Management was still very much a moot question. The important point that must be made here is this, that even if the plaintiff's action in Suit No. C.L. F048 of 1979 was statute barred as against the University College Hospital Board of Management (as it now appears to have been) and the defendant may be said to have been negligent in instituting this second action against that defendant, the action did not fail because it was statute barred. It failed, and this has not been gainsaid anywhere, only because of the plaintiff's personal default in not complying with the order of the court which obliged him to first pay the costs awarded against him in Suit No. C.L. F131 of 1975. Further, it was argued by Mr. Samuels that the defendant was negligent in commencing the second action against the second and third defendants named therein, in that "the University Hospital of the West Indies was not a legal entity and had no capacity to sue or be sued and O.D. Scott was only an agent of the University Board of Management" (see paragraph 15 of the Statement of Claim). On this aspect of the matter I find that even if it could be said that the defendant was here negligent, again the further consideration remains as to whether, assuming such negligence amounted to gross negligence (i.e. crassa negligentia), it was, or, at the very least, may have been the operative cause of the failure of the plaintiff's action in Suit No. C.L. F048 of 1979. The clear and unchallenged evidence which emerges from the plaintiff's pleadings is that it was not.

That evidence shows beyond the shadow of a doubt that such failure was due solely to the plaintiff's personal default as I have already described.

In the result I find that there are no facts disclosed in the plaintiff's pleadings which show actionable negligence, or otherwise provide a basis from which such negligence on the part of the defendant may necessarily be inferred.

Accordingly there will be judgment as follows:-

Judgment for the defendant on the defendant's summons dated January 31, 1984. (Plaintiff's action in Suit No. C.L. F156 of 1983 ordered struck out).

Plaintiff's summons dated July 16, 1992 dismissed.

Costs to the defendant to be agreed or taxed.

(1) Pearce v. Lansell 8 E.R. 1332

(2) Miller v. The University Hospital of the West Indies Board of Management C.S.C.C.A No. 43 [illegible]