Privy Council Appeal No 8 of 2005

General Legal Council ex parte Basil Whitter (at the instance of Monica Whitter) *Appellant*

v.

Barrington Earl Frankson *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 27th July 2006

Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Mance

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*[Delivered by **Lord Hoffmann**]*

1. Mrs Monica Whitter was aggrieved by what she alleged to be professional misconduct by her former attorney Mr Barrington Frankson. As she lived in England, she instructed her son Mr Basil Whitter to make a complaint on her behalf to the Disciplinary Committee of the General Legal Council, pursuant to section 12 of the Legal Profession Act (No 15 of 1971). Mr Whitter made the necessary affidavit, saying that he did so on behalf of his mother. The Committee heard the complaint and ordered Mr Frankson to be struck off the roll and to make

restitution of moneys due to Mrs Whitter. The Court of Appeal, by a majority, (Downer and Langrin JJA, Panton JA dissenting) held that section 12 did not give the Committee jurisdiction to hear an application by Mr Whitter on behalf of his mother. She had to swear the affidavit herself. Their Lordships consider that this is too narrow a view of the statute and that the application was properly made.

2. The question turns upon the construction of section 12 of the Act:

> "(1) Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by an attorney, that is to say - (a) any misconduct in a professional respect..."

3. The question is whether an aggrieved person must apply in person or whether he can authorise someone to apply on his behalf and (although this may be another way of saying the same thing) whether he must make the necessary affidavit in person or whether he can authorise someone to make the affidavit on his behalf.

4. 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 authorise someone else to do it on his behalf. *Qui facit per alium facit per se*. Thus in *The Queen v The Justices of Kent* (1873) LR 8 QB 305 a landowner was entitled to appeal against a rating assessment by a notice "signed by the person giving the same or by his attorney". It was signed by his attorney's clerk. Blackburn J said, at p 307, that as the clerk had authority from the appellant to sign on his behalf, that was sufficient. The clerk's signature was treated as the signature of the appellant. He referred to *R v Middlesex* 1 LM & P 621 in which the statute required the churchwardens who wished to appeal against an order for the removal of a pauper to give reasonable notice. Patteson J said that the notice could be given by the agent or attorney of the churchwardens.

5. There are statutes which, exceptionally, require a personal signature and exclude performance by an agent. In *Hyde v Johnson* (1836) 2 Bing NC 776, 779-780 the Court of Common Pleas considered Lord Tenterden's Act (9 Geo. IV, c. 14, s.1) which required that an acknowledgement of a statute-barred debt should be signed "by the party chargeable thereby". The Court was struck by the contrast with the Statute of Frauds, which was enacted for a very similar purpose but said that the necessary memorandum should be signed by the party to be charged "or some other person thereunto by him lawfully authorised". The absence of a similar express provision for agency made the court conclude that a personal

signature was required. In that case, a requirement of personal signature increased the protection which the statute gave to the person to be charged. In the present case, it would simply make it more difficult for him to invoke the statutory procedure.

6. The exceptional nature of a case like *Hyde v Johnson* 2 Bing NC 776 was emphasised by the Court of Appeal in *In re Whitley Partners Ltd* (1886) 32 Ch D 337, in which a contributory in an insolvent company applied to have his name taken off the list on the ground that he had not signed the memorandum of association himself. Section 11 of the Companies Act 1862 provided that the memorandum should be "signed by each subscriber in the presence of, and attested by, one witness at the least". But the Court of Appeal said that it was sufficient that someone had signed with his authority. Cotton LJ said, with reference to *Hyde v Johnson*, at p 339:

> "That case I think was decided on the special ground that the enactment which the Court was then considering was one of a series of enactments which made a distinction between a man's signing by himself and signing by an agent, and it was therefore considered that where signature by an agent was not mentioned the Act required signature by the man himself. That may be quite right, but in the present case the enactment we have to construe is not one of a series of enactments some of which refer to signature by an agent, and I think it would be wrong to hold that an enactment simply referring to signature is not satisfied by signature by means of an agent."

7. The only case in this line of authority which causes some difficulty is the decision of the Court of Appeal in *In re Prince Blücher* [1931] 2 Ch D 70, in which the Court of Appeal held that section 16(1) of the Bankruptcy Act 1914, which required a debtor seeking a composition with his creditors to lodge with the Official Receiver "a proposal in writing signed by him", required a personal signature. Lord Hanworth MR referred to *Hyde v Johnson* 2 Bing NC 776 and *In re Whitley Partners Ltd* 32 Ch D 337 but seems to have completely misunderstood the latter case and treated it as authority for the proposition that in the absence of express language permitting signature by an agent, personal signature is always required. The judgement of Slesser LJ was to the same effect. It may be that, as Professor FMB Reynolds suggests in the 17th edition of *Bowstead and Reynolds on Agency* (2001) at p. 42, n 84 *Prince Blücher*'s case turned upon "special provisions of the Bankruptcy Act 1914" but there is nothing in the judgments to indicate what was special about them. It may be that the decision could have been justified on the ground that the applicant lacked mental capacity to instruct an agent. But on the reason given by the court, their Lordships consider that the case was wrongly decided.

8. Does it make a difference that the applicant under section 12 must make his complaint by affidavit? In some cases, the purpose of the affidavit will make it clear that only the designated person can make it. In *Clauss v Pir* [1988] Ch 267 Mr Francis Ferris QC, sitting as a deputy judge of the Chancery Division, decided that an order upon a defendant to swear an affidavit verifying his list of documents could be performed only by the defendant personally, at pp 271-272:

> " 'There are...two exceptions to the general rule that a person may do by means of an agent whatever he has power to do himself...' [One] is...where statute requires the evidence of a signature of the principal. The second exception is... that a party cannot do by an attorney some act the competency to do which arises by virtue of some duty of a personal nature requiring skill or discretion for its exercise. It might be thought that the obligation to swear a verifying affidavit which requires the deposing party to apply his mind to matters which are or should be within his own knowledge (and, amongst other things, to make the very important statement on oath that there are not and have not been in his possession, custody or power any documents relevant to the action apart from those which are disclosed) is a clear example of a duty of a personal nature requiring skill or discretion for its exercise."

9. The judge did not suggest that every statutory requirement to make an affidavit had to be performed personally and it is well known that the contents of affidavits are often hearsay, deposed upon information and belief. In the case of section 12, the affidavit is in the nature of a pleading: it has to contain the allegations which the attorney must answer but no more. The evidence to support the allegations will in due course be put before the Committee in accordance with the Legal Profession (Disciplinary Proceedings) Rules contained in the Fourth Schedule to the Act.

10. There is therefore no reason comparable with that in *Clauss v Pir* 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.

11. Section 12(3) provides that an application under subsection (1) "shall be made to and heard by the Committee in accordance with the rules mentioned in section 14", which states:

> "14(1) The Disciplinary Committee may from time to time make rules for regulating the presentation, hearing and determination of applications to the Committee under this Act.
>
> (2) Until varied or revoked by rules made by the Committee pursuant to subsection (1) the rules contained in the Fourth Schedule shall be in force."

12. Mr Dingemans QC, who appeared for Mr Frankson, laid considerable stress upon the rules in the Schedule, which he says are drafted on the assumption that the affidavit will be personally made by the person aggrieved. Rule 3 says that the application shall be "in writing under the hand of the applicant in Form 1 of the Schedule to these Rules". It seems to their Lordships, however, that this form of words is no different from the requirement in section 11 of the Companies Act 1862 that the memorandum of association be "signed by each subscriber in the presence of, and attested by, one witness at the least". The point about the principle *qui facit per alium facit per se*, as explained by Blackburn J in *R v The Justices of Kent* (1873) LR 8 QB 305, is that the hand and signature of the agent counts as the hand and signature of the principal. It therefore satisfies the requirements of the rules. In any case, their Lordships do not think that it would be right to restrict the primary provision in section 12 by reference to the rules. Although they are scheduled to the Act, they are subject to revocation or amendment by the Committee. No doubt they are relevant to be considered in the construction of section 12, but they can have no independent effect in excluding the possibility of a complaint through an agent if, upon the true construction of section 12, that is permitted.

13. Their Lordships will humbly advise Her Majesty that the appeal should be allowed with costs and the matter remitted to the Court of Appeal to hear the appeal on its merits. Pending the disposal of that appeal and subject to any further order of the Court of Appeal, there will be a stay of the orders made by the Disciplinary Committee.