JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 21/2010

APPLICATION NO. 42/2010

BETWEEN	OSWALD JAMES	APPLICANT
AND	THE GENERAL LEGAL COUNCIL	RESPONDENT

Brian Barnes instructed by Wilson Franklyn Barnes for the applicant

Mrs. Sandra Minott-Phillips and Gavin Goffe instructed by Myers Fletcher & Gordon for the respondent

13 April and 6 July 2010

IN CHAMBERS

HARRIS, J.A

[1] This is an application for a stay of execution of an order of the General Legal Council suspending the applicant from practising as an attorney-at-law for a period of one year from 20 February 2010.

[2] On 19 February 2003 Raphael Douglas filed a complaint with the General Legal Council against the applicant stating that he misled him

and or his attorney-at-law with respect to the payment of a sum of $2,500,000.00. This complaint had its genesis in an action brought by Douglas against Auto Village Ltd in which judgment was entered in Douglas' favour for the sum of $2,422,000.00 with interest at the rate of 6% per annum and costs of $16,000.00. On 24 July 2001 Reid, J extended an order for a stay of execution of the judgment until 27 September 2001, pending an application to set aside the judgment, on condition that:

> "a sum not exceeding $2,500,000.00 be paid in by the Defendant to the Defendant's attorneys-at-law Messrs. Nunes, Scholefield, DeLeon & Company within 7 days from the date of completion of the sale of the premises registered at Volume 1203 Folio 187 for land part of Portmore in the parish of Saint Catherine be placed in an interest bearing account in the Bank of Nova Scotia in the joint names of the Attorneys-at-Law for the parties."

[3] The applicant's client, Paul Afflick, obtained loans from Dehring Bunting and Golding (DB&G), which were secured by mortgages on two properties, namely, 7 Stilwell Avenue, owned by Afflick and his wife and Lot 8 Portmore Town Centre, owned by Auto Village Limited, a company of which Afflick was one of its directors. This company was placed in receivership and arising from this, the Afflicks brought proceedings against DB&G. The properties were sold at public auction by DB&G, in the exercise of their power of sale as a mortgagee. Following this, an

agreement was reached by the parties wherein a sum of $13.5 million was paid to DB&G and the suit was discontinued.

[4] Portmore Town Centre was the only property for which the applicant had the carriage of sale. This exercise was however carried out by Hart Muirhead Fatta. Following the sale of the properties in August 2001, Hart Muirhead Fatta paid a net sum of $8,169,351.00 to the applicant as a balance due to Afflick. On Afflick's instructions, the sum of $7,627,351.00 was disbursed to him by the applicant. Subsequent to this, a statement of account dated 23 August 2001, identifying itself as relating to the sale of the Portmore property only, was sent to Nunes Scholefield DeLeon & Co. who then acted for Afflick. Nunes Scholefield DeLeon & Co. later sent a copy to John Graham & Co. who represented Douglas. That statement was wanting in some respects, namely, the consideration for the purchase price of the Portmore property was understated, receipts and disbursements of funds were in some instances incorrectly accounted for, and a payment of $7,627,351.00 to Afflick was not disclosed.

[5] In his affidavit in support of the complaint, Douglas averred that he was informed by his attorneys-at-law John Graham & Co. that the applicant had the carriage of sale of Lot 8 Portmore Town Centre and the sum of $2,500,000.00 should have been retained in satisfaction of the condition specified in Reid J's order. He continued by stating that upon

request from his attorneys-at-law with respect to the sale of the property, the applicant remitted statements of account showing that there would have been no funds to satisfy the judgment and that the statements contained inaccuracies and false information.

[6] As a rule, an appeal does not operate as a stay of execution of a judgment. This however, does not mean that the court is without authority to suspend a judgment, if the circumstances so warrant. The court is clothed with wide discretionary powers in granting or refusing a stay of execution of a judgment.

[7] In seeking a stay, an applicant must satisfy two criteria. He must advance good reasons for requesting the stay by demonstrating that he has real prospect of succeeding in the appeal and he must show that he would be ruined if the stay were refused. See **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887; which had been approved and adopted in the cases of **Jamaica Flour Mills Ltd v West Indies Alliance Co. Ltd & Ors** (1997) 34 JLR 244; **Flowers, Foliage and Plants of Jamaica Ltd and Jennifer Wright and Douglas Wright v Jamaica Citizens Bank Limited** [1997] 34 JLR 447.

[8] In **Linotype,** Staughton L.J, although not propounding any broad principles as to the grant of a stay of execution of a judgment, expressed the view that a more flexible approach has been embraced by the courts

as opposed to that which previously existed. The flexible approach has been further endorsed in **Hammond Suddard Solicitors v Agrichem International Holding Ltd** [2001] EWCA Civ 1915, in which Clarke LJ, as he then was, proposed the test to be that, the court when deciding whether to grant or refuse a stay, should adopt a balancing exercise. At page 1917 he said:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled?
>
> If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

[9] The test as proposed by Phillips LJ, as he was then was, in **Combi (Singapore) Pte Limited v Sriram** unreported (FC/2 97/62 73/C, judgment delivered 23 July 1987) is as follows:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar

> detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[10] Mr Barnes submitted that the committee erred when it found that the applicant had the intention to mislead when in fact, there was no evidence in support of such a finding. He argued that the principal ground on which the committee based its reasons for judgment, was that the complainant and his attorney-at-law were misled into believing that the liabilities of Mr Afflick were so great that upon the sale of his assets and those of Auto Village Limited only a balance of $48,500.00 remained. The committee, he argued, disregarded the evidence that the applicant represented Mr Afflick in the sale of the Portmore property only and could not have misled the complainant and his attorney-at-law into believing that a particular state of affairs regarding Mr Afflick's finances existed after the sale of his assets.

[11] He further submitted that there is no evidence to show that the complainant issued any instructions to his attorney-at-law to request a statement of account from the applicant, or that the applicant sent any statement of account to the complainant. He further argued that the

committee also erred in finding that the applicant failed to render a true account until 23 June 2008. The statement of 23 June 2008 shows how the net proceeds, which came to the hands of the applicant, were disbursed he argued. The earlier statement of account containing certain omissions was prepared by the applicant for internal use and for the purpose of advising his client and the balance would be a deficit of $1,094,150.00 and not a surplus of $48,505.00, he argued. The persons who were alleged to have been misled, he also argued, were not in the applicant's contemplation, as the statement of account was delivered to Nunes Scholefield and DeLeon, the then attorneys-at-law for the Afflicks.

[12] Mr Goffe submitted that the criteria for deciding whether a stay ought to be granted are whether the applicant has reasonable prospect of success in his appeal and that it would be likely that the court would substitute a penalty no greater than suspension from practice for three or four months. In support of his submissions he cited the case of **Thomas v Law Society** QBD C/O 1849/00, All England Official Transcripts (1997-2008). There was ample evidence to support the committee's findings, he submitted. He argued that although the canons under which the applicant was charged make no reference to misleading, it is not a necessary ingredient that anyone was actively misled by the conduct of the attorney. This is so by reason that canon V (o) simply proscribes the

attorney making a false statement of fact, he argued. The threshold, he contended, is that someone relies on a document which the attorney knows to be false. Implicit, in that, is an element of deceit, even if deceit is not stated to be a necessary element. All the necessary ingredients had been established, in that, the applicant created false documents intending a third party to rely on them, he argued. The statement of account of 23 August, he submitted, did not include the proceeds of sale of one property, yet it reflected the entire indebtedness for both properties. If the applicant's statement intended to be an estimated statement, then it would not have shown a sum of $54,000.00 as due and owing to the client, yet two weeks before a sum of $7.8 million was paid to the client, he contended.

[13] I must at the outset say that this application for stay of execution is governed by the principles earlier stated by me. In **Thomas v Law Society** the criteria on which the tribunal relied were those stated by Mr Goffe. Those requirements, it appears to me, may have been considered within the framework of the English Solicitor's Code of Conduct Regulations. The present case is governed by the Canons of Professional Ethics made under our Legal Profession Act, which are grounded in the common law. It would seem therefore, that in this case, in determining whether to grant

or refuse a stay, the common law principles are relevant and this court should be guided thereby.

[14] I will first look at the question as to strength of the appeal, that is, whether the applicant has a good prospect of succeeding. He was found to be in breach of canons 1 (b) and V (o). The canons are recited hereunder:

> "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."

> "V (o)
>
> An attorney shall not make a false statement of law or fact."

[15] The complaint against the applicant by Mr Douglas is as follows:

> "He has misled me/my attorneys-at-law in relation to the amount of money paid by Paul Afflick to Dehring, Bunting & Golding and as a consequence a sum of $2,500,000.00 which should have been paid to me pursuant to an order made in the Supreme Court has been lost."

[16] At the hearing the complaint was amended to add the following, that the respondent:

> "(a) Knowingly made a false statement of fact – Canon V (o); and
>
> (b) Knowingly assisted Mr. Paul Afflick to break the law and facilitated his disobedience of the order of the Court by providing

inaccurate information concerning the net proceeds of sale from the sale of land in Portmore, St. Catherine, registered at Volume 1203 Folio 87 of the Register Book of Titles – Canon III (f)."

[17] The committee found that:

"a) default judgment had been entered by the Complainant against Mr. Afflick/Auto Village Limited;

b) there were claims pending in the Supreme Court brought by the Complainant against Mr. Afflick and Auto Village Limited in which "The aggregate damages and/or money claimed by those suits (were) nine million dollars";

c) an order had been made by Mr. Justice Reid that, as a condition for the grant of a stay of execution in favour of Mr. Afflick/Auto Village limited on condition that payment of the sum of $2,500,000.00 was to be made by Mr. Afflick/Auto Village Limited within seven days of July 24, 2001 to his Attorneys-at-Law for the purpose of its being placed into an interest earning account in the names of Mr Afflick's Attorneys-at-Law and the Attorneys-at-Law for the Complainant;

d) the sum required to satisfy the said judgment had not been paid;

e) Messrs Nunes Scholefield DeLeon would rely upon the Statements of Account; and that

f) the Complainant's Attorneys-at-Law would also rely upon the said Statements of Account."

The committee continued:

> "As we have found, the reason for presenting the Statements of account dated August 23, 2001 with their obviously false and misleading information was to demonstrate that only minimal surplus funds were realized upon the sale of Mr. Afflick and Auto Village Limited's assets. Indeed, in reliance on the Statement of Account showing that a balance of $48,500.00 was due to Mr. Afflick, Nunes Scholefield Delleon & Co. requested that sum and same was paid over to them by the Respondent in late August or early September 2001. This sum later became the subject of a claim by the Complainant's Attorneys-at-Law."

[18] The issue arising is whether the material before the committee supported a finding that the applicant had violated the canons of which he was found to have been in breach. The central issue is whether the applicant actually misled Douglas and or his attorney-at-law by issuing the statement of account of 23 August 2001. The committee was cognizant of the fact that Reid, J's order did not place an onus on the applicant to pay the $2.5 million, it being incapable of being enforced by Douglas. It went on to state as follows:

> "It was only capable of performance by Mr. Afflick. It was his act only to sustain the execution. The act was the payment into a joint account of the sum of not more than $250,000,000.00 within seven days of the completion of the sale of the Portmore Centre."

[19] It must be borne in mind that Reid J's order specified that the $2.5 million was to be paid by the defendant seven days from the date of

completion of the sale of the Portmore property. Auto Village Limited was the defendant. There was evidence from Mark Golding disclosing that Lot 8 Portmore Centre was owned by Auto Village Ltd. Reid J's order was conditional upon the $2.5 million being paid by Auto Village Ltd, pending the hearing of a summons for stay of execution and to set aside the default judgment. Douglas relied upon the order of Reid J as the catalyst for putting into motion the machinery for obtaining the $2.5 million from the proceeds of sale of the Portmore property. It appears from the committee's findings that Afflick was regarded as a joint defendant and the payment was due from him as a result of his personal liability. He was not a defendant. Notwithstanding the finding, it cannot be ignored that Afflick was one of the directors of the company and of course, as a director, one could look to him to satisfy the requirements of Reid J's order.

[20] On 25 June 2001, Hart Muirhead Fatta sent a statement of account to Mr Afflick in care of the applicant. This statement, although its heading indicates that its contents related to the sale of the Portmore property, included disbursements and a credit for the estimated proceeds of sale of the Stilwell Avenue property. One item included disbursements in relation to both properties. However, at the time of that statement the sale of the Portmore property had not yet been completed. That statement could only be regarded as an estimate. It is arguable that the applicant could

not have used that statement as the benchmark for the preparation of any statement of account during the life of Reid J's order. On 7 August 2001, Hart Muirhead Fatta remitted a cheque to the applicant for $8,169,351.29 in connection with the completion of the sale of the Portmore property. A letter of 12 November 2001, from Hart Muirhead Fatta to John Graham & Co. indicates that the date of the completion of the sale was 8 August 2001. However, the completion date must be taken to be 7 August 2001. In obedience to Reid J's order, the $2.5 million would have had to be paid into court within seven days from 7 August, which would have been on or before 15 August 2001. Reid J's order would therefore have been spent prior to the submission of the impugned statement of account of the 23 August 2001. That statement was sent by the applicant, at Afflick's request, to Nunes Scholefield DeLeon & Co. who at the time acted for Afflick. On 24 August 2001, a copy of the statement was sent by Nunes Scholefield DeLeon & Co to John Graham & Co. Douglas' attorneys-at-law. On 4 September 2001 John Graham & Co. wrote to Nunes Scholefield Deleon & Co. seeking clarification on certain items in the account.

[21] At the time the statement of account came into the hands of Douglas' attorneys-at-law, the condition upon which Reid J's order was based, was no longer in force. The act which Auto Village Limited was required to perform was the payment of money into court on or before 15

August 2001. This was not done. In such circumstances, it could be argued that the statement rendered by the applicant on 23 August would have been of no effect. No order was made for the payment of the judgment debt from the proceeds of sale of the Portmore property which would require Afflick, a director of Auto Village Limited to pay Douglas the judgment debt from the proceeds of sale of the Portmore property. It is arguable that the question of providing any statement of account to Douglas or to his attorneys-at-law would not arise. Arguably, it could not be said that Douglas had been misled and that the failure of the applicant to render a proper statement of account of the receipts and disbursements from the sale of the Portmore property amounted to his having knowingly aided Afflick to contravene the law. It is my view that the prospect of success of the appeal appears to be good.

[22] I now turn to the second criterion as to the granting or refusal of a stay of execution. Mr Barnes submitted that if the stay is refused and the applicant is successful in the pursuit of his appeal, the suspension for a year would destroy his practice which would result in serious financial loss causing him to be ruined. No injustice or prejudice would be encountered by the respondent should the stay be granted, while the damage which the applicant would suffer would be too great to be quantified, he argued.

[23] Mr Goffe submitted that the Disciplinary Committe's function is for the protection of members of the public. He argued that the applicant states that he is a partner in his firm and accordingly, his client's business could be handled by other persons in the firm during the hearing of the appeal as it is unnecessary for the client's interest to be protected in relation to the appeal. The applicant should use his resources towards the expeditious hearing of the appeal, he submitted.

[24] The applicant is an attorney-at-law who had been in practice prior to being suspended. In affidavits of 1 and 11 March 2010, he refers to himself as being a partner in his firm. However, in the affidavit of 1 March, he went on to state that he is the sole practitioner. I accept that he is the sole practitioner in his firm. He has an active practice. There is a risk that he would encounter irreparable loss should his suspension be permitted to continue. No harm would accrue to the respondent should he be allowed to continue his practice. There is nothing in the committee's reasons and findings which would suggest that the applicant is a danger to the public. In my opinion, there is nothing disclosed in the evidence which would warrant him being considered a danger to the public. As a consequence, he should be allowed to continue with the pursuit of his business. To deny him a stay might cause injustice, for the reason that if he succeeds his appeal would be rendered a futile exercise.

[25] Interestingly, in **Thomas'** case the facts upon which allegations of dishonesty were made against him were not in dispute. The issue was what inference could be properly drawn from agreed facts as to whether he had been dishonest. The facts were found to be proved. It was ordered that he be struck from the Roll of solicitors. He sought a stay pending an appeal. Although the tribunal was not satisfied with the merits of an appeal, it showed some clemency in granting a 28 day stay.

[26] It is hereby ordered that there be a stay of execution of the judgment of the General Legal Council pending the hearing of the appeal.