

JAMAICAIN THE COURT OF APPEALGENERAL LEGAL COUNCIL APPEAL NO: 1/85

BEFORE: The Hon. Mr. Justice Rowe - President  
 The Hon. Mr. Justice White, J.A.  
 The Hon. Mr. Justice Ross, J.A.

|         |                |            |
|---------|----------------|------------|
| BETWEEN | KENNETH McLEOD | APPELLANT  |
| A N D   | LUCILDA McLEOD | RESPONDENT |

Mr. Roy Fairclough for Appellant

Mr. C. Rattray, Q.C. for the General Legal Council as  
 amicus curiae

February 20 & April 24, 1986

ROSS J.A.

This is an appeal against the majority decision of the Disciplinary Committee of the General Legal Council in complaint No. 6 of 1982 handed down on August 7, 1985, in which it was ordered that the appellant be suspended from practice for six months and pay the complainant costs fixed at \$2,400.00.

This complaint was made by the respondent Lucilda McLeod against Kenneth McLeod, an attorney-at-law, on 25th January, 1982, and stated as follows:

"On the 25th April, 1980, I agree in writing to sell my premises known as 16 Claude Clarke Avenue, Montego Bay, St. James to Mr. Kenneth McLeod and Mr. Orrett McLeod at a price of \$40,000.00.

In view of the fact that I intended to go abroad, I personally handed the duplicate certificate of title to Mr. Kenneth McLeod whom I knew to be an attorney-at-law, with express instructions that no transfer of the premises should be effected until the purchase price was paid to me or suitable arrangements for payment made.

"On my return to Jamaica in April, 1981, I received information that the premises had been transferred to Mr. Kenneth McLeod and Mr. Orrett McLeod. I did not execute an instrument of transfer at any time.

I thereupon consulted Mr. N.M. Hamaty, attorney-at-law with a view to having the premises re-transferred to me or the purchase price paid by the purchasers. To date neither event has taken place and I am therefore referring the matter to you for you to take any steps which you may consider appropriate. I have enclosed copies of relevant documents."

The complaint was heard by the Disciplinary Committee of the General Legal Council; the complainant and Mrs. Hines gave evidence in support of the complaint, after which it was submitted that there was no case to answer by the appellant. The Disciplinary Committee ruled that there was no case to answer in regard to the allegations of forgery, but that there was a case to answer in respect of paragraph (2) of the grounds of the complaint, a prima facie case having been made out. The appellant then gave evidence and after hearing submissions by attorneys on both sides the Committee reserved its decision.

On August 7, 1985, the Committee by a majority delivered its decision. It commenced with the allegations of the complaint set out as follows:

- "(a) That the complainant did not execute an instrument of transfer at any time.
- (b) That the complainant gave express instructions to the respondent that no transfer of the premises should be effected until the purchase price was paid to the complainant or suitable arrangements for payment made.
- (c) That the respondent effected transfer of the said premises to himself and his brother contrary to the complainant's instructions and by the use of a forged instrument of transfer.
- (d) That up to the date of the execution of the complaint herein the respondent had failed to re-transfer the said property or pay the purchase price."

The Committee then went on to set out its findings which were as follows:

- "(1) On the 25th April, 1980 the Complainant entered into a written Contract to sell her premises known as 16 Claude Clarke Avenue, Montego Bay, to the Respondent Kenneth McLeod and the Respondent's brother, Orrett McLeod for \$40,000.00. The Respondent and his brother, Orrett, are in fact nephews of the Complainant.
- (2) The Contract was drawn up by the Respondent who inserted therein a term to the effect that the carriage of sale was to be in the hands of Victor L. Robinson, Attorney-at-law of 23½ Orange Street, Montego Bay.
- (3) In fact Mr. Robinson played no part in the proceedings at all and the Respondent at all relevant times acted for both Vendor and Purchaser. The Respondent admitted this when he stated in the course of his evidence 'The carriage of sale was really in my hands.'
- (4) The Complainant executed a Transfer to the Respondent and his brother.
- (5) The Complainant gave the duplicate Certificate of Title to the Respondent but did not give the Respondent as she said she did specific instructions not to transfer the land without seeing that she was paid. The Respondent in fact procured the registration of this Transfer on the appropriate Certificate of Title entered at Volume 1018 Folio 65 on the 1st May, 1980.
- (6) On the 26th May, 1980, the Respondent mortgaged the land to the Jamaica National Building Society to secure \$40,000.00. On the 3rd March, 1981 the Respondent further mortgaged the property to National Commercial Bank Jamaica Limited to secure another loan of \$20,000.00.

4.

- (7) The Respondent received the mortgage money, spent it otherwise, and did not pay the Complainant the purchase money.
- (8) The Complainant changed her mind about selling the land to her nephews.
- (9) The Complainant came to realise that the Respondent had mortgaged the property and spent the mortgaged money and was not in a position to transfer the property back to her.
- (10) When the Complainant threatened the Respondent with proceedings, the Respondent entered into an agreement on the 8th May, 1981 (Exh. 3) with the Complainant to re-transfer the land to her which would have involved paying off the mortgages already mentioned.
- (11) The Respondent failed to perform the agreement to re-transfer (Exh. 3) or to pay the purchase price to the Complainant, whereupon the complaint to the Disciplinary Committee dated 25th January, 1982 was laid.
- (12) Subsequent to the laying of the Complaint to the Disciplinary Committee the Respondent entered into another agreement with the Complainant dated 19th September, 1982 (Exh. 6).
- (13) The Complainant did sign the Instrument of Transfer.
- (14) The Complainant alleged that she handed the duplicate Certificate of Title to the Respondent with express instructions that it was not to be transferred to the purchasers unless the purchase money was paid to the Complainant or unless arrangements were made for the payment of same. The Respondent denies that any express instructions to that effect was given. We are not satisfied that any such express instructions were given by the Complainant.

5.

(15) We hold that even without express instructions it is the plain duty of an Attorney-at-law acting for a Vendor to ensure that the Vendor's title is not transferred unless the Vendor is paid, and we hold that this duty is the more binding if, as in the present case the Attorney-at-law is acting for both Vendor and Purchaser and is himself the Purchaser.

(16) The Respondent was in breach of the duty which the law imposes upon Attorneys-at-law who buy from their client in that he failed to ensure that the complainant was advised in the transaction as diligently as she would have been if she had been contracting with a stranger and that the transaction was as advantageous to the Complainant as it would have been if she had been contracting on reasonable and equal terms with a stranger (see Halsbury's Laws of England 4th Ed. Vol. 44 Paras. 121 & 122; Cordery on Solicitors 6th Ed. pages 124-125; Waters v. Thorn (1856) 22 Beav. at p. 553). In determining that the Respondent was in breach of this duty regard was had to the following:

- (a) The absence of independent advice to the Complainant and the failure of the Respondent to advise Complainant to seek such advice.
- (b) The inference that the land was sold at an undervalue based upon the fact that the land which was bought by the Respondent for \$30,000.00 was immediately mortgaged by the Respondent for \$40,000.00 and approximately ten months later mortgaged for an additional \$20,000.00.
- (c) The fact that the purchase money payable by the Respondent and his brother to the Complainant was not secured except on the Respondent's personal security.
- (d) The transfer of the land by the Respondent to himself and his brother before the purchase money was paid to the Complainant.
- (e) The fact that the Respondent borrowed \$60,000.00 by mortgaging the said property and yet failed to pay the purchase money owed to the Complainant.

6.

(17) That the conduct of the Respondent viewed as a whole, including his failure to honour the agreement dated 8th May, 1981 (Exh. 3), was conduct which tended to discredit the legal profession and constituted misconduct in a professional respect."

This was followed by the order of the Disciplinary Committee that the appellant be suspended from practice for six months and pay the complainant's costs fixed at \$2,400.00.

It is against this order that this appeal has been made.

The first ground of appeal is:

"That the Disciplinary Committee erred in law in finding the appellant guilty of conduct in relation to a complaint never preferred against him and in relation to which the respondent had not been called to answer."

On this ground Mr. Fairclough pointed out that at the end of the complainant's case a submission of no case to answer was made by him and the Disciplinary Committee ruled that:

"There is no case to answer in allegation of forgery but there is a case to answer in respect of paragraph 2 of the grounds of the complaint, a prima facie case having been made out."

Paragraph 2 of the complaint was to the effect that the complainant gave express instructions to the appellant that no transfer of the premises was to be effected until the purchase price had been paid or suitable arrangements for payment had been made. As to this complaint, <sup>in its</sup> finding No. 14, the Committee stated that it was not satisfied that express instructions were given by the complainant to the appellant not to transfer the title unless the purchase price was paid or arrangements made for the payment. In the circumstances, Mr. Fairclough submitted, since the Committee had ruled that there was a case to answer as

7.

to whether or not express instructions not to transfer without payment or arrangements for the payment of the purchase price/<sup>had been given</sup> and having heard all the evidence ruled that this allegation had not been proved, the Committee was not entitled to look further to see whether a proven act of the appellant constituted a breach of duty if that act was not specifically alleged in the formal complaint. The Committee had adopted, he submitted, a wrong approach in dealing with the matter as the proper approach established through the decided cases was:

- 1 the Committee should first identify the facts alleged against the attorney in the form of complaint;
- 2 having heard the evidence the committee should see whether the evidence supports the facts as alleged; and
- 3 if so, then the Committee should go on to decide whether these facts ground a conclusion that the attorney is guilty of misconduct in a professional respect.

Mr. Fairclough then went on to say that in this case the Committee having followed steps (1) and (2) should have stopped there, having found that the evidence adduced did not support the facts alleged; it was wrong for the Committee in the absence of any amendment of the grounds of complaint to have gone on in its finding No. 15 to find a duty in the appellant towards the respondent and impliedly a breach of such duty, since that issue was never raised at the hearing and the Committee did not have an opportunity of hearing any explanation which the appellant might have given.

In support of his submissions he referred to Diggs-White v. Dawkins 14 J.L.R. 192; this was also an appeal by an attorney from an order made by the Disciplinary Committee of the General Legal Council after hearing evidence of a complaint against the attorney. The Committee found that the attorney was guilty of

negligence but made no findings in relation to the other matters complained of. There had been no allegation of negligence in the complaint.

It was held, inter alia, that it was not open to the Committee to find that the appellant had been guilty of gross neglect or negligence since there had been no such charge preferred against him.

In the instant case the allegation of forgery was not proved and the Committee was not satisfied that express instructions not to transfer title had been given to the appellant. In addition however, the formal complaint contained the allegations that the appellant had failed to re-transfer the property or to pay the purchase price, and these were not in dispute. In respect of this aspect of the complaint the Committee stated in finding No. 15 (above) that:

"We hold that even without express instructions it is the plain duty of an attorney-at-law acting for a vendor to ensure that the vendor's title is not transferred unless the vendor is paid, and we hold that this duty is the more binding if, as in the present case the ..... attorney-at-law is acting for both vendor and purchaser and is himself the purchaser."

The instant case is therefore clearly distinguishable from Diggs-White's case as there was here a complaint about the failure of the appellant to pay over the purchase price, whereas in Diggs-White's case there had been no complaint in respect of the negligence found by the Committee. Further, the appellant admitted that he had failed to pay over the purchase price to the complainant and so this aspect of the complaint was never in issue as were the complaints of forgery and express instructions referred to above. There was therefore no merit in this ground of appeal.



9.

Before leaving this aspect of the appeal I would say that a complaint against an attorney is not to be equated with a statement of claim in a civil action to which all the technical rules of pleading apply. If the interests of justice are to be served the attorney-at-law should not be permitted to shelter behind some mere technicality. It should be borne in mind that the complaint may have been prepared by the complainant, a layman, and, provided that the complaint filed indicates generally the nature of the complaint, all the relevant evidence ought to be admitted before the Disciplinary Committee. Thereafter the important question should be whether such evidence discloses acts on the part of the respondent which amount to professional misconduct. In cases where the evidence disclosed acts which may constitute professional misconduct but which are not mentioned in the complaint the interests of justice may require the Disciplinary Committee to grant an amendment of the complaint to include the additional matters, and to call on the respondent to answer the additional complaint.

The second ground of appeal is:

"That the Disciplinary Committee erred in failing to distinguish between a case in which the law presumes undue influence and will set aside a transaction between attorney-at-law and client and a case in which a tribunal is required to adjudicate on specific facts alleged against an attorney-at-law in which nothing is presumed and the attorney-at-law may only be found guilty of misconduct in a professional respect after the allegations of fact made against him are proved."

As I understand it, this ground (if it can be regarded as such) arises from the finding No. 16 of the Committee which stated, inter alia, that the appellant was in breach of the duty imposed on attorneys-at-law who buy property from their clients. Mr. Fairclough submitted that there was no complaint about the price or undue influence, nor, was there evidence to suggest that

the complainant was other than satisfied with the price agreed.

There was evidence that immediately after the transfer of the property to the appellant at a price of \$30,000.00 it was mortgaged by him for \$40,000.00 and ten months later for an additional \$20,000.00 and this clearly indicates that the property was sold at a substantially lower price than its market value. While there is no specific complaint of undue influence on the part of the appellant the contents of finding No. 16 are nevertheless relevant to a consideration of the conduct of the appellant in this transaction. This conduct was the more reprehensible as it was a transaction between the appellant and his aunt, who no doubt placed complete confidence in <sup>him</sup>not only as her nephew but also as a member of an honourable profession.

The Disciplinary Committee was not concerned with questions as to whether the transaction was void or voidable having regard to the relationship between an attorney-at-law and his client - it was merely concerned with the question whether or not any of the matters alleged by the complainant and found to be proven constituted conduct unbecoming his profession on the part of the appellant in his capacity as attorney-at-law. To do so it was open to them to take into account all the facts relating to the transaction.

We could find no merit in this ground.

Ground 3 states:

"That the Disciplinary Committee erred in law in finding the appellant guilty of misconduct in a professional respect having found against the complainant on all the substantial allegations of fact."

The first thing to be said of this ground is that it is not a correct statement of fact. The Committee, it is true, did find against the complaint on two substantial allegations of fact which were in issue - the forgery and the express instructions referred to above, but they were not the only

11.

substantial allegations of fact. There was also a substantial allegation of fact which was admitted by the appellant, viz; that the purchase price had not been paid although the appellant transferred the property to himself and his brother and obtained substantial sums, indeed twice the contract price, on mortgages in respect of the said property.

The next matter to be considered is what is meant by misconduct in a professional capacity. There is no magic about these words and the question is therefore whether the findings made by the Committee are capable of leading reasonably to a conclusion as to professional misconduct. Assistance as to what constitutes professional misconduct may be had from the Diggs-White case (supra) where at p. 195 of the judgment of Graham-Perkins J.A. it is stated:

"In Re A Solicitor exp. the Law Society (1911-13) All E.R. Rep. at p. 204 Darling J. said:

'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 these 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."

Applying that, it comes to this, that the Law Society are very good judges of what is professional misconduct as a solicitor, just as the Medical Council are very good judges of what is professional misconduct as a medical man. I see no kind of reason for coming to any other conclusion than that to which the Law Society have come, that that method of obtaining business is not such as this court can possibly countenance, and therefore, the Society were perfectly right in saying with

'regard to that matter that there was professional misconduct.'

The authority on which Darling J. relied for the foregoing definition was that enunciated in Allison v. General Council of Medical Education and Registration (1894) 1 Q.B. 750. The definition quoted above with the words 'solicitor' and 'Disciplinary Committee' substituted for the words 'medical man' and 'General Medical Council' respectively is quoted in that excellent work, Cordery: Law Relating to Solicitors (6th Edn.) at p. 514, in connection with the proposition that professional misconduct includes dishonourable conduct on the part of a solicitor in the course of his employment towards his client. The thinking reflected in the definition also finds expression in the standards of professional etiquette and conduct for attorneys prescribed by the rules made by the General Legal Council in pursuance of S. 12 (7) of the Act, the 'specified breach' of which shall for the purposes of this part constitute misconduct in a professional respect."

The Disciplinary Committee, having made its findings of fact, concluded that:

"The conduct of the respondent, viewed as a whole, including his failure to honour the agreement dated 8th May, 1981 (Exh. 3) was conduct which tended to discredit the legal profession and constituted misconduct in a professional respect."

There was clear evidence on which the Committee could find as it did and there is no basis for the suggestion that the Committee erred on the facts or in law in arriving at its conclusion. There is no merit in this ground.

Finally in ground 4 it was stated:

"That the punishment imposed on the appellant was manifestly excessive in the circumstances."

This was a rather unsavoury case in which there was very little to be said in mitigation save that the amount owing to the complainant has now been paid, but that was only done after the complaint had been made to the Disciplinary Committee. The conduct of the appellant can be described as quite reprehensible, and nothing was said to persuade the Court that it should interfere with the order of the Disciplinary Committee.

For the reasons set out above the appeal was dismissed and the order of the Disciplinary Committee was confirmed. The costs of the appeal taxed or agreed are to be paid by the appellant.

Before leaving this matter I would add that after the appeal was dismissed Mr. Fairclough informed the Court that he had advised the appellant to cease to practise while the appeal was pending. The order of the Disciplinary Committee was made on August 7, 1985, and the Court was asked to take this into account in deciding when the period of suspension should commence. The Court was referred to the relevant provisions of the Legal Profession Act and in particular to section 17 which deals with the powers of the Court of Appeal in regard to appeals from decisions of the Disciplinary Committee. Section 17 (2) states:

"Where the Court of Appeal confirms the order (whether with or without variation) it shall take effect from the date of the order made by the Court of Appeal confirming it."

In the instant case the order of the Disciplinary Committee has been confirmed by the Court of Appeal and the order must therefore take effect from the date on which the Court of Appeal confirmed it, viz, 20th February, 1986.