JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 30 OF 1982

BEFORE: THE HON. MR. JUSTICE ZACCA, P.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.(AG.)

BETWEEN	SYLVESTER MORRIS	APPELLANT
AND	GENERAL LEGAL COUNCIL EX PARTE ALPART CREDIT UNION	RESPONDENT

October 29 & 30, 1984; January 23, 1985

H. G. Edwards, Q.C. for Appellant.
Arthur Williams for Alpart Credit Union.
Hugh Small amicus curiae.

CAREY, J.A.:

When this appeal was dismissed in October as devoid of merit, we acceded to a request from Mr. Small to reduce into writing this court's views as to undertakings given by an attorney-at-law to a third party as it was the view of the General Legal Council that the seriousness of giving undertakings in commercial dealings was nowadays not fully appreciated at the Bar. This appeal provides therefore, a convenient vehicle for calling attention to the consequences of such breaches by practitioners.

Governing the standards of professional conduct in this country are Canons which have been made pursuant to section 12(7) of the Legal Profession Act. The current Canons are to be found in the Jamaica Gazette Supplement Proclamations Rules and Regulations No. 71 dated 29th December, 1978, at page 281 et seq. and the relevant Canon is Canon VI (d) which provides as follows:

> "An Attorney shall not give a professional undertaking which he cannot fulfil and shall fulfil every such undertaking which he gives."

Canon VIII (d) decrees that a breach of Canon VI (d) shall constitute misconduct in a professional respect and an attorney who is in breach thereof "shall be subject to any of the orders contained in section 12(4) of [The Legal Profession] Act." It is right to detail these provisions of the Act:

> "(4) On the hearing of any such application the Committee may as they think just make any such order as to -
>
> (a) striking off the Roll the name of the attorney to whom the application relates, or suspending him from practice on such conditions as they may determine, or imposing on him such fine as they may think proper, or subjecting him to a reprimand;
>
> (b) the payment by any party of costs or of such sum as they may consider a reasonable contribution towards costs;
>
> (c) the payment by the attorney of any such sum by way of restitution as they may consider reasonable."

In so far as the present appeal is concerned, the relevant Canons are those of 1972, published in the Jamaica Gazette Extraordinary on 6th January, 1972. These Canons were repealed and replaced by those of 1978. Such alterations as exist do not affect Canon VI (d) which retained both form and contents. A breach of that Canon also constituted misconduct in a professional respect.

As section 12(4) clearly shows, the powers of the Disciplinary Committee in respect of punitive sanctions are quite extensive and may well involve serious consequences to an attorney-at-law who fails to fulfil his professional undertaking. In the present appeal, the appellant who failed to honour the undertaking he had given to a third party, was subjected to a reprimand by that body and ordered to pay an amount of $4,880.49 by way of restitution. It was against these orders, that this appeal was taken to this court.

The applicant before the Disciplinary Committee of the General Legal Council was Alpart Credit Union (the present respondent) and the matter of complaint came about in this way - In 1975, a Mr. Harley Black, an employee of Alpart and a member of the Alpart Credit Union, agreed together with his wife to purchase property being Lot No. 8 Rhymesbury, in the parish of Clarendon from Farm Lots Development Company Limited. He accordingly applied to the respondent for a loan to enable his wife and himself to discharge the purchase price to the vendor. The usual undertaking was obtained from the appellant who represented the vendor and had in his possession the registered title for the lot in the name of Mr. & Mrs. Harley Black. In reliance on this undertaking, the respondent remitted to the appellant a cheque for $6,800 being the amount of loan and to discharge the purchase price. This cheque was duly received by the appellant who endorsed it as agent and attorney for the vendor. Unfortunately, he did not deliver the title to the respondent. But Mr. Black somehow obtained possession of the certificate of title and used it to secure another loan. The result was, that the respondent's loan was unsecured. The services of Mr. Black were terminated and he thereafter ceased to pay his instalments by way of salary deductions or at all, so that, of the principal sum, he still owed $4,030.47. The respondent however has a lien on the shares of Mr. Black worth $802.00. When the interest was added to the debt and after deducting the net worth of the shares, Mr. Black was indebted to the respondent in the sum of $4,802.49 which was the amount ordered to be restored.

The ground of the complaint made by the respondent was thus stated:

> "..... has in breach of his undertaking to Alpart Employees' Cooperative Credit Union Limited failed to deliver Certificate of Title at Volume 1127 Folio 119 and allowing the said certificate to be

> "used in a manner prejudicial to their interests in that a Mortgage is registered thereon in favour of the Jamaica Citizens Bank Limited thus leaving the Credit Union to whom a balance of J$4,028.47 is still owed in an unsecured position."

In response to this complaint, the appellant displayed an incomprehensible disinterest. He deposed as follows:

> "3. That I do not remember giving any undertaking to the Credit Union as alleged, and if one was given, I am not in breach of it.
>
> 4. With regards to paragraph 4 I allowed no certificate to be used in a prejudicial manner.
>
> 5. My investigation and enquiry from Mr. Black shows that in my absence from my office, the legal owner, the said HARLEY BLACK came to my office and in my absence took the registered Title mentioned and this taking was unknown to me and it was several months later that (sic) learnt what happened.
>
> 6. That Mr. Harley Black is well known to the Credit Union as a substantial farmer owning over 60 Acres of farmland with Cattle and poultry with house thereon and numerous heavy tractors equipment valued at over half of a million dollars at Rhymesbury, Clarendon.
>
> 7. I have no intention whatsoever to pay any debt on behalf of Mr. BLACK whose assets, I will never value in my whole life. The Credit Union is aware of Mr. BLACK'S substantial assets as he is well known to them, if they chose not to go against Mr. BLACK to recover their loan, I cannot help them as I did not facilitate the owner's use of the registered Title. I was not even aware that it had been wrongfully taken from my office behind my back."

Paragraph 3 hardly a statement of fact, seems more appropriate to pleadings. Howsoever that may be, its effect, I suggest, is that the appellant had not given any undertaking which he had breached. In addition, paragraphs 5, 6 & 7 illustrate quite strikingly the appellant's attitude to the giving of an undertaking. As I understood his explanation, the certificate of title was abstracted from his office in circumstances for which he could not be held accountable: it had been removed in his

absence and "unknown to him." When he eventually appeared before the Disciplinary Committee, he admitted in the course of his defence that having given a personal undertaking he did not realise anything was amiss until a request for the certificate of title was made by the respondent. He was not in a position to assist the Disciplinary Committee with respect to the Blacks' removal of the title from his office. He had given instructions for the title to be despatched but the reason for that failure was unknown to him. I do not suppose it would be farfetched to observe that the appellant did not consider himself at fault in any way, especially as Mr. Black was a far wealthier person than he was. Further, he had advised the respondent to bring an action to recover the amount of the loan from Mr. Black whose address he had passed on to them.

The Disciplinary Committee found, inter alia, that the appellant had given a written undertaking to deliver the Certificate of Title in the name of Mr. & Mrs. Harley Black on payment of $6,800.00, that the respondent paid that amount to the appellant by a cheque which was endorsed and encashed by the appellant on behalf of the vendor, that in breach of his undertaking, he failed to deliver the Certificate of Title to the respondent. The result of his failure is that the debt of the Blacks to the respondent is unsecured. That counduct amounts to misconduct in a professional respect.

In the face of this evidence, the finding of misconduct in a professional respect, was in my view, inevitable. The appellant had given an undertaking which he could have fulfilled and he had not kept his word. This was in breach of Canon VI (d). Such a breach, as is provided in the Canons, constitutes misconduct in a professional respect. The arguments advanced by Mr. Edwards on behalf of the appellant were, I regret to say, wholly without merit. But in the main he seemed to be saying that negligence on the part of an attorney-at-law could not amount to professional misconduct, and in any event there was no evidence

of negligence on the part of the appellant. The appellant had acted in keeping with normal office procedure.

It is convenient therefore to consider undertakings to see whether delegation of duties or negligence are answers to breach thereof. Before I do so, I set out the undertaking which prompted this appeal:

"15th September, 1976

"The Manager,
Alpart Credit Union,
Nain,
Saint Elizabeth.

Dear Sir,

Re: Purchase of Lot No. 8 - Rhymesbury Clarendon by Mr. & Mrs. Harley Black from Farm Lots Development Company Limited Title Registered at Volume 1127 Folio 119

I, Sylvester C. Morris, hereby undertakes to send to Alpart Credit Union, Nain Saint Elizabeth, Registered Title in the names of Mr. & Mrs. Harley Black for Lot 8, Rhymesbury, in the Parish of Clarendon, Registered at Volume 1127 Folio 119 on payment of $6,800.00 (SIX THOUSAND, EIGHT HUNDRED Dollars).

Yours faithfully,

SYLVESTER C. MORRIS
ATTORNEY-AT-LAW

FOR AND ON BEHALF OF FARM LOTS DEVELOPMENT COMPANY LTD."

Undertakings take many forms and may be given by an attorney to the court, to a client or to third parties. When the court enforces these undertakings, it is taking punitive action against its officers to ensure a uniform code of honourable conduct. This is made quite clear in the old case of In re Hilliard (1845)

2 Dow. & L. 919 at pp. 920 - 921 where Coleridge J. observed:

> "It seems to me that the Court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. The Court acts on the same principle, whether the undertakings be to appear, to accept declaration, or other proceedings in the course of the cause, or to pay the debt and costs. It does not interfere so much as between party and party to settle disputed rights; as criminally to punish by attachment, misconduct, or disobedience in its officers."

In that case, an objection taken by counsel that the undertaking given by a solicitor was void by sec. 4 of the Statute of Frauds was peremptorily dismissed. Hamilton J. in United Mining and Finance Corporation Ltd. v. Becher [1910] 2 K.B. 296 at p. 305 further explained the basis of the court's jurisdiction in this regard. He put it this way:

> "The second point is that although Coleridge J. places the jurisdiction in terms upon the ground that it is exercised with the view of securing honesty in the conduct of its officers, honesty in that regard is not meant by him to be purely a moral quality, but is, as is evident from the decision in In re Gee and other cases, a term applicable to the proper and professional observation of undertakings professionally given. The conduct which is required of solicitors is to this extent perhaps raised to a higher standard than the conduct required of ordinary men, in that it is subject to the special control which a Court exercises over officers so that in certain cases they may be called upon summarily to perform their undertakings, even where the contention that they are not liable to perform them is entirely free from any taint of moral misconduct."

[Emphasis mine]

Further, where an undertaking has been given the question which should be asked, is whether the undertaking was given by the attorney in his character of attorney in the transaction in dispute. See In re Gee (1845) 2 Dow. & L. 997. There was no question in this case but that this undertaking was given

in the appellant's character of attorney. Plainly as these cases show, it matters not whether some technical defence is open to a party or whether the attorney is guilty of any blameworthy conduct. An ordinary man is expected to keep his word; a fortiori an attorney. But if further authority was wanted to emphasize the rationale of the court's discretion to punish its officers, Myers v. Elman [1939] 4 All E.R. 484 is apposite. This case was not however concerned with an undertaking by an attorney-at-law but with conduct by the managing clerk of an attorney who had delegated his duties to his clerk. The House of Lords held that the managing clerk had knowingly prepared affidavits of documents which were inadequate and in the circumstances the respondent was guilty of misconduct. "Professional misconduct" is not as Lord Atkin at p. 497 makes clear in his opinion limited to those cases which involve -

> "personal misdoing. After all, they only mean misconduct in the exercise of the profession."

In that case, which, as shown, concerned misconduct in litigation proceedings, he was moved to assert at p. 497:

> "From time immemorial, judges have exercised over solicitors, using the phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the court itself. ..... The duty owed to the court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties, whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable, ... Nevertheless, as far as the interests of the court and the other litigants are concerned, it is a matter of no moment whether the work is actually done by the solicitor on the record or by his servant or agent. If the court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible."

It is no answer then to say as this appellant sought to do, that he had issued instructions for he had professionally pledged that he would deliver the certificate of title. It was an obligation or undertaking which he could fulfil because he had the document in his possession. So that even if the Canons were not extant, the appellant as an attorney could be punished by the court which has an inherent jurisdiction to punish its officers. The present Rules and those which predated them and relate to this appeal accept, that conduct which is in keeping with the traditions of the legal profession, has not been changed in any way. Canon VIII (a) states as follows:

> "The foregoing Canons should not be construed as a denial of the existence of other duties and rules of professional conduct which are in keeping with the traditions of the Legal Profession though not specifically mentioned therein."

And again Canon VIII (c) provides:

> "Where in any particular matter explicit ethical guidance does not exist, an attorney should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

It is necessary to point this out as there was some suggestion from Mr. Edwards that the Canons had altered those principles at common law which concerned barristers and solicitors. The Legal Profession Act sought, among other things, to fuse both branches of the profession which up to the passing of that Act were in existence in this country. The breach of an undertaking amounts to professional misconduct whether at common law or by the present statutory provisions.

I propose now to deal with an argument on the part of learned counsel for the appellant that negligence can never amount to professional misconduct. I must assume that this proceeded on the basis that the appellant's conduct amounted to negligence for he had also said "au contraire" that it did not.

When the term "negligence" is used in respect to conduct

of an attorney, it often means no more than that the attorney was lacking in professional skill. Therefore when it is said that negligence is not a ground for the exercise of a disciplinary jurisdiction, it is in this sense that the term must be understood. Diggs-White v. Dawkins [1976] 14 J.L.R. 192, is the sort of case illustrative of a case of "a sorry lack of skill" on the part of an attorney-at law in legal proceedings. In that case Graham-Perkins J.A. cited with approval a dictum of Lord Esher M.R. in Re Cooke (1889) 5 T.L.R. at pp. 407 and 408. I would call attention to the first two sentences -

> "But in order that the Court should exercise its penal jurisdiction over a solicitor it was not sufficient to show that his conduct had been such as would support an action for negligence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable in his profession."

The explanation of the appellant in this case to the Disciplinary Committee amounted to this, that he had delegated the carrying out of his undertaking. The Canon governing the giving of undertaking provides that an attorney should not give an undertaking which he cannot fulfil. There was no question that the appellant was not in a position to fulfil his undertaking. He was in possession of the certificate of title but did not deliver it to the respondent although he had received the purchase money. He had broken his promise which he could have fulfilled. It was dishonourable to him as a man and dishonourable in his profession and by way of parenthesis, it was not a case of professional incompetence in the sense adumbrated.

The importance of undertakings in the world of commerce and conveyancing cannot be over-emphasized. The practice of attorneys giving undertakings relating to certificates of title has been of long standing and the whole business, especially of conveyancing would be brought to a halt if parties whether they be attorneys or financial institutions could no longer

rely on the word of a member of an honourable profession. Take the instant case, the respondent would not have so easily parted with $6,800.00 had not the appellant, who signed as attorney-at-law, undertaken to deliver the certificate of title in exchange. A registered title is a valuable security in this jurisdiction and as the facts in the present case show, because Mr. Black was able to get possession of the certificate, he was enabled to obtain a mortgage from Jamaica Citizens Bank for $3,000.00. The earlier loan by the respondent to the Blacks is thus unsecured; the prejudice to the respondent is altogether grave.

From the evidence which the appellant gave, it appears that the security in some attorneys' offices must leave a great deal to be desired. Mr. Black, if the attorney's word is accepted, having attended at the office, helped himself to the certificate of title. I venture to think that one of the sad consequences of fusion brought about by the Legal Profession Act 1973, is that some former barristers who now practise largely as solicitors, are lacking in the training or facilities which relate to the latter practice. There was certainly no course of training for barristers especially, who, by Act of Parliament, woke up one morning as heirs to another hat - the solicitor's. In former times, it was the solicitor's branch which was engaged in conveyancing practice and thus that branch became familiar with the importance and the necessity for giving and honouring undertakings. Not so the barrister's.

One hopes therefore that this case will focus attention in this important area of commercial and conveyancing practice and the seriousness of breaching undertakings. The appellant, I observe, was subjected to a reprimand and ordered to make restitution. That penalty cannot by any manner of means be stigmatised as harsh; it was benevolent.

Zacca P. (as he then was) who has read these reasons in draft wishes me to say that he agrees entirely.

WRIGHT, J.A. (AG.):

I have read with approval, the judgment, in draft, of Carey J.A. and wish only to unburden myself of the sense of revulsion induced by the conduct of the appellant. Even if he were a recent graduate of a Law School his training, despite a lack of experience, should invest him with due regard for the ethics of the honourable profession to which he has been admitted as a member. But a plea of inexperience and/or ignorance is not available to this appellant who has practised at the Bar for many years. His undoubtedly unethical conduct in dealing with the Alpart Credit Union was greatly aggravated by his rather cavalier response to the complaint made against him.

The sanctions imposed upon him by the General Legal Council are mild indeed and to my mind do not fully reflect the concern expressed on the Council's behalf by Mr. Small who informed the court of the growing incidence of defaults on undertakings which gives cause for concern.

For my part, I think it ought to be made unequivocally clear that this court frowns very sternly upon this detraction from the high standard of practice expected of the Bar. And this must be so not only in defence of the Legal Profession but in protection of the general public against the havoc that can result from any further deterioration in the standard of practice at the Bar.