JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 19/2011

APPLICATION NO 34/11

BETWEEN	**CHANDRA SOARES**	**APPLICANT**
AND	**THE GENERAL LEGAL COUNCIL (ex Parte Kenneth Chung)**	**RESPONDENT**

R.N.A. Henriques, QC and John Givans instructed by Givans & Co. for the applicant

Michael Hylton, QC for the respondent

15 and 29 March 2011

IN CHAMBERS

ORAL JUDGMENT

MCINTOSH JA

[1] The applicant is an attorney-at-law who, up to 12 February 2011, had enjoyed an unblemished career spanning some 20 years or more. That date signaled a change in her status however, when, after hearing a complaint made against her concerning her conduct of a client's account, the Disciplinary Committee of the General Legal Council

("the Committee") handed down its finding that she was guilty of professional misconduct and imposed the ultimate sanction of striking her from the Roll of attorneys-at-law entitled to practice in Jamaica. She has appealed against that sanction and by this application she now seeks a stay of its execution pending the outcome of her appeal.

[2] Briefly, the complaint before the Committee was that she had failed to make a full return of the proceeds of sale in a property transaction and she offered no challenge to the complainant's evidence save where he denied her allegation that he had agreed on her request to treat the outstanding sum as a loan. She had even drawn up a promissory note in that connection but he denied any knowledge of that. The Committee accepted his word. The applicant said that after agreeing to treat the matter as a loan the complainant changed his mind and some six weeks after she repaid him in full including interest and legal costs.

[3] The Committee set out its findings in its judgment which I will not rehearse in this oral judgment. Suffice it to say that it based its decision on what was termed the undisputed facts there being only one disputed fact relating to the loan just mentioned. The Committee found beyond a reasonable doubt that the applicant had knowingly converted the outstanding sum of $7,985,424.76 to her own use and benefit and/or to the use and benefit of persons other than the complainant without his consent and that she was therefore guilty of professional misconduct contrary to section 12(4) of the Legal Profession (Amendment) Act 2007. After considering that the misappropriated

sum had been refunded with costs and interest and that the applicant did not seek to deny that she had wrongly used the sums belonging to the complainant, the panel which heard the complaint said:

> "Whatever sympathy the panel may feel for the attorney is subject to the overriding duty to protect the integrity of the legal profession and most importantly the interests of the public."

The Committee then proceeded to impose the ultimate sanction as being appropriate to the circumstances of the case.

[4] The principles for the grant of a stay of execution are well settled and are generally accepted by both sides. To succeed the applicant must show that she has some prospect of succeeding in the appeal (see ***Linotype-Hell Finance Ltd v Baker*** [1992] 4 All ER 887) and that the grant of a stay would best accord with the interests of justice (see ***Combi (Singapore) Pte Limited v Ramnath and Sun Limited*** (FC2 97/6273/C unreported judgment delivered 23 July 1997). These principles have been consistently followed in our courts and there is a wealth of authority in that regard which need not be mentioned here. They were admirably reviewed in ***Oswald James v The General Legal Council*** SCCA No 21/2010 Application No 42/2010 a judgment delivered by Harris JA on 6 July 2010 and referred to by the applicant's counsel.

[5] In the summary of the submissions which follows I wish to point out to learned Queen's Counsel for both the applicant and the respondent that no disrespect is

intended. I seek only to put the arguments in some context for the purposes of my analysis and conclusions.

[6] Mr Henriques learned Queen's Counsel for the applicant submitted that the applicant's appeal was in essence an appeal against the sanction imposed by Committee which he described as harsh. He contended that a more reasonable sanction could have been imposed in all the circumstances, as the period of non-payment was short and there was no other complaint against the applicant. He referred the court to cases which he argued were supportive of his submission such as the unreported case of ***Kenneth McLeod v The General Legal Council (at the instance of Rudolph Brown)*** a decision of this court delivered on 12 November 2003 where the court substituted a period of two years suspension for the sanction of striking off which the Committee had imposed and the case of ***Re Clarke*** [2008] 73 WIR 43 where the complaint before the Disciplinary Committee was as to misappropriation by the appellant of a large portion of funds for his personal use which had led to a substantial delay in the completion of certain property transactions and had prejudiced the client. The court noted that there were several promises to repay which were not kept and that the course of conduct had stretched over nine years. That court imposed a suspension of nine months.

[7] The case of ***Bolton v Law Society*** [1992] 2 All ER 486, cited by the Committee on the standard of professional conduct required from practising attorneys, is unhelpful in the circumstances, Mr Henriques submitted, as the applicant accepted that her

conduct was below the required standard and the case of ***Georgette Scott v The General Legal Council (Ex Parte Errol Cunningham)*** SCCA No 118/2008 also referred to by the Committee is to be distinguished on the basis that that applicant had other cases against her. Mr Henriques also drew the court's attention to ***Brian Lindsay Thomas v The law Society*** QBD C/O 1894/00 All England Official Transcripts (1997-2008) where there was a finding of dishonesty and where the court upheld the sanction of striking off. Mr Henriques said there was a principle that striking off was only appropriate where there was dishonesty but in the instant case he said there can be no finding of dishonesty when from the beginning the applicant admitted that she had not paid the money and had prepared a promissory note to pay the outstanding sum.

[8] Finally, Mr Henriques submitted that the applicant faces ruin if a stay is not granted. Her livelihood would be taken away and that must mean ruin. She has an appeal with a good prospect of success based on precedent in these very courts and accordingly she should be granted a stay pending the determination of her appeal.

[9] Mr Hylton, QC for the respondent submitted that in determining whether the applicant had a real prospect of success reliance on **Oswald James** was not really helpful to the applicant as in that case the court had for its consideration an arguable challenge to the Committee's substantive findings as to whether or not there was any misleading by the applicant. The court held that there may not have been any misleading as found by the Committee. As the appeal is against sentence, what the court will be required to do is to alter the Committee's sentence. It is his contention

that there is no principle as contended for by Mr Henriques that a finding of dishonesty is required before the sanction of striking off is appropriate. He submitted that the relevant Act Regulation and decided cases all confirm that the Committee has the power to impose striking off as a sanction and there is no such limitation on that power. The primary concern of the Committee and the court should be what is required for the protection of the clients and the public in the particular case.

[10] There were two factors critical to the findings of the Committee which required the court's consideration, Counsel said. The first is that the transaction took place in 2008 which was the year in which the applicant received the funds and the applicant's evidence before the Committee was that she was involved with a church which demanded certain contributions from her and that she had not only used her funds in that connection but also the funds that were entrusted to her. This was over a period from 2006 to 2008 showing that the matter before the Committee was not a one-off situation as during the course of time she was using other clients' funds and would take funds from another client's account and used the complainant's funds to repay them.

[11] In addition, there was also the discrepancy in the duties that were to be paid on the transaction. The correct duties were not paid in that transfer tax was not calculated on the correct purchase price. Those were the matters which the Committee had for its consideration learned Queen's Counsel said and it would take strong considerations for the court to interfere with the exercise of the Committee's discretion.

[12] Learned Queen's Counsel also submitted that the applicant had not shown that she would be financially prejudiced if a stay was not granted. He referred again to the case of ***Oswald James*** where the court's finding that there was a risk of irreparable loss to the applicant was based on his status as a sole practitioner. In the instant case the applicant told the Committee that she had a partner. That partner is not the subject of any ruling by the Committee and can continue the practice.

[13] Finally, it was Mr Hylton's submission that based on the present grounds of appeal the applicant has not shown that there is a likelihood of success in her appeal and has not shown that she would be ruined or would suffer irreparable damage if there is no stay. Mr Hylton added that the General Legal Council is mandated to produce the record of appeal and would undertake to produce the record speedily so that the appeal may be heard with dispatch. He pointed out that in ***McLeod*** the court had reduced striking out to suspension and if the court on hearing this appeal were to take a similar approach the absence of a stay would cause no prejudice as the court could direct the date from which the suspension should take effect.

Analysis

[14] After a careful review of all the material presented in this application I have concluded that the applicant has some chance of succeeding on her appeal. As I understand the law this does not mean a 50/50 chance but some chance of success. I am persuaded of the applicant's prospect of success from authorities such as ***Re Clarke.*** I also found ***Bolton v The Law Society*** helpful in that regard. I have placed

some reliance also on the unreported case of ***McLeod*** about which I have sought confirmation from our own records in the registry and from one member of the panel which indicated that the note of the oral judgment submitted by counsel is accurate. In ***McLeod*** the attorney for the appellant admitted to the court that there was no basis for challenging the findings that Mr McLeod was guilty of professional misconduct. There, counsel's contention was that although there was a clear case that Mr McLeod had intermeddled with Mr Brown's funds and that there was a report to the Fraud Squad, the punishment was disproportionate to the offence. The court, comprising Downer JA (Presiding) and Smith and Panton JJA, found merit in the submissions and set aside the striking off sanction substituting therefor the two years suspension referred to earlier.

[15] Whilst Mr Hylton QC may be quite correct in his submission that the court hearing the appeal may well impose a period of suspension if minded to vary the sanction of the Committee I do not feel it appropriate at this stage to speculate on what sanction may be imposed and to cause that thinking to drive the approach to be taken in this application. At the end of the day, the question remains whether the applicant has satisfied the criteria required for a successful application for a stay of execution. I have reservations about the second order being sought in the appeal (that is that the appellant be fined and/or strongly reprimanded) but ultimately that will be a matter for the panel at the hearing of the appeal. Suffice it to say that I find merit in the submission of Mr Henriques, QC that based on precedents in these very courts this applicant's appeal has some prospect of success.

[16] The two factors pointed out by Mr Hylton QC are in my view important but the authorities certainly show circumstances of similar and in some instances arguably greater seriousness which did not result in the ultimate sanction. Further, authorities such as ***Bolton*** and ***Re Clarke*** show that the courts, while mindful of the inescapable duty to protect the public interest and to ensure that the public is not led to believe that misappropriation of client's funds are matters to be tolerated, must also be concerned that in paying due regard to the public interest, punishment must be appropriate and proportionate and to that end the courts have often had regard to extenuating or mitigating factors.

[17] In ***Re Clarke*** the Committee recommended that the applicant be reprimanded by the Court of Appeal and the court was asked to take into account mitigating factors such as the appellant's open admission that he had misappropriated the funds but subsequently replaced them and his admission in writing that he was indebted to the client for interest and expenses and his intention to pay those to the client. In this case there is material for consideration in that regard. The court can no doubt take judicial notice of the power of religious beliefs in our culture, misguided though some of them may be and regrettably those beliefs are no respecter of status in society and levels of education. After all, our ultimate goal in a Christian society in this life is to secure a place in the afterlife (though it certainly must be seen as misguided to think that that place comes with a price tag attached to it).

[18] It is my view that ***Georgette Scott v The General Legal Council (Ex Parte Errol Cunningham)*** is distinguishable from the case at bar as the circumstances of that applicant were different from those in the instant case involving the payment by cheque which was dishonoured, outstanding payments up to the time of the hearing of the complaint and a finding of dishonesty in the applicant's use of the complainant's funds to name a few differences.

[19] I wish to add here that I agree with learned Queen's Counsel for the respondent that there is no principle that striking off is only appropriate where there is a finding of dishonesty. My reading of the authorities has disclosed no such principle and if Mr Henriques is right it seems to me that that may well not have inured to the benefit of the applicant.

[20] I have also reached the conclusion that the applicant has satisfied the second requirement for the grant in that she has shown that there is a risk that she will experience irreparable prejudice if the application is refused. It seems to me that there is a greater risk of injustice to her than to the public if the stay is refused. Learned Queen's Counsel for the respondent submitted that unlike the case of the applicant in ***Oswald James*** who was a sole practitioner, this applicant had given evidence that there is a partner in her firm who could continue the work of the firm so that financial loss or ruin would or could be avoided. However, I note that the applicant referred to this partner with whom she shares a surname, (the name "Sonia Soares" suggests that she is very likely an off-spring of the applicant or at least a relative), as a junior partner.

There is no indication as to the level of experience of this junior partner or as to the life of the partnership so that to place the running of a business built up over these several years in what is likely to be inexperienced hands may well result in other problems. Furthermore, the applicant has a debt to service which in all likelihood is a personal loan and in a substantial sum. This to me has all the makings of a financial disaster and the interests of justice would require that she be allowed to continue in her practice until the determination of her appeal. That would afford her some time to put certain arrangements in place and to structure the business of her firm in the event that it becomes necessary to be under different management.

[21] In para. [24] in ***Oswald James*** to which Mr Hylton QC drew the court's attention, Harris JA expressed her opinion that there was nothing in the Committee's reasons and findings that suggested that the applicant was a danger to society and nothing disclosed in the evidence that warranted him being considered as such. As a consequence, the learned Judge of Appeal expressed the opinion that he should be allowed to continue with the pursuit of his business and granted him a stay of execution pending the determination of his appeal. In the instant case, it is my view that the evidence and the findings of the Committee disclosed that the applicant no longer indulges in the particular religious activity and considers herself to have been gullible and misguided. She hitherto had 20 years of unblemished reputation as an attorney-at-law (notwithstanding the admission of other acts of impropriety referred to by Mr Hylton which were not the subject of any complaint before the Committee and seemed to have occurred in the same period of religious ferver).

[22] Accordingly, the order of the court is that there be a stay of execution of the decision of the Disciplinary Committee of the General Legal Council handed down on 12 February 2011 that the applicant be struck from the Roll of Attorneys-at-Law entitled to practise in Jamaica, and that the applicant be entitled to continue her practice as an attorney-at-law pending the determination of the appeal against that decision.