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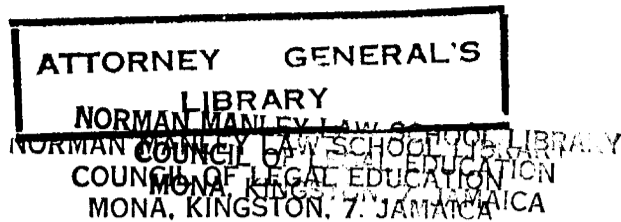
AG

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.35 OF 1995

IN CHAMBERS



IN THE MATTER of the Fair
Competition Act and the Legal
Profession Act

A N D

IN THE MATTER of the Legal
Profession (Canons of Professional
Ethics) Rules

BETWEEN THE GENERAL LEGAL COUNCIL PLAINTIFF
A N D THE FAIR TRADING COMMISSION DEFENDANT

D.A. Scharschmidt, Q.C., Dennis Goffe, Q.C., and
Alan Wood for Plaintiff.

Derrick McKoy, Ms. Jewel Scott, Ms. Christine Dale and
Mrs. Susan Ridsen-Foster for Defendant.

Heard: July 24, 25 and 26, November 14, 1995.

CHESTER ORR, J.

On the 29th November, 1994, the Senior Legal Officer of the Fair Trading Commission wrote to the President of the Jamaica Bar Association indicating, inter alia, that it was the view of the Commission that some of the Canons of Professional ethics are inconsistent with the Fair Competition act and may contravene the provisions of section 35 of the Fair competition Act as amounting to a conspiracy between the Government of Jamaica and the General Legal Council with Attorneys-at-Law in Jamaica to restrain or injure competition unduly.

As a consequence the General Legal Council filed an Originating Summons seeking the following declarations and orders:

1. That it be declared that in performing its statutory functions and duties under the Legal Profession Act, the General Legal Council

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2.

established by the Legal Profession Act is not amenable or subject to the jurisdiction of the Fair Trading Commission established under the Fair Competition Act.

2. Further and more particularly, that it be declared that the Legal Profession (Canons of Professional ethics) Rules, being subsidiary legislation and/or statutory rules made under the Legal Profession Act are not governed by the Fair Competition Act 1993.
3. That it be declared that the statutory rules made under the Legal Profession Act and in particular, the Legal Profession (Canons of Professional Ethics) Rules do not constitute an agreement within the meaning of that term as used in the Fair competition Act.
4. That it be declared that the Legal Profession (Canons of Professional Ethics) Rules made by the General Legal Council in performance of the statutory functions and duties imposed by the Legal Profession Act, do not contravene the Fair Competition Act.
5. Further or alternatively, that it be declared that the fair competition Act does not apply to the Legal Profession (Canons of Professional Ethics) Rules by reason of the fact that, the Legal Profession (Canons of Professional Ethics) Rules are made in the public interest under the Legal Profession Act in order to protect the public at large:-
 - (a) by upholding standards of the legal profession and promoting proper professional conduct by attorneys-at-law who are officers of the Supreme Court; and
 - (b) by preventing the system for administration of justice being brought into disrepute by its officers.
6. That it be declared that the provisions of the Fair Competition Act do not repeal, amend, or modify the provisions of the Legal Profession Act, and the Legal Profession (Canons of Professional

Ethics) Rules made thereunder.

Declaration No. 4 was abandoned at the hearing.

The Legal Profession Act was enacted in 1972.

Section 3(1) states:

“There shall be established for the purposes of this Act a body to be called the General Legal Council which shall be concerned with the legal profession and, in particular -

- (a) subject to the provisions of Part III with the organisation of legal education; and
- (b) with upholding standards of professional conduct.”

The constitution of the Council is specified in the First Schedule to the Act. The members are:-

- (a) the Chief Justice or his nominee;
- (b) the Attorney General or his nominee;
- (c) one member appointed by the Minister responsible for the Law Courts;
- (d) fourteen members being Attorneys-at-Law nominated by the Bar Association of Jamaica.

By section 12(7) -

“The Council may -

- (a) prescribe standards of professional etiquette and professional conduct for attorneys and may by rules made for this purpose direct that any specified breach of the rules shall for the purposes of this Part constitute misconduct in a professional respect;”

In exercise of the powers conferred by this section, the Council made Rules intituled The Legal Profession (Canons of Professional Ethics) Rules referred to as “Canons” which were published in the Jamaica Gazette Supplement of the 29th December, 1978 and were subsequently amended.

Section 11 empowers the Council to appoint a Disciplinary Committee the composition of which is prescribed by the section. This committee has the power after due enquiry, to impose sanctions for professional misconduct, subject to an appeal to the Court of Appeal.

The Fair Competition Act was enacted on 9th March, 1993. The Title reads:

"An Act to provide for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices."

Service is defined as "a service of any description whether industrial, trade, professional or otherwise."

Section 4 established for the purposes of the Act a body called the Fair Trading Commission referred to in the Act as "the Commission".

The Commission is empowered to carry out investigations in connection with matters falling within the provisions of the Act and may enforce any contravention of the obligations and prohibitions prescribed therein by application to the Court which may impose penalties for such contraventions.

Mr. Goffe dealt with Declarations 1, 2 and 6.

He submitted that the Legal Profession Act and the Canons were not repealed by the Fair Competition Act. The Canons were rules promulgated by the General Legal Council, "the Council" and have the force of a statute. There was no express repeal of the Legal Profession Act by the Fair Competition Act. Such repeal could not be implied as the Statutes deal with different subject matters and are not so inconsistent as to be repugnant to one another.

The Fair Competition Act is of general application and the earlier Act, the Legal Profession Act applies only to Attorneys-at-Law. Under section 3 of the Legal Profession Act it is the clear intention of Parliament to give the Council plenipotentiary powers to govern the legal profession and the later Act was not

intended to derogate from these powers. He relied, inter alia, on the maxim "Generalia specialibus non derogant and Seward v. Vera Cruz (1884) 10 App. Cos. 59.

Mr. Scharschmidt dealt with Declarations 3 and 5. He submitted that the Canons were not governed by the Fair Competition Act. He referred to sections 17 and 35 of the Fair Competition Act. Section 17 prohibits any person from giving effect to any agreement which has the purpose or effect of substantially lessening competition in a market.

Section 35 (l) states:

"No person shall conspire, combine, or agree with another person to -

(a)

(d) Otherwise restrain or injure competition unduly."

He cited Halsburys Laws of England 4th edition vol. 4 par. 845 to show that words in a statute are primarily to be construed in their ordinary meaning and referred to definitions of agreement in the Shorter Oxford English Dictionary and Webster's New Universal Dictionary, respectively as follows:

"A coming into accord; as mutual understanding;"

" an understanding or arrangement between two or more people, countries, etc; bargain; compact; contract."

The canons cannot in any sense be deemed agreements. They were exemplifications of the statutory power conferred on the Council by the Legal Profession Act. In this exercise the Council acted independently and no other body participated in that exercise. The canons were not the result of an agreement or a conspiracy.

He referred to section 3 (f) of the Fair Competition Act which states:

"Nothing in this Act shall apply to -

(a)

(g) activities of professional associations designed to develop or enforce professional standards of competition reasonably necessary for the protection of the public:"

He stated that the Council was a statutory body with the express purpose of upholding standards of professional conduct. "Association" is not defined in the Act. The Act makes it clear that it shall not apply to the Council nor does it apply to the Bar Association.

Section 35(2) states that nothing in subsection (1) (supra) applies to a conspiracy, combination, agreement or arrangement which relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public -

(a) in the practice of a trade or profession relating to the service:

The canons are designed not to benefit a particular litigant but the public at large.

Mr. McKoy, on behalf of the Fair Trading Commission, submitted that the Legal Profession Act is subject to the jurisdiction of the Fair Competition Act. The Fair Competition Act is intended to cover all aspects of commerce and delivery of services which by the definition in the act includes professional services. Both acts can co-exist.

In carrying out the duties of the Legal Profession Act the Council must also act consistently with the Fair Competition Act as with any other later legislation. The legal profession is not an exception to competition law. He cited Golfarb v. Virginia State Bar 44 L.ed 2d. 752 95 S. Ct. 204.

The Canons being subsidiary legislation and/or statutory rules made under the Legal Profession Act are also governed by the Fair Competition Act. It is not true that because a rule is subsidiary legislation it cannot be governed by a later primary legislation.

The Canons were "agreements" within the meaning of the Fair Competition Act. The Fair Competition Act defines "Agreement" and gives it a broad meaning. The Act intended the term agreement to be used in its broadest sense to cover all types of arrangements or understandings, not just agreements.

He referred to definitions of arrangement in the Oxford English Dictionary Corrected Re-issue 1961:

"Disposition of measures for the accomplishment of a purpose;"
and in Stroud's Judicial Dictionary 4th edition (II) -

"Arrangement (Restrictive Trade Practices Act 1956 (c.68) S.6(3)) bears its ordinary popular meaning (Re British Basic Slag Application, British Basic Slag [1963] 1 W.L.R. 727 C.A. Registrar of Restrictive Trading Agreements.

There is an arrangement within section 6 where, although no formal agreement exists, the conduct of the parties shows they have accepted mutual obligations (Mileage Conference Group of the Tyre Manufacturers Conference Agreement [1966] 1 W.L.R. 1137)"

No attorney in Jamaica can practice except in accordance with the Legal Profession Act and the Canons. The Act and the Canons constitute an arrangement under which attorneys practice. The Canons are within the expanded meaning of arrangements.

Declaration 5

The Fair Competition Act applies to the Canons although they are rules made in the public interest in order to protect the public at large by upholding standards to prevent the system of the administration of justice being brought into disrepute. Had the legislature intended to exempt professional ethics in the

public interest it would have done so. It has made a restricted list of activities which it is proposed to exempt.

Declaration 6.

The Fair Competition Act does not repeal, amend or modify the Legal Profession Act.

To the extent that the Canons contravene the Fair Competition Act, those Canons have been repealed, amended or modified.

In reply Mr. Goffe submitted that before the Fair Trading Commission can argue that the Canons or any of them are inconsistent with the Fair Trading Act, they must establish that the Canons are agreements.

The cases cited by Mr. McKoy have a common feature. They all relate to professional associations with voluntary membership unlike the General Legal Council.

Mr. Scharschmidt submitted that the word "arrangement" should be given its ordinary meaning and the definition should be governed by the *eiusdem generis* principle and the meaning restricted by its context.

I now deal with the issues raised in the summons:

- (1) The relationship between the Legal Profession Act and the Fair Competition Act.

As indicated above, the Legal Profession Act was enacted before the Fair Competition Act. In the Legal Profession Act the General Legal Council was established and given plenipotentiary powers in all matters relating to the legal profession. The Fair Competition Act, a later act is a general enactment to provide for the maintenance and encouragement of competition, *inter alia*, in the supply of services including professional services.

In *Seward v. Vera Cruz* (1884) 10 App. Cas. 59 the Earl of Sebourne L.C. said at 68 -

"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to

subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."

In Kutner v. Phillips [1891] 2 Q.B. 267, A.L. Smith J, said at 272 -

"Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together: *Thorpe v. Adams*."

In Barker v. Edger and others [1898] H.L. Cases 748 Lord Hobhouse in giving judgment of the Board said at 754 -

"When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

There is no clear intention that the Fair competition Act was intended to interfere with the provisions of the Legal Profession Act which relate to services by the legal profession nor is there a necessary inconsistency in the two Acts standing together.

In the circumstances I hold that the Fair Competition Act has not repealed, amended or modified the provisions of the Legal Profession Act. It follows, therefore, that the General Legal Council in performing its statutory duties is not subject to the jurisdiction of the Fair Trading Commission.

(ii) The relationship of the Canons to the Fair Competition Act

It is essential to determine whether the Canons fall within the ambit of those actions which are subject to the jurisdiction of the Fair Trading Commission.

Sections 17 and 35 of the Fair Competition Act are relevant for this exercise.

Section 17(3) prohibits any person from giving effect to any provision of an agreement which has the purpose of substantial lessening of competition or has or is likely to have the effect of substantially lessening competition in a market. (emphasis supplied).

Section 35(l) states -

"No person shall conspire, combine agree or arrange with another person to

(a) (b) (c)

(d) otherwise restrain or injure competition unduly."
(emphasis supplied)

There are exceptions to both these sections.

Sections 46 and 47 empower the Supreme Court on application by the Commission to impose a pecuniary penalty for contravention of sections 17 or 35.

By section 38 a person who contravenes section 17 or 35 is liable in damages for any loss caused to any other person by such conduct.

It follows, therefore, that in order for the Canons to attract the sanctions imposed by the Fair Competition Act, they must result from an "agreement" or an "arrangement" which contravenes the relevant provision relating to lessening competition.

The learned authors of Halsburys Laws of England 4th ed. vol. 47 state at par. 865.

"Words are primarily to be construed in their ordinary meaning or common or popular sense, and as they would have been generally understood the day after the statute was passed, unless such a construction would lead to manifest and gross absurdity, or unless the context requires some special or particular meaning to be given to the words."

To construe the words agreement and arrangement in their ordinary or popular meaning would not lead to manifest and gross absurdity nor has it been demonstrated and indeed there is nothing in the context of the Fair Competition Act which requires that some special or particular meaning be given to these words.

The ordinary meaning of "agreement" is that stated in the Shorter Oxford dictionary supra,

"a coming into accord, or a mutual understanding"

or as in Webster's New Universal Unabridged Dictionary -

"An understanding or arrangement between two or more people, countries, etc. bargain, compact, contract."

For a Canon to constitute an agreement, it must be the result of an understanding between two or more people. The Council, a statutory body, cannot agree with itself and there is no statutory requirement nor any evidence to support an agreement by the Council with any other person or body, for example, the Bar Association as a prerequisite to prescribing the Canons.

With regard to the word arrangement, Wilmer L.J. said in British Basic Slag v. Registrar of Restrictive Trading Agreements [1963] 1 W.L.R. 727 at 739

"To deal first with the meaning of the subsection, I think it highly significant that Parliament did not see fit to include any definition of "arrangement." I infer from this that it was intended that the word should be construed in its ordinary or popular sense. Though it may not be easy to put into words, everybody knows what is meant by an arrangement between two or more parties. If the arrangement is intended to be enforceable by legal proceedings, as in the case where it is made for good consideration, it may no doubt properly be described as an agreement."

Mr. McKoy submitted that other jurisdictions with comparable legislation adopt a broad interpretation of the word arrangement and urged that I adopt this approach. He cited Apple Fields Ltd. and Another v. New Zealand Apple and

Pear Marketing Board and Another [1991] 2 W.L.R. 129 to show that subsidiary legislation can amount to an arrangement in New Zealand Law.

In this case a levy was imposed by the Apple and Pear Marketing Board a statutory body on apple growers. This levy was the result of an agreement between the Board and the Grower's Federation. It was held that this agreement was an arrangement under section 27(1) of the Commerce Act 1986 of New Zealand which provides:

"No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market."

Lord Bridge said at 134.

"Arrangement is a perfectly ordinary English word and in the context of section 27 involves no more than a meeting of minds between two or more persons not amounting to an agreed course of action. Whether in every case the exercise of a statutory power by one person with the required statutory approval of another would necessarily amount to an arrangement it is unnecessary to decide. Here there was much more. The evidence demonstrates clearly that the imposition of the second tier levy resulted from a strong initiative taken by the grower members of the federation expressed through their conferences, adopted as federation policy and pressed on the board. In the light of this evidence their Lordships have no doubt that Holland J. was right to find that the levy was imposed pursuant to an arrangement." (emphasis supplied).

I find this case unhelpful. The Council acts independently of any other body in prescribing the Canons.

Mr. McKoy also relied heavily on Golfarb v. Virginia State Bar 44 L.Ed. 2d. 572. In this case the Supreme Court of the United States of America held that the minimum fee schedule published by the Fairfax Virginia County Bar Association and enforced by the State Bar was not exempt from the Sherman Act as "state action", such activities not being required by state law or the state's

highest Court in regulating the practice of law. Section 1 of the Sherman Act is similar to section similar to section of the Fair Competition Act. It reads -

Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

and provided punishment for every person engaged in such illegal conduct.

In Parker v. Brown 317 U.S. 341 87 L. Ed. 315 (1943) the Court held that an anticompetitive marketing programme which "derived its authority and its efficacy from the legislative command of the state" was not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit a state from imposing a restraint as an act of government.

Chief Justice Burger who delivered the opinion of the Court in Golfarb v.

Virginia State Bar said at 587 -

"Respondents have pointed to no Virginia Statute requiring their activities. It is not enough that as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather anticompetitive practices must be compelled by direction of the state as a sovereign.

The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity and in that posture cannot claim it is beyond the reach of the Sherman Act." (emphasis supplied).

This case is clearly distinguishable from the instant one. By analogy the Canons may be described as conduct prompted by state action, they are regulations having the force of statute. The Council has not joined with the Bar Association or any other organisation to promulgate the Canons. Therefore, the Canons would not constitute a violation of the Sherman Act.

Declaration 5.

Section 3 of the Fair Competition Act states -

"nothing in this Act shall apply to -"

- (g) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public;"

The Oxford English Dictionary gives a definition of association as -

"A body of persons who have combined to execute a common purpose or advance a common cause; the whole organisation which they form to effect their purpose; a society, e.g. the British Association for the Advancement of Science, the National Football Association . . ."

The General Legal Council is not thus an association nor can the Canons be described as "activities" of the Council.

I hold that the exemption in this section is not applicable to the Canons.

The following declarations are hereby granted:

1. That it is declared that in performing its statutory functions and duties under the Legal Profession Act, the General Legal Council established by the Legal Profession Act is not amenable or subject to the jurisdiction of the Fair Trading Commission established under the Fair Competition Act.
2. Further and more particularly, that it is declared that the Legal Profession (Canons of Professional Ethics) Rules, being subsidiary legislation and/or statutory rules made under the Legal Profession Act are not governed by the Fair Competition Act 1993.
3. That it is declared that the statutory rules made under the Legal Profession Act and in particular, the Legal Profession (Canons of Professional ethics) Rules do not constitute an agreement within the meaning of that term as used in the Fair Competition Act.

6. That it is declared that the provisions of the Fair Competition Act do not repeal, amend, or modify the provisions of the Legal Profession Act, and the Legal Profession (Canons of Professional Ethics) Rules made thereunder.

There will be Costs to the Plaintiff. Such costs to be agreed or taxed.