JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 1/86

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

BETWEEN EARL WITTER APPELLANT

AND ROY FORBES RESPONDENT

Bertram Macaulay, Q.C., & Mrs. P. Benka-Coker for Appellant.

Richard Small as Amicus Curiae

15th March & 6th April, 1989

CAREY, J.A.:

One of the inevitable results of fusion of the legal profession is that a number of lawyers who qualified as barristers-at-law, are now engaged in what was regarded as solicitor's work, a sphere of activity with which they were largely unfamiliar, and have created problems of one kind or another. This is but another example which has so far come to our attention in this Court. For another see Morris v. General Legal Council C.A. 30/82 (Unreported) dated 23rd January, 1985, a decision of this Court which was later affirmed by the Privy Council.

The facts which were found by the Disciplinary Committee of the General Legal Council as constituting

professional misconduct may be summarized in this way: The appellant was consulted in May 1974 by a Mr. Roy Forbes, a Jamaican who is a United States resident. He had earlier entered into split contracts with certain developers for the sale of land and the construction of a house thereon in the parish of St. Catherine. They were responsible for obtaining a mortgage for him but this undertaking was never fulfilled. The developers ran into financial difficulties by May 1974 and there was a possibility that they might be placed in liquidation by their bankers, Citibank. Mr. Forbes instructed the appellant to obtain title on his behalf. The developers were, in fact, put into receivership by the Bank. The receiver requested from the appellant details and costs of repairs carried out by Mr. Forbes as well as the client's intentions as to the unpaid contract price which included escalation costs. By 1978 Mr. Forbes had been advised by Citibank that it was willing to release the property for $15,000. He intimated to the appellant his reluctance to pay $15,000. Certain advice which it is not necessary to rehearse, was tendered to him by the appellant. By a letter dated 8th November, 1978, Citibank wrote to Mr. Forbes intimating that his deposit would be forfeited if by 10th December, 1978 the outstanding balance was not paid. Mr. Forbes sent the letter to the appellant. Subsequent to this, a settlement was proposed by Citibank as a result of negotiations by the appellant, whereby Mr. Forbes would be required to pay a sum of $13,267.87 on or before 30th September, 1979. The proposal was contained in a letter to the appellant dated 27th January, 1979. This proposal was never communicated to Mr. Forbes until he arrived here in October 1980. Mr. Forbes declined to accept the proposal.

In a subsequent letter dated 27th August, 1979, the Bank's attorney again wrote enquiring whether the proposal was acceptable and intimating that if nothing was heard within six weeks thereof, the bank would exercise its powers of sale under the mortgage. During the entirety of the retainer, Mr. Forbes wrote several letters to Mr. Witter enquiring about the progress of the matter but the only communication to Mr. Forbes took place on the occasions when Mr. Forbes visited Jamaica. The proposal for settlement had a deadline of 30th September, 1979 for acceptance. By letter dated 27th August, 1979, the Receiver wrote to Mr. Witter asking whether or not the proposal was acceptable and advised that if he did not have word within six weeks he would proceed to action without further notice.

The Committee found as follows:

> "Mr. Forbes had always sought information as to the progress of his business. He should most certainly have been told of this vital proposal with due expedition.
>
> We find Mr. Witter guilty of misconduct in a professional respect."

and also -

> "The failure to advise Mr. Forbes of the proposal with due expedition amounts to deplorable neglect. This ground creates a offence separate and apart from the second ground and we are obliged to find Mr. Witter guilty of misconduct in a professional respect."

The specific Canons of which the appellant ran afoul were Canons IV (r) and (s) which provide as follows:

> "(r) An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with all information as to the progress of the client's business with due expedition.

> "(s) In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."

A number of grounds were put forward but I do not think a great many of them need any consideration for counsel advanced before us no arguments. Mr. Macaulay submitted first that any breach of the rules made by the General Legal Council (the Council) since it amounted to professional misconduct, must involve an element of wrongdoing. He cited two cases to support this proposition, viz., Felix v. General Dental Council [1960] A.C. 704 and Bhandari v. Advocates Committee [1956] 1 W.L.R. 1442. He said that there was no finding made by the Committee which showed that it was aware of such an ingredient. With all respect to Mr. Macaulay, neither of the cases cited are, in my view, either relevant or helpful to any matter under consideration in this appeal. In the first case, one of the points discussed was the phrase "infamous and disgraceful" conduct in relation to the conduct of a dentist. We are not concerned in this appeal with any such terminology. In the second case which related to an advocate in Kenya, it was said that on a charge of professional misconduct involving an element of deceit or moral turpitude, a high standard of proof is required. We are not in this appeal dealing with professional misconduct involving an element of deceit or moral turpitude.

Both rules of which the appellant was found guilty are concerned with the proper performance of the duties of an attorney to his client. The Canon under which these rules fall, prescribes the standard of professional etiquette and professional conduct for attorneys-at-law, vis-a-vis their clients. It requires that an attorney

"shall act in the best interests of his client and represent him honestly, competently and zealously within the bounds of the Law. He shall preserve the confidence of his client and avoid conflict of interest."

The violated rules both involved an element of wrong-doing, in the sense that the attorney knows and, as a reasonable competent lawyer, must know that he is not acting in the best interests of his client. As to rule (r) it is not mere delay that constitutes the breach, but the failure to deal with the client's business in a business-like manner. With respect to rule (s), it is not inadvertence or carelessness that is being made punishable but culpable non-performance. This is plain from the language used in the rules.

Mr. Macaulay contended that there was no specific finding of fact which showed that culpability. I cannot agree. By setting out as it did, the history of the matter between the parties and the consequences which would result from the failure timely to advise Mr. Forbes of the bank's offers, the Committee was indicating that element of blameworthiness involved in the appellant's performance of his duties as an attorney, vis-a-vis his client. Indeed, the appellant far from suggesting that he was merely dilatory but not culpable, asserted that he dealt with his client's business with expedition. The Committee did not accept his word however. In my view, that ground fails. There was ample evidence before the Committee which entitled it to come to the decision that the appellant was guilty of deplorable neglect in the performance of his duties. It seems to me that the appellant was entirely oblivious to the facts that his client could lose his house and the sums he had paid on deposit. What the evidence showed was that he had the means of communicating with his client all information regarding the client's

business but did not. He supplied no reasons for his conduct. Both pejorative adjectives apply to his neglect. It was both "inexcusable" and "deplorable" and in a word, culpable.

There were a number of grounds of appeal put forward without argument which challenged the rules made by the Council on several bases. It was said for instance that it was "ultra vires" the Council to make rules which do not imply deceit and/or moral turpitude but, for example, delay or negligence because professional misconduct implies deceit or moral turpitude. Other grounds challenged the validity of Canons IV (r) and (s) on the footing that they were void for uncertainty, or inconsistent with the rule-making power conferred on the Council by Section 12 (7) which provides as follows:

> "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;
>
> (b) prescribe anything which may be or is required to be prescribed for the purposes of this Part."

It is enough to say that the Council is charged with the responsibility of setting the standards both as to <u>etiquette</u> and <u>conduct</u> which embrace all the activities in which an attorney may be involved whether as between himself and a client, another attorney or the Court. Some of these activities necessarily cannot involve moral turpitude or deceit. I would hardly imagine that disrespectful behaviour to a judge in court implies deceit or moral turpitude, but such conduct would scarcely qualify

as correct professional conduct. For the purposes of this appeal, the two rules under Canon IV which have been infringed are quite clear, and made in pursuance of section 12(7) of the Legal Profession Act and for the purpose of setting the standards expected of an attorney-at-law practising in this country. It was also said that Canon IV (s) did not prescribe a standard of professional etiquette which was predictable but created standards that could vary with the predilections of the different panels of the Disciplinary Committee. The Canon was therefore void as being inconsistent with Section 12(7) of the Legal Professional Act.

With the rapid growth of the Bar since fusion, and since the publication of the present Canons of Professional Ethics in 1978, the time would seem opportune for the enactment of a comprehensive and up-to-date Code of conduct for attorneys practising in this country. The accumulated experience of the past decade should have demonstrated the inadequacies of the present Code. Having said that, I need, however, only deal with the specific rules with which the appellant was adjudged guilty in considering this ground of appeal. The Council is empowered to prescribe rules of professional etiquette and professional conduct. Specifically, rule (s) of Canon IV is concerned with professional conduct for attorneys. It is expected that in any busy practise some negligence or neglect will occur in dealing with the business of different clients. But there is a level which may be acceptable or to be expected and beyond which no reasonable competent attorney would be expected to venture. That level is characterized as "inexcusable or deplorable". The attorneys who comprise a tribunal for the hearing of disciplinary complaints,

are all in practice and therefore appreciate the problems and difficulties which crop up from time to time in a reasonably busy practice and are eminently qualified to adjudge when the level expected has not been reached. I cannot accept that the determination of the standard set, will vary as the composition of the tribunal changes. The likelihood of variation is in the sentence which different panels might impose but that doubtless can be monitored by the Court or the Council itself.

What I have said in regard to Canon IV (s) applies equally to a submission challenging the validity of Canon IV (r) on the ground that the phrase "with due expedition" is not certain and positive in its terms.

That is enough to dispose of the present appeal which, in my view, is without merit. These reasons impelled me to conclude that the Committee came to the right decision which should be affirmed. Accordingly, I agreed the appeal should be dismissed.

As a footnote, I would suggest that in future appeals against decisions of the General Legal Council should be so intituled so as to make that body the proper respondent. Further, the relevant rules should be amended to allow these appeals to be treated in the same way as appeals from the Supreme Court and should provide that the preparation of the Record should be on the appellants.

FORTE, J.A.:

I have read the judgment of Carey, J.A., and entirely agree with the reasons therein.

GORDON, J.A. (Ag.):

I have read the judgment herein and find there is nothing I can usefully add. I agree with the reasons.

Cases referred to

① Morris v. General Legal Council CA 30/82 (unreported) 23/1/85

② Felix v. Dental Council (1960) AC 704

③ Bhandari v. Advocates Committee (1956) 1 WLR 1442