[2012] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO 70/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**HAROLD BRADY**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL (Ex parte Alva Langley & Rarane Langley)**	**RESPONDENT**

Gordon Robinson instructed by Brady & Co for the appellant

Mrs Sandra Minott-Phillips, QC and Mrs Alexis Robinson instructed by Myers Fletcher & Gordon for the respondent

11 July, 28 September and 5 October 2012

PANTON P

[1] On 24 May 2011, the disciplinary committee of the General Legal Council reprimanded the appellant, an attorney-at-law, for misconduct and ordered him to pay the amount of $250,000.00 towards the costs of the complainants. This is an appeal against that decision. On 28 September 2012 we dismissed the appeal and made the following order with a promise to put our reasons in writing:

> "The appeal is dismissed and the order of the disciplinary committee affirmed. Costs to the respondent to be taxed if not agreed."

The complaint

[2] The complaint before the committee was filed by Mr and Mrs Alva Langley who were parties to a contract, the benefit of which had been assigned to the appellant's client. The complaint was in the following form:

> "That Harold Brady, Attorney-at-Law has unlawfully retained and/or paid over to his client Arc Systems Ltd the full mortgage proceeds of $14,000,000.00 received by him from Jamaica National Building Society through their Attorneys Nunes, Scholefield, DeLeon & Co., in circumstances where he fully knew that the amount due and payable to his client under the Sale Agreement was $6,700,000.00 and that the balance of $7,300,000.00 should have been paid over to me (sic). The relevant correspondence and documents have already been submitted."

The facts

[3] The evidence presented to the disciplinary committee was clear and uncomplicated. It showed that on 13 April 2004, the Langleys, as purchasers, entered into an agreement for sale with Quentin Hugh Sam and Alfred Hugh Sam, vendors, in respect of land registered at Volume 1209 Folio 156, known as number 4 Dillsbury Ave, Jacks Hill, Kingston 6. The consideration was US$50,000.00, the equivalent in Jamaican dollars being stated as $3,000,000.00. A deposit of US$5,000.00 was payable on signing, followed by a further payment of US$25,000.00 with the balance of

US$20,000.00 being payable on completion. The date for completion was 365 days from the date of execution.

[4] Earlier, on 18 February 2004, the Langleys had entered into an agreement with KES Development Company Limited (hereinafter, KES) for the construction of a townhouse on the land purchased from the Hugh Sams. Under this agreement, the Langleys were required to pay to KES US$250,000.00 as follows: a deposit of US$60,000.00 on signing, a further sum of US$90,000.00 within ninety days of the payment of the deposit, and the balance of US$100,000.00 on completion. The date of completion was stated as being 365 days from the date of execution of the agreement. Any monies paid in Jamaican dollars were to be converted into United States dollars at the prevailing rate of exchange at the date of payment, and any shortfall would be payable by the Langleys at the prevailing rate of exchange at the date of payment. The agreed exchange rate between the Langleys and KES was 60 Jamaican dollars to one United States dollar.

[5] It turned out that KES was unable to fulfill its part of the agreement and the townhouse was not constructed within the time agreed. Consequent on this failure on the part of KES, it entered into an arrangement with ARC Systems Limited with a view to the completion of the project. This resulted in ARC Systems Limited issuing a document headed "Notice of Assignment" and dated 28 August 2006, purportedly signed by the appellant for Brady & Co, attorneys-at-law on behalf of ARC Systems Limited. The notice reads:

> "You are hereby notified that pursuant to Clause 6 of an Agreement for Construction of a Townhouse dated February 18, 2004 between K.E.S Development Company Limited and yourself, K.E.S has assigned and transferred to the undersigned ARC Systems Limited of 14 Bell Road, Kingston 11 in the parish of Saint Andrew, all rights and claim [sic] against you being all the moneys due and owing under Clause 11 (c) for Unit # 1, 4 Dillsbury Avenue, Kingston 6 in the parish of Saint Andrew.
>
> You are further notified to direct all balance payments to Brady & Co, Attorneys-at- Law."

This notice was issued to Mr Langley, his attorneys-at-law, KES, the attorneys-at-law for KES, Mr Quentin Hugh Sam one of the vendors of the lot referred to earlier, and to Messrs Patrick Bailey & Co, attorneys-at-law.

[6] Mrs Andrea Walters-Isaacs of Palmer & Walters, the Langleys' attorneys-at-law, immediately wrote to KES' attorney, Jennifer Messado & Co, seeking KES' formal position urgently on the notice of assignment. Mrs Jennifer Messado responded promptly saying that it was very unfortunate that matters had reached that stage. She said that the situation was very serious and that there was then existing a total stand-off existing between the parties. She said further : "… you have NO ALTERNATIVE but to take whatever steps are necessary to protect yourselves". After this communication, KES retained the services of Rattray Patterson Rattray.

[7] On 20 September 2006, the appellant wrote to the Langleys' attorneys-at-law as follows:

> "Further to our Notice of Assignment, we have now been informed that the balance due and owing is as follows:
>
> **US$211,000.**
>
> Kindly confirm this amount within seven (7) days of receipt hereof.
>
> Your cooperation will be highly appreciated."

Given the agreement that the operative exchange rate was 60:1, this meant that the amount due in the national currency, according to the appellant, was J$12,660,000.00. The response from the attorneys-at-law for the Langleys stated that the amount was incorrect and that the correct amount was US$120,000.00, being US$100,000.00 on the construction agreement and US$20,000.00 on the agreement for sale. The letter from Palmer & Walters also indicated that they were still awaiting KES' formal position on the notice of assignment. The appellant replied on 18 October 2006, to say that the balance was US$211,883.00 according to representations that had been made by Jennifer Messado & Co. He said that Brady & Co could not accept the amount stipulated by Palmer & Walters unless they could substantiate it by accounting for all the monies paid by the Langleys.

[8] Further correspondence between Palmer & Walters on behalf of the Langleys and Brady & Co on behalf of ARC Systems Limited make interesting reading as Palmer & Walters substantiated their position as regards the amount due and owing by the Langleys. On 23 November 2006, Brady & Co wrote to Palmer & Walters referring to the latter's letter of 14 November 2006. Mrs Keisha Diego-Grey, on behalf of Brady &

Co, referred to various receipts and invoices that had been provided to Brady & Co, and concluded thus:

> "… Therefore, the outstanding balance on the unit would be US$36,619.29 or J$2,270,395.98.
>
> We are prepared to hand over the title to the unit in exchange for this outstanding balance."

On 28 November 2006, Mrs Andrea Walters-Isaacs, on behalf of Palmer & Walters, responded to Brady & Co thus:

> "By our calculations, the total amount paid on account is $10,800,000.00 in addition to legal fees of $63,250.00. The total amount payable on both Agreements is $18,000,000.00 leaving a balance payable of $7,200,000.00.
>
> We therefore assume that the balance of $2,270,395.98 indicated in your letter is an error."

[9] Subsequent to this correspondence between the Langleys' attorneys and Brady & Co, there was further discourse between Mrs Walters-Isaacs and Rattray Patterson Rattray, attorneys-at-law for KES, as regards the due amount. The correspondence was copied to the appellant. There was also communication between Mrs Walters-Isaacs and Jamaica National Building Society as regards the latter's letter of commitment for mortgage financing to the Langleys.

[10] On 23 October 2007, Mrs Walters-Isaacs wrote to the appellant thus:

> "We write further to previous [sic] herein and in particular our discussions of the 22nd instant.

> By our calculations the balance due to complete the sale [sic] J$6,000,000.00 MINUS the amount expended by [sic] clients to complete the unit.
>
> Of course the Mortgage commitment from Jamaica National Building Society is for the sum of Fourteen Million Dollars ($14,000,000.00).
>
> The amount remaining after payment to your client of the above indicated balance proceeds of [sic] RBTT Bank Limited and the National Commercial Bank who have provided our clients with bridge financing in the matter and in respect of whom Mesdames Jennifer Messado & co. [sic] had issued Letters of Undertaking.
>
> Kindly let us have your IMMEDIATE confirmation in writing that your client will deduct the sum of J$6,000,000.00 ONLY from the anticipated mortgage proceeds failing which we will have no alternative but to instruct Jamaica National Building Society and Nunes Schofield [sic] DeLeon & Co. to withdraw their Letter of Commitment and Letter of Undertaking respectively."

This letter was copied to all relevant parties. It provoked a response from Rattray Patterson Rattray on 2 November 2007 which was copied to Brady & Co. In that response, Rattray Patterson Rattray reminded Mrs Walters-Isaacs that their calculations had indicated a balance of US$112,032.00 plus J$95,820.00.

[11] The letter of 23 October 2007 was not responded to by the appellant. There was further dialogue between Mrs Walters-Isaacs and Rattray Patterson Rattray and eventually the latter wrote to Palmer & Walters indicating pleasure at having arrived "at a mutually acceptable agreement on the way forward". The agreement was that the Langleys would pay J$6,700,000.00 net to Brady & Co in exchange for the duplicate certificate of title for the lot registered in the name of the Langleys, a letter of

possession, and letters to the National Water Commission and the Jamaica Public Service Company; and pay all costs to stamp the sale agreement and to register the transfer of the title into their names.

[12] On 8 April 2008, the agreement was communicated by Rattray Patterson Rattray to the appellant in writing. His letter stated:

> "We refer to the captioned matter and are pleased to advise that the Purchasers of Unit Number 1 have agreed to pay the sum of Six Million Seven Hundred Thousand Jamaican Dollars (J$6,700,000.00) net to you in exchange for a signed Transfer and the duplicate Certificate of Title for the lot.
>
> As you are already holding an undertaking from Nunes, Scholefield, DeLeon & Co. for the payment of Fourteen Million Jamaican Dollars (J$14,000,000.00) on registration of Jamaica National Building Society's Mortgage, we request that you now forward the signed Transfer for this Unit to us so that we can have same signed by the Purchasers and noted with the payment of Transfer Tax and Stamp Duty."

By 16 April 2008, the appellant complied with the request for the instrument of transfer. His letter stated:

> "We refer to your letter of April 8, 2008.
>
> As instructed, we enclose the signed Instrument of Transfer for the purpose of having it duly cross-stamped by the Commissioner of Stamp Duty & Transfer Tax for taxes.
>
> Kindly return it to us immediately upon completion so that we can send it along with the duplicate Certificate of Title to Nunes, Scholefield, DeLeon & Co."

However, a letter from Mrs Walters-Isaacs to the appellant six months later (23 October 2008) indicates that the appellant had completely ignored the contents of the

correspondence as regards what was due from the Langleys and what was supposed to happen with the balance of the mortgage sum. That letter also has to be quoted in full. It reads thus:

> "I refer to the captioned and write further to our discussions (Walters-Isaacs/Brady) of even date herewith.
>
> Please **IMMEDIATELY** forward to the undersigned your cheque in the sum of **Seven Million Three Hundred Thousand Dollars ($7,300,000.00)** this being the balance payable to my clients, Alva and Rarane Langley from the mortgage proceeds received by you some three (3) weeks ago!
>
> In our discussions this morning, you indicated that you had paid over the entire mortgage amount of **Fourteen Million Dollars ($14,000,000.00**) to your client Arc Systems Limited, this purportedly pursuant to the Notice of Assignment dated August 28, 2006.
>
> However, as I pointed out to you in our subsequent discussions, that Notice – which was prepared by your firm – stated that KES had assigned and transferred to ARC **"all rights and claims against (the purchasers) being all the moneys due and owing under Clause 11 (c) for Unit #1, 4 Dillsbury Avenue, Kingston 6".**
>
> At a meeting with the principals of KES and their Attorney in April, 2008, my clients agreed, inter alia, to pay the sum of **Six Million Seven Hundred Thousand Jamaican Dollars ($6,700,000.00)** net in exchange for a signed Transfer and the duplicate [sic] of Title for the property.
>
> In her letter to you of April 8, 2008, KES's [sic] Attorney Ms. Andrea Rattray indicated this as being the basis on which my clients had agreed to complete the sale and

> requested you to forward the signed Transfer on the foregoing terms.
>
> We were all therefore shocked to learn this morning that you had paid over the entire mortgage proceeds of **Fourteen Million Dollars ($14,000,000.00)** to ARC and are even more alarmed at your refusal to cancel or to otherwise seek to recover the cheque!
>
> In my letter to you dated October 23, 2007, one year ago, I had indicated that the amount remaining from the mortgage proceeds after payment of the sums owed to KES, was to be paid to RBTT Bank [sic] Limited and the National Commercial Bank who provided our clients with bridge financing in the matter.
>
> Your failure to honour the terms under which the monies were sent is disingenuous at best and may well be regarded as professional misconduct, if not a misappropriation of funds.
>
> I have STRICT INSTRUCTIONS to institute legal proceedings against you and to report the matter to the Fraud Squad and to the General Legal Council should your cheque for the sum of **Seven Million Three Hundred Thousand Dollars ($7,300,000.00)** not be paid over by 4:00 p.m. on Friday, October, 2008 [sic]."

[13] The appellant on receipt of this letter from Mrs Walters-Isaccs responded under an "Urgent" heading, by "fax & hand". His letter dated 24 October 2008, reads:

> "We refer to your letter of 23rd instant which was received by email and fax.
>
> We advise that our decision to pay over the mortgage proceeds of Thirteen Million Eight Hundred and Fifty Thousand Dollars ($13,850,000.00) which was received in respect of this matter was in accordance with the Deed of Assignment and the Letter of Undertaking dated 20th

> September, 2007 which was given to us by Nunes, Scholefield DeLeon & Co. and which was again confirmed in letter dated 10th April, 2008 from the said Nunes Scholefield DeLeon & Co; copies of the said letters are attached. We note that the letters were copied to you and that we have had no objections from you in respect of the said letters.
>
> We further advise that our actions at all time [sic] in having the matter completed were in respect of the undertaking given by Nunes Scholefield and at no time had we undertaken to pay over any sums to the Purchasers or any other persons. It is your [sic] understanding that any undertaking that may have been given was made by Jennifer Messado of Jennifer Messado & Co.
>
> Please be guided accordingly."

This letter by the appellant is important especially when it is considered that he chose not to give evidence before the disciplinary body. Of course, it has to be noted that he was under no duty to give evidence. This letter was apparently aimed at giving its readers an idea of the thinking of the appellant, at least at the time the letter was written.

The findings and decision

[14] The committee considered those facts and the submissions of Mr Gordon Robinson for the appellant and Mrs Walters-Isaacs for the Langleys, and indicated their awareness of the relevant burden and standard of proof. The committee noted that "there really, at the end of the day, was not much dispute about the primary facts". However, they listed 12 specific findings of fact. The most important findings were that the appellant, having been advised by Mrs Walters-Isaacs, knew:

i. the amount of money that was due to his client; and

ii. that the entire mortgage proceeds from the Jamaica National Building Society did not belong to his client.

The committee also found that the appellant, by remaining silent and non-esponsive to certain letters, led the Langleys or Mrs Walters-Isaacs to believe that the amount over and above the amount due to his client would have been handed over to them.

[15] The committee, considering the exchange of correspondence between the appellant and his firm on the one hand, and Mrs Walters-Isaacs and Rattray Patterson Rattray on the other hand, expressed it in this way:

> "He knew by exchange of letter [sic] that the balance had been agreed at J$6.7 Million … . He knew the complainants' attorney was expecting that the mortgage proceeds over and above that balance would be remitted to her, see **Exhibit 1 page 30**. By his silence and by his positive act of sending the transfer without demur as to the figures stipulated he represented that himself and his clients accepted that state of affairs."

[16] The committee considered that canon I(b) of the Legal Profession (Canons of Professional Ethics) Rules was the relevant canon for consideration, given the facts of the case. That canon reads thus:

> "An attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behavior which may tend to discredit the profession of which he is a member."

The Rules stipulate that a breach of that canon (among others) constitutes misconduct in a professional respect. The committee assessed the issue for consideration as being whether the appellant had failed to maintain the honour and dignity of the profession, or whether he had acted in a manner that tended to discredit the profession. In considering the matter, they referred to Canon VIII (a), (b) and (c) which read as follows:

> "(a) Nothing herein contained shall be construed as derogating from any existing rules of professional conduct and duties of an Attorney which are in keeping with the traditions of the legal profession, although not specifically mentioned herein.
>
> (b) Where in any particular matter explicit ethical guidance does not exist, an Attorney shall 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.
>
> (c) Where no provision is made herein in respect of any matter, the rules and practice of the legal profession which formerly governed the particular matter shall apply in so far as is practicable, and a breach of such rules and practice (depending on the gravity of such breach) may constitute misconduct in a professional respect."

[17] The committee was of the view that an attorney who knowingly misleads others, acts dishonourably and in a manner likely to discredit the profession. It is misleading, they said, to act in a manner which gives the impression "that one is in agreement with

their stated position where to do so lulls those into a false sense of security as it relates to that stated position". They pointed to the fact that the appellant had failed on 17 April 2008 to indicate disagreement with the balance due. Consequently, they concluded that "his decision, without prior warning to the complainants, to pay over to his client the entire amount received [was] conduct which tends to the discredit of the profession and was not honourable".

[18] The committee made some further comments and observations which ought to be mentioned, if only because they formed the basis of grounds of appeal. One such observation was that "an attorney is not entitled to knowingly aid and abet unlawful conduct, by for example to knowingly accept trust monies in breach of trust". They went on to state that Arc Systems Limited, by accepting the overpayment, would have been liable in quasi-contract for money had and received. The appellant, given his state of knowledge, by paying over all the money to his client, would have aided and abetted their unlawful receipt of such funds. This was dishonourable action on the appellant's part which would tend to discredit the profession, said the committee.

The grounds of appeal

[19] Twenty-four grounds of appeal were filed challenging the committee's decision. They are as follows:

> "(1) The Tribunal erred in finding as a fact that the Assignment was 'of the benefit of the balance due under Clause 11 c of the contract between KES' when:
>
> (a) The effect of the Assignment's provisions is a matter of law not fact and can only be

ascertained from a careful examination of the terms and provisions of the Assignment itself.

(b) The Complainants never asked to see the Assignment nor did they lead any evidence as to what were the terms and conditions of the Assignment itself which document was never put into evidence by the Complainants or on their behalf.

(2) The Tribunal erred in finding that the Notice of the Assignment 'represented to the complainants and their attorney that the [appellant's] client was entitled to the balance due under Clause 11 c of the Construction Agreement' when in fact a Notice of Assignment cannot and did not purport to include all the terms and conditions of the Assignment itself and did in fact represent that KES had assigned to Arc 'all rights and claims against you' regarding the balance due under the said construction contract which clearly meant that it was not limited to the specific figure that had been agreed to be paid as 'balance' under Clause 11c of the contract but all rights and claims regarding that Clause including the right to claim more than the stated figure if for whatever reason a properly authenticated statement of account (or failing that a claim in court or other dispute resolution process) established that further sums were due under the contract as 'balance'.

(3) The Tribunal erred in finding that it was agreed between KES and the complainants that 'the balance due' was $6.7 Million in light of the incontrovertible evidence that:

(a) No Statement of Account had been received from KES Attorney-at-law with carriage of sale

(b) Sums were paid in an ad hoc manner including before the sale agreement was signed

(c) There was disagreement between KES and the complainants as to the balance due

(d) The [appellant] had made it clear from the outset that his information from KES was that the balance due was US$211,000

(e) The sum of J$6.7 Million was a settlement agreement between KES and the complainants to which agreement neither Arc nor its attorney was privy and was in no way indicative of any legally binding statement of what was actually the balance due

(4) The Tribunal erred in making a finding that the [appellant] 'knew' that his client was not entitled to the entire mortgage proceeds when there was no evidence to establish this knowledge and, contrarily, the evidence was that:

(a) The respondent was asserting that the sum of US$211,000 was due and, despite subsequent negotiations, never resiled from that legal position;

(b) Despite their reliance on a fictitious 'cap' of liability to be US$100,000 based on the relevant clause of the contract, the complainants [sic] own allegation that $6.7 Million was due under that said same clause, at their alleged 'fixed' rate of exchange of J$60 to US$1, amounted to US111,666.66.

(c) In the absence of the Assignment, it is impossible to assess all the factors that

were operating on the [appellant's] mind as he represented his client;

(d) Arc had no contractual obligation whatsoever to the complainants to whom it was KES who had an obligation to account for sums due under the construction contract and against KES it is that the complainants still had this claim to account for payments made;

(e) No payment was ever made by the complainants to Arc pursuant to the construction contract until receipt of the mortgage proceeds which were expressly issued and collateralized as a result of and in consideration for the said construction contract;

(f) The mortgagee, having sight of the Assignment and with express reference to same, represented to all concerned including the [appellant], the complainants and the complainants' attorneys one year before the mortgage proceeds were eventually disbursed, that Arc was entitled to the entire proceeds of the mortgage pursuant to the deed of assignment

(g) There was no evidence led by the complainants of any authentic documented proof of the true 'balance due' as claimed by them (which claim changed from time to time) having been shown to the [appellant].

(h) The terms of the letter written by the complainants' attorneys-at-law on October 23, 2007, was the clearest evidence of the fact that the complainants and their attorneys were fully aware that there was

no agreement between themselves and Arc regarding the actual 'balance' due and, in the face of that letter which specifically threatens action if no response is received, the Tribunal's findings of fact regarding the [appellant's] knowledge are unsupportable and in error.

(5) The Tribunal erred in taking into consideration the [appellant's] 'unresponsiveness' to the letter of April 8, 2008 which was not written to him but to the complainants' attorneys. Another letter of April 8, 2008 written to him was in fact responded to but only in the limited way requested in that letter. The Tribunal also erred in taking into consideration the [appellant's] non responsiveness to the letter of November 8, 2007 which included matters regarding the exchange rate to be applied which the Tribunal itself has acknowledged was irrelevant and non-binding being an alleged oral agreement of which Arc could not have known and which letter itself included attempts to seek credit for payments for which the complainants were obviously not entitled to seek from Arc and which letter required no response. The Tribunal also erred into [sic] taking into account the [appellant's] non-responsiveness to the letter of October 23, 2007 when the letter itself anticipated non-responsiveness and threatened specified action in that circumstance.

(6) The Tribunal erred in law in taking into account [sic] 'non-responsiveness' of the [appellant] especially in a situation when he was representing a client in conflict with the complainants who were separately represented. In those circumstances, The Tribunal erred in finding that 'non-responsiveness' could amount to professional misconduct.

(7) In making their findings of fact, no finding was made regarding the express assertion of entitlement coming from the complainants [sic] own mortgagee on September 27, 2007 and the effect that had or ought to have had on all parties despite the clear evidence of the letter dated October 23, 2007 written almost immediately thereafter by the complainants' Attorneys-at-law.

(8) In all the circumstances, the Tribunal's finding of fact that the [appellant] knew that 'the entire mortgage proceeds of J$14 Million did not represent the amount due to his client pursuant to the assignment' is unsustainable, contrary, arbitrary and unreasonable having regard to the evidence before the Tribunal.

(9) The Tribunal erred in law in placing a responsibility upon counsel for a client in a contentious matter to explain his actions to opposing counsel or to warn opposing counsel before he took presumed lawful action on his client's instructions which might have been thwarted had he warned opposing counsel.

(10) The Tribunal erred in law in finding that the receipt of the funds by Arc amounted to an unlawful receipt and rendered it liable to recovery of the funds as monies had and received in the absence of any evidence from which this could be concluded in particular in the absence of a criminal conviction, a finding from a court of civil liability or the essential document upon which Arc had acted namely the Assignment.

(11) The Tribunal failed to take into account or, if it did so, failed to do so properly, that there was no contractual nexus whatsoever between Arc and the complainants in this matter and that it was trite law that an assignee of the benefit of a contract does not owe the other party to the original contract any

obligation whatsoever. Since Arc owed the complainants no obligation whatsoever to account and neither Arc nor its attorney had undertaken to account, it was not open to the Tribunal to find that Arc's receipt of the entire mortgage proceeds was unlawful.

(12) The Tribunal erred in making a finding of civil and/or criminal liability when this was not a trial of any such charge and insufficient evidence had been led either to establish or rebut such a charge.

(13) The Tribunal erred in law in relying on the cases cited at paragraph 31 of the decision to find that the [appellant's] conduct was dishonourable or a discredit to the profession. The cases cited dealt with clear and unambiguous acts of dishonour (including two involving criminal convictions; one of issuing threats and making secret tapes of opposing counsel's conversations; and one of accepting a gift in his client's will) and were not remotely similar to the instant facts.

(14) The Tribunal erred in law in applying the principle in Finers v Miro (paragraph 32 of the Decision) when, in that case, the attorney had discovered that client's assets held by him represented the proceeds of fraud. No fraud can be alleged in this case.

(15) The Tribunal erred in law in finding the case of John Fox v Bannister King (paragraph 32 of the Decision) applicable to the current facts when that was a case in which an attorney knew that his client's instructions would further an unlawful conduct.

(16) The Tribunal erred in law in finding that the [appellant] knowingly misled the complainants or their attorney in the absence of any evidence that anybody was misled and in the face of the express

warnings from Jennifer Messado; from the Mortgagee; and the express terms of the complainants' attorneys' own letter of October 23, 2007.

(17) The Tribunal erred in law in finding that the [appellant] knowingly misled the complainants' attorney when no evidence of any kind was given by the complainants' attorney.

(18) The Tribunal erred in finding that a failure to indicate disagreement particularly in the circumstances of this case can amount to dishonourable conduct.

(19) The Tribunal erred in law in failing to consider properly or at all that the subject matter of this complaint was a bona fide dispute between clients of independently represented attorneys and properly the subject of a Supreme Court action between the clients and was not a dispute that could properly form the basis of a complaint of professional misconduct. The Tribunal persisted on this erroneous path despite uncontradicted evidence that the complainants' attorneys had written a letter of demand directly to Arc and had eventually negotiated a settlement of their claim directly with Arc.

(20) The Tribunal erred in law in usurping the jurisdiction of the supreme court [sic] as it attempted to resolve a legal and factual dispute in the absence of the necessary evidence and by treating such a dispute as a proper subject matter for a complaint of professional misconduct against opposing counsel;

(21) The Tribunal erred in law in interpreting a settlement agreement between Arc and the complainants as proof that Arc was liable to the complainants instead of the true value of that

evidence which is that the complainants were at all times aware that their claim should be made against Arc and not against Arc's legal representative. Settlement agreements by their own nature do not decide legal liability.

(22) The Tribunal's imposition of an order that the [appellant] pay $250,000 as a contribution to the complainants' costs was arbitrary and unlawful as there was no evidence as to how much costs, if any, the Complainant [sic] had expended in prosecuting the complaint.

(23) The Tribunal's sanctions were excessive in all the circumstances;

(24) The Decision of the Tribunal was unreasonable in light of the evidence."

[20] With great respect, there appears to be a fair degree of repetition in the formulation of these grounds. However, they may be grouped as challenging the committee's findings as regards the following -

(a) the assignment;

(b) the appellant's knowledge of the balance due to ARC;

(c) the conduct of the appellant, given his knowledge;

(d) the committee's alleged reliance on certain decided cases; and

(e) the failure of the committee to regard the matter as a bonafide dispute that ought properly to be the subject of an action between the parties in the Supreme Court.

The submissions and opinion thereon

[21] In the grounds of appeal, the appellant complains that the Langleys never asked to see the assignment nor did they lead any evidence as to its terms and conditions. Further, the complaint goes, the committee erred in its finding that the Langleys were entitled to the balance due under the stated clause when in fact a notice of assignment cannot include all the terms of the assignment and the balance could include more than the stated amount. Mr Robinson submitted that ARC Systems Limited had no obligation to account to the Langleys for payments already made as the contract remained between the Langleys and KES. He cited the case ***Tolhurst v Associated Portland Cement Manufacturers*** [1902] 2 KB 660, in support of the point that the contract remained between the Langleys and KES, and submitted further that too much reliance was placed by the committee on the notice of assignment. They should have been more mindful, he said, of the fact that a notice of assignment is not an assignment.

[22] Mrs Sandra Minott-Phillips QC, for the respondent, submitted that the subject matter of the assignment to ARC Systems Limited, according to its attorneys-at-law, was the right to receive under clause 11(c) of the construction agreement, the sum of US$100,000.00 Using the agreed exchange rate, she said that the sum equates to J$6,000,000.00. When additional expenses for the Langleys' account were added to that sum, it increased, by agreement between the Langleys and the original builders to J$6,700,000.00 and this figure was agreed in April 2008, she said.

[23] With the greatest of respect to learned counsel Mr Robinson, who is not given to making submissions of this nature, his argument as regards notice of assignment and assignment is bordering on a quibble. The stark reality is that the notice of assignment that was signed and issued by the appellant himself stipulates that what had been assigned to ARC Systems Limited were all rights and claims against the Langleys "being all monies due and owing under Clause 11 (c) for Unit # 1 …" By his own hand, therefore, he had expressed a recognition of what ARC Systems Limited was entitled to. It follows that at least he would have been under a duty as ARC System Limited's attorney to ascertain what was the actual sum due in order to protect his client's interest. Equally, he was under no duty to collect more than what was due to his client. Bearing in mind the correspondence that had passed between him, Rattray Patterson Rattray and the Langleys' attorneys, he was clearly put on notice as regards what was due to ARC Systems Limited. He was advised further as to what the Langleys wished to do with the balance that would have been coming into his hands from the Jamaica National Building Society. It would be unworthy of him to say that he was unaware of that fact, given the correspondence. It is understandable in the circumstances, therefore, why he exercised his right to not give evidence at the hearing.

[24] It seems rather callous of the appellant to have responded to Mrs Walters-Isaacs that he had never undertaken to pay over any sum to the Langleys or any other person.

[25] The undertaking by Nunes Scholefield DeLeon & Co, which he said he acted in keeping with, was contained in a letter dated 20 September 2007. That letter was copied to the attorneys for the Langleys. It was after that that Mrs Walters-Isaacs sent

her letter to the appellant requesting confirmation that he would deduct only $6,000,000.00 seeing that the balance was to be paid to National Commercial Bank and RBBT. The latter letter dated 23 October 2007 (page 115 of the record) was copied to Nunes Scholefield DeLeon & Co, so all relevant parties were aware of the state of affairs. Finally, Rattray Patterson Rattray, acting for KES, who had assigned the benefit of the contract to ARC Systems Limited, wrote to the appellant on 8 April 2008, stating clearly the amount agreed and what was expected of him (see page 123 of the record).

[26] Mr Robinson complained of the committee's reliance on certain decided cases which, he said, were irrelevant. The position, however, is that the committee had no need to refer to them as the facts of the instant case do not need support from any quarter in order for the committee to have arrived at the conclusion at which they arrived. To suggest further that this was a matter that ought to have been fought in the Supreme Court in an action to be brought by the Langleys is unacceptable.

Summary and conclusion

[27] There can be no doubt that the committee arrived at the correct decision. The Langleys entered into a contract to build their house. The benefit of receiving all monies due and owing under that contract by the Langleys was assigned to ARC Systems Limited. A mortgage company provided a sum of money to the Langleys for the purpose of the construction. A portion of the mortgage amount was due to ARC Systems Limited. The appellant, representing ARC Systems Limited knew of that sum. The appellant also knew that the mortgage company would have been sending more than the amount due, and that the balance after deducting what was due to ARC

Systems Limited was required by the Langleys to clear bridging loans obtained elsewhere for the construction. Despite that knowledge, and specific reminders and requests by the Langleys and by the assignor, the appellant gave the entire amount to ARC Systems Limited. Finally, when the attorneys for the Langleys protested the behavior, they were rebuffed.

[28] The committee would have been failing in its appreciation of its duty had it excused this conduct by the appellant. An attorney in his dealings in matters of this nature must always act in a manner to inspire confidence in the legal profession. There was no obvious reason for the appellant to have given to ARC Systems Limited money that he knew was not due to it, while the Langleys languished, wringing their hands about the fate of their funds to clear the bridging loans. Such behaviour by an attorney provides for unnecessary speculation as to motive and as to the conduct of members of the profession. The appellant did indeed act in a manner that was dishonourable and which tended to discredit the profession.

[29] Grounds 22 and 23 challenge the sanctions imposed by the disciplinary committee. However, the appellant ought to regard himself as being fortunate, given the facts of the case. The case ***Bolton v Law Society*** [1994] 2 All ER 486 is instructive on the point as an appellate court ought not to interfere with the sanctions, except in a very strong case.

[30] It is for the foregoing reasons that we made the order set out in paragraph [1].