JAMAICA

SUPREME COURT CIVIL APPEAL NO:118/2008

MOTION NO. 15 OF 2009

BEFORE: **THE HON. MR. JUSTICE COOKE, J.A.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

BETWEEN	**GEORGETTE SCOTT**	**APPLICANT**
A N D	**THE GENERAL LEGAL COUNCIL (Ex- Parte Errol Cunningham)**	**RESPONDENT**

Paul Beswick instructed by Ballantyne, Beswick & Co for the applicant

Mrs. Sandra Minott-Phillips and Miss Ky-Ann Lee instructed by Myers, Fletcher &Gordon for the respondent

20th and 23rd October and 18th December, 2009

PHILLIPS, J.A.

The applicant, by way of a Notice of Motion sought conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal delivered on the 30th day of July, 2009, which upheld the decision of the Disciplinary Committee of the General Legal Council and which decision is set out in detail later in this judgment. The application was made pursuant to sections 110(1) and 110(2) of the Constitution of Jamaica, and included an application for a stay of the Disciplinary Committee's orders. On the 20th October 2009 we heard arguments on this application and on the 23rd October 2009 we made the following orders:

(1) Motion for conditional leave to appeal to Her Majesty in Council refused;

(2) Application for stay of the orders of the Disciplinary Committee is likewise refused; and

(3) There shall be no order as to costs.

We promised to give our reasons at a later date and we do so now.

The applicant claimed that the appeal concerned a final decision in a civil proceeding and that the matter in dispute between the parties was of a value which was upwards of $1000.00 and was a claim as of right, pursuant to section 110(1)(a) of the Constitution. The applicant also claimed that the questions involved in the proposed appeal were of exceptional general or public importance and it was in the public interest that the said questions be submitted by way of further appeal to Her Majesty in Council, pursuant to section 110(2) of the Constitution, which application is subject to the discretion of the court.

The proposed questions are set out below:

> "1. Whether the General Legal Council Disciplinary Committee is bound to proceed and/or has jurisdiction to proceed with a complaint against an attorney-at-law after notification by the complainant that the complaint is to be withdrawn.
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> 2. Is the General Legal Council's Disciplinary Committee bound to observe the rules of natural

> justice and accordingly to make enquiries concerning the mental health of an Attorney charged with a breach of the canons of professional ethics where there is evidence before the disciplinary panel that the attorney-at-law may be subject to mental illness affecting the attorney-at-law's judgment?
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> 3. Is the General Legal Council bound to give reasons for the imposition of all sanctions available when sentencing an attorney-at-law for breach of the canons of professional ethics?
>
> 4. Whether the General Legal Council's Disciplinary Committee has jurisdiction to proceed with the hearing of a complaint where the panel hearing the complaint comprise attorneys-at-law with an interest in contested litigation with parties represented by the attorney-at-law."

The issue in this application was whether the applicant was entitled to leave within the provisions of the Constitution cited above.

The background

The matter came to the Court in this way. On the 14th October, 2008 the Disciplinary Committee of the General Legal Council gave its decision whereby the applicant was struck off the Roll of Attorneys-at–law entitled to practise in the several courts in the island of Jamaica. The applicant was also ordered to pay to the complainant, Mr. Errol Cunningham, the sum of $750,000.00, with interest at the rate of 12% per annum from May, 2005, until payment and to pay him costs of $50,000.00. The facts of the case are set out in the judgment of the Court of Appeal. Briefly, the applicant acted on behalf of the complainant vendor in a conveyancing transaction. This was the first and only matter for

which she had been retained by the complainant. She received the proceeds of sale and paid the same over to the complainant by way of a cheque which was dishonoured by the bank. The applicant had many explanations as to why the funds which should have been placed in a client's trust account were not available in the said account when due. Suffice it to say, she accepted that the funds were due to the complainant and at the hearing before the Committee she indicated that she intended to repay all sums to him. It was therefore not an issue in the case whether monies were due and there was no challenge to the amount claimed of $750,000.00.

At one point in the proceedings the complainant indicated that he would be prepared to withdraw the complaint as the attorney had made arrangements to repay him the amounts outstanding. However, the hearing before the Committee had already started and due to its perceived seriousness, the hearing proceeded. The learned judges of appeal indicated in their judgment that they would not have expected the Committee to have done otherwise.

At the hearing before the Committee, there were issues raised by the applicant of mental instability on her part and bias on the part of the members of the tribunal. The Committee dealt with all of the matters before it and its decision was upheld on appeal.

The application

In the hearing before us, the applicant filed and relied on her affidavit in support sworn to on the 26th August 2009, in which she claimed that the amount of outstanding principal which was due to the complainant was substantially less than the $750,000.00, as she had made payments to the complainant between the period of the initial complaint and the hearing and also during the period before the decision of the Committee was delivered. She further stated that the Committee had therefore not accurately calculated the amounts due and had failed to order that an account be taken, so as to ascertain the correct amount outstanding, although she was, she stated, quite sure that the amount due was significantly greater than $1000.00. She therefore relied on this statement to ground her application under section 110(1) (a) of the Constitution.

Mr. Beswick argued that there was no obligation on the applicant to set out the specific amounts that she had paid or the specific amount that she was saying was due. Her statement in her affidavit, vague as it was ,was sufficient as the affidavit had been served on the General Legal Council some time ago and there had been no response, he argued. Interestingly, when submitting on the issue of a stay of the judgment and orders of the Committee, counsel informed the court that it was his understanding that the outstanding sums had all been paid and there was no need to stay that aspect of the order which therefore meant that this information with regard to the specific amounts paid and the balance due should have been readily available.

With regard to the questions posed, Mr. Beswick submitted that the Court ought to find that in its opinion, by reason of their great general or public importance, those questions should be submitted to Her Majesty in Council. He further submitted that the public would be interested with regard to question 1, whether a complainant could ask for and expect that his matter could be withdrawn from the Committee. It was also his contention that with regard to question 2, the Committee should have asked for the doctor to attend to comply with the principles of natural justice. With regard to question 3, the Committee, he argued, was bound to give specific reasons for each sanction imposed. In respect of question 4, it was argued that there should be far greater transparency with regard to how the panels are constituted, particularly, if members of the panel while representing clients are involved in hostile litigation with attorneys who are representing other clients and are before those same members in a disciplinary matter.

Mrs. Minott-Phillips submitted that there was no appeal in respect of the sanction ordered by the Committee for the attorney to make restitution of the sum of $750,000.00 to be paid to the complainant and so there was no matter in dispute which was of the value of $1000 or upwards and as a consequence there would be no appeal as of right to Her Majesty in Council.

With regard to the questions posed, Mrs. Minott-Phillips submitted that there was nothing stated in the affidavit in support of the application to

embrace the questions and so the Court had nothing on which to exercise its opinion. It was counsel's further submission that reason and common sense demanded that the Court only act on evidence before it and nothing else. Additionally, the questions were all peculiar to the applicant and too general in their import and did not fit into the scope and intent of the provision in the Constitution.

Discussion on the submissions

With regard to section 110(1) (a)of the Constitution, this Court is of the view that the applicant must show the following:

> "(1) that the decision being appealed is a final decision in a civil proceeding and
>
> (2) that the matter in dispute on the appeal is of the value of one thousand dollars or upwards, or
>
> (3) that the appeal involves directly or indirectly a claim to or question respecting property of a value of one thousand dollars or upwards, or
>
> (4) that the appeal involves a right of the value of one thousand dollars or upwards.

In this matter, it is the Court's view that, although the decision of the Court of Appeal is a final decision in civil proceedings, throughout this case the applicant has never made an assertion, neither before the Disciplinary Committee nor in this Court that the money was not owed. How therefore can

the applicant properly say that the sum owed is the subject of a dispute? That claim in our view is bereft of any transparency.

In the hearing before the Disciplinary Committee the evidence was that the sum of $750,000.00 claimed as outstanding by the complainant was made up of $300,000.00 as principal and $450,000.00 as interest and this was not challenged in any way whatsoever. Indeed, that evidence was accepted by the applicant. In this court, the applicant also did not directly challenge the fact that the $750,000.00 was owed. In these circumstances, a dispute does not arise. A dispute would have had to have originated from material which was before either the Disciplinary Committee or this Court. It cannot arise ex post facto, as a 'last ditch' effort to ground jurisdiction "as of right" to access the Privy Council.

This Court is of the view that the claim that there is a dispute in relation to these sums cannot be sustained. The fact of the applicant's indebtedness has never been in any doubt. Finally, the applicant never said previously that she originally owed the said sum of $750,000.00 but had paid a specific amount and thus a specific balance remains plus interest, so that any opposing position could have been taken by the General Legal Council to permit a submission from her that there are different views on the state of the sums owed. We therefore reject this belated claim. It is misconceived and cannot ground any claim under section 110(1)(a) of the Constitution.

Section 110(2) of the Constitution involves the exercise of the Court's discretion. For this section to be triggered, the Court must be of the opinion that the questions, by reason of their great general and public importance or otherwise, ought to be submitted to Her Majesty in Council.

In construing this section there are three steps. Firstly, there must be the identification of the question(s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue(s) which require(s) debate before Her Majesty in Council. Thirdly, it is for the applicant to persuade the Court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.

In ***Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams***, (1992) 29 J.L.R. 79 at page 81, Rowe, P stated that the provision in section 110(2) of the Constitution is not new and is substantially the same as rule 2(b) of the Privy Council Rules made by Order in Council dated February 15, 1909. He cited the dictum of MacGregor JA, who in delivering the judgment of the Court of Appeal in ***Vick Chemical Company v. Cecil Decordova and Others*** (1948) 5 J.L.R.106 at page 109 said:

> "It was not enough that a difficult question of law arose, it must be an important question of law. Further, the question must be one not merely affecting the rights of the particular litigants, but one the decision of which would guide and bind others in their commercial and domestic relations."

In ***Verne Granburg v. Elinor Inglis*** (1990) 27J.L.R. 53, Rowe P, stated that no great conflict of law arose (relating to the rights of set off in respect of sums advanced to a partnership without the taking of partnership accounts, and also in certain landlord and tenant situations) as to warrant the court granting leave to appeal to Her Majesty in Council on that ground. He further stated, "We do not think that merely to take a matter to the Privy Council to see if it is going to agree with us, is a matter on which the court ought to grant leave."

In light of these authorities, the Court will peruse the questions and give its opinion as to whether its discretion ought to be exercised to grant leave.

Question No.1- Whether the Committee ought to proceed despite being informed of the complainant's notice of withdrawal of complaint.

The learned President in his judgment dealt comprehensively with this aspect of the appeal, (see paragraphs 4and 5 of the judgment) , when he canvassed the evidence relative thereto, and at paragraphs 14-18 of the judgment where he dealt with the ground of appeal relating to the alleged procedural irregularity. He set out that counsel for the appellant argued that once the complainant made the request to the committee to withdraw the

complaint on the basis that payment arrangements had been made with the attorney in November, the panel of the Disciplinary Committee hearing the matter was obliged to refer the complaint to the entire committee established under the Legal Profession Act. The learned President set out the framework within which matters are filed and heard by the Committee. He specifically referred to sections 11 and 13 of the Act and rules 7 of the third schedule and 15 of the fourth schedule to the Act.

With regard to question 1, as framed, before us, rule 15 is very clear and provides a complete answer. Rule 15 states:

> "No application shall be withdrawn after it has been sent to the secretary, except by leave of the Committee. Application for leave to withdraw shall be made on the day fixed for the hearing unless the Committee otherwise directs. The Committee may grant leave subject to such terms as to costs or otherwise as they think fit, or they may adjourn the matter under Rule 16 of these Rules ."

The application may therefore be withdrawn with the leave of the Committee. The application shall be heard on the day fixed for hearing. Rule 15 effectively disposes of any issue allegedly arising on this question.

With regard to the jurisdiction of the panels, the learned President in the judgment of this Court stated that the natural meaning of the words and rules in the Schedules "point to the panel of at least three members being total masters in their own house, within the confines of the Act. There is no question of any

request for a withdrawal of a complaint being referred to the entire Committee of at least fifteen members, with its various divisions and panels." Section 13(2) specifically states:

> "Each division shall be entitled to hear and determine any such application and shall be entitled to exercise all the powers of the Disciplinary Committee; and any hearing by or determination or order of such division shall be deemed to be a hearing by or determination or order of the Disciplinary Committee."

The learned President also referred to the words of Pollock, C.B. in the case of **Re-(an Attorney)** [1863] Law Times Reports [Vol. IX N.S.-299] which indicated that when an application is grounded on grave charges, they must be answered and if not, the attorney must be punished. Further Pollock, C.B. opined that the court must recognize its duty, particularly if others forget theirs, to hear and determine the matter and will take such steps that will prevent the parties from arriving at a private settlement thereby smothering and getting rid of the matter. Our appellate court found the ground of appeal misconceived.

As indicated earlier in these reasons, the complainant attempted to withdraw the complaint on the second day of the hearing when evidence had already been given of serious transgressions of professional misconduct by the attorney. In light of all that has been said above, we found that on this question there was no issue worthy of debate before the Privy Council.

Question 2- Whether the Committee is bound to inquire into an attorney-at law's mental health

There was no evidence put before the Disciplinary Committee upon which they could have made any finding that the attorney was suffering from any mental instability at the time of her handling of the specific transaction, the subject of the complaint. It certainly was not incumbent on the Committee to subpoena Dr. Irons to give evidence. The proceedings before the Committee are not inquisitorial and if the attorney and her counsel were of the view that Dr, Irons' evidence could establish the necessary link, then they should have put him forward as a witness for the defence. Exhibit 5 (Dr. Irons' report) was not helpful. The applicant has not therefore persuaded us that this question as posited was one of any great general and/or public importance.

Question 3 Whether the Committee is bound to give reasons for each sanction imposed.

It is clear from the decision of the Disciplinary Committee, which was accepted by the Court of Appeal, that reasons were given for the sanctions imposed. The Disciplinary Committee relied on and quoted the dicta of the Master of the Rolls in the case of ***Bolton v Law Society*** [1994] 2 All ER 486 at 491. The learned President quoted this passage in his judgment also. It is worthy of repetition here only to demonstrate that the Committee was mindful of the role of the attorney and her obligation to discharge her duties with all honesty and integrity and the duty of the committee to impose sanctions when the attorney fails to do so. The charges in this case were serious. The sanction imposed was

harsh. The particular sanction imposed, and set out as it was below the quote of the Master of the Rolls, made it pellucid that the sanction imposed by the committee was applicable to the facts of this case and that any other possible sanctions set out in the Legal Profession Act were not suitable in the particular circumstances. The Master of the Rolls put it thus:

> "It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness ...Any solicitor who is shown to have discharged his professional duties with less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors' Disciplinary Tribunal. Lapses from the required high standard may of course take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties."

On page 492 Sir Thomas Bingham went on to say:

> "If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending reinvestment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not and has never been seriously in question. Otherwise the whole profession *and* the public as a whole is injured."

Indeed, the learned President had this to say in paragraph 28 of his judgment:

> "The reasons for the decision of the Committee could not have been more clearly stated. In the instant case, the complainant sold his apartment in the tourist town of Ocho Rios only to have the appellant misappropriate a portion of the monies received. And the misappropriation occurred after he had paid her costs in advance. This type of behaviour by an attorney-at-law is inexcusable and unacceptable. The appropriate sanction has to be disbarment."

This question in our view is not one worthy of debate before the Privy Council.

Question 4 – Bias on the part of members of the Committee.

The Court of Appeal dealt with the question of the alleged bias of the members of the Disciplinary Committee in detail and, simply put, the facts of this matter do not support any such claim. The argument of counsel in the Court of Appeal was that the chairman of the Committee had demonstrated bias by refusing to allow the withdrawal of the complaint. As the Court of Appeal found and the learned President stated in his judgment, in the course of hearings, one must make rulings and the making of a ruling in the course of a hearing which is within the jurisdiction of the panel cannot per se be an indication of bias. Any such claim, the Court stated, was therefore without any merit.

With regard to the other members of the panel, acting on behalf of clients against clients represented by the attorney, that too cannot be an indication of bias particularly in the circumstances of this case where in one instance the

matter was going to mediation, and in the other, there was amicable correspondence between the attorney and another member of the law firm who was really acting on behalf of the client. In neither case were the matters hostile nor did they involve any party before the Committee. The Court found that there was no merit in the ground of appeal alleging actual or the perception of bias. We found this question not worthy of debate before the Privy Council.

In our opinion, all the questions posed do not attract any debate, and consequently cannot be regarded as being of great general or public importance.

For all the reasons stated above, we refused the motion for conditional leave to appeal to Her Majesty in Council and likewise refused to stay the orders of the Disciplinary Committee.