J A M A I C A

IN THE COURT OF APPEAL

CIVIL APPEAL No. 34 of 1974

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.

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LESLIE L. DIGGS-WHITE	APPELLANT
v.	
GEORGE R. DAWKINS	RESPONDENT

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U.V. Campbell for the Appellant.

Respondent not appearing.

May 12, 1976

GRAHAM-PERKINS, J.A.

This appeal arises from an order made on November 16, 1974, by the majority of a division of the Disciplinary Committee (Dr. Adolph Edwards dissenting), constituted under the provisions of the Legal Profession Act, 1971 (hereinafter referred to as 'the Act') to enquire into the complaint of Mr. George Dawkins (hereinafter referred to as 'the complainant') against an attorney-at-law, Mr. L. Diggs-White (hereinafter referred to as 'the appellant'), whereby it was ordered, *inter alia*, that the appellant "be suspended from practising as an attorney-at-law for a period of three months" with effect from January 1, 1975 to March 31, 1975, and that he refund certain monies, received by him as fees, to the complainant.

It is important at the outset to notice the precise allegations in the affidavit sworn to by the complainant on May 28, 1974 which the appellant was required to answer before the Committee. Those allegations were as follows:

> "He received moneys from me $350.00¢ to obtain a divorce for my daughter, and to the date hereof I do not know of any papers being filed.
>
> He has refused to see me, speak to me or give me any information regarding the case.
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> He obtained my money under false pretences.
>
> He deceived me into thinking a divorce case could be tried behind my daughter's back, and in chambers.
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> He deceived me by giving me two false dates for trial when in fact no case had been set down for trial by the Supreme Court or any Court in respect of my daughter's divorce."

In the "FORM OF APPLICATION AGAINST AN ATTORNEY-AT-LAW" signed by the complainant on May 28, 1974, he asserted that he made his application "on the ground that <u>the matters of fact stated</u> in the said affidavit constitute conduct unbecoming his profession on the part of (the appellant) in his capacity of an attorney-at-law."

The Committee heard the sworn evidence of the complainant and the appellant over three full days, and in the end the Chairman said:

"We find:-

(1) The contract between the complainant and the attorney was that the attorney should file the petition and conduct the case to decree absolute or dismissal.

(2) The fee for so doing was not payable in advance.

(3) The fee was $800.00.

(4) The last receipt was altered and not by the attorney or with his consent.

" (5) A petition was filed by the attorney.

(6) The complainant was aware of this at the time of making the complaint.

(7) The petition has at all material times been defective and has not been cured by the attorney up to the present time.

(8) Late in 1972 the attorney received instructions which would have enabled him to have the petition amended and cure the defects.

(9) The attorney made an abortive attempt by summons unsupported by the necessary affidavit to get an amendment of the petition which amendment would have been ineffective.

(10) Nothing done or filed to date by the attorney has been or is of any benefit to the petitioner.

(11) The attorney has not earned and is not entitled to any fee or anything done by him in relation to divorce proceedings filed by him.

(12) The attorney has been guilty of gross neglect or negligence which in the opinion of the majority of the panel amounts to professional misconduct.

(13) Dr. Adolph Edwards (dissenter) finds the attorney guilty of negligence but not to the extent whereby it amounts to professional misconduct."

The Committee then made the orders noted earlier.

Section 15 of the Act provides, <u>inter alia</u>:

"(1) Every order made by the Committee under this Act shall be prefaced by a statement of their findings in relation to the facts of the case and shall be signed by the Chairman of the Committee or Division of the Committee as the case may be so, however, that if the findings are not unanimous dissenting opinions may be expressed in the statement."

Section 12(1), as far as is here relevant, provides:

> "Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person ..."

It is, I think, clear that the words "in relation to the facts of the case" in s.15 must be taken to refer to those "matters of fact stated" in the affidavit by the complainant in support of his application to the Committee. In _Henry James Sloan_ v. _General Medical Council_, an appeal from a determination of the Disciplinary Committee of the General Medical Council whereby the Committee had adjudged the appellant guilty of infamous conduct in a professional respect in relation to the facts proved against him, Lord Guest, speaking for the Judicial Committee of the Privy Council, said [(1970) 2 All E.R. at p. 688]:

> "The inquiry in the present case is before a Disciplinary Committee consisting of the members of the appellant's own profession. There are no closed categories of infamous conduct and in every case it must be a question for the Committee to decide first whether the facts alleged in the charge have been proved and second whether the doctor was in relation to those facts guilty of infamous conduct in a professional respect."

Similarly, I think, in every enquiry by a Division of the Disciplinary Committee of the General Legal Council it must be for the Committee to decide, firstly, whether the _matters of fact_ alleged in a complainant's affidavit are proved and, secondly, whether the attorney-at-law against whom the complaint is made is, _in relation to those facts_, guilty of professional misconduct. Equally clear it is that in this case the Committee made one finding only in relation to the matters of fact stated in the complainant's affidavit, which matters, by virtue of s.12(1) of the Act, the

appellant was required to answer. That finding is numbered (1) *supra* and it is, quite obviously, related to the first matter of fact alleged by the complainant in his affidavit.

This appeal is, of course, an appeal "by way of rehearing". See s. 16 of the Act. And by Rule 18(3) of the Court of Appeal Rules, 1962, this Court is empowered "to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require". Although, however, the foregoing provisions have been the subject of many judicial pronouncements I am aware of none which has asserted a right in an appellate court to conclude findings of fact based on the evidence of witnesses whom it has not seen and heard. In the result I am constrained to the conclusion that the Committee has not, indeed, effectively heard and determined the allegations made by the complainant, at least one of which, in my view, involves *prima facie* an allegation of conduct unbecoming the profession of an attorney-at-law.

I go on, however, to examine the findings actually made by the Committee and the effect thereof. I proceed, as I must, on the hypothesis that the finding numbered (12) *supra* rests on those findings recorded at (7), (8) and (9) *supra*. The question arises, therefore, whether these latter findings were open to the Committee having regard to the very precise allegations made by the complainant. I have not the least doubt that the Committee proceeded on a manifestly wrong principle to a wrong conclusion, albeit in good faith. Let me say at once that I have no difficulty in concluding that the evidence on which the findings recorded at (7), (8) and (9) were based could have led to no other reasonable conclusion than that the appellant was clearly guilty of sheer incompetence. Having said that, however, it is important to note that the appellant was not required to answer a charge of incompetence, or "gross neglect or negligence" before the Committee. Not a single one of the allegations in the complainant's affidavit involved, *ex facie*, any implication of incompetence or

negligence. I refrain from expressing any opinion on the implications contained in the complainant's allegations. In Lau Liat Meng v. Disciplinary Committee, (1967) 3 W.L.R. 877, the evidence before the Committee disclosed that a solicitor had, very improperly, retained $500 which he had received over and above the solicitor and client costs recoverable by him without disclosing the fact to his client. The charges preferred against the solicitor by his Bar committee related to matters other than that concerned with the monies improperly retained by him. Nevertheless, the Disciplinary Committee held against the solicitor on the ground, inter alia, that he had received the additional sum of $500 in excess of the amount recoverable by him in circumstances in which it should have been disclosed. On appeal, the Privy Council, in a judgment delivered by Lord Hodson, said at p. 884:

> "While acknowledging the gravity of the admission made by the appellant as to his $500.00 which he put into his own pocket without disclosure to his client and as to which he gave no satisfactory explanation, it must be recognised that he was not charged either with having made excessive charges for professional work or having committed any specific fraudulent act. The case against him was contained in the statement quoted above which was made pursuant to rule 2 of the Advocates and Solicitors (Disciplinary Proceedings Rules), 1963. It was once amended but no amendment was made or sought to be made after the appellant had made his admission. Formal amendment might have been dispensed with provided adequate notice of the charge had been given, but natural justice requires adequate notice of charges and also the provision of opportunity to meet them. This requirement was not met.

> " Their Lordships are accordingly of opinion that it would be unjust to allow the finding with regard to the $500.00 to stand. If disciplinary proceedings are hereafter at any time taken against the appellant in respect of this sum no conviction or acquittal will stand in their way, for no charge relating to this matter has ever been made."

In the result it is clear that, quite unhappily, the Committee avoided any conclusion as to four of the five matters in respect of which the complainant alleged himself to be aggrieved. There can be no doubt that both the appellant and the complainant were entitled to a clear finding by the Committee on the question whether in relation to those facts of which complaint was made a case of professional misconduct had been established. Equally unhappily the Committee proceeded to findings, perhaps justified by the evidence before it, in respect of matters to which no charge against the appellant related. In these circumstances there can, I think, be no doubt that the appeal must be allowed, and in accordance with the provisions of S. 17(1) of the Act; I would order that the application be reheard by the Committee.

It will, perhaps, be useful to examine the question whether, assuming the Committee's findings as to "gross neglect or negligence" were open to it, those findings are capable of leading reasonably to a conclusion as to professional misconduct. What, therefore, is professional misconduct? This question cannot by its very nature, admit of a ready answer. In re A Solicitor. Ex parte The Law Society, (1911-13) All E.R. Rep. 202, Darling, J., said, at p. 204:

> " A definition (of professional misconduct) could not be more authoritative than one drawn up by such an authority as that, and adopted after careful consideration by those three learned judges. It was:
>
> > ' If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or

> 'dishonourable by his professional brethren of good repute and competency then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'.'
>
> Applying that, it comes to this, that the Law Society are very good judges of what is professional misconduct as a solicitor, just as the Medical Council are very good judges of what is professional misconduct as a medical man. I see no kind of reason for coming to any other conclusion than that to which the Law Society have come, that that method of obtaining business is not such as this court can possibly countenance, and, therefore, the Society were perfectly right in saying with regard to that matter that there was professional misconduct."

The authority on which Darling, J., relied for the foregoing definition was that enunciated in Allison v. General Council of Medical Education and Registration, (1894) 1 Q.B. 750. The definition quoted above, with the words "solicitor" and Disciplinary Committee" substituted for the words "medical man" and "General Medical Council" respectively is quoted in that excellent work, Cordery's Law Relating to Solicitors, 6th Edn., (1968) at p. 514, in connection with the proposition that professional misconduct includes "dishonourable conduct on the part of a solicitor in the course of his employment towards his client, ...". The thinking reflected in the definition also finds expression in the standards of professional etiquette and conduct for attorneys prescribed by the rules made by the General Legal Council in pursuance of s.12(7) of the Act, the "specified breach" of which "shall for the purposes of this Part constitute misconduct in a professional respect."

I now ask the further question: Ought the "gross neglect or negligence" found by the majority of the division herein be held to amount, on the background of the findings at (7), (8), and (9) *supra*, to professional misconduct? I think not.

Nearly 90 years ago, in a judgment which I respectfully commend as a constant reminder to every attorney-at-law in this Island, Lord Esher, M.R., with his accustomed and commendable clarity, emphasised the true distinction between negligence and dishonourable conduct. In _re Cooke_, (1889) 5 T.L.R. at pp. 407-408, the learned Master of the Rolls said:

> "But in order that the Court should exercise its penal jurisdiction over a solicitor it was not sufficient to show that his conduct had been such as would support an action for negligence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable in his profession. A professional man, whether he were a solicitor or a barrister, was bound to act with the utmost honour and fairness with regard to his client. He was bound to use his utmost skill for his client ... If an attorney were to know the steps which were the right steps to take and were to take a multitude of wrong, futile, and unnecessary steps in order to multiply the costs, then if there were both that knowledge and that intention and enormous bills of course resulted, the attorney would be acting dishonourably. A solicitor must do for his client what was best to his knowledge, and in the way which was best to his own knowledge, and if he failed in either of those particulars he was dishonourable."

The foregoing criteria, _inter alia_, as to professional misconduct by an attorney-at-law in relation to his client are, I think, as valid today as they were in 1889. They point to the true standards and practices by reference to which professional misconduct by members of our profession is to be judged when complaints are made by lay clients to the Disciplinary Committee of the General Legal Council.

In my view, the findings of the Disciplinary Committee point unmistakably to a sorry lack of skill in the appellant in relation to the filing of a petition for dissolution of marriage. I would hold that the incompetence demonstrated by the appellant cannot, in the circumstances of this case, be held to amount to professional misconduct.

Before parting with this case I wish to repeat what I said at the end of the arguments advanced by Mr. Campbell. It is a matter of grave distress to me and to my brothers that it is possible for what has happened in this case to have happened at all. For myself I cannot see how any attorney could seek to justify the retention of fees paid to him on the faith of his competence to perform a particular service in circumstances in which it is clear that he lacked the necessary competence to do what he was engaged to do.

ZACCA, J.A.:

I agree.