

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. 360 of 2005

IN THE MATTER OF KENNETH FOSTER, Q C

AND IN THE MATTER OF Sections 41 and 42 of the Legal Profession Act No. 31 of 2000

DECISION

Introduction

- [1] **SHANKS J:** This was an application by Lucius Joseph against Kenneth Foster QC under the inherent disciplinary jurisdiction of the High Court in relation to attorneys which is expressly preserved by section 42 of the Legal Profession Act 2000. The application was the first to come before the court under the procedure drawn up and approved by Edwards J under sections 11 and 20 of the West Indies Associated States Supreme Court (St Lucia) Act 1969. I am satisfied that Mr Foster was properly served with notice of the application in accordance with that procedure. It is unfortunate therefore that he failed to file an affidavit in answer to the Applicant's complaints as required by para 2 of the notice attached to the application or attend the hearing on 10 June 2005 or communicate with the court in any way. I regret to say that this failure to take action or attend the hearing is consistent with some of the allegations made against him by the Applicant. The consequence of his non-attendance in this case is that the court can proceed to hear and determine the application in his absence (as is made abundantly clear by para 4 of the notice) and that is the course which I am taking.
- [2] The nature of the court's jurisdiction is explained at para 351 of the title Solicitors in the current edition of Halsbury's Laws of England and in the decision of the English Court of Appeal in *R & T Thew Ltd v Reeves (No 2)* [1982] 3 AllER 1086. The jurisdiction

can be exercised summarily on application. It has both punitive and compensatory elements. The court exercising it has wide powers: it may order the attorney to perform of an undertaking, to pay costs, to make good losses or to pay over money to a client and it may suspend the attorney from practice or remove his name from the Roll or fine him. But even when the jurisdiction is to be exercised in a purely compensatory fashion, it can only be exercised if the attorney's conduct is found to be inexcusable and such as to "merit reproof". Mistakes, errors of judgment and mere negligence are not generally sufficient to call it into operation. Further, in so far as it is punitive it is usually inappropriate for the court to exercise the jurisdiction of its own motion, since such matters should generally be referred to a disciplinary committee established under the Legal Profession Act.

- [3] The background to the Applicant's complaints is that he retained Mr Foster to act for him in 1997 to bring a claim on behalf of a number of family members in relation to a substantial piece of land in the Quarter of Gros Islet. There is no doubt that he paid Mr Foster \$15,000 in advance and another \$15,000 shortly after proceedings were issued. It appears that two claims with similar parties were issued by Mr. Foster (1997/702 and 1997/718) but it seems from the files that only action 1997/718 proceeded. It is quite apparent that the case was involved and complex and concerned many parties and a long history. I was not able fully to understand the issues in the litigation (and I am certainly not able to form any view as to the rights and wrongs) but, in view of the complaints made and the limitations on my jurisdiction which I have mentioned, I do not think that this matters. What is clear is that, one way or another, Mr Joseph's side lost at first instance and that an appeal was launched by Mr Foster.

The individual complaints

- [4] Mr Joseph's complaints are listed in his affidavit dated 12 May 2005 which he prepared himself without the benefit of legal advice. It is clear to me that the matters alleged in paras 1 to 6 of the affidavit in the bald form in which they have been put could not, even if they amount to more than mistakes, errors of judgment or negligence and I therefore have no jurisdiction to deal with them in the context of this application. I turn therefore to consider the complaints set out at paras 7 to 12 of the affidavit, bearing in

mind that a high standard of proof is required before the court should be satisfied that +misconduct meriting reproof has occurred.

- [5] Para 7 of the affidavit alleges that Mr Foster failed to submit documents for the appeal despite Mr Joseph paying \$60 to Mr Foster's office for the purchase of paper for the preparation of documents on 11 September 2002. There is a receipt for this sum in the papers and a certificate of result of appeal dated 10 June 2003 which confirms the non-compliance with CPR 62.12 so that I am satisfied that this complaint is established as a matter of fact. The failure to lodge papers under CPR 62.12 is clearly a serious matter and *prima facie* it contravenes the requirement to act in the best interests of the client and to represent him competently provided by para 20 of Part A of the Code of Ethics set out in the Third Schedule to the Legal Profession Act. In the absence of any evidence or explanation from Mr Foster I am satisfied that he was in breach of this requirement and that such breach constituted professional misconduct which merits reproof.
- [6] Para 8 of the affidavit alleges that Mr Foster failed to appear before Redhead CJ (Ag) on 10 June 2003: this is confirmed by the certificate of result of appeal I have mentioned which also confirms that the appeal was then dismissed for want of prosecution. The failure to appear at a court hearing without good reason is clearly a breach of para 20 of Part A and of para 38 (which provides that an attorney shall be punctual in attendance before the Court) and I am satisfied that in the absence of any explanation it constituted professional misconduct which merits reproof.
- [7] Para 9 of the affidavit alleges that Mr Foster failed to appear at a hearing on 18 February 2004 relating to costs. In the absence of any evidence to the contrary I am satisfied that the allegation is true. For the reasons given in relation to para 8, I am also satisfied that the failure constituted professional misconduct which merits reproof.
- [8] Para 10 of the affidavit alleges that Mr Foster verbally declined to represent the Applicant further before Charles J on 14 May 2004. As I understand the allegation it is that Mr Foster announced orally in front of the court at a hearing concerning the case that he would no longer represent him: I am satisfied that this is what happened. This is *prima facie* a breach of para 33 of Part A of the Code (which limits the circumstances

in which an attorney can withdraw from employment: though note also para 16 of Part B) and is undoubtedly a breach of para 15(1) of Part B (the mandatory provisions) which requires due notice of withdrawal to be given in writing and where appropriate that the permission of the court is obtained. Again, in the absence of any evidence or explanation from Mr Foster, I am satisfied that these breaches are established and constituted professional misconduct meriting reproof.

[9] Para 11 of the affidavit alleges that Mr Foster failed to comply with a request by letter of 3 August 2004 that he state in writing and inform the court of his current position in respect of claim 718/1997. I was also informed at the hearing that, apart from the oral announcement I have mentioned, Mr Foster has never properly come off the record or taken other steps formally to end his retainer. I am satisfied that that is the case. In those circumstances he was in breach of his duty to provide his client with information under para 26(1) of Part A of the Code and of his general duty to follow his client's reasonable instructions. Given the serious consequences that could result for the client from Mr Foster not formalising the position (papers could continue to be served on Mr Foster and may not come to the notice of the client) I am satisfied that this failure amounted to professional misconduct meriting reproof.

[10] Para 12 of the affidavit alleges that Mr Foster failed to inform the Applicant of a meeting between himself and Winston Cenac (the affidavit states Hinkson but this appears to be an error), who was a partner in the firm of solicitors representing the other side, which appears to have taken place in October 1998. There is a letter among the papers from Mr Cenac which refers to a meeting to arrange a settlement and which has on it some handwritten notes by Mr Foster which confirm that such a meeting was arranged. I accept the Applicant's evidence that he was never informed of this and, in the absence of evidence from Mr Foster, I am prepared to infer that the meeting took place as planned. Mr Foster's failure to inform his client of this meeting happened before the Code of Ethics came into force and is not in any event (I think) covered by any express rule in the Code. Nevertheless in my view it must be a breach of duty towards a client to enter into settlement discussions with the other side without informing him and obtaining express instructions on the matter. Again in the absence of any explanation from Mr Foster I find that this is conduct worthy of reproof.

What steps should the court take?

- [11] Although the court has power to order an attorney to pay costs, make good losses or pay over money to a client I do not think that any such order would be appropriate here. This is because I have no way of knowing whether Mr Foster's failures have involved the client in any costs or caused him any loss. Naturally Mr Joseph asserted at the hearing that he ought to have succeeded in the litigation and that the loss of the opportunity to appeal therefore caused him loss but on the basis of the evidence before the court I could not possibly make such a finding.
- [12] I am therefore left only to consider whether to impose some kind of punishment on Mr Foster in respect of the misconduct I have found to be established. I am conscious that in normal circumstances it would be unusual to impose a punishment under the inherent jurisdiction when the Legal Profession Act 2000 has provided for a disciplinary committee to deal in the first instance with complaints against attorneys and without having heard from Mr Foster himself. On the other hand, I think I can take judicial notice of the background to the institution of the procedure under which this application was made and in which I myself had a part: there is at the moment no functioning disciplinary committee, while there was such a committee it apparently dealt with only one complaint, and the Registrar of the High Court (who is the ex officio secretary to the committee) has in the last few months received numerous complaints against attorneys which she has had no way of dealing with. I think I can also take judicial notice of the fact (which is clear from sitting for the last five months as a civil judge in St Lucia) that there is indeed cause for complaint by the public about the standards of conduct of various attorneys and of the fact that there is a sense of deep frustration that nothing is being done about it. It is also relevant that under the Legal Profession Act 2000 where the disciplinary committee finds that there has been misconduct which justifies a suspension or removal from the Roll it must refer the matter back to the High Court (see sections 39(1), 39(3) and 41(1)).
- [13] In all the circumstances I think it would be right for me to go ahead and impose an appropriate penalty on Mr Foster for the misconduct I have identified rather than adjourning the matter to give him a further opportunity to attend and/or referring the matter to such disciplinary committee as might at some stage in the future be re-

established (only to have them refer it back to the High Court under section 39(3) if they thought a suspension or fine was the appropriate penalty). In doing so I remind myself to be careful not to impose an undue punishment in this particular case because of the background I have described or *pour encourager les autres*.

- [14] Taking everything relevant into account I have come to the view that the correct penalty for the misconduct I have found is one of three months' suspension from practice in respect of each of the complaints made by paras 7 and 8 of the affidavit, two months' suspension for each of the complaints made at para 9 and 12 and one month's suspension for each of the complaints at paras 10 and 11. The periods of suspension shall run concurrently so that the total period of suspension shall be three months. During that period Mr Foster may not appear in court, advise or otherwise act for any client, write any business letter, take any money in connection with his professional services or otherwise perform any function of an attorney. The period of suspension shall begin on 1 August 2005 so as to give him a chance to organise his affairs and for the suspension to be advertised. He must make sure that all his matters are handed over to someone else to deal with during the suspension period. I will also order him to take all proper steps to terminate his retainer by Mr Joseph and to return all papers to him.

Order

- [15] The order I make is as follows:
- (1) Kenneth Foster QC is hereby suspended from practice as an attorney for the period 1 August to 31 October 2005 for his professional misconduct in relation to action number 1997/718;
 - (2) He must before 1 August 2005 use his best endeavours to make arrangements for the handling of his practice by others during the period of suspension so as to cause minimum prejudice to any client of his;
 - (3) He must by 2 pm on 24 June 2005 file in court a proper application to be removed from the record in action number 1997/718 and return to the Applicant any papers held by him relating to that case;

- (4) A copy of this order and the judgment of the court shall be served on Mr Foster and the Applicant by the Registrar as soon as possible;
- (5) 14 days thereafter a copy of this order shall be sent by the Registrar to the Chief Registrar, the Senior Magistrate, the Registrar of Lands, the Companies Registrar, and the Registrar of International Business Companies.
- (6) As soon as possible thereafter notice of the order shall be posted at the High Court and shall be advertised in the Gazette and in two local newspapers.

Murray Shanks
High Court Judge (Ag)

15th June 2005