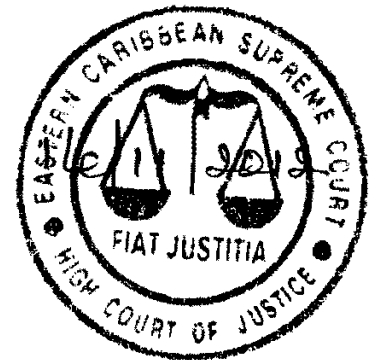


THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV2010/0081

BETWEEN:



[1] ERIC HACKSHAW

Claimant

and

[1] MIRA COMMISSIONG

Respondent

Appearances:

Mr. Jomo Thomas for the applicant

Mr. Stanley Marcus QC and Mr. Bertram Commissiong QC for the respondent

2012: October 15
November 16

JUDGMENT

[1] **THOM, J:** The applicant applied to the court for a rule to issue to the respondent an Attorney-at-Law practicing in the State of Saint Vincent and the Grenadines for her to show cause why she should not be suspended or struck off the Roll for unprofessional conduct.

[2] The background to this application is that the applicant in 2005 agreed to sell a portion of land situate at Queen's Drive in the State of Saint Vincent and the Grenadines to one Mrs. Janice Da Breo. The respondent was the solicitor for Mrs. Da Breo in the transaction. The applicant was unrepresented. The applicant does not dispute that the respondent suggested to him that he should retain counsel to represent him but he chose to represent himself.

- [3] The applicant alleges that the entire purchase price was not paid over to him by the respondent, the respondent is refusing to pay him the outstanding sum of \$42,800. Further the respondent placed a lower sum as the purchase price on the Deed of Conveyance thereby depriving the Government of Saint Vincent and the Grenadines of revenue in the sum of \$7,500. The respondent also advanced the applicant the sum of \$200.00 and \$500.00 and recorded the sums as \$2,000.00 and \$5,000.00 respectively. Also the respondent has refused to provide the applicant with a full account of the purchase price.
- [4] The applicant filed two affidavits in support of his application. The applicant in his affidavit dated 2nd March, 2010 deposed that a contract of sale for a parcel of land at the price of \$350,000 was signed and executed by himself and Mrs. Janice Da Breo. In 2006 he signed the Deed of Conveyance transferring the said parcel of land to Mrs. Da Breo. A final payment of \$97,000.00 was remaining on the purchase price, but the respondent only paid \$43,000.00 to him, and informed him that the remainder was to pay the 5% government tax.
- [5] The transaction was recorded at the Inland Revenue Department as the purchase price being \$200,000.00, instead of \$350,000.00 thus reducing the sum payable to the Government by \$7,500.00.
- [6] On two occasions he borrowed from the respondent the sum of \$200.00 and \$500.00 which he requested to be set off from the sums owing to him. These sums were recorded as him receiving \$2,000.00 and \$5,000.00 respectively thereby depriving him of \$6,300.00.
- [7] The respondent filed an affidavit in response in which she deposed that the applicant was not her client. She did not represent him in the sale transaction or on any other occasion. The transaction for the sale of the property begun in February 2005 between Mrs. Da Breo and the applicant before she was retained by Mrs. Da Breo.

- [8] The parties agreed to the payment of a deposit and the balance to be paid over a period of time. She was not aware of the quantum of the deposit. There was no set time nor a fixed payment schedule. There was no written agreement for sale. The respondent also deposed that her role was to receive the money from Mrs. Da Breo and pay same over to the applicant. Mrs. Da Breo would notify the applicant when she sent money to be paid to him and he would collect it from the respondent.
- [9] The respondent further deposed that she did a search of the title to the property and she found that the property was mortgaged to the National Commercial Bank ('the Bank'). She prepared a draft deed transferring the fee simple in the property from the bank to Mrs. Da Breo.
- [10] In February or March 2005 Mrs. Da Breo sent US\$8,000.00 being EC\$21,441.84 with instruction to pay off the loan at the Bank. The applicant objected and the sums were not paid to the Bank. Mrs. Da Breo also sent US\$5,000.00 to her brother and this sum was paid over to the applicant. After some time had elapsed the applicant indicated that he had undervalued the property and since Mrs. Da Breo was taking so long to pay for the property the price would be increased to \$350,000.00. At this time Mrs. Da Breo confirmed that the purchase price was \$300,000.00 and not \$200,000.00. Mrs. Da Breo sent an additional US\$8,000.00 and instructed her to retain the said US\$8,000.00 as the applicant's portion of the stamp duty. The applicant was not in agreement with this arrangement and expressed his disapproval in a manner which amounted to verbal abuse. Therefore a new arrangement for payment was made, Mrs. Da Breo sent the money to her mother who took it to the respondent's office and the applicant would receive it from Mrs. Da Breo's mother Mrs. Baptiste and signed three copies of the payment voucher. The applicant would receive one copy, also Mrs. Baptiste and the respondent would retain the third copy. The first payment under the new arrangement was made on the 13th December, 2005 and the final payment was made on 19th September, 2007. At the time the final payment was made Mrs. Da

Breo was in Saint Vincent and the Grenadines. Mrs. Da Breo and the applicant agreed the sum that was due and owing on the purchase price. The respondent stated that her only input was to call the bank to verify the balance of the applicant's loan which was in the sum of EC\$23,518.98. On the 19th September, 2007, the applicant and Mrs. Da Breo returned to her office where Mrs. Da Breo paid the applicant \$42,886.14 in cash and showed her a cheque made payable to the Bank for the sum of EC\$23,518.98. The same 19th September, 2007 the Deed of Transfer was sent to the Bank with the cheque for EC\$23,518.98. The applicant did not object to the sum that was paid to him nor to any aspect of the transaction.

- [11] The respondent further deposed that an error was made on the Deed of Conveyance. The purchase price was stated as \$200,000.00 instead of \$350,000.00. An earlier version of the Deed was used in error. The transaction was done in a haste to accommodate Mrs. Da Breo who was leaving Saint Vincent and the Grenadines within a few days. The error was only discovered when the Accountant reviewed the financial records of the office. She wrote to the Accountant General about the matter. She wrote follow up letters to the Accountant General seeking to get the matter resolved
- [12] The applicant filed an affidavit in response on the 20th April, 2012 in which he denied that he had owed the Bank any sums. He also denied that he was showed a cheque for the Bank in the sum of EC\$23,518.98.
- [13] Learned Counsel for the applicant Mr. Jomo Thomas submitted that the explanation given by the respondent for the wrong purchase price on the deed was questionable since the letter to the Accountant General is dated 28th November, 2008 some months after the applicant confronted her about the lower purchase price on the deed.

[14] Learned Counsel submitted that once a solicitor is found liable for professional misconduct the law provides for sanctions to be applied. Learned Counsel referred to the case of **Re Grey (1892) 2QBD p.440** and submitted that the principles established in **Re Grey** are, that a solicitor has a duty to his client as well as a duty to the court and his profession. The court has a duty to uphold the integrity of the profession. An account of the purchase price should be given to the applicant and he should be awarded costs.

[15] Learned Queen's Counsel Mr. Stanley Marcus for the respondent submitted that it is not professional misconduct to commit an error or make a mistake in the course of effecting a transaction on behalf of his client – see **Myers v Elmen (1939) 4AER p.484** where Lord Wright stated:

“The matter complained of need not be criminal. It need not involve speculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice.”

[16] The onus of proof is on the applicant to prove his allegations or claims and the applicant has not provided any sufficient evidence in either of his affidavits which were filed to prove the allegations. Further there is no evidence of dishonesty on the part of the respondent.

[17] Learned Queen's Counsel also submitted that the respondent agrees that the wrong sum was stated as the purchase price but urges the court to accept the respondent's explanation for the oversight, and the action the respondent has taken to get the matter resolved when the respondent realized an error was made.

FINDINGS

[18] The law governing discipline of Legal Practitioners in Saint Vincent and the Grenadines is the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Cap 244. In particular section 76 provides for suspension or the striking off of a legal practitioner for reasonable cause. The section reads as

follows:

"76. Any two judges of the High Court may, for reasonable cause, suspend any barrister or solicitor from practicing in Saint Vincent and the Grenadines during any specified period, or may order his name to be struck off the Court Roll."

[19] Rule 4 of the Regulations made under the Act sets out the procedure to give effect to the provisions of section 76. It reads as follows:

"(1) Proceedings to suspend or strike a barrister or solicitor off the roll shall be commenced by an application to a judge in chambers for a rule to issue to the barrister or solicitor named to show cause why he should not be suspended or struck off the roll."

(2) Such application may be made by the Attorney General or by the person aggrieved by the action of the barrister and solicitor complained against.

(3) In the event of a rule being granted, further proceedings thereunder shall be in open court."

[20] This application was brought in accordance with the above procedure.

[21] In **Re Grey** referred to by Learned Counsel for the applicant Lord Esher at p.443 after reviewing the cases of **In re Freston** 11 Q.B.D. p.545 and **In re Dudley** 12 Q.B.D. p.44 explained the jurisdiction of the Court in disciplinary proceedings against solicitors in the following manner:

"The principle so laid down is that the court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the court's own officers. That power of the court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore be affected by anything which affects the strict legal rights of the parties."

[22] I will deal first with the claim of \$42,000.00 being allegedly withheld by the respondent. While the applicant in his first affidavit stated that the final payment due was \$97,000.00 and only \$43,000.00 was paid to him, in his second affidavit

in response to the respondent's affidavit, the applicant did not dispute the manner in which the purchase price was paid to him. In particular that the purchase price was paid in installments, there was no fixed sum to be paid, nor no fixed time when the payments were to be made. More importantly the applicant did not deny that the arrangement for payment where the money was sent to the purchaser's mother Mrs. Baptiste and not to the respondent. Also Mr. Bernard Hamilton of Lowmans Leeward, the Manager of Credit Administration of the Bank with leave of the Court swore and filed an affidavit in this matter on the 20th August, 2010 and a second affidavit of 30th November 2010 which amend the earlier affidavit. In his affidavit at paragraphs 2, 3 and 4 Mr. Hamilton outlined the loan arrangement between the applicant and the bank. These paragraphs read as follows:

- (2) Eric Hackshaw (hereinafter referred to as "the applicant"), a customer of the bank guaranteed a loan from the bank, bearing number 122401, for David Urias Ezra Lewis. The said guarantee was supported by a continuing legal mortgage, over thirty-seven thousand, seven hundred and ten (37,710.00) square feet of land at Cane hall Estate (hereinafter referred to as "the land"). The said continuing legal mortgage was made on 31st December, 2001, bearing number: 08/2002" (Exhibited herewith and marked "NCB2").
- (3) The applicant subsequently obtained four (4) further loans, from the bank, which were also supported by the said continuing legal mortgage. These loans were:
 - (a) Loan bearing number: 19803 granted in February 2003 and paid off in March 2004.
 - (b) Loan bearing number: 21704, granted in March 2004 and paid off in April 2005.
 - (c) Loan, bearing number 35504, granted in May 2004 and paid off in January 2005.
 - (d) Loan, bearing number 92005 granted in October 2005. The existing facilities at this time were the indirect liability in the name of David Lewis and loan number 92005. Loan paid off in August 2007.
- (4) The said loan, bearing number 122401, in the name of David Urias Lewis and guaranteed by the applicant, was paid off on 19th September, 2007. The outstanding sum prior to the said payment being twenty three thousand, five hundred and eighteen dollars

and ninety-eight cents in the Eastern Caribbean currency (EC\$23,518.98). (Copy of credit advice slip showing pay off of loan, bearing number: 122401, exhibited herewith and marked "NCB 3").

- [23] In the face of this evidence showing that the sum of \$23,518.98 was paid to the bank on 19th September, 2007 in relation to his mortgage with the bank, at the hearing of this application the applicant conceded that the sum was indeed paid.
- [24] In view of the above evidence I find that the applicant has not provided any evidence to show that the respondent is withholding from the applicant \$42,800 being part of the purchase price of the property.
- [25] In relation to the issue of the correct stamp duty not being paid on the transaction, I accept the respondent's evidence that she has in her possession the sum of EC\$21,437.99 being the remaining sum of the purchase price to pay the stamp duty and the remainder if any would be paid to the applicant. I accept the respondent's explanation outlined in the respondent's affidavit and referred to earlier in paragraphs 10 and 11. The applicant in response did not deny that there was no written agreement stating the purchase price. A written agreement was not exhibited by the applicant. Also the applicant did not deny that the purchase price was changed during the course of the transaction.
- [26] In relation to the allegations of the loans of \$200.00 and \$500.00 and the loans being recorded as \$2,000.00 and \$5,000.00, I agree with submission of Learned Queen's Counsel that no mention is made by the applicant of the times, places and the nature of the records. The applicant did not deny that every time payment was made to him he signed three (3) copies of a payment voucher and he was issued with a copy. No documentation on this issue was exhibited by the applicant.

[27] In relation to the issue of "accounting", as stated earlier the applicant did not deny the manner in which the purchase price was paid to him being by the purchaser's mother Mrs. Baptiste and the purchaser herself. Further the applicant did not deny that his Attorney Mr. Jomo Thomas was provided with copies of the payment slips as outlined in the respondent's affidavit at paragraphs 72 and 73. These paragraphs read as follows:

"72 Sometime after that Mr. Thomas came to our office saying that he had come for the copies of the payment slips. Despite our last encounter I was cordial and hospitable and so was he. Our Accountant had recently put all the paperwork together and I was therefore able to personally photocopy all the payment slips, vouchers and checks (sic) our accountant had been able to find, while Mr. Thomas sat in our office and had a conversation with Ms. Cadogan and Mr. Simon Kamara, a client who happened to be in the office at the time.

73 When I was finished photocopying the documents I put them in an envelope and gave them to Mr. Thomas. He remained in our office for a while longer talking with Ms. Cadogan and Mr. Kamara and then he left."

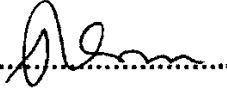
[28] In conclusion I find that the applicant has not adduced any evidence upon which the court could order that a rule be issued to the respondent to show cause why she should not be suspended or struck off the roll in Saint Vincent and the Grenadines.

[29] I wish to state that the respondent is required to resolve the payment of stamp duty with the Accountant General and pay what sums if any are due to the applicant forthwith.

[30] On the issue of costs, Learned Queen's Counsel submitted that the applicant should pay the respondent's costs in the sum of \$3,500.00, while Learned Counsel for the applicant submitted that the court should make such award as it sees fit.

[31] Having reviewed the matter I find that while the applicant has failed, the issue of the payment of the stamp duty is still unresolved and the applicant may be entitled to receive a portion of the EC\$21,437.99. This is in the possession of the respondent. In view of this I will not make an award for the payment of costs to the respondent.

[32] The application is hereby dismissed.



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Gertel Thom

HIGH COURT JUDGE