

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Complaint No. 42 of 2015

**IN THE MATTER OF THE LEGAL PROFESSION
ACT CAP 370A of the Laws of Barbados**

AND

**IN THE MATTER OF THE COMPLAINT of CECIL
ARLEIGH MARSHALL, Complainant**

AND

**IN THE MATTER OF ALLISON H. ALEXANDER
ATTORNEY-AT-LAW, Respondent**

**Before: The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon.
Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal.**

2016: October 6

2017: February 1

May 9

The Complainant present and unrepresented

Ms. Michelle Russell for the Respondent

**Mrs. Marguerite Woodstock-Riley QC for the Disciplinary Committee of the
Barbados Bar Association**

**Ms. Donna Brathwaite QC for the Attorney General, Amicus Curiae in
association with Ms. Allison Burke**

**Mr. Patterson Cheltenham QC and Ms. Liesel Weekes for the Barbados Bar
Association, Amicus Curiae**

DECISION

MASON JA:

Introduction:

[1] *The Legal Code of Ethics 1988* of the Barbados Bar Association (the Code) governs the professional conduct of attorneys-at-law here in Barbados. Rules 70, 74, 87 and 90(1) provide as follows:

“70. An attorney-at-law shall not retain money he received for his client longer than is absolutely necessary.

74. In the performance of his duties an attorney-at-law shall not act with inexcusable delay, negligence or neglect.

87. In pecuniary matters an attorney-at-law shall be most punctual and diligent, he shall never mingle funds of others with his own and he shall at all times be able to refund money he holds for others.

90(1) Breach by an attorney-at-law of any Rules contained in this Part shall constitute professional misconduct and an attorney-at-law who commits such a breach shall be liable to any one of the penalties which the Disciplinary Committee recommends and which the Court of Appeal is empowered to impose.”

[2] The high standard demanded of attorneys-at-law by these rules of the Code should never appear to overawe those who have the honour and privilege to belong to what has always been considered a noble profession.

[3] In the matter now before this Court, the Disciplinary Committee of the Barbados Bar Association established under Part V of the **Legal Profession**

Act, Cap 370A (the Committee), after hearing and deliberating a complaint made against Allison Alexander found her guilty of professional misconduct in that she breached rules 70, 74 and 87 of the Code. The Committee recommended that she be suspended from practice for a period of not less than one year.

Background

- [4] Mr. Cecil Marshall, the complainant, sought the services of Ms. Alexander to complete the sale of his property situated at No. 41 Dairy Meadows, Horseshoe Drive, Holders Hill in the parish of Saint James. At the time, the property was encumbered with a mortgage resulting in the property being distressed. A decision was made to sell the same and the process commenced.
- [5] The sale was completed early in August 2015. However, when the complainant contacted Ms. Alexander later that month, he was advised that funds were missing from her account but that the matter would soon be resolved. The complainant was later informed that he could collect a cheque from Ms. Alexander's husband on 21 August, 2015.
- [6] Mr. Marshall made attempts to have the cheque processed but these were futile and concluded with him being advised by his bank that the cheque should be referred to the drawer. After seeking answers, the complainant was informed by Ms. Alexander that she had overpaid some of her clients and that she was

currently in the process of recovering said sums from these clients after which he would be paid.

[7] This did not materialise. On another occasion, the complainant was informed that Ms. Alexander was in the process of closing the sale of a hotel out of which she would be able to repay the amount owed. On 30 September 2015 Ms. Alexander sent an email to the complainant indicating that there was a delay in the receipt of the funds from her client but that she was working on providing the complainant with an interim payment on 2 October 2015 until the funds were received.

[8] Despite this promise, the funds were never repaid to the complainant resulting in him filing a complaint with the Committee against Ms. Alexander.

Report of the Disciplinary Committee

[9] The Committee in its final report rehearsed the complaint and the pertinent facts and outlined the evidence of the parties as presented at the hearing.

[10] The Committee found (to which there is no dispute) that the sum of \$163,803.88 was due to be paid by Ms. Alexander to the complainant within a reasonable time after 13 August 2015 on demand.

[11] It was also determined that Ms. Alexander had provided no details regarding her explanation that she had mistakenly overpaid other clients causing a shortfall in her account. Essentially, the Committee at paragraph 36 of the

report, found Ms. Alexander to be in breach of *Rules 70 and 87* of the Code and guilty of professional misconduct. It went on further to state in the ensuing paragraph, that the inability to refund the complainant due to such a mistake was at the very least negligent or neglectful and amounted to a breach of *Rule 74* of the Code in that she acted with such inexcusable delay that it amounted to professional misconduct.

- [12] The report concluded that the offence of theft had however not been established on the facts and recommended that Ms. Alexander be suspended from practice for a period of one year.

Written Submissions by Ms. Alexander

- [13] On 26 August 2016 Ms. Alexander filed submissions on her own behalf in which reliance was placed on the case of **R (on the application of Campbell) v General Medical Council (2005) EWCA Civ 250** which set out guidelines on mitigation.

- [14] Particular emphasis was placed on the dicta in that case which stated that the professional history of the practitioner must be a consideration. In support of this proposition, Ms. Alexander submitted at paragraph 3.4 of her submissions that in 12 years of practice, there were no other instances where her professional conduct had been put under scrutiny. This, together with the fact that responsibility had been readily accepted and that Ms. Alexander did not

waste the Committee's or the Court's time, were relevant mitigating considerations when determining the appropriate penalty to be imposed.

[15] Thereafter, counsel sought to distinguish other matters dealt with by this Court arising on similar facts. She submitted that the attorney-at-law **In the Matter of Dr. Harold Eastmond BB 1995 CA 24 (Eastmond)** was involved in repeated instances of misconduct which, when examined in totality, warranted his name being removed from the Roll of Solicitors. The same could not be said of her, as there was no history of unscrupulous events or trends.

[16] Ms. Alexander also suggested that the speed at which this matter was dealt with by the Committee was a factor worth considering. She pleaded that **In the Matter of Mortimer Clarke BB 2008 CA 7 (Clarke)**, the length of time it took for that matter to be heard facilitated the repayment of the amount owed. Meanwhile, her matter had been speedily addressed resulting in insufficient time for repayment. There was no substantial real or personal property available to be utilised, and in addition, the family home owned solely by her husband had been placed on the market. To date there has been no sale to facilitate payment.

[17] Another point which Ms. Alexander advanced was that in **Clarke**, the professional misconduct spanned nine years unlike a few months as in her case. She submitted that this should be taken into account when determining

the appropriate penalty. She requested that a lesser period of suspension be imposed than that recommended by the Committee bearing in mind the financial impact it would have on her and her young family.

The Proceedings before This Court

- [18] In the proceedings before this Court, counsel for Ms. Alexander, Ms. Michelle Russell, stated that she was relying largely on the written submissions filed by Ms. Alexander. Counsel submitted that she was not attempting to condone the actions of her client. However in mitigation, she asserted that it should be noted that at no point in time when this matter was to be heard did Ms. Alexander waste the Committee's time or that of the Court. Counsel further asserted that Ms. Alexander had admitted her culpability in the initial stages and demonstrated responsibility by her statements of intention to repay.
- [19] Counsel submitted to this Court that the delay in repayment was further attributed to the publicity this matter had attracted in the media. Counsel claimed that as a result of this, Ms. Alexander had lost some of her clients and her ability to apply for a loan became virtually impossible. Counsel stressed that Ms. Alexander did intend to repay but circumstances did not permit her to do so.

[20] Ms. Russell referred to **Clarke** in which the Committee had taken note of and suggested that Mr. Clarke's forthrightness and cooperation with the Committee should be taken as a mitigating factor by the Court.

[21] In urging the Court to be lenient with Ms. Alexander, counsel was mindful of this Court's decision in **Clarke** at para 43:

“One way in which this Court may best serve and protect the public interest is to ensure Mr. Clarke's absence from the practice of law for a reasonable time.”

[22] Counsel referred to this Court's power under s. 22(1) of the **Legal Profession Act** which allows for suspension in s. 22(1)(c) and for an order for compensation to the complainant in s. 22(1)(f).

Submissions by the Disciplinary Committee

[23] Mrs. Marguerite Woodstock-Riley QC, Chairman of the Disciplinary Committee, addressed the mitigating factors raised by stating that it was not a fair assessment to conclude that this was the first instance of misconduct. It was more appropriate to state that this was the first report of such against Ms. Alexander. Mrs. Woodstock-Riley QC contended while repayment is a consideration, it does not remove the fact that an offence took place as determined by this Court in **Re: Fields [2015] 87 WIR 68 (Fields)** resulting in a departure from its earlier sentiments.

- [24] With regard to the speedy disposal of this matter, counsel responded that the Committee was indeed moving with haste with these types of matters. In the past, matters took a great deal of time before resolution. During that period, the attorney was still allowed to practise but that should not be the case and it is a habit from which the Committee is trying to depart.
- [25] Mrs. Woodstock-riley QC submitted that the recommendation of a year's suspension was considered after the Committee had taken into account the factors surrounding this matter. She contended that previous cases reflect situations where the attorney had taken the funds for personal use but this was not evident on the present facts. In this instance, the explanation given was that there was an accounting error in the attorney's client account. There was nothing to show that there was theft but on the other side of the spectrum, there was no proof supporting the reasons given. However, she maintained that the attorney's actions amounted at the very least to a breach of the Code, which raises the issue of suspension.
- [26] Mrs. Woodstock-Riley QC contended that when making a determination as to the appropriate penalty, the consideration was not the amount of money involved since even the smallest sum would be an issue. The question whether it was a genuine mistake or a deliberate use of funds is critical and on the facts before the Court, there was no evidence giving rise to theft. She argued that

there must be evidence of dishonesty and undoubtedly there is a difference between dishonesty and negligence. A level of dishonesty was necessary to take the matter from the sphere of suspension to disbarment. She concluded that a breach of *Rules 70 and 87* creates automatic professional misconduct but it does not lead to automatic suspension or disbarment which remains within the discretion of the Court.

Submissions on Behalf of the Crown

- [27] Ms. Donna Brathwaite QC representing the Attorney General as amicus curiae, argued that suspension for a period of six months or one year was inadequate. To impose such would be to disregard the duty to maintain public confidence in the integrity of the profession. She made reference to paragraphs 42 and 43 of **Clarke** where the court expressed that its duty was to protect the public interest.
- [28] Counsel submitted that the case of **Eastmond** was distinguishable from the instant matter. In the **Eastmond** case, Dr. Eastmond had been at the Bar for three years at the time of the offence while Ms. Alexander had eleven years and the sum involved in **Eastmond** did not compare with the amount herein. She stated that the Office of the Attorney General fully supported the statements in **Re: Fields** that the court must send a message of zero tolerance

to any form of dishonesty and the ultimate sanction should apply in such case regardless of the amount.

[29] Ms. Brathwaite QC also submitted that unless proof was brought to substantiate Ms. Alexander's claim, then that claim should not simply be accepted without question by this Court. It filtered down to a matter of dishonesty. The assertion that the speed in which the matter was adjudicated by the Committee which in turn attributed to delay in repayment was not a submission that should be considered. She contended that Ms. Alexander should be removed from the Roll and the sum together with interest be repaid to the complainant. She argued that even though the Committee had made no findings with regard to theft, it nonetheless concluded that there was professional misconduct, which should be the focus of this Court.

Submissions on behalf of the Bar Association

[30] According to Mr. Patterson Cheltenham QC, counsel for the Bar Association, appearing *amicus curiae*, the fundamental principle arising here is that the funds are not the attorney's; she was a trustee of the funds and held them for a designated purpose. In this case, the designated purpose was to complete the sale and hand over the excess to the complainant on presentation for collection. Counsel submitted that this situation was nothing but a concoction of stories on every occasion in an attempt to quell the queries raised. Counsel

argued that it was for these reasons that the Bar Association was in full agreement with the submissions made by the Crown.

[31] Mr. Cheltenham QC stated that there had been a clear breach of *Rule 70 of the Code* established on the facts of this matter, as there was no reason why the complainant should not have received his money when requested. Counsel argued that Ms. Alexander was also in breach of *Rule 74*. Considering that there was undue delay or neglect with regard to *Rule 87* counsel further argued that a breach of the Code had been established except in relation to the aspect of the rule about the mingling of funds.

[32] Mr. Cheltenham QC also rejected Ms. Alexander's argument about her inability to repay the funds on account of the speed with which the matter came before the Committee. He contended that the matter concerned serious issues and reminded that the public is the consumer whose interest is the central focus and that public interest in and public perception of the profession is paramount.

[33] Counsel suggested that there should be "no slap on the wrist" where misconduct is concerned and especially where as here, the complainant continues to suffer from lack of return of his funds. He was not in support of the attorney's request for suspension of six months because it was not only

the financial aspect of the case but the emotional trauma which has also to be borne in mind.

Issue

[34] The sole issue for this Court is the appropriate penalty to be imposed.

Discussion

[35] Professional misconduct arises where an attorney-at-law fails to fulfil his core duty of promoting the cause of justice. The legal profession is self-regulated and its code of ethics governs and regulates the standard of professional conduct expected of an attorney-at-law. The purpose behind the regulation of the profession is to maintain a good public image, to insist that persons comply with the rules of conduct and if the circumstances should arise, to remove the deviant members of the profession. An attorney is under a duty to always act in the best interest of his client, to represent him honestly, competently and zealously and endeavour to obtain the benefit of every remedy and defence authorised by law.

[36] As a general rule, any form of fraud or dishonesty committed by an attorney against the interest of his client will be deemed to be professional misconduct under *Rule 90 of the Code*. This includes misappropriation of a client's funds and failure to apply a client's funds for the purpose for which it was intended.

- [37] We now consider some of the cases adjudicated by this Court in which the Court considered the appropriate penalty to be imposed in instances of professional misconduct.
- [38] In **Clarke**, Mr. Clarke was retained by the complainant to purchase a property in the amount of \$150,000.00. As usual, the agreement was prepared and a deposit paid with completion expected by a specific date. The complainant gave his attorney two further sums to make up the purchase price. The transaction was not completed, leaving the complainant to make enquiries and eventually to file a formal criminal complaint. The parties exchanged communications regarding repayment, with Mr. Clarke requesting further time from his client. Time passed and while some of the amount was repaid, an outstanding debt remained.
- [39] The Disciplinary Committee found that Mr. Clarke had misappropriated a large portion of his client's funds for personal reasons ultimately prejudicing his client and breaching *Rules 70* and *87* of the Code. The Court was of the view that there was a breach but beyond that, the numerous promises made effectively destroyed the element of trust which inheres in any attorney and client relationship. His actions caused significant loss and much distress to his client spanning over a period of 9 years. In making its determination, the

Court ordered that there be a suspension for 9 months as well as payment into court of the sum owed together with accrued interest.

[40] In **Re Asquith Jules BB 1997 CA 11 (Jules)**, Mr. Jules was retained by the complainant in 1993 and paid the sum of \$16,000.00 to purchase land. However, the sale was never completed. The Disciplinary Committee found Mr. Jules' actions constituted professional misconduct for failing to act expeditiously and keeping his client's money longer than necessary. The Court made an order suspending his practice for a period of six months with the owed amount to be repaid with interest.

[41] The complainant in **Re Winston Haynes BB 1986 CA 1 (Haynes)** paid monies to his attorney, Mr. Haynes, for the purchase of lots. Mr. Haynes denied this allegation but the Disciplinary Committee, on hearing the evidence, found that there was an attorney/client relationship between the parties. Mr. Haynes was found guilty of gross negligence in that the complainant never had the land conveyed to him nor was his money returned. At page 3 of the judgment, the Court referred to **In Re Martin (1843) 6 Beav.**

337 where Lord Langdale stated:

“It is undoubtedly the duty of the Court to protect solicitors in the fair and honest discharge of their difficult and delicate duties; but when a solicitor is found to have availed himself of his honourable and confidential position, for the purpose of taking advantage of and defrauding his clients, it is not less the duty of the Court to withdraw from him those privileges, and that

certificate of character, which are afforded by his being permitted to remain on the roll of solicitors.”

[42] It was suggested that the case of **Haynes** was not one where the attorney deliberately set out to defraud the client. His wrongdoing arose by using one client’s funds to pay other clients. His only property was mortgaged making the possibility of recovery extremely remote much like this matter under consideration. The Court agreed that Mr. Haynes was guilty of gross negligence and professional misconduct. It was determined that the conduct displayed fell below the standard expected and Mr. Haynes was removed from the Roll of Attorneys, as public confidence in the profession should be maintained.

[43] In **Re George Brancker, BB 1990 CA 5**, the Court had to consider two reports pertaining to Mr. Brancker. The first arose based on a complaint where \$9,800.00 was received for purchasing land from Mr. Fred Moore in the sum of \$12,000.00. Mr. Brancker was acting for both parties. However, when Mr. Moore died, the client, Mr. Sobers, was unable to contact his attorney. The second complaint arose, as Mr. Brancker was the attorney for Mr. Fred Moore who was the executor for the Estate of Charles Moore. Miss Worrell was the common law wife of Charles Moore who died leaving 3 lots of land, 2 of which were sold. Mr. Brancker did not provide any statements of account to Miss Worrell resulting in the complaint being made. The

Committee found gross professional misconduct in both instances and recommended a fine in respect of the first complaint and a suspension for the second.

[44] The case of **Re Errol Niles BB 1993 CA 28** followed a similar line of reasoning. Mr. Niles was retained to complete the purchase of land. The Committee decided after hearing the applications, that professional negligence and misconduct had been established, as there were breaches of *Rules 70, 74 and 87* and consequently a breach of *Rule 90*. Mr. Niles offered no reasonable excuse for his grave neglect of his professional responsibility to his client. In making its determination, the Court ordered that Mr. Niles be removed from the Roll of Attorneys and the sums owed be repaid.

[45] More recently, this Court dealt with the matter of **Re: Fields**. Ms. Simpson, the complainant, emigrated to England in 1964 with the intention of returning to the Island on her retirement. She saw an advertisement for a plot of land with a dwelling house for sale and made enquiries. On a visit to the Island, she met with Mr. Fields who was the developer's attorney and expressed her interest in the property. A holding fee of \$5,000.00 was paid along with two later payments of £20, 000.00 and £112, 000.00 respectively. It was only after having a conversation with the developer that Ms. Simpson realised that something was amiss. She retained another attorney to represent her in the

matter to be heard by the Disciplinary Committee. After hearing the evidence, a recommendation was made for Mr. Fields to be disbarred having been found to be grossly negligent.

[46] Counsel for Mr. Fields sought to argue before this Court that suspension was the penalty which ought to be imposed. Mr. Fields, during the hearing before the Committee, showed no contrition for his actions and admitted to nothing. His approach to the matter and to his client to whom he owed a professional duty was condescending and disdainful. His response to the complaint was to wash his hands of the situation, distance himself from his staff and their authority, even going as far as to lie on his health to avoid responsibility. It was a callous disregard for the plight of his client and a disrespect of the profession. In light of his egregious behaviour, Mr. Fields was struck off the Roll of Attorneys and ordered to repay the amounts received with interest.

[47] On a review of the cases, one factor emerges: each case must be determined on its facts. In **Clarke**, Mr. Clarke from inception admitted to the Committee that he had misappropriated the money but had already repaid the principal. The only issue before the Committee was the outstanding fees and interest. Similarly, in **Jules**, Mr. Jules conceded before the Committee that he had received the money from his client. The issue which the Court had to address was his failure to abide by his previous undertaking to repay on the dates

agreed to by him (similar to Ms. Alexander's plight). In **Eastmond**, after presenting the evidence to the Committee, it was recommended that there be a suspension for a period of six months. However, what is noteworthy in **Eastmond**, is that once Dr. Eastmond became aware of his client's claim, he repaid what he thought was due, namely the amount borrowed from the client. The remaining amount retained by him was found not to be reasonable for his services and this was where the problem arose. When considering **Haynes** where there was a denial of a client relationship, the Court was of the view that Mr. Haynes' conduct fell far below the standard expected of a member of an honourable profession and that both interest in the legal profession and public interest warranted removal from the Roll of Attorneys because of his professional negligence and misconduct.

[48] The power of this Court is set out in **s. 22(1)** of the **Legal Profession Act, Cap 370** as follows:

“The Court of Appeal on the consideration of any report submitted by the Committee may:-

- (a) dismiss the application;
- (b) order the name of the attorney-at-law to be removed from the Roll;
- (c) order that the attorney-at-law be suspended from practising law for such period not exceeding three years as it thinks fit;

- (d) impose on the attorney-at-law to whom the report relates such fine as it thinks proper; or
- (e) reprimand the attorney-at-law; and
- (f) make such order as to costs as it thinks fit, and in addition, except where the application is dismissed, the Court may order the attorney-at-law to pay the applicant or person aggrieved such sum by way of compensation and reimbursement and such further sum in respect of expenses incidental to the hearing of the application and the consideration of the report as it thinks fit.”

[49] We accept the Committee’s findings that Ms. Alexander’s conduct, though not amounting to theft, was less than professional but that her negligence towards her client’s business cannot be allowed to prevail with impunity.

[50] It has been recommended by the Committee that Ms. Alexander be suspended for a period of one year. The Court is not obliged to act in accordance with the recommendations of the Committee. It is evident from the *dicta* of Owen J in **Re Hodgekiss [1962] SR (NSW) 340** that while the court should give weight to and be slow to differ from the Committee’s opinion, it is for the Court to make up its own mind on the facts before it. This was seen in **Ernest Jackman BB 2003 CA 14** where the Court, finding there to be insufficient evidence, disagreed with the recommendation of the Committee for disbarment.

[51] Ms. Alexander was retained for the sole purpose of assisting the complainant who was in the midst of dealing with a difficult financial situation. Due to an accounting error or oversight, the complainant has been deprived of his money from August 2015 to present. It should be noted that no evidence was submitted in support of her explanation and equally nothing was shown to indicate that the money had been used for personal gain as in some of the cases referred to in this decision. The situation went from a ‘mere mistake’ to a concoction of stories given to the client in an attempt to repress his requests for his funds compounded by the complainant’s inability to have the proffered cheque cleared by the bank. Ms. Alexander’s saving grace is that she has not sought to deny her actions but readily accepted culpability and expressed an intention to repay. She did not waste the resources of this Court or of the Committee. However, there is an element of dishonesty in her actions which cannot be countenanced.

[52] What also cannot be countenanced is Ms. Alexander’s betrayal of the trust which the complainant had placed in her. There was evidence that Ms. Alexander had without incident concluded a matter previously for the complainant who again retained her services in the present matter, no doubt expecting a similar and successful result.

[53] Our legal profession is one rich in history and guarded by its reputation for integrity. Thus the quality of service offered by attorneys-at-law should constantly be of the highest quality. The Court must continue to demand that honourable conduct on the part of its officers is maintained and public confidence in the profession guaranteed by high moral and ethical standards. A breach of this duty cannot be ignored or go unpunished because it is not only the reputation of the particular attorney who is found guilty or who has transgressed that is at risk of being besmirched. Unprofessional conduct on the part of an attorney-at-law threatens the image of the entire profession thereby bringing it into disrepute.

[54] With this in mind we repeat here the observation made by this Court in **Clarke**: one way in which this Court may best serve and protect the public interest is to ensure that Ms. Alexander be not allowed to practise her profession for a reasonable time. And so we do.

Disposal

[55] We now make the following order:

1. That Ms. Alexander be suspended from practice for 18 months from the date of this order.
2. That Ms. Alexander pay into court the sum of \$163, 803.88 together with interest at the rate of 6% from 13 August 2015 until payment is made.

3. That should these payments not be completed by the conclusion of the period of suspension, that is the next 18 months, said suspension shall continue until full payment is made.
4. That the Registrar shall make the appropriate entry in the Roll of Attorneys-at-Law and cause publication to be made in the Official Gazette in accordance with **section 24** of the **Legal Profession Act, Cap 370A**.
5. That the Registrar shall summon Ms. Alexander, the President and Secretary of the Bar Association to a meeting within 14 days of the date of this order to make satisfactory arrangements for the handling and completion of all matters currently being dealt with by Ms. Alexander.
6. That the formal order of this Court be drawn up, settled and signed by the Registrar pursuant to **section 22(3)** of the **Legal Profession Act, Cap 370A**.

Chief Justice

Justice of Appeal

Justice of Appeal