



The Court of Appeal for Bermuda

CIVIL APPEAL No 15 of 2014

Between:

A BARRISTER

Appellant

-v-

BERMUDA BAR COUNCIL

Respondent

**Before: Baker, President
Kay, JA
Bell, JA**

Appearances: Appellant in Person
Mr. Saul Froomkin Q.C., Isis Law Limited for the Respondent

Date of Appeal: 18 March 2015

Date of Decision & Reasons: 20 March 2015

REASONS

Bell, JA

1. The Appellant in this case was the subject of a complaint filed with the Bermuda Bar Association on 7 April 2011, relating to a conveyancing transaction, which led to two counts of breach of the Barristers' Code of Professional Conduct 1981 ("the Code") being filed on 2 March 2012.

2. Disciplinary hearings took place on 21 and 22 October 2013 before a tribunal comprising the Honourable Chief Justice, Mr Wendell Hollis, a senior member of the bar, and Ms Michelle Stone, an experienced conveyancing practitioner (“the Tribunal”).
3. On 22 April 2014, the Tribunal dismissed Count 1 and found Count 2 to have been proved. That charge was that the Appellant had failed to be competent, diligent and efficient in his professional activities, contrary to rule 6(iv) of the Code.
4. The Tribunal held at the end of paragraph 19 of its ruling that “in the most unconvincing part of his oral evidence the (Appellant) claimed that he saw no material difference between the property described in the sale and purchase agreement, and the legal interest subsequently conveyed. The fallacy of this position can best be illustrated by comparing the crucial elements of the two descriptions:” and the Tribunal then set out the contents of the sale and purchase agreement, referring to “all that lot of land”, and those of the conveyance, referring to “all that one half interest in the lot of land”. The Tribunal continued to declare itself satisfied beyond reasonable doubt that on this broad basis the Appellant was guilty of contravening rule 6(iv) by;
 - (a) failing to take adequate steps to ensure that the Complainant knew that she was acquiring an extremely unusual legal interest by purchasing not an apartment but a one half interest in a house consisting of two apartments, one of which she would be able to occupy; and
 - (b) failing to appreciate adequately or at all the basic duties of a conveyancing attorney as illustrated by, inter alia
 - (i) the misconceived insistence that at all material times the (Appellant’s) only ‘client’ was the vendor, and
 - (ii) the incoherence of the closing statement and the admitted basic error in over-charging the Complainant.
5. The Tribunal considered sentence on 11 June 2014, and ordered that the Appellant be suspended from the practice of conveyancing work for two years pursuant to rule 20(2)(b) as read with rule 19(2) of the Bar Disciplinary Tribunal Rules 1997 (“the Rules”), ordered that the Appellant pay the sum of

\$9266.25 to the Complainant by the way of repayment of all legal fees received by him from her, pursuant to rule 20(2)(d) of the Rules, and ordered that the Appellant should pay to the Bermuda Bar Association the sum of \$2,500 within six months after the expiration of his suspension, by way of contribution to the Professional Conduct Committee's costs pursuant to Rule 23(1) of the Rules.

6. The Appellant filed Notice of Appeal dated 23 July 2014. We had before us grounds of appeal filed on different dates, but they appear to be in identical terms. The grounds of appeal were filed in relation to the conviction on the second charge. They were, firstly, that the Tribunal had erred in law and was in breach of the rules of natural justice and ultra vires its jurisdiction by adjudicating upon the determination of the civil and legal rights and obligations of the Appellant and other private parties touching and concerning the validity and enforceability of private contractual obligations contrary to section 6(8) of the Bermuda Constitution Order 1968 ("the Constitution").
7. Secondly, the grounds contended that notwithstanding the execution of a legally binding contract exhibiting the legal intention of the Complainant, in breach of the rules of natural justice and contrary to section 6(8) of the Constitution, in breach of a fair hearing, the Complainant erred in fact and law upon a false assertion that she purchased or was purchasing a fee simple absolute of a beneficial and legal interest in title to property, which in law did not exist.
8. Thirdly, that in breach of the rules of natural justice and contrary to section 6(8) of the Constitution, in breach of a fair hearing the Tribunal erred in fact and law upon a false assertion that the Complainant intended to purchase a fee simple absolute of a beneficial and legal interest in a title, which in law did not exist.
9. Fourthly, that the Tribunal erred in law and was in breach of the rules of natural justice by holding in the absence of an accrual of a cause of action and in the absence of proof of loss attributable to a breach of the relevant duty of

care in the tort of negligence, that the Appellant was in breach of an implied duty of care.

10. Fifthly, that the Tribunal erred in law by shifting the burden of proof upon the Appellant by holding that he was in breach of his duty of care and failing to advise the Complainant upon an assertion that an extremely unusual interest existed in the fee simple absolute of the title to the property, which contrary to, and by operation of law, did not exist
11. The grounds of appeal were supported by a skeleton argument of some 27 pages and a list of no less than 65 authorities. Many of those authorities were in support of incontrovertible principles of law, and indeed Mr Froomkin accepted a number of them as authority for the propositions in issue. That still left a considerable volume of material to be covered in the period allotted for hearing the appeal of just under half of a day. The Appellant was reminded by the Court on a number of occasions of the need to cover all points in the allotted time, but frequently covered the same territory in respect of the different grounds of appeal. In the event, the Appellant was able to conclude his submissions within the allotted time.
12. Mr. Froomkin described the Notice of Appeal and skeleton argument as incomprehensible. With all respect to the Appellant, they are hard to understand, and frequently pray in aid of the appeal alleged breaches of the rules of natural justice and the right to a fair hearing, without specifying the grounds for the particular assertion. The position was not made any clearer in argument.
13. It is convenient to deal with the grounds of appeal with reference to the following submissions of the Respondent. These are that with respect to the grounds of appeal generally, the Appellant misconceived the role that the Tribunal was playing. It was not, contrary to the Appellant's assertions, adjudicating upon the determination of the civil and legal rights and obligations of the Appellant and other private parties (ground 1). The Tribunal was deciding whether on the evidence before it the Appellant had been competent, diligent and efficient in all of his professional duties, as required by

section 6(4) of the Code. The ratio decidendi of the Tribunal can be found (submitted the Respondent) at paragraphs 19 and 20 of its ruling, and paragraph 19 is the one that finishes with the passage referred to in paragraph 4 above, referring to the contrasting terms of the sale and purchase agreement and the conveyance.

14. Then the Respondent's submissions regarding ground 4 say:

“the Tribunal was entitled to decide on the credibility of Appellant and the Complainant, and having found the Complainant's evidence to be credible, there is no basis on which such a finding should be set aside, with respect to the complaints set out in grounds 2 and 3 of the Notice of Appeal”.

15. Next, these submissions contend that the Tribunal was correct in law in holding that there was imposed upon the Appellant a duty of care to the unrepresented purchaser, namely the Complainant, contrary to the allegations contained in grounds 4 and 5.

16. And by way of summary, the Respondent's skeleton submitted that the Notice of Appeal as a whole disclosed no reasonable grounds upon which the decision of the Tribunal should be set aside. It contended that the evidence accepted by the Tribunal was overwhelming, and justified the finding by the Tribunal at paragraph 14, in the following terms: “(the Appellant) expressly admitted carelessly over-charging the Complainant. However, more fundamentally, his defence involved the implicit admission that in drafting the conveyance deed he did not pay any or any due regard to the interest of the Complainant as purchaser, because he viewed himself as owing no duties of care toward her. A competent and diligent conveyancing lawyer would realise the mere act of drafting a deed of conveyance gives rise to a legal and ethical obligation to ensure that the purchaser acquires the legal interest they contracted to acquire”.

17. The gravamen of the complaint before the Tribunal and the thrust of the argument before this Court was that there was no material change in the description of the property in the contract and the property interest conveyed. The Appellant maintained before the Tribunal, as he did before us, that there

was no difference between the two descriptions. The Tribunal described this as being the most unconvincing part of the Appellant's oral evidence, and set out by way of illustration the crucial elements of the two descriptions, and proceeded to declare itself satisfied beyond reasonable doubt that on this basis the Appellant was guilty of contravening rule 6(iv) of the Code.

18. We agree both with the Tribunal's conclusion and reasoning, and in relation to the grounds of appeal the Court respectfully agrees with and adopts the reasoning set out in the Respondent's submissions. It follows that the appeal against conviction must fail.
19. As to sentence, the sentence of the Tribunal is entirely within the range to be expected for the conduct which the Tribunal found to have been proved against the Appellant.
20. Accordingly, the Appellant's appeals against conviction and sentence are dismissed.
21. In relation to costs, the Appellant accepted that costs should follow the event, and accordingly we ordered that the Respondent to the appeal should have its costs.

Signed

Bell, JA

Signed

Baker, P

Signed

Kay, JA