

The General Legal Council

Appellant

Antonnette Haughton-Cardenas

Respondent

FROM
**THE COURT OF APPEAL OF
JAMAICA**

JUDGMENT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL

Delivered the 12th May 2009

Present at the hearing:-

Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Neuberger of Abbotsbury

(Delivered by Lord Rodger of Earlsferry)

1. The General Legal Council ("the Council") was established by section 3(1) of the Legal Profession Act 1971 ("the Act"). One of its functions is to uphold standards of professional conduct. By section 3(2), the Council has power to do all such things as may appear to it to be necessary or desirable for carrying out its functions under the Act.

2. By sections 4 and 5 of the Act, the Council is to maintain a roll of legally

qualified persons and every person whose name is entered on the roll is to be known as an attorney-at-law and, on payment of the appropriate fee, is to be issued with a practising certificate. Armed with that certificate, the attorney is entitled to practise as a lawyer. If, however, the name of an attorney is removed from the roll, his or her practising certificate ceases to be in force.

3. The name of the respondent, Mrs Antonnette Haughton-Cardenas, was entered on the roll of attorneys in 1979 and she proceeded to practise as an attorney.

4. The functions of the Council include discipline of attorneys. Section 11(1) of the Act provides for a Disciplinary Committee to be appointed; under section 12 complaints can be made of professional misconduct. Professional misconduct includes:

"any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect)."

Section 12(7)(a) provides that the Council may:

"prescribe standards of professional etiquette and professional conduct for attorneys and may by rules made for this purpose direct that any specified breach of the rules shall for the purposes of this Part constitute misconduct in a professional respect."

5. Section 35, in part VII dealing with accounts, provides:

“(1) The Council may make regulations requiring attorneys

- (a) to open and keep separate bank accounts of clients' moneys and containing provisions as to the manner in which such accounts may be operated; and
- (b) to keep accounts containing particulars and information as to moneys received, held or paid by them, for or on account of their clients.

(2) The Council may take such action as may be necessary to ascertain whether or not the regulations are complied with."

6. In 1978, under the powers conferred on the Council by section 12(7) and under every other enabling power, the Council made the Legal Profession (Canons of Professional Ethics) Rules. Canon VII (a) and (b)

provides:

"(a) An Attorney shall comply with rules as may from time to time be prescribed by the General Legal Council relating to the keeping in separate accounts -

- (i) the funds of himself or of any firm with which he is associated; and
- (ii) those of his clients.

(b) An Attorney shall -

- (i) keep such accounts as shall clearly and accurately distinguish the financial position between himself and his client as and when required; and
- (ii) account to his client for all monies in the hands of the Attorney for the account or credit of the client, whenever reasonably required to do so

and he shall for these purposes keep the said accounts in conformity with the regulations which may from time to time be prescribed by the General Legal Council."

7. Canon VIII(d) provides that breach by an attorney of the provisions of, inter alia, Canons VII(a) and (b) is to constitute misconduct in a professional respect and an attorney who commits such a breach is to be subject to any of the orders contained in section 12(4) of the Act. Section 12(4)(a) provides that the Disciplinary Committee may, as they think just, make any such order as to striking the attorney's name off the roll, or suspending him from practice, imposing a fine or reprimanding him, as they may consider reasonable.

8. In 1999, under sections 12(7) and 35 of the Act, and every other enabling power, the Council made the Legal Profession (Accounts and Records) Regulations 1999 ("the 1999 Regulations"). These regulations contained provisions, the details of which are not material for present purposes, prescribing the manner in which attorneys were to keep their accounts. Regulation 16 provided:

"(1) Every attorney shall, not later than six months after the commencement of any financial year (unless he or she files a declaration in the form of the First Schedule which satisfied the Council that owing to the circumstances of his or her case it is unnecessary or impractical for him or her to do so), deliver to the Secretary of the Council an accountant's report in respect of the financial year next preceding that year.

(2) Every attorney shall produce or cause to be produced to the accountant whose accountant's report he or she proposes to deliver

to the Secretary of the Council pursuant to paragraph (1) all books, records and accounts required by Regulation 6 to be kept by him or her and, in addition, any files or other documents connected with, or related to, or explaining or throwing any light on, anything in those books, records and accounts."

9. On 4 February 2005 Mr. Michael Hylton QC, a member of the Council, made a complaint under section 12(1) of the Act that the respondent, Mrs Haughton-Cardenas, had failed to deliver to the Secretary an accountant's report in respect of the years 1999,2000,2001 and 2003, contrary to regulation 16(1) of the 1999 Regulations. In September 2005, the respondent delivered reports for 2001 to 2004, but she did not deliver reports for 1999 or 2000. That remained the position in 24 July 2006 when the complaint against her came to be considered by the Disciplinary Committee.

10. At the hearing, the attorney appearing for the respondent made a preliminary submission that the Council had no power under section 35 to make regulation 16 requiring attorneys to deliver accountants' reports to the Council. The Council could make regulations only in relation to the specific matters referred to in section 35(1). The Committee rejected the submission. Mrs Haughton-Cardenas then appealed to the Court of Appeal under section 16 of the Act. The Court of Appeal accepted her argument and allowed her appeal. At a hearing at which Mrs Haughton Cardenas was not represented, the Board granted the Council special leave to appeal to the Board.

11. At the hearing of the appeal, however, Mr Dunkley submitted on behalf of Mrs Haughton-Cardenas that no appeal to the Privy Council was competent. Section 110(1) and (2) of the Constitution makes specific provision for certain kinds of appeals. Section 110(3) and (5) then provides:

"(3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter.

(5) A decision of the Court of Appeal such as is referred to in this section means a decision of that Court on appeal from a Court of Jamaica."

The respondent's argument was succinct: the Disciplinary Committee of the Council is not a "court". The decision of the Court of Appeal is, accordingly, not a decision of that court on appeal from a court of Jamaica in terms of subsection (5). Therefore, Her Majesty had no power to grant special leave under section 110(3).

12. The first point to notice, however, is that section 110(3) does not confer any power on Her Majesty: it simply confirms that nothing in section 110 affects Her Majesty's power to grant special leave from a decision of the Court of Appeal on

appeal from a court of Jamaica. In other words, the enactment of the specific provisions in section 110 is not intended to affect the previous power of the Board to grant special leave to appeal.

13. Mr Knox QC, who appeared for the Council, pointed out that section 110 of the Constitution is similar in all material respects, save one, to section 82 of the independence Constitution of Trinidad and Tobago which was enacted just a few months later. The difference is that section 82 of that constitution contains no equivalent of section 110(5) of the Constitution of Jamaica. If the intention of those framing the constitutions had been to limit appeals to the Privy Council to appeals to the Court of Appeal from particular kinds of tribunal in Jamaica, then one might well have expected to find an equivalent provision in the constitution of Trinidad and Tobago. The fact that no such provision is found suggests that section 110(5) was inserted in the Constitution of Jamaica for a different purpose.

14. That purpose can easily be identified. During the period when Jamaica was part of the West Indies Federation, the Cayman Islands and the Turks and Caicos Islands were dependencies of Jamaica. When Jamaica became independent in 1962, the Cayman Islands and the Turks and Caicos Islands became separate Crown colonies. But provision was made for appeals from their courts to continue to be made to the Court of Appeal of Jamaica. Since, however, the two territories were now separated from Jamaica, appeals to the Privy Council from decisions of the Court of Appeal affecting the Cayman Islands and the Turks and Caicos Islands were provided for by an Order in Council relating to those territories: the Cayman Islands and the Turks and Caicos Islands (Appeal to Privy Council) Order in Council 1962. The definition of "judgment" in section 2(1) of the Order was framed in such a way as to limit it to judgments of the Court of Appeal (of Jamaica) given in the exercise of any jurisdiction conferred on the court by any law for the time being in force in the Cayman Islands or the Turks and Caicos Islands. The purpose of section 110(5) of the Constitution of Jamaica was, accordingly, to confine the provisions for appeal to the Privy Council under the Constitution to appeals from decisions of the Court of Appeal when exercising its jurisdiction in relation to Jamaica, as opposed to its jurisdiction in relation to the other islands.

15. That being the purpose of the provision, section 110 must be interpreted accordingly. In particular, section 110(3) simply means that nothing in the section is intended to affect the power of the Board to grant special leave from decisions of the Court of Appeal when it is exercising its jurisdiction in relation to Jamaica. The Board is accordingly satisfied that the phrase "Court of Jamaica" in section 110(5) should be interpreted broadly, as applying to any body exercising jurisdiction in Jamaica from which an appeal lies to the Court of Appeal.

16. The respondent takes the provision much further and contends that section

110(3) is to be interpreted as, in effect, having a twin effect. Not only would it *affirm* the continued existence of the Board's power to grant special leave from decisions of the Court of Appeal in appeals from Jamaican courts, but it would also, by implication, *remove* the preexisting power of the Board to grant special leave from decisions of the Court of Appeal in appeals from Jamaican tribunals and other bodies such as the Disciplinary Committee. Since the real purpose of section 110(5) is readily identifiable and has nothing to do with cutting down the scope of appeals in Jamaican matters, the Board must reject that interpretation. The effect of section 110(3) and (5) is to leave the Board with power to grant special leave from a decision of the Court of Appeal, exercising its jurisdiction in relation to Jamaica, in any case where it is appropriate.

17. Therefore the Board had power to grant the Council special leave to appeal in this case. It now turns to the substance of the appeal.

18. In holding that the Council had no power to make regulation 16 of the 1999 Regulations, the Court of Appeal accepted an argument based on the contrast between the two subsections of section 35 of the Legal Profession Act. Subsection (1)(a) and (b) specifies two matters relating to accounts for which the Council is given power to make regulations. Subsection (2) then gives the Council power to take such action as may be necessary to see whether or not the regulations on those matters are complied with. The respondent's argument is that, since the Council is given a specific power to make regulations on the matters in subsection (1), but not for the purposes of subsection (2), the necessary inference is that it has no power to make regulations for the purposes of subsection (2).

19. The respondent seeks to reinforce her argument by reference to section 29 of the Solicitors Act 1957, which applied in England and Wales at the time when the Legal Profession Act was being drafted in Jamaica:

“(1) The Council shall make rules –

- (a) as to the opening and keeping by solicitors of accounts at banks for clients' money; and
- (b) as to the keeping by solicitors of accounts containing particulars and information as to moneys received, held or paid by them for or on account of their clients; and
- (c) empowering the Council to take such action as may be necessary to enable them to ascertain whether or not the rules are being complied with:

Provided that any such rules shall not come into operation until they have been approved by the Master of the Rolls.”

The Court of Appeal observed that it was obvious that the Jamaican legislation was

"patterned off" the English Act - but with a significant difference in the drafting. The English legislation gives the English Council power to make rules empowering the English Council to take the necessary action to enable them to ascertain whether or not the rules to be made under paras (a) and (b) are being complied with. That was the kind of power which the Jamaican Council purported to exercise when making regulation 16 of the 1999 Regulations - but no such power was conferred by section 35 of the Jamaican legislation.

20. Panton P, with whom Harrison JA and Harris JA concurred, concluded:

"If the legislature had intended the Council to have the power to make regulations other than in relation to the *INTO* areas mentioned, it would have said so in section 35(1). Indeed, it would have followed section 29 of the Solicitors Act in every respect. The power to make regulations is a power that has to be specifically provided for. It cannot be a matter of inference. In the Legal Profession Act, wherever it was intended to give the GLC power to make regulations, the legislature has specifically so stated. The words 'take such action as may be necessary' (section 35(2)) do not embrace or include the power to make regulations."

21. The Board acknowledges that the Act contains a number of provisions which specifically confer a power to make regulations and rules: section 4(6), conferring a power to make rules of court prescribing certain matters in relation to the roll of attorneys and practising certificates; section 10, conferring a power on the Council to make regulations for matters connected with legal education (including qualification for enrolment under section 6(2)); section 14(1), conferring a power on the Disciplinary Committee to make rules relating to applications to the Committee; section 33, conferring a power on the Minister to make regulations in respect of anything which may be or is required to be prescribed under Part VI, dealing with the preparation of legal documents; and, finally, section 35(1) itself. So there is plainly scope for an argument that a power (such as the power in section 35(2)), that is expressed generally, should not be construed as conferring the same specific power as is conferred by other provisions: *specialia generalibus derogant*.

22. The Board recognises that there might be force in that argument in relation to the very general power conferred by section 3(2) "to do all such things as may appear to it to be necessary or desirable for carrying out its functions under this Act". Even there, the Board would express no concluded view, however - especially since section 4(1) envisages regulations relating to the keeping of the roll of attorneys and to the payment of fees, for the making of which no specific power appears to be conferred in Part II. Here, however, the focus must be on the terms of section 35 itself.

23. Section 29(1) of the English Solicitors Act 1957, on which the respondent relies, is, on one view, rather strange. Paragraphs (a) and (b) are straightforward, requiring the Council to make rules on various matters relating to solicitors' accounts. But paragraph (c) requires the Council to make rules "empowering" it to take such action as may be necessary to enable it to ascertain whether or not the rules are being complied with. The English Act therefore envisages that the English Council, which otherwise has no power to take the necessary action, can nevertheless confer on itself that very power by making rules. The legislation appears to contemplate the Council pulling itself up by its own bootstraps. The rules by which it gives itself this new power are only to come into operation after being approved by the Master of the Rolls.

24. When the English Council duly exercised the power under section 29(1)(c), the effect was simply to give the Council the power to take the necessary action to see that the rules on accounts were being complied with. Section 35(2) of the Jamaican Act confers precisely that power on the Jamaican Council- directly, without the need for the Council to make a regulation to obtain it. Indeed, it seems likely that the draftsman of the Jamaican legislation saw that section 29(1)(c) of the English Act was, at best, an over-elaborate way of conferring the necessary power on the Council.

25. In practice, of course, the rules made under section 29 of the English Act went much further than simply conferring on the Council a general power to take the necessary action to see that the rules on accounts were being complied with. They also spelled out, for all concerned, the specific powers that the Council intended to exercise in execution of the general power that it had conferred on itself by making the rules. For example, rule 12 of the Solicitors' Accounts Rules 1967 provided for the Council to be able to require a solicitor to produce his books of accounts etc for inspection by someone appointed by the Council and for that person to prepare a report.

26. By contrast, the 1999 Regulations conferred no power on the Council to take the necessary action to see that the regulations on accounts were being complied with. The Council already had that power by virtue of section 35(2). What, then, was the effect of Regulation 16 of the 1999 Regulations? Surely -like, say, rule 12 of the English rules - to spell out, for all concerned, the specific powers that the Council intended to exercise in execution of the general power that had been conferred by section 35(2).

27. The respondent accepts that the powers which the Council exercised, requiring her to produce an accountant's report, can properly be regarded as "necessary to ascertain whether or not the regulations [were] complied with." So, even the respondent admits that the requirement made of her was *intra vires* the Council. But the requirement to produce the accountant's report would be ineffective unless there

were some sanction on an attorney who failed to comply. That sanction is therefore necessary and it will be provided if the failure to comply is made to count as punishable professional misconduct. So the Council must have the power under section 35(2) to make failure to comply with its requirement professional misconduct. The Council can therefore use its power under section 35(2) to enshrine the specific requirements in regulation 16 of the 1999 Regulations, breach of which will constitute professional misconduct under Canons VII and VIII(d) of the Legal Profession (Canons of Professional Ethics) Rules. The necessary sanction for that misconduct can then be imposed under section 12(4) of the Act.

28. The Board is accordingly satisfied that the Council's general power under section 33(2) included a power to make regulations, embodying the specific requirements that it intended to make in the exercise of its general power, and so ensuring that failure to comply with those requirements amounted to professional misconduct for the purposes of section 12(4).

29. For these reasons the Board will humbly advise Her Majesty that the appeal should be allowed, with costs here and below, and the complaint remitted to the Disciplinary Committee to proceed as advised in the light of this judgment.