

Judgment Book



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 225/99

**IN THE MATTER of the estate of
Florence Rankine, deceased, and of
all that parcel of land known as
part of Cherry Garden, Saint
Andrew, being the Lot numbered
Sixteen on the plan of Cherry
Garden, and being the land
registered at Volume 687 Folio 44
of the Register Book Titles, and all
that parcel of land known as thirty-
one East Queen Street, Kingston,
and being the land Registered at
Volume 1211 Folio 859 of the
Register Book of Titles;**

A N D

**IN THE MATTER OF The Legal
Profession (Canons of Professional
Ethics) Rules 1978;**

A N D

**IN THE MATTER OF the Legal
Profession Act.**

**BETWEEN NATIONAL COMMERCIAL BANK
JAMAICA LIMITED**

PLAINTIFF

A N D ANTHONY PEARSON

DEFENDANT

Mr. A. Williams instructed by Messrs. Henry & Malcolm for Plaintiff.

**Mr. D. Morrison Q. C. Instructed by Messrs. Anthony Pearson & Co.
for Defendant.**

HEARD: 30th September 1999 and 1st October, 1999

By an Originating Notice of Motion dated 2nd day of June 1999 the
Plaintiff sought an Order:

1. That the Defendant do honour the terms of his professional undertaking set out in the letter dated the 6th day of August, 1992, in his capacity as Attorney-at-Law for Michael Rankine;
2. That the Defendant do honour the terms of his professional undertaking by paying such sums as will liquidate the indebtedness of the said Michael Rankine to the Plaintiff within fourteen (14) days of the date of this order;
3. That in the event that the Defendant fails to comply with (2) above, that he be committed to prison for Contempt of Court;
4. Alternatively, any declarations and/or as this Honourable Court may think fit;
5. Such further and other relief as may be just;
6. Costs.

The facts on which the Plaintiff relies are contained in the affidavit of Joan Guthrie, Credit Officer of the Plaintiff, sworn to on June 2, 1999. The facts relevant to this motion are as follows:-

The Defendant, an Attorney-at-law, at the material time was acting for one Michael Rankine. The latter guaranteed loans made to DELMAR FARMS LTD. BY THE Plaintiff. There were two guarantees signed by Michael Rankine, the first dated 15th April 1993 for \$50,000.00 and the second dated 10th June, 1993 for the sum of \$400,000.00. By letter dated August 6, 1992, the defendant in his capacity of Attorney-at-Law for Michael Rankine, gave his professional undertaking to pay over to the Plaintiff a sum not exceeding \$450,000.00 from that part of the net proceeds of the sale of premises at Lot 16 Cherry Gardens, St. Andrew and Thirty One (31) East Queen Street, Kingston.

Both premises were sold; sale of 31 East Queen Street was completed on November, 16, 1995 and Lot 16 Cherry Gardens on April 16, 1996. Michael Rankine received from the sale of the East Queen Street premises the sum of Twenty Six Thousand, Four Hundred and fourteen dollars and thirty two cents (\$26,414.32) and from the sale of the Cherry Gardens premises Nine Hundred and sixty five thousand, two hundred and forty three dollars and seventy five cents (\$965,243.75).

The Plaintiff further avers that the defendant knew or should have known that the plaintiff was extending loan facilities guaranteed by Michael Rankine, in reliance on the said undertaking provided. Despite this, defendant failed or neglected to collect the net sale proceeds due to Michael Rankine and to pay over to the Plaintiff from the amount collected a sum of Four Hundred and Fifty Thousand dollars (\$450,000.00) despite numerous demands for the Plaintiff.

By affidavit sworn to on the 13th day of September, 1999, the Defendant admitted that he issued a letter of undertaking, a copy of which was appended to the affidavit of Joan Guthrie. He outlined the circumstances under which the issue of the said letter of undertaking came to be made, that the letter was issued as a result of instructions given to him by Michael Rankine. Defendant denies that he has ever received the "benefit due to Michael Rankine" from his late mother's estate and that the Plaintiff is aware of this fact.

He further denies that the Plaintiff was extending loan facilities in reliance on the said undertaking, nor is it true that the loan facilities extended to Michael Rankine were by plaintiff's reliance upon the said undertaking.

The undertaking referred to supra is contained in letter dated 6th

August 1992, and reads, at the material facts thus:

"6th August, 1992

*The Manager
National Commercial Bank
Cnr. Duke and Harbour Streets
Kingston.*

Dear Sir:

Re: Estate Florence Rankine

We act on behalf of Mr. Michael Rankine, a beneficiary under the Estate of his late mother.

We are instructed that premises at 136 Barbican Road, and 31 East Queen Street, real assets of the Estate are to be sold, and that one-quarter share from the net proceed of those sales are payable to Mr. Rankine.

He has instructed us to collect on his behalf, the net proceed of the sale due to him, and to pay that to you not exceeding Four Hundred and Fifty Thousand Dollars (\$450,000.00).

We hereby give our undertaking to do so whenever those proceeds come to hand.

*Yours faithfully,
PLAYFAIR, JUNOR, PEARSON & CO.*

*Per: ANTHONY PEARSON.
AP/dd*

*c.c. Mr. Michael Rankine
c.c. Eric & Erica Strachan
c/o Clinton Hart & Co."*

This letter was written to the Plaintiff while Defendant was a Partner in the firm of Playfair, Junor, Pearson & Co. and on the face of it, copied to Michael Rankine and to Eric and Eric Strachan c/o Clinton Hart and Co., the latter being Executors of the Estate of Florence Rankine, late mother of Michael Rankine.

By letter dated 28th July, 1998, Defendant, sought and apparently obtained from Plaintiff permission to have Playfair, Junor and Company released from the abovementioned undertaking and that they accept in its place "on identical terms the undertaking of the writer."

"....."

We respectfully ask you that you release Playfair, Junor Pearson & Company from the undertaking referred to and accept in its place on identical terms the undertaking of the writer."

THE ISSUE

Is Defendant liable to the Plaintiff for the amount of his undertaking

In view of the fact that the proceeds of sale of the land, on which his undertaking was predicated, never reached his hand.?"

COURTS JURISDICTION

The Court has summary jurisdiction in an application such as this Motion where the plaintiff/applicant seeks to move the Court into disciplining one of its officers for conduct in a transaction in which the said

officer was acting in his capacity as an Attorney and consequently as an officer of the Court *John Fox (a firm) v. Bannister, King & Rigbys (a firm)*

1987 1 AER at p. 740.

"The basic principles applicable in the present case are not in doubt. The jurisdiction being invoked here is the inherent jurisdiction which the Supreme Court has over solicitors, who are its officers. It is a Jurisdiction 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: See Re Grey [1892] 2 QB 440 at 443 per Lord Esher Mr. One of the areas in which this principle falls to be applied is the enforcement of undertakings given by them professionally; and if they do not do so they may be called on summarily to make good their defaults." Per Nicholls L.J.

In our own jurisdiction, Carey J.A. In *Sylvester Morris v. General Legal Council ex parte Alpart Credit Union (1985) 22 J.L.R. page 1, at page 5 paras H& I* said

"Undertakings take many forms and may be given by an attorney to the court, to a client or to third parties. When the court enforces these undertakings, it is taking punitive action against its officers to ensure a uniform code of honourable conduct. This is made quite clear in the old case of In re Hilliard (1845) 2 Dow. & L. 919 pp. 920-921 where Coleridge, J., observed:

It seems to me that the court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers

in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. The court acts on the same principle, whether the undertakings be to appear, to accept declaration, or other proceedings in the course of the cause, or to pay the debt and costs. It does not interfere so much as between party and party to settle disputed rights; as criminally to punish by attachment, misconduct, or disobedience in its officers."

* *Australian Guarantee Corporation (N.Z.) Ltd. v. East Brewster Urquhart & Partners (1990) 2 New Zealand Law Reports 167 at page 171:*

- (a) *As part of the general disciplinary powers of the High Court over the conduct of its officers, the Court can require that a solicitor who has defaulted on an undertaking to a third party with respect to his client's affair pay:
 - (i) *damages for the loss suffered by the third party in consequence and/or*
 - (ii) *the third party's costs on a solicitor and client basis.**
- (b) *If such payment is ordered the solicitor normally has a right of indemnity against his client.*
- (c) *The jurisdiction is a discretionary punitive and disciplinary one and does not exist for the purpose of enforcing legal rights.*
- (d) *Such cases can be dealt with by summary judgment, although of course that is by no means the only appropriate procedural vehicle.*
- (e) *An undertaking for this purpose must be a personal undertaking given by the solicitor in his professional capacity. It is not sufficient if the undertaking is merely given on behalf of a*

client or if it is given by a solicitor in some capacity other than as solicitor.

- (f) *Before such an undertaking can be enforced it must be clear in its terms.*
- (g) *In construing the meaning of such an undertaking it will generally be assumed that the undertaking was intended to facilitate the successful completion of an essentially commercial dealing. It should not normally be construed in any technical or legalistic fashion but rather by reference to the evident substance and intention.*"

SUBMISSIONS

APPLICANT'S SUBMISSION:

1. There is no doubt that the Defendant/Respondent did issue to the Bank an undertaking to disburse to the Bank the proceeds of Sale which would come to his client "the substance and intent of which is that the proceeds would eventually come into his hands."

The Court should therefore exercise its Summary jurisdiction to enforce the undertaking.

2. This undertaking was clearly provided by Defendant/Respondent in a professional capacity, he acting as Attorney for his client.

It was an undertaking, not on behalf of his client, but that he would pay over the funds "as soon as those funds came to hand." (emphasis mine)

3. Respondent may make much of the words indicating that he would pay over the funds so soon as they came to hand, and that this set out a condition precedent to the undertaking – a condition which had not yet been fulfilled.

However this interpretation would be to import the very "technical and legalistic fashion" of which the

"Australian Guarantee" case warns should not be done. The attorney should know or take steps to ensure that the undertaking can be fulfilled.

4. Respondent should at very least have advised Clinton Hart and Co. of his authority from his client to collect the sale proceeds due to him, and that he had issued an undertaking predicated on the collection of these proceeds, and require Clinton Hart to deliver such proceeds to him on the sale of the properties.

Respondent did nothing and this did amount to negligence. The language of the letter clearly states that it was an undertaking.

RESPONDENT'S SUBMISSION:

The jurisdiction of the Court as submitted by Applicant's Attorney is agreed. *P110 Chapter 5 Cordery's Law Relating to Solicitors 8th Edition* under heading

"UPON HIS UNDERTAKINGS

"The Court has a discretion whether to exercise its summary jurisdiction and will do so only in clear cases.

It is not an unlimited jurisdiction, a fact made clear by the authorities, and in so far as is relevant to the instant case, is subject to the following: -

- (a) *The jurisdiction is discretionary and "should therefore only be exercised in a clear case" per Lord Denning M.R. in 'Godfrey Silver & Drake v. Baines (1971) 1 AER 473 at 475 at H, also*

John Fox (a firm v. Bannister, King and Rigbey's (a firm)

(1987) 1 AER 737, 744.

- (b) *It is of critical importance to appreciate the meaning and scope of the undertaking in deciding whether a Attorney is in breach of a professional undertaking.*

(Australian Guarantee Case pp. 171 –172)

- (c) *An Attorney cannot be liable for breach of a conditional undertaking, where the condition has not been fulfilled.*

(Hill v. Fletcher 1850 English Reports 155 Exchequer Bk. II)

- (d) *The Court will not order performance of an undertaking which has become impossible of performance.*

(Udall v. Capri Lighting Ltd. (1987) 3 AER 262 (this case is distinguishable on its facts).

CONCLUSIONS: -

The facts relied upon by the Applicant have largely been agreed by the Respondent.

The principal difference is that the affidavit of Mrs. Joan Guthrie asserts that “the Defendant knew or should have known that the Plaintiff was extending loan facilities guaranteed by Mr. Rankine in reliance on the said

indenting. "The submission of Respondent is that there is absolutely no evidence of this.

Reference is made to the Applicant's own pleading in Suit No., C.L. 1998/N149 where the Plaintiff avers that "Dar-mar Farms Ltd., was at all material times ... a customer of the plaintiff and that by a guarantee in writing dated June 10, 1993 there was consideration for the grant of credit facilities.

The principal question to be decided here is what is the effect of the "Undertaking". What has the Respondent undertaken to do? It is agreed that he undertook to "pay ... to you not exceeding Four Hundred and Fifty Thousand dollars (\$450,000.00). If the question 'when' is asked, the answer must be "whenever these proceeds come to hand.""

The Defendant's letter dated the 6th August 1992, at its third paragraph reads: -

"He has instructed us to collect on his behalf, the net proceeds of the sale due to him..."

The very letter in which this is contained indicated on its face that copies were sent to Michael Rankine and to Eric and Erica Strachan respectively, Eric and Erica Strachan being the executors of the Estate of Florence Rankine. Defendant also stated in his affidavit sworn to on 13th September

1999, that the said letter was issued and copied to Michael Rankine and the
aforementioned executors of his mother's estate.

I accept that this was the situation as this has not been contested.

Mr. Williams for the Plaintiff submitted that the Defendant should
have at the very least, have advised Clinton Hart and Company of his
authority from his client to collect the proceeds of sale due to him. The
nature of the undertaking required that the Defendant advise Clinton Hart
and Co. that he had issued an undertaking predicated on the collection of
those proceeds and require Clinton Hart and Co. to him on sale of the
properties.

The real fallacy of this submission is that Clinton Hart and Company
would have had obligation to pay out the proceeds to the Executors of the
Estate only, not to Michael Rankine, not to Defendant. It stands to reason
therefore that notice should be given to the executors to whom Clinton Hart
and Co. were obliged to pay over the proceeds of the sale so they could
make "disbursement of the legacies."

It is therefore the Executors who should have had notice and it
appears that the copy of the said letter to them provided that notice. It is
therefore not correct to say as Mr. Williams further submitted, that

“Defendant did nothing, which at best amounts to negligence. “This submission is not borne out by the fact that the Executors were informed.”

I find that the undertaking was one which was predicated on the happening of a certain event, namely, the proceeds of sale coming into the Defendant's hand. It is not contended that the proceeds ever came to Defendant. Defendant's client, knowing full well of the terms of the undertaking proceeded to obtain from the executors, the said proceeds of sale which should have been paid to Defendant, at least to the tune Four Hundred and Fifty Thousand dollars (\$450,000.00) the amount mentioned in the letter containing the undertaking. It is patent to me that the only construction that can be placed on this is that Defendant undertook to do something conditional on the money coming to his hands. This never happened as the Executors paid over the monies to Defendant's client Michael Rankine.

Rankine's behaviour was reprehensible to say the least. He knew that the letter had been issued to Plaintiff, that it was copied also to Eric and Ericas Strachan, the exectutors of his mother's estate - none of the money received by Rankine was paid over to Defendant. According to Cordery's Law relating to Solicitors Eighth Edition, page 111 paragraph 3 captioned “The object of enforcing undertakings” and the cases cited there, ‘In

enforcing undertakings, the Court is not guided by considerations of contract, but aims at securing honesty of conduct in its officers.”

Canon vii (d) of the Legal Profession (Canons of Professional Ethics)

Rules, state as follows:-

“An attorney shall not give a professional undertaking which he cannot fulfil and shall fulfil every such undertaking which he gives.”

Canon viii (d) provides that a breach of Canon vi (d) shall constitute misconduct in a professional respectand an Attorney who is in breach thereof “shall be subject to any of the orders contained in Section 12 (4) of the Legal Profession Act.

Carey J.A. In “*Morris v. General Legal Council (1985) 22 J>R, 4, at*

p. 5 stated

“Undertakings take many forms and may be given by an attorney to the Court, to a client or to third parties. When the Court enforces these undertakings, it is taking punitive action against its officers to ensure a uniform code of honourable conduct. This is made quite clear in the old case of *In re Hillard (1845) 2 Dow. & L. 919 at pp. 92--921* where Coleridge, J., observed:

It seems to me that the court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers.”

I am not convinced on the evidence before me that there is any dishonesty or misconduct in a professional respect. This is therefore not a case in which the Court's jurisdiction can be successfully invoked against the Defendant.

The application is therefore refused and the Originating Notice of Motion denied. Costs are to be the Defendant's on Attorneys and own client basis.