



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00449

BETWEEN	CAVELL PALMER	CLAIMANT
AND	MAUVELLETTE DAYES	DEFENDANT

Application by Defendant to prevent attorney at law acting for the Claimant – Attorney at law acted for husband and wife in purchase of property - Husband now deceased - Wife challenging husband’s will which gifts 60% of the property to Claimant – Attorney’s office drafted alleged will - Attorney acting for Claimant in her claim to an interest in the property-Claim relies on husband’s alleged promises and declarations as well as on the alleged will - Whether attorney possessed of confidential information.

Leonard Green instructed by Chen Green & Co. for Claimant

Emily Shields, Maria Brady & Marissa Wright instructed by Gifford Thompson & Bright for Defendant

Heard: 12th and 23rd February, 2021.

In Chambers: (By Zoom)

COR: BATTIS J.

1. By an Amended Notice of Application, filed on the 4th February 2021, the Defendant applied for the following relief:

- 1) *“That Leonard Green Attorney-at-Law of the law firm Chen Green & Company be restrained from*

representing the Claimant in this claim against the Defendant.

2) That Leonard Green Attorney-at-Law of the law firm Chen, Green and Company be restrained from representing the executors under the estate of Wessell Dayes in Suit No. SU2020ES01547 – in which the Defendant/Applicant has lodged a caution”

2. The application was supported by an affidavit of Mauvellette Dayes (the Defendant) filed on the 4th February 2021. In response Mr. Leonard Green, the subject of the application, filed an affidavit on the 9th February, 2021. The Defendant then filed an affidavit in reply on the 11th February 2021. Mr. Leonard Green filed written submissions dated the 22nd February 2021. He attended before me to argue the matter. This is regrettable. I once again remind the profession of Canon V(p) of the Legal Profession (Canons of Professional Ethics) Rules which endorses the established practice that, save for matters of a formal nature, an attorney at law should not give evidence in a matter in which he or she appears, see ***Cable & Wireless Jamaica Limited v Eric Jason Abrahams [2019] JMCC Comm 7*** (unreported judgment delivered 15th March 2019) at paragraph 3 and, ***Andrew Issa Realty Limited (t/a Coldwell Banker Jamaica Realty) et al v Everoy H. Chin & Co Ltd [2020] JMCC Comm 21*** (unreported judgment delivered 31st July 2020).

3. Having considered the affidavits, written and, oral submissions I made the following orders:

- 1) Mr. Leonard Green attorney-at-law and the firm Chen Green & Co. are restrained from acting as Attorneys-at-law for the Claimant in this matter and in Suit SU2020ES01547.*
- 2) No order as to costs*
- 3) Permission to appeal granted*

- 4) *CMC fixed for the 15th April 2021 at 11:00 a.m. for 1 hour.*
- 5) *Time extended to the 19th March 2021 for filing a Reply and Defence to Counter Claim.*
- 6) *Defendants attorneys at law to prepare file and serve the Formal Order.*

I promised then to put my reasons in writing at a later date. This judgment fulfils that promise.

4. This is the third judgment, in almost as many months, I have had to write in connection with this claim. On the 23rd December 2020 I delivered written reasons for the grant of an interlocutory injunction and, on the 2nd February, 2021, I issued reasons for not punishing the Defendant for breach of the said injunctive Orders. In my judgment, of the 23rd December, I observed at paragraph 7 that,

“... the complaint about the Claimant’s legal representation, while not withdrawn, was not then pursued.”

That complaint was at that time supported by paragraph 65 of the Defendant’s affidavit filed on the 24th November 2020. It reads,

“65. That I was shocked and surprised when my attorney Mr. Lambert S. Johnson received a letter from Mr. Leonard Green setting out the entitlement of the Claimant, warning that I will have to give an account. That part of my shock and surprise is born from the fact that I still have unfinished legal business with Mr. Green and fees on account for work to be done.”

This demonstrates that the present application, is not recently concocted and, may be the result of a genuine concern felt by the Defendant.

5. The Defendant subsequently changed attorneys and her new attorneys have pursued the complaint. The Defendant asserts that herself and her husband were clients of Mr. Leonard Green. He acted for them in the purchase of property at Barracks Road in Savanna-la-Mar as well as property on which the Kibo Hotel is located. She supports the assertion with documentation, being a transfer, receipts and letters issued by Mr. Green's firm, see exhibit MD 1 to her affidavit filed on the 4th February 2021 and, exhibit MD1 to her affidavit filed on the 11th February 2021. She also references other matters in which she alleges Mr. Green acted for herself and other members of her family. The Defendant states, at paragraphs 10 and 11 of her affidavit filed on the 4th February 2021,

“10. As Mr. Leonard Green has been and I considered that even up to the date of the death of my husband that he was still our family and business attorney, he invited me and my step children to his chambers on or around the 2nd June 2020 and we attended upon his office. Whilst there he questioned me again as to how my husband and I started our business and I explained to him in full the origins of the idea and the funding of the various purchases of Kibo Hotel. I gave him then further insight into my life. Although I attended with my step-children, Mr. Green only questioned me about my affairs. I trusted him at that time and so I felt comfortable disclosing this information to him - he having acted for us so many times as our attorney and in my mind he still was.

11. At the time of his invitation to me and my children to his office, I was unaware of the purported will of my husband. Mr Leonard Green also informed me at that time that he had always advised my husband to make a will but my husband

did not listen to him. He did not produce the purported will at the time.”

6. The Defendant asserts that Mr. Green received confidential and/or privileged information and that she has agreed to no disclosure. To support her concerns, that confidences shared may be used adversely to her, she recounts that during his cross-examination of her Mr. Green asked whether she was an educator. He elicited from her that she was a graduate of St. Josephs Teacher’s College. This information, she says, he obtained from her by virtue of their client/lawyer relationship. This evidence was referenced by me in the judgment I delivered on the 2nd February 2021. It helped to establish that the Defendant understood the order she was accused of breaching see, ***Cavell Palmer v Mauvellette Dayes [2021] JMCC Comm 6*** (unreported judgment delivered on the 2nd February 2021) at paragraph 16.
7. Mr. Green for his part admits that he acted for Mr. and Mrs. Dayes in the purchase of various properties and in particular the Kibo Hotel property. This admission is to be found in paragraph 14 of his affidavit filed on the 9th February 2021. However, in paragraph 4 of the same affidavit, Mr Green stated:

“4. As for paragraph 3, I represented the Applicant’s the deceased (sic) before 2010 and was faithful to the instructions he gave me. I have never been instructed by the Applicant to represent her in any matter whatsoever. She has never paid me any fees and I challenge her to produce any evidence that she paid me fees to represent her in any matter nor did I give her any business advise (sic). I know nothing about her business or personal affairs since I did not know her until sometime around 2017 when her husband introduced her to me while I represented him in the matter of an application made by his landlord for outstanding rental and for recovery

of possession of the Montego Bay branch of Western Farms supplies in the Saint James Parish Court.”

8. Mr. Green stated, in relation to the building at Barracks Road, that he acted for the Defendant and her deceased husband. He also acted for them when the Kibo Hotel was purchased. However, he stated:

“6... It was the deceased alone who always instructed me and whenever he instructed me to add his wife as a legal owner to any of the purchases I did so.”

Mr. Green goes on to say in the paragraph which follows:

“7. The deceased always told me that his wife operated the Montego Bay store and could not come to Savanna-la-Mar as she had no one to manage that facility in her absence. I believed him.”

9. It seems to me that an explanation would only be necessary for his wife’s absence if the deceased, who proffered the explanation, regarded her as appropriately there. That is, she too was a client, and would otherwise be present, but for her duties in Montego Bay.
10. Mr. Green, in the affidavit under reference, denies the Defendant’s assertions that:
(a) she was present at some meetings with her husband because he says she was “never” there; (b) she had an input into the discussions surrounding the purchase of the Kibo Hotel; (c) she gave him any information confidential or otherwise; (d) in the meeting at his office the Defendant disclosed intimate or privileged details involving the purchase of the Kibo Hotel ; (e) he had failed to disclose the existence of a will and ; (f) the circumstances of his engagement could cause her prejudice.

11. Mr. Green responds to paragraph 11 of the Defendant's affidavit (quoted at paragraph 5 above) as follows:

"13. Paragraph 11 of the Applicant's affidavit is as shocking as it is untrue as I was aware of what the Applicant had come to my office to do. I told the Applicant that there was a will. This did not go down well with her and I went further to tell her that she should get independent legal advice if it is that she had concerns about the will. It was a matter for the deceased to disclose to the Applicant that he had made a will and the fact that he did not do so was a matter for him and his wife to sort out while he was alive."

12. Mr. Green, also in the said affidavit, made the following instructive disclosures,

"12. ... I knew the Claimant Ms. Palmer from she was a student attending high school. I was a part of the negotiations with the Moshas to create a workable arrangement for the purchase of the hotel so that the Applicant could safely secure her legal share in the property. I was never a part of any scheme to deprive the Applicant of anything that she was entitled to.

.....

14. I represented the Claimant during the lifetime of the deceased. I represented both the Claimant and the deceased during the time that the hotel was being purchased. My present action is not against the Applicant to take anything from her, as she seeks to contend, but simply as part of my duty as an officer of the court to ensure that the clear on (sic)

unambiguous testamentary intention of my deceased client is carried out.

.....

9. It would be safe to assume that the deceased and the Applicant were inextricably bound up in business as husband and wife and the Applicant may have taken out joint loans to pursue joint ventures for their mutual benefit. The records will show that the deceased always maintained control of all those business matters with which he was engaged with the Applicant as he was the engine of all the projects that he did rely heavily on me for legal and personal advice.

.....

10. As for paragraph (sic) 8 and 9. I do not deny that over the years I dutifully acted for the deceased and he relied on me for almost any significant move that he wanted to make. I assert that the deceased confided in me greatly and it would not be all of his personal and business dealings that he would necessarily want me to divulge to the Applicant.”

13. Mr. Green therefore admitted that the Defendant, to his knowledge, was inextricably bound up with the business of the deceased. Therefore, although he took instructions from the deceased he was aware that the Defendant was also a principal. It really matters not which of two “inextricably bound” business partners gives the instructions. At the end of the day they are both clients. That is pellucid and was clear, or ought reasonably to have been clear, to Mr. Green. He has said that the deceased had, on occasion, attended on him with the Claimant and that there was some information divulged to him which “*he had no intention of having me disclose to his wife ...*”. (see paragraph 16 of his affidavit). One would

have hoped that, faced with a claim and counterclaim in which, (a) ownership of the hotel in the purchase of which he acted is in issue and, (b) the validity of the will his office drafted is challenged, Mr. Green would have withdrawn from the matter. If only, as I pointed out to him very early in proceedings related to the injunction, because he may well have to be a witness for one side or the other.

14. Rather than do so Mr. Green has put forward stout legal arguments. He submits correctly, that an order preventing an attorney from acting is not to be lightly made. The effect is to prevent a party retaining the legal representative of his or her choice – a cardinal constitutional right. Further that care should be exercised to prevent one party, using the process to obtain a technical advantage by, removing skilled and experienced counsel to the unfair advantage of the other party. Mr. Green relied on dicta in the case of ***JMMB Merchant Bank Limited v Winston Finzi and Mahoe Bay Company Limited (2015) JMCCD16*** a decision of the Honourable Mr Justice Sykes (now the Chief Justice). Mr Green drew comfort from the fact that, in both that case and ***Olint Corp. Ltd. v. National Commercial Bank Claim No. 2008 HCV00118*** (cited by Sykes J (as he then was), the courts declined to bar the attorney from acting.

15. The facts of those authorities bear no relation to the instant matter. It is the facts of the particular case that are important. The relevant principles were admirably summarised by Sykes J (now Chief Justice) in the case cited and I repeat them here:

“38. From the cases cited above the following is established:

- a. there is no absolute or automatic rule preventing an attorney at law from acting for a subsequent client against a former client.*
- b. the Supreme Court has an inherent power over attorneys at law and on that basis, in a proper*

case, can restrain an attorney, by an injunction from representing a current client against a former client.

- c. *before making such an order barring the attorney from representing the current client the court must be mindful of the fact that such an order has the consequence of depriving a litigant of his right to choose the attorney he or she wishes to represent him or her.*
- d. *if a court shows itself to (sic) ready to grant such an order it may encourage attorneys to withdraw from cases where it was not necessary for them to do so and undermine the “cab-rank rule”, which was developed to ensure that unpopular persons or persons representing unpopular causes were able to secure legal representation.*
- e. *the burden is on the applicant to show that (a) the attorney is in possession of confidential information and that he or she has not consented to its disclosure and (b) the information is or may be relevant to the current matter;*
- f. *the burden on the applicant is not heavy while the burden on the attorney once the applicant crosses the threshold is heavy;*
- g. *the exercise of the power requires the court to consider all the facts and circumstances including the nature of the case and the nature of the evidence*

- h. the applicant should inform the other side, without delay, as soon as the applicant has the information that would give rise to the application;*
- i. it is irrelevant how long before the representation of the former client ceased because once confidential information is given then the attorney is under an obligation to maintain that confidence to his or her grave unless the client gives consent for the disclosure.*
- j. the power to remove an attorney in a case is a power which should not be exercised lightly.*
- k. once the applicant makes the case for disclosure and the attorney has not rebutted the evidence or has not demonstrated that the risk is non-existent or very very remote then it appears that the order should be made.”*

16. The application of these principles to the facts of this case leads to one inexorable result. Mr. Green’s failure to see the inappropriateness, of his continuing to act, is due to his failure to appreciate the consequences of a possible intestacy. By this I mean that, in the course of representing Mr Dayes, Mr. Green received instructions to which Mrs. Dayes (at Mr. Daye’s request) was not to be privy. Mr Green also acted for both Mr. and Mrs. Dayes in business matters in which, as Mr. Green said, they were both “inextricably bound.” Mr. Green was Mr. Daye’s attorney until the day he died. Mr. Dayes having died, and the alleged will having been challenged in this litigation, it means that the estate of Mr. Dayes has an interest in a true determination. If the will is in fact invalid, then the estate will be dealt with as on an intestacy. If the will is valid then the executors named will control the estate or that part of it governed by the will. Either way Mr. Green, or his office,

will have information (privileged or confidential) pertaining to the matter. Can it be said that, in acting for one side or the other in this dispute concerning the will's validity, there is not a danger of confidential information (given to him by Mr. Dayes) being used. Considered in this way it is pellucid that the attorney, caught in the middle, ought to act for neither side. Until and unless it is determined whether or not the estate, or a part of it, is an intestacy Mr Green cannot know to whom, if anyone, the confidential information received from Mr Dayes may be shared.

17. The situation is further complicated because the Defendant is herself a former client of Mr Green. This is so whether or not she had ever set foot in Mr. Green's office. The deceased gave instructions on behalf of himself and the Defendant when purchasing the property. This necessarily involved information about how the couple financed the purchase among other things. Mr. Green admits that the Defendant was a joint participant in the raising of loan capital to effect the purchase. Any information shared, pertaining to the acquisition of the property, was therefore obtained in the context of a client lawyer relationship. Mr. Daye's death does not change that fact. Nor is it particularly relevant that the Claimant attended on Mr Green in the company of Mr. Dayes at the time of the joint purchase by Mr. Dayes and the Defendant. If anything it renders Mr. Green's position even more precarious. There is no way to parcel information garnered from Mr. Dayes pertaining to the circumstances of the acquisition of the property, which is not the Defendants' confidence, from information which is. This is particularly relevant because the claim also relies on the alternative assertion that the Claimant had been promised and/ or gifted a share in the property by Mr. Dayes while he was alive. The claim relies on representations and/or a declaration of trust as well as on the purported will. In other words, even without a will the Claimant maintains an entitlement to an interest in the property. That claim is not only adverse to the Defendant but also to the estate of Mr. Dayes.
18. On the facts of this case, as admitted by Mr. Green, the Defendant need not particularise any information Mr. Dayes may have given to Mr. Green. In the first

place she could not possibly be aware of all he told Mr Green. Her husband conducted most of the business, on their behalf, by himself. It is in any event unnecessary as, Mr. Green has said, Mr. Dayes did confide in him. It is also self-evident that instructions were given to Mr. Green who became aware of the intricacies of how finance was raised and all that went into the purchase of that commercial property. In the face of a claim, which is both hostile to devolution on intestacy and hostile to the Defendant's situation as co-owner, the Defendant is entitled to the protection of the court. The attorney, who acted in the purchase of the said property and who was acting for the deceased up to the day he died, should not be allowed to act for someone with a contrary interest.

19. Those are the reasons I made the Orders stated at paragraph 1 of this judgment. I do not make any findings one way or the other either, on the allegations in the Claim or, on the affidavits filed in this application. It has not been necessary. Further there was no cross examination so it would not be proper (or possible) to make factual findings on, for example, the question whether Mr. Green had disclosed the existence of the will when he met with the Defendant in his office. It is however admitted, and to this I was a witness, that Mr. Green used in cross-examination of the Defendant personal information he had obtained from her. That is a practical demonstration not only of the reason for her concerns but, more importantly, of the danger of Mr. Green using information obtained to the advantage of the Claimant.

20. On the matter of costs, I indicated to counsel that, I did not think Mr. Green's client should be exposed. I regarded Mr Green's insistence on acting in the matter as resulting, not from mala fides but, from an error of judgment. I therefore proposed to make no order as to costs. Mrs. Shields, to her great credit, did not object to this course of action. In the result therefore the injunction was granted and the orders at paragraph (1) above made accordingly.

David Batts
Puisne Judge