[2015] JMCA App 46

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 192/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**JADE HOLLIS**	**APPLICANT**
AND	**THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Ms Carol Davis for the applicant

Mrs Daniella Gentles-Silvera instructed by Livingston Alexander and Levy for the respondent

24, 25, 27 November and 18 December 2015

BROOKS JA

[1] After hearing submissions from counsel in respect of applications by Miss Jade Hollis, an attorney-at-law, the court ruled, on 27 November, by a majority, that the applications should be refused. The orders made at that time were as follows:

> 1. The application to vary or discharge the order of Phillips JA made herein on 14 October 2015 is refused.

2. The application for extension of time within which to file notices and grounds of appeal against the orders of the Disciplinary Committee of the General Legal Council made herein on 13 June 2015 is refused.

3. The application for stay of the disciplinary proceedings in the complaint of Gregory Duncan against Jade Hollis before the Disciplinary Committee of the General Legal Council is refused.

4. Costs to the respondent to be taxed if not agreed.

[2] Miss Hollis sought a number of orders concerning a challenge that she wished to mount against the decision made on 13 June 2015 by a panel of the disciplinary committee of the General Legal Council (the panel). On that date, the panel refused her application to stay the hearing of a complaint made against her, in a professional capacity, by Mr Gregory Duncan. She wished for the disciplinary proceedings to await the outcome of criminal proceedings involving the same issues raised by Mr Duncan's complaint.

[3] The first order that she sought in this court is a reversal of an order made by Phillips JA, as a single judge of this court. Phillips JA ruled that Ms Hollis had filed, out of time, a notice of appeal from the decision of the panel. Miss Hollis contended that Phillips JA erred in that decision. She asked that in addition to reversing the judgment of Phillips JA, the court should also grant a stay of execution of the decision of the panel. That application was also before Phillips JA, who declined to hear it. The learned judge of appeal ruled that, the notice of appeal having been filed out of time,

there was no appeal in place, and therefore no basis on which a stay of proceedings pending appeal could be heard.

[4] Miss Hollis also asked, as an alternative to reversing the order of Phillips JA, that this court grant her an extension of time within which to appeal and also grant a stay of the proceedings before the panel, pending the hearing of the appeal.

[5] In analysing her requests there are three main processes to be conducted. The first is a review of the decision of Phillips JA. The second, in the event that the court agrees with the decision of Phillips JA, is a consideration of the application for extension of time within which to appeal. The third, in the event that Miss Hollis is successful in either the first or the second issue, is a consideration of her application for a stay of proceedings pending appeal. Each issue will be considered separately.

Background

[6] Miss Hollis has her own law firm. In the course of her practice she carried out some conveyancing transactions for Mr Duncan, who is a land developer. Relations between the two soured and Mr Duncan accused her of not turning over monies due to him from one or more of the transactions. He complained to the GLC and to the police. The police charged Ms Hollis with a number of criminal offences and the GLC ordered her to appear before its disciplinary committee to answer Mr Duncan's complaints.

[7] Ms Hollis appeared before the panel of the disciplinary committee on 13 June 2015. She applied for a stay of the disciplinary proceedings pending the completion of the criminal proceedings. The panel refused her application.

[8] She applied to the Supreme Court for permission to file an application for judicial review of that decision. A judge of the Supreme Court refused her application, stating, among other things that she should pursue the remedy of an appeal to this court.

[9] Miss Hollis then filed, in this court, a document containing a notice and grounds of appeal. She also filed an application for a stay of the disciplinary proceedings pending the hearing of the appeal. It was that application that Phillips JA heard and refused.

The decision of Phillips JA

[10] The issue on which the decision of Phillips JA turned was whether the order of the panel was made during the course of the hearing of the disciplinary proceedings or prior to their commencement. Phillips JA ruled that the hearing in a civil trial commences at the opening speech or address of the first party or, if dispensed with, when the first witness is called. She ruled therefore that as neither of those events had occurred when the panel refused Miss Hollis' application for a stay of the proceedings, the application was not done during the course of the hearing and was therefore a procedural application. An appeal from the decision of the panel would therefore be a procedural appeal and the time within which it should be filed is seven days (see rule 1.8 of the Court of Appeal Rules (CAR)).

[11] Although Ms Davis sought to challenge that reasoning, it is, with respect, unassailable. This court ruled in **Dyche v Richards and Another** [2014] JMCA Civ 23

that a decision which is made on a preliminary objection is not a ruling during the course of a hearing, but is an order which is appealable. The court cited with approval, the following extract from Words and Phrases Legally defined, 3rd edition, concerning when a trial begins:

> "...this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter[s] upon the hearing and examination of the facts for the purpose of determining the questions in controversy in the litigation…"

An application seeking a postponement or stay of a hearing is not a question in controversy in the litigation. It must be considered a preliminary question.

[12] Based on the decision in **Dyche**, the decision of Phillips JA that Miss Hollis' application before the panel was a procedural application, and that the decision by the panel was an order, which was subject to a procedural appeal, must be affirmed. The next issue is the application to extend time within which to appeal.

The application to extend time within which to appeal

[13] The principles by which Miss Hollis' application must be assessed, were succinctly set out in **Leymon Strachan v Gleaner Company Ltd and Another** (Motion No 12/1999, judgment delivered 6 December 1999). Panton JA at page 20 of his judgment, as he was then, stated them as follows:

> "The legal position may therefore be summarised thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.

(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider-

(i) the length of the delay;
(ii) the reasons for the delay;
(iii) whether there is an arguable case for an appeal and;

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[14] Although that case was decided before the introduction of the present Court of Appeal Rules (CAR), the principles stated in the extract have been held by a number of cases, including **Jamaica Public Service Co Ltd v Samuels** [2010] JMCA App 23, to remain relevant in the new dispensation of the CAR.

[15] Miss Hollis' application for the extension of time, within which to file a notice of appeal, must therefore fulfil the requirements set out in item 3 of the extract quoted above. These will be assessed in turn.

The length of the delay

[16] The notice of appeal ought to have been filed on or before 20 June 2015. Miss Hollis filed one on 18 August 2015. That is some 66 days after the order was made by

the panel. It could be argued that this court has allowed extensions where the delay has been longer than that period. Miss Hollis' application should therefore not fail on the basis that the delay was egregious and unpardonable.

The reason for the delay

[17] Miss Hollis' reason for the delay is that she was led by a statement of the panel that its decision was not appealable. She, therefore, in attempting to challenge it, filed an application for permission to file an application for judicial review. That application failed however, on the basis that the decision was an order and that the appropriate course by which to challenge it was an appeal. The ruling of the Supreme Court dismissing her application, was handed down on 31 July 2015.

[18] The next aspect of Miss Hollis' explanation was that she was of the view that the appeal could have been lodged within 42 days of being served with the document communicating the decision of the panel. She, of course would be wrong in that regard, bearing in mind the reasoning, set out above, concerning procedural appeals and the time for filing them.

[19] Although an attorney-at-law and being advised by experienced counsel, Miss Hollis' application should not falter on this basis either. Litigants should not be deprived of access to this court for simple technical breaches of the rules, providing that they do not result in an abuse of the process of the court.

Whether Miss Hollis' proposed appeal is arguable

[20] The merits of the proposed appeal were extensively argued by counsel for both Miss Hollis and for the GLC. There is one particular element on which they joined issue. It was whether the panel had correctly considered all the elements in assessing whether to grant Miss Hollis' application for a stay of the disciplinary proceedings before it.

[21] Ms Davis for Miss Hollis argued that the panel, in coming to its decision, erred in failing to consider two of the three reasons that Miss Hollis advanced in support of her application for the stay. Those two were her health and financial challenges. Learned counsel pointed to the following paragraph taken from the panel's reason for its decision:

> "We have given careful consideration to each ground or basis on which this application is made. We are of the considered opinion that grounds 2 and 3 cannot be relied upon in law when the panel considered that the primary object of the disciplinary proceeding is to examine the professional conduct of the Attorney and to take into account the interest of the public and the general reputation of the profession at large."

[22] Ms Davis argued that the dismissal of those two aspects of Miss Hollis' application was wrong in law. Miss Hollis ought to be allowed to argue the point in an appeal.

[23] Mrs Gentles-Silvera submitted that the panel did not refuse to consider the two elements. The panel stated, learned counsel submitted, that it did consider the

elements but found that they could not tip the balance in Miss Hollis' favour. Mrs Gentles-Silvera pointed out that the medical reports that had been presented to the panel were months old and did not provide any information concerning Miss Hollis' condition at the time of her application.

[24] The point may be considered arguable if there were material to support it. The reports were, however, not current reports and all that the panel had before it, on this point, was Miss Hollis' assertion that she was suffering from stress. In her affidavit before this court she has expanded on those assertions concerning her medical condition but has not provided any medical report to support them. The panel could not be faulted for not awarding any significance to the reliance on a tenuous reference to a medical condition.

[25] The claim to a financial challenge in having to contend with both criminal and disciplinary proceedings at the same time is not a good basis for staying the disciplinary proceedings. The duty of the GLC to protect the public from the unprofessional conduct of attorneys-at-law and to uphold the good name of the profession cannot be made subject to the financial constraints of a person charged with misconduct. It may also be said that Miss Hollis did not provide the panel with any substantial evidence to support her claim to financial challenges.

[26] It is the panel's discretion which is to hold sway, by virtue of section 12B(1) of the Legal Profession Act. Unless the panel failed to consider or misapplied a relevant

principle of law or failed to consider or misapplied a relevant fact in the case, its exercise of its discretion must be upheld. Section 12B(1) states:

> "12B (1) It is hereby declared, for the avoidance of doubt that where –
>
> > (a) an application made in respect of an attorney pursuant to section 12 is pending; and
> > (b) criminal proceedings arising out of the facts or circumstances which form the basis of the application are also pending,
>
> The Committee may proceed to hear and determine the application, unless to do so would, **in the opinion of the Committee**, be prejudicial to the fair hearing of the pending criminal proceedings.
>
> (2) Where the Committee hears an application in the circumstances described in subsection (1), the Committee may, if it thinks fit, on its own initiative or at the request of the attorney, defer the filing, pursuant to section 15(2), of any order made by it in relation to that application until the conclusion of the criminal proceedings mentioned in subsection (1)(b)." (Emphasis supplied)

[27] At this stage there does not seem to be any basis for saying that the panel was wrong in rejecting the reasons tendered by Miss Hollis.

The degree of prejudice to the respective parties

[28] Another point stressed by Ms Davis and countered by Mrs Gentles-Silvera is the issue of the prejudice that Miss Hollis asserts she would suffer in the defence of the criminal charges against her, if she were obliged to provide evidence in the disciplinary hearing.

[29] On Ms Davis' submissions Miss Hollis would not be able to rely on her constitutional right to silence in the trial of the criminal charges against her. Ms Davis' submissions are faced with strong authority to the contrary. In **Panton and Others v Financial Institution Services Ltd** [2003] UKPC 86, the Privy Council, in an appeal from this jurisdiction spoke directly to the issue of the conflict between co-existing criminal and civil proceedings arising out of the same set of circumstances. Their Lordships said at paragraph 11 of their judgment that the person charged in the criminal proceedings had to show a real risk of injustice. They said in respect of the point:

> "10. Their Lordships accordingly now turn to the question whether the Jamaican courts erred when they refused to grant the stay or suspension sought by the appellants.
>
> 11. Both courts began with the need to balance justice between the parties. The plaintiff had the right to have its civil claim decided. It was for the defendants to show why that right should be delayed. **They had to point to a real and not merely a notional risk of injustice. A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in the criminal proceedings. The accused's right to silence in criminal proceedings was a factor to be considered, but that right did not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings.** What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings. The Court of Appeal also gave particular attention to the appellants' constitutional rights, a matter to which their Lordships will return." (Emphasis supplied)

[30] Their Lordships stated that it was insufficient to merely assert that there would be prejudice to the defence to the criminal case. They said at paragraph 13:

> "13. The affidavit by one of the appellants was put in general terms:
>
> > "I will be greatly prejudiced in my defence in the criminal matters if I am forced to proceed with the action herein before the criminal charges are tried."
>
> He mentioned the presumption of innocence, the burden and standard of proof and his right to remain silent in criminal proceedings. He would be obliged to testify in the civil proceedings if he were to have any opportunity of succeeding in them. He did not indicate how that testimony would prejudice him beyond the defence already filed, the material discovered and the answers given. Nor was there any specification in the course of the argument before the Board."

[31] Their Lordships stated that the person charged would continue to benefit from the presumption of innocence in the criminal proceedings, despite any obligation imposed by the civil proceedings. They stated in part at paragraph 16:

> "…The presumption of innocence stated in section 20(5) [of the Constitution] was also mentioned. The appellants will continue to be entitled to the benefit of that presumption and to the heavier onus of proof on the prosecution in the criminal proceedings. Their Lordships have already considered and found wanting any significance, in the circumstances of the present case, of the right to remain...silent in the criminal proceedings."

[32] In the face of that authority Ms Davis' submissions are not convincing that the point is arguable.

The application for stay of proceedings pending the hearing of the appeal

[33] Without an extension of time to file a notice of appeal, there is no benefit to discussing the application for a stay of proceedings pending the hearing of an appeal.

The existence of an appeal would be a prerequisite to such a discussion. Without a grant of an extension there would be no appeal.

Conclusion

[34] Miss Hollis' application to set aside or vary the order of Phillips JA cannot succeed. That decision is supported by ample authority including a previous decision of this court on the very point. She was, therefore, obliged to rely on the alternative ground of an application to extend the time within which to appeal.

[35] That alternative application, although it cleared the hurdles of excusing the delay in its being filed, cannot satisfy the requirement that the case is arguable. The panel cannot be said to have erred in refusing the application for the stay of its proceedings. In that situation there can be no leave to appeal granted and consequently no stay of proceedings pending the hearing of the appeal.

[36] It is for those reasons that I agreed that the applications should have been refused.

SINCLAIR-HAYNES JA (DISSENTING)

[37] Jade Hollis (the applicant), an attorney-at-law, in an application for court orders filed on 23 October 2015, has moved this court for, *inter alia*, the following orders:

i. That Phillips JA's order be varied or discharged.

ii. Alternatively, that the time for filing her appeal be extended and that notice of appeal filed on 18 August 2015 be allowed to stand.

iii. That the disciplinary proceedings against her consequent on the complaint of Mr Gregory Duncan be stayed pending the hearing and determination of the appeal.

The application for court orders was supported by an affidavit of the applicant filed on the same day.

Background

[38] The facts have been culled from the affidavits filed in this matter. In March 2014, the applicant instituted proceedings against Mr Gregory Duncan, who was formerly her client, to recover advances she made to him. Subsequently, on 10 March 2014, Mr Duncan complained to the Disciplinary Committee of the General Legal Council (the Committee) claiming that, in breach of the Legal Profession (Canons of Professional Ethics) Rules the applicant:

i. failed to maintain the honour and dignity of the profession;

ii. failed to handle his business with competence and due expedition;

iii acted with inexcusable or deplorable negligence in the performance of her duties; and

iv. failed to account to him for monies in her hands for his account after requests were made to do so.

Additionally, whilst she was out of the country, Mr Duncan caused criminal charges to be laid against her.

[39] The applicant was not in the island when the matter came up before the Committee on 14 March 2015. She had left Jamaica on 31 July 2014 for medical attention in respect of medical problems she had been experiencing before. Her medical treatment commenced on 1 August 2014 in the United States and on 11 December 2014 she, in the words of her doctor, had undergone major abdominal operation.

[40] Her attorney-at-law, Ms Carol Davis applied to the Committee for a stay of the hearing on 14 March 2015 on the ground that the applicant could not return to the island for the hearing because she was recovering from major surgery. Ms Davis also informed the Committee that the applicant would have been charged criminally upon her return and urged it to stay the hearing pending the outcome of the criminal charges. The application was refused on the ground that charges were not yet laid hence there was no concurrent criminal proceedings. The hearing was ordered to proceed and she was notified by the Committee that the hearing was fixed for 13 June 2015.

[41] The applicant returned to Jamaica in April 2015. Upon her return, she was charged with four counts of fraudulent conversion on 20 April 2015, and placed before the Corporate Area Resident Magistrate's Court. The complaint which grounded the charges was the same facts on which Mr Duncan's complaint to the Committee was based. The criminal matter was set for hearing on 15 May 2015 at which time it was ordered by the Resident Magistrate that an accounting in respect of the accounts of

both the applicant and Mr Duncan be conducted. The matter was consequently adjourned to 23 October 2015.

The application for stay before the Committee

[42] On 13 June 2013, the date fixed for the hearing before the Committee, an application was made on behalf of the applicant. for a stay of the hearing of Mr Duncan's complaint pending the resolution of the criminal proceedings. It was made on the ground that its continuation would "be prejudicial to a fair hearing of the criminal proceedings". Ms Davis submitted to the Committee that the facts before the Corporate Area Resident Magistrate's Court were similar to those before the Committee. It was her submission that if the applicant was forced to file an affidavit and testify, her defence in the criminal matter would be prejudiced. Further, having undergone major surgery and having to deal simultaneously with both matters have resulted in the applicant experiencing physical stress, Miss Davis submitted.

The Committee's ruling

[43] The Committee on the same day refused the application for stay and made the following ruling:

> "This is the second application being placed before this panel by [the applicant] in which she seeks a stay of these disciplinary Proceedings pending the outcome or resolution of the criminal proceedings.
>
> On the 14th March, 2015 this panel dismissed the first application for the stay and ordered that the hearing proceed. On the application today, this panel is again being urged to stay the proceedings pending resolution of the criminal proceedings.

The three basis [sic] urged are:

1. The fact that the criminal proceedings have now been initiated and Mrs. Samuels-Brown, Q.C. in her letter of June 3rd, 2015 and exhibited as JH2 to the affidavit of [the applicant] urges that there will be prejudice to [the applicant] if the hearing of the complaint were to proceed.

2. [The applicant] is suffering from undue physical stress as a consequence of the existence of the concurrent proceedings.

3. She is undergoing severe financial constraint as a result her physical state and the existence of these proceedings and as a consequence of these matters she is finding it difficult to fulfil her physical obligations.

We have given careful considerations to each ground or basis on which this application is made. We are of the considered opinion that grounds 2 and 3 cannot be relied upon in law when the panel considered that the primary object of the disciplinary proceeding is to examine the professional conduct of the Attorney and to take into account the interest of the public and the general reputation of the profession at large.

With respect to ground 1 the panel is not persuaded that the allegation contained therein are sufficient to warrant a stay of these proceedings on the basis that continuation would be prejudicial to the fair hearing of the criminal proceedings. We do not agree with this submission either and in these circumstances the application is dismissed."

Events consequential to the Committee's ruling

[44] Ms Davis sought leave of the Committee to appeal but stated that she was informed by the chairperson Mrs Benka-Coker QC that:

> "... [We] do not think that rulings are appealable. We are of the view that in law a ruling of tribunal is not appealable."

[45] In an affidavit filed 23 October 2015, Ms Dalia Davis, secretary for the Committee, averred that the panel was not accurately quoted. However the Committee's bundle titled "Index To Documents of Respondent", which was filed on 14 September 2015, contained the official transcript. At page 151 in response to Ms Davis' application for leave to appeal, the panel responded thus:

> "We are of the view that in law a ruling of a tribunal is not appealable..."

[46] The applicant consequently applied for judicial review of the decision. That application was resisted by the Committee, which argued that the appropriate remedy was in the form of an appeal. The application was consequently dismissed on 31 July 2015.

[47] On 18 August 2015, the applicant filed notice and grounds of appeal in which she cited 12 grounds challenging the decision of the Committee. An application to stay the disciplinary proceedings brought against her before the Committee, pending the hearing and determination of the appeal was also filed on 18 August 2015. That application was supported by an affidavit of the applicant filed on the same day. On 26 August 2015, an amended application for stay of the disciplinary proceedings was filed on her behalf.

The preliminary point

[48] At the hearing of the application, the Committee took a point *in limine* that the appeal was a procedural one and hence was out of time. Phillips JA agreed. Two months had by then elapsed. Ms Davis however disagreed and posited before this court that the trial of the matter had commenced hence the Committee's order was appealable. The issue before Phillips JA was whether the Committee's order was made during the trial or before. I agree with Brooks JA's position that Phillip JA's decision is unassailable.

[49] Furthermore, this court has already settled this issue as to when a procedural appeal arises in **Garth Dyche v Juliet Richards and Another** [2014] JMCA Civ 23. Phillips JA in delivering the unanimous decision of the court accepted as correct the following quotation from Words and Phrases Legally Defined, 3rd edition:

> "...this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non jury trial, enter[s] upon the hearing and examination of the facts for the purpose of determining the questions in controversy in litigation..."

In the absence of any binding authority emanating from the Privy Council, it is my view that the matter is settled.

The application to extend time

[50] Panton JA (as he then was) in **Leymon Strachan v Gleaner Co Ltd and Dudley Stokes** Motion No 12/1999, delivered 6 December 1999, at page 20 of the judgment, encapsulated the principles which ought to guide the grant of an extension

of time. Morrison JA (as he then was), on behalf of the court, in **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, at paragraphs [28] and [29], referring to the judgment of Panton JA in **Leymon Strachan**, enunciated the following:

> "[28]...This is how Panton JA (as he then was) stated the legal position:
>
> > 'The legal position may therefore be summarised thus:
> >
> > (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
> >
> > (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
> >
> > (3) In exercising its discretion, the Court will consider -
> >
> > (i) the length of the delay;
> >
> > (ii) the reasons for the delay;
> >
> > (iii) whether there is an arguable case for an appeal and;
> >
> > (iv) the degree of prejudice to the other parties if time is extended.
> >
> > (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.'
>
> [29] It seems to me to be clear from this, if I may say so with respect, perfectly accurate statement of the legal position that, among other things, the question of the merits of the proposed appeal is an important one..."

The length and reasons for the delay

[51] The appeal being procedural, the applicant was required by virtue of rule 1.11(1)(a) of the Court of Appeal Rules (CAR) to file her notice of appeal within seven days. The decision of the Committee was handed down on 13 June 2015. The notice of appeal ought to have been filed within seven days of that date, that is, by 21 June 2015. It was filed on 18 August 2015. Although the delay in filing the notice of appeal spans some two months, the court must also consider the reason for the delay.

[52] Immediately upon receiving the Committee's ruling, which the applicant considered to be unfavourable, permission was requested to appeal. She was advised by the panel which was presided over by no less than Queen's Counsel that the ruling was not appealable. It is true, as submitted by Mrs Gentles-Silvera, that the applicant is an attorney and she was represented by experienced and able counsel and they ought to have done their research. Nevertheless, that fact alone is not a reason to cast her from the seat of justice.

[53] Application was made with dispatch for judicial review. At that hearing, the very Committee which had informed that the order was not appealable opposed the application for judicial review on the ground that any remedy lay with an appeal as the decision was an order and not a ruling. Notice of appeal was consequently filed together with an application for a stay of proceedings. There is an absence of any evidence of slothfulness or contumacy on the applicant's part in pursuing her appeal.

The issue of prejudice

[54] Grounds 1, 2, 3 and 7 of the applicant's application for court orders, filed on 23 October 2015, in respect of a stay of the disciplinary proceedings, relate to the issue of prejudice. They are as follows:

> "1. The [applicant] on 13th June, 2015 made an application to the Committee of the General Legal Council for a stay of the disciplinary proceedings given that the [applicant] had been charged and faced criminal proceedings arising out of the same facts.
>
> 2. The [Committee] refused the [applicant's] Application
>
> 3. The [applicant] has filed Notice of Appeal citing 12 grounds as to why the decision of the [Committee] was in error and should be set aside.
>
> 4. ...
>
> 5. ...
>
> 6. ...
>
> 7. The [applicant] has an appeal with a good chance of success. The [applicant] would suffer serious prejudice if the stay is not granted. In particular the purpose of the appeal would be nullified. Further the [applicant] would be forced to file [an] affidavit in the disciplinary proceedings which inter alia would prejudice her right to a fair trial, her constitutional and common law rights to silence and her constitutional right not to incriminate herself."

It is necessary to examine the grounds relative to this issue in order to determine whether she has an arguable case with a chance of success.

The grounds of appeal

[55] The applicant in respect of prejudice relied on the following proposed grounds of appeal:

> "a. ...
>
> b. The panel of the Disciplinary Committee erred in dismissing the Appellant's application for stay of the disciplinary proceedings.
>
> c. The panel of the Disciplinary Committee wrongly exercised its discretion by refusing to grant the Appellant's Application for a stay of proceedings.
>
> d. The panel of the Disciplinary Committee gave no and/or no adequate consideration to the factors prejudicing the fair hearing of the criminal proceedings.
>
> e. The panel of the Disciplinary Committee erred in determining that matters related to the Appellants [sic] health and to her financial status were matters that could not be relied on in law.
>
> f. The panel of the Disciplinary Committee gave no adequate consideration to the issue of how the continuation of the proceedings would affect the Appellants [sic] right to silence in criminal proceedings which had commenced against her.
>
> g. The panel of the Disciplinary Committee gave no or no adequate consideration to the fact that by continuing the proceedings the [appellant] would be required to file an affidavit with respect to the matters complained of, which said affidavit would compromise her right to silence and her constitutional right not to incriminate herself.

h. The panel of the Disciplinary Committee erred in that they gave no or no adequate consideration to the issue of past and possible future media attention which would prejudice a fair [sic] of criminal proceedings.

i. The panel of the Disciplinary Committee erred in that they gave no adequate consideration to the issue of how the continuation of the disciplinary proceedings would affect a fair trial of the criminal proceedings.

j. The panel of the Disciplinary Committee erred in that they gave no or no adequate reasons for the rejection of the Appellants [sic] application.

k. The panel of the Disciplinary Committee erred in that they failed to balance the competing interests of the Appellant and [Mr Duncan] in deciding whether or not to grant to stay of the disciplinary proceedings.

l. The panel of the Disciplinary Committee erred in that they made a determination against the Appellant in circumstances where there was no evidence before taking issue with the Appellant's evidence or showing any detriment to [Mr Duncan]."

[56] The applicant posited that her financial and health conditions, together with exposure of her defence could prejudice the fair hearing of the criminal matter. She tendered into evidence a letter, dated 3 June 2015, from her attorney-at-law, Mrs Jacqueline Samuels Brown, QC which was attached to her affidavit, filed on 5 June 2015 in support of her application for stay of proceedings before the Committee. The letter reads:

> "You have sought my advice as to whether you should give up your constitutional right to silence in relation [sic] the

criminal charges now pending against you in the Resident Magistrate's Court for the Corporate Area. I now respond. The Charter of Rights of our Constitution has reaffirmed, in unequivocal terms, the presumption of innocence and your concomitant right to silence. Although there is case law to say that in specific cases it may be permissible to proceed in two jurisdictions; there is the caveat that this should not happen where, to a probability, you will be prejudiced.

It is my professional view that you will be so potentially prejudiced should you file an Affidavit and/or give oral testimony whether or [sic] examination in chief or cross examination in the matter now pending at the General Legal Council. I therefore further advise that you seek leave not to file an Affidavit and apply that [sic] those proceedings to be stayed. My advice is premised on, inter alia, the following:

1. You have now appeared in court on May 15, 2015 to answer to charges of four counts of fraudulent conversion and formally pleaded not guilty.

2. From documents disclosed in the criminal case, which I have preliminarily reviewed, it appears to me that the allegations in the General Legal Council case overlap with those in the criminal charges.

3. This means that any response to the disciplinary charge would necessarily be similar to your defence in the criminal case. Affidavit or oral evidence by you in response to the disciplinary charges, should that hearing proceed prior to your criminal trial, would mean that you have forfeited your right to silence.

4. …

5. In any event I believe it would be unfair to you for Mr. Duncan to be privy to your detailed defence in the disciplinary matter and thus be afforded the opportunity of using it as a dress rehearsal to adjust his evidence in the Criminal Court. I raise this particularly as I recall our 7 hour meeting with him and his lawyer when we presented our detailed account with supporting documents. To my surprise he did not reciprocate and the detailed accounting which at the end of the meeting he promised to produce was not forthcoming.

6. Bearing in mind that both the criminal proceedings and the General Legal Council proceedings were initiated by Duncan it is fair to say that he has created a situation where you are forced to defend the same issue in two different arenas at the same time. He has now created a classical situation of being able to 'have his cake and eat it'.

7. ..."

[57] By way of her affidavit of 23 October 2015, the applicant expressed concerns that the matter before the Committee was moving at a faster pace than the criminal matter with the complainant having testified and the Committee pressing her attorney to provide dates to expedite the matter. She was concerned that in the circumstances the decision of the Committee would become available before the trial concluded. She

reiterated and relied on the concerns expressed by her attorney in her letter of 3 June 2015.

[58] Her evidence was that the decision of the Committee placed her "into a totally invidious position" having been advised by her attorney not to file affidavits or give evidence. She expressed the view that she did obey her attorney's advice because if convicted she could face imprisonment whilst if she failed to file her affidavits, the disciplinary proceeding would proceed without her evidence thus risking her losing her licence.

[59] She further averred that her illness, which caused her to be away from the jurisdiction for nine months, the false accusation and resultant bad national publicity the matter had received have resulted in a decline in her practice. She has, as a result, experienced difficulty paying her attorneys. She is therefore unable to pay both counsel if both matters are dealt with concurrently. She said that she would be prejudiced in having a fair hearing in the criminal trial. She considered it important to retain reputable counsel because her liberty and her profession were at stake.

[60] Further she is a single mother of two children. Her practice is her primary means of livelihood and support for her and her family. If the disciplinary proceeding should continue without her having proper representation, this might result in her being struck from the roll of attorneys.

[61] The Committee was advised of her health issues. She was undergoing severe financial constraint as a result of her physical state and the existence of the

proceedings against her. As a consequence, she found it difficult to fulfil her physical obligations. She averred that the reason she left Jamaica, was for medical treatment for a very serious medical condition which she had been experiencing for a year.

[62] She underwent major surgery on 11 December 2014 and was still under her doctor's care as her recovery was slow because she developed complications. She said she had been warned by her doctor to avoid situations involving stress. She exhibited two medical reports dated 30 October 2014 and 9 February 2015.

[63] Having to deal with two matters concurrently increased her levels of stress and caused her bad headaches. Her chance of a fair trial in the criminal proceedings, she said, would be hampered if she were to give evidence while feeling unwell or suffering from headaches. She opined that the Committee ought to have considered these facts.

[64] In the first report, dated 30 October 2014, the doctor stated that the applicant was a patient under her care and was scheduled for preoperative appointment on 25 November 2014. She was scheduled to undergo major surgery on 12 December 2014. The doctor estimated that the post recovery period would have been eight weeks.

[65] On 9 February 2015, the doctor stated in her report that the applicant underwent major operative procedure on 11 December 2014. The doctor stated that her estimated recovery period could not be determined at that time. The applicant, the doctor stated, continued to be under her care "following a major abdominal surgery". The doctor further stated that a determination as to when the applicant would be able to resume her normal activities would be made at her follow up visit in "several weeks".

[66] Mrs Gentles-Silvera submitted that the applicant failed to provide a further medical report, the last having been provided in February 2015. The following quote is taken from paragraph 68 of Mrs Gentles-Silvera's written submissions:

> "...the evidence which the Applicant placed before the Disciplinary Committee [regarding her health] was that she had been out of Jamaica receiving medical treatment and had major surgery in December, 2014 and was still weak and found it stressful to have to deal with the criminal proceedings and the disciplinary proceedings at the same time and was getting serious headaches due to stress...the Applicant was 'scheduled for a follow up visit in several weeks at which time it will determined (sic) if she is able to resume her normal activities'."

[67] It was Mrs Gentles-Silvera's submission that she would have expected a follow up visit and an up to date medical report if such reliance was going to be placed on the state of the applicant's health and how it would be prejudicial to the criminal proceedings. She submitted that the medical report did not speak to the complications, stress nor headaches of which the applicant complained. Whilst the matter was before the Committee on 13 June 2015 there was no up to date medical report and it did not follow that what was stated by the doctor in 9 February 2015 medical report was still accurate in June 2015. It was also her submission that the doctor clearly expected to see the applicant again as in 9 February 2015 report she stated that the applicant was scheduled for a follow up visit in several weeks to determine if she (the applicant) could resume her normal activities.

Prejudice to Mr Duncan

[68] It was also the applicant's evidence that the respondent provided no evidence of any prejudice he is likely to suffer if her application for a stay of the proceedings were to be granted. She pointed out that before the Committee he is self-represented and in the criminal trial, he is represented by the clerk of court. He therefore has minimal expenses. In the circumstances, she said that the Committee exercised its discretion wrongly. It is her belief that her appeal would be stifled and she would suffer great prejudice if a stay is refused.

Whether the proposed appeal is arguable with a chance of success

[69] The medical reports are instructive. The 30 October 2014 medical report contemplated a recovery period of eight weeks. The doctor was however unable to provide a recovery period in February 2015, approximately two months after the operation. Indeed she desired to examine her "several weeks" after her last visit in February 2015. That fact is supportive of the applicant's evidence that her recovery was slow.

[70] In light of the doctor's inability in February to provide a recovery period the applicant's evidence of headaches caused by the stress of handling two matters against her simultaneously having recently undergone "major abdominal operation" warranted consideration by the Committee.

[71] The Committee noted in its reasons for refusing her application for a stay, that at the first hearing in March 2015 she did not attend. At that hearing an application was

made on her behalf on the ground that she was out of the country and had just undergone major abdominal operation. At that point there was no medical before the court. It was however, the word of counsel, an officer of the court. On 13 June 2015, the Committee was however in possession of her medical reports which confirmed that she had in fact undergone major surgery out of the jurisdiction in December 2014. In the circumstances, the fact that an application for an adjournment was made, ought not to have been held against her.

[72] The reason proffered by the Committee for rejecting the applicant's application on the grounds of her health and finances; that it could not be relied on in law, was contrary to the authorities. There was no attempt to weigh those considerations in the scale of justice. The Committee expressed concerns only about examining the professional conduct of the attorney, the interest of the public and the reputation of the legal profession. Although those are vital considerations, those ought not to be the Committee's only considerations. The Committee merely recited the bases upon which the applicant contended prejudice, by stating:

> "The three bases [sic] urged are:
>
> 1. The fact that the criminal proceedings have now being initiated and Mrs Samuels-Brown QC in her letter dated June 3, 2015, exhibited as JH2 to the Affidavit of [the applicant], urges that there will be prejudice to [the applicant] if the hearing of the complaint were to proceed;
>
> 2. That [the applicant] is suffering from undue physical stress as a consequence of the existence of the concurrent proceedings; and

3. She is undergoing severe financial constraints as a result her physical state and the existence of these proceedings, and as a consequence of these matters she is finding it difficult to fulfil her physical obligations."

[73] The applicant's application ought to have been accorded the same treatment as that of Mr Duncan's. The Committee was mandated to ensure that justice was done to both the applicant and Mr Duncan. To achieve that mandate, both parties were entitled to proper consideration being given to their respective cases.

[74] The Committee's dismissal of the applicant's ill health and consequential financial difficulties as not being matters that could be relied on is evident in its statement that:

> "...the primary object of the disciplinary proceeding [sic] is to examine the professional conduct of the Attorney and to take into account the interest of the public and the general reputation of the profession at large."

[75] However, this court in dealing with the issue of a stay in **Donald Panton, Janet Panton and Edwin Douglas v Financial Institutions Services Limited** SCCA No 110/2000, delivered on 25 October 2001, clearly stated that the primary consideration was to do justice between the parties. At page 7, Langrin JA said:

> "The determination of whether to stay the civil proceedings in light of a pending or possible criminal prosecution involves the exercise of a discretion by the Judge hearing the application and in the exercise of that discretion, the primary consideration is to do justice between the parties, with the burden being on the defendants to show that if the civil action is not stayed there would be some real risk of

injustice (not merely loss of a tactical advantage) to them in the criminal proceedings."

[76] Furthermore, section 12B(1) of the Legal Profession Act conferred upon the Committee a discretion with respect to the grant of an application for a stay of disciplinary proceedings in the face of pending criminal proceedings, if to proceed with the disciplinary proceedings would prejudice the applicant's criminal matter. The section provides:

> "12B – (1) It is hereby declared, for the avoidance of doubt that where—
>
> a) an application made in respect of an attorney pursuant to section 12 is pending; and
>
> b) criminal proceedings arising out of the facts or circumstances which form the basis of the application are also pending,
>
> the Committee may proceed to hear and determine the application, **unless to do so would, in the opinion of the Committee, be prejudicial to the fair hearing of the pending criminal proceedings**." (Emphasis mine)

[77] Mrs Gentles-Silvera placed heavy reliance on the Court of Appeal decision in **Donald Panton, Janet Panton and Edwin Douglas v Financial Institutions Services Limited** (with which the Privy Council concurred in its judgment delivered on 15 December 2003), that the application to have the criminal proceeding heard before that of the disciplinary hearing ought not to be granted unless there was real risk of injustice, "not merely loss of a tactical advantage". In **Donald Panton, Janet Panton**

and Edwin Douglas v Financial Institutions Services Limited, the appellants, like the applicant in the instant case, were defendants in both civil and criminal proceedings. The appellants' application for a stay of the civil proceedings until the completion of the criminal matter was refused. Their application to the Privy Council suffered a similar fate. The Privy Council did not find that the principle of the right to remain silent in the criminal matter was applicable to the circumstances of that case.

[78] It pointed out that the Court of Appeal had duly balanced "justice between the parties". Their Lordships said, at paragraph 11, that:

> "...The plaintiff had the right to have its civil claim decided. It was for the defendants to show why that right should be delayed. They had to point to a real and not merely a notional risk of injustice. A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in the criminal proceedings. The accused's right to silence in criminal proceedings was a factor to be considered, but that right did not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings. What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings..."

[79] In reviewing the decision of the Court of Appeal, their Lordships of the Privy Council found that the Court of Appeal had considered the constitutional rights of the appellants. On the other hand they found, at paragraph 13, that the appellants:

> "...did not indicate how that testimony would prejudice him beyond the defence already filed, the material discovered and the answers given. Nor was there any specification in the course of the argument before the Board."

[80] In the instant case, unlike **Donald Panton, Janet Panton and Edwin Douglas v Financial Institutions Services Limited** in which a defence had been filed and the discovery process had been undertaken, the applicant has not filed any affidavits nor has she disclosed her defence. The facts and circumstances of the instant case in that regard are therefore altogether dissimilar from that of **Donald Panton, Janet Panton and Edwin Douglas v Financial Institutions Services Limited.** The applicant in the instant case has outlined the areas in which she will suffer prejudice if a stay of the disciplinary proceedings is not granted.

[81] For the following reasons, I am of the view that the applicant has demonstrated that she has an arguable case with a chance of succeeding on her appeal:

1. The Committee's failure to accord any weight to the applicant's complaint that she would be prejudiced in the criminal matter against her by virtue of the financial difficulties and the physical stress she encountered in having to deal concurrently with the disciplinary proceedings shortly after having undergone major surgery.

2. The Committee's consideration as its primary object, "to examine the professional conduct of the attorney and to take into account the interest of the public and the general reputation of the Profession", resulted in

the subordination of the overriding responsibility in all circumstances, to do justice between the parties.

3. The absence of particulars as to why the Committee was unimpressed by the applicant's allegation that her testimony at the disciplinary hearing would result in her forfeiting her right to silence thus prejudicing the fair hearing of the criminal matter.

For these reasons I cannot agree that the applicant's application ought to be refused.

P WILLIAMS JA (AG)

[82] I have read, in draft, the reasons for judgment of my brother Brooks JA and my sister Sinclair-Haynes JA. Brooks JA's reasoning accurately reflects the bases on which I agreed that the applications should be refused.