

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 2/2016

APPLICATION NO 56/2016

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)**

BETWEEN	HUMPHREY LEE MCPHERSON	APPLICANT
AND	THE GENERAL LEGAL COUNCIL	RESPONDENT

Applicant in person

Mrs Sandra Minott-Phillips QC and Miss Rachel McLarty instructed by Myers Fletcher and Gordon for the respondent

30 May and 9 June 2016

PHILLIPS JA

[1] I have read in draft the judgment of my sister Edwards JA (Ag) and I agree with the reasoning and the conclusion.

P WILLIAMS JA (AG)

[2] I too have read in draft the judgment of my sister Edwards JA (Ag) and agree with her reasoning and her conclusion. I have nothing to add.

EDWARDS JA (AG)

Introduction

[3] On 30 January 2016, the Disciplinary Committee of the General Legal Counsel, after hearing a complaint brought by a former client of Mr Humphrey Lee McPherson, made the following orders:

“SANCTIONS. The panel imposes the following sanctions in keeping with section 12 (4) of the Legal Profession Act as amended

- (1) the panel orders that the attorney Humphrey McPherson pay to the complainant’s estate the sum of \$1,820,000.00 with interest at the rate of 6% from February 2004 the date of the statement of account sent by the attorney to the complainant until payment.
- (2) That the attorney be struck from the Roll of Attorneys-at-law entitled to practise in Jamaica.
- (3) That the attorney pays costs of \$750,000.00 to the attorneys-at-law for the complainant Bailey Terrelonge Allen.”

[4] On the 14 March 2016 Mr McPherson filed a notice and grounds of appeal challenging the orders made against him by the Disciplinary Committee. He also filed Notice of Application for Court Orders No (56/2016) seeking inter alia, the following order:

“That the judgment of the Disciplinary Committee of the General Legal Council delivered on 30th day January, [sic] 2016, be stayed and the matter reverted to the status quo, prior to aforesaid date, pending the determination of this appeal.”

[5] The notice and grounds of appeal were served on the named respondent, the General Legal Council (GLC). In response the GLC filed a "Notice of Respondent's Representation and of Preliminary Point" on 31 March 2016, seeking an order to strike out the appeal on the basis that it was not properly constituted and was, therefore, a nullity. The preliminary point raised in the notice was that:

" ... the appeal was not made within the time stipulated in section 16(1) of the Legal Profession Act (LPA) and Rule 5(1) of the Disciplinary Committee (Appeal Rules) 1972 (being 28 days from the date of the pronouncement of the decision appealed against), nor was an extension of time granted to the Appellant by the Court."

In its notice the GLC also opposed the application for a stay of the Disciplinary Committee's decision on the same grounds as that stated in its preliminary objection.

[6] Mr McPherson, in response, filed a "notice of opposition to preliminary point" on 16 May 2016. In his "notice of opposition", Mr McPherson asked the court to dismiss the preliminary point "as illegal, null and void and/or a continuous pattern on the part of the respondent to attempt to obstruct and pervert the course of public justice". The basis of his opposition to the preliminary point can be summarized as follows:

1. This appeal is properly constituted pursuant to the Court of Appeal Rules, (CAR);
2. The appeal was made within the time stipulated in the CAR 1.11(1)(c) where the time allowed is "within 42 days of the date the order or

judgment appealed against was served on the appellant [sic]". The judgment was served on the appellant on 2 February 2016;

3. Section 16(1) of the Legal Profession Act and rule 5(1) of the Disciplinary Committee (Appeal Rules) 1972 stipulating 28 days from the date of pronouncement of the decision is irrelevant; the respondent inaccurately joins different appellate proceedings pursuant to an order and a decision of the Disciplinary Committee;
4. Section 16(1) of the LPA speaks to an Order while the CAR 1.11(1)(c) speaks to an order or judgment and this appeal concerns a judgment of the Disciplinary Committee;
5. The Disciplinary Committee (Appeal Rules) 1972 speaks to appealing a decision not an order or judgment of the Disciplinary Committee and does not fall within the CAR Rule 1.11(1)(c) which speaks to order and judgment, not a decision.
6. Under these circumstances there is no need for the court to grant an extension of time to the appellant.

[7] The matter was set for hearing on 24 May 2016. On that date due to Mr McPherson's absence the matter was adjourned until 30 May 2016. On 30 May 2016 both parties were present. Mr McPherson appeared in person. In the light of the notice

filed by the GLC, the court heard the preliminary objection challenging the validity of the notice of appeal first.

The Submissions

[8] Mrs Minott-Phillips QC submitted on behalf of the GLC that the notice of appeal filed is a nullity because it was filed outside of the time limited by the relevant rules for doing so and no leave was applied for or granted to extend the time. Learned Queen's Counsel submitted that the appeal is from a decision of the Disciplinary Committee and the orders made included a striking off the Roll. She submitted further that the Legal Profession Act (LPA) dealt with such appeals and section 16(1) of that Act is the relevant section in relation to this appeal.

[9] It was also submitted that as a result the relevant rules of court in relation to section 16(1) of the LPA are the Disciplinary Committee (Appeal Rules) of 1972. Learned Queen's Counsel also pointed out that rule 2, the definition section of those rules, makes it clear that the rules were made to govern appeals to the Court of Appeal under sections 16 and 18 of the LPA.

[10] It was also contended that in relation to the time within which to file an appeal the applicable rule was rule 5(1) of the Disciplinary Committee (Appeal Rules) 1972. This rule it was submitted specifies that an appeal from the Disciplinary Committee should be filed "within 28 days from the date of the pronouncement of the order findings or decision appealed against".

[11] It was further submitted that the order appealed was pronounced on 30 January 2016 and the notice was filed and served on 14 March 2016, some 43 days after the date of the decision of the Disciplinary Committee. It was also argued that the prospective appellant had not applied for nor had he obtained an extension of the time within which to file and serve the notice of appeal.

[12] Learned Queen's Counsel pointed out that as a result the notice of appeal filed is a nullity and there is no proper appeal in existence on which to grant a stay. Mrs Minott-Phillips then drew the court's attention to the decision of **Eileen Crosbie Salmon v The GLC** [2013] JMCA App 33, which was a matter heard by a single judge of this court, on which she placed reliance.

[13] It was submitted that in **Crosbie Salmon**, McIntosh JA considered a similar preliminary objection as to whether the notice of appeal before her was a nullity having not been made within the time stipulated in section 16(1) of the LPA and rule 5(1) of the Disciplinary Committee (Appeal Rules). The learned judge of appeal who heard the application was required to determine whether, by virtue of the LPA, the relevant rules governing appeals from the decisions of the disciplinary committee were the Disciplinary Committee (Appeal Rules) or whether those rules had been repealed by the CAR. She found that the Disciplinary Committee (Appeal Rules) were not repealed and were extant and that they were the governing rules not the CAR.

[14] Learned Queen's Counsel also submitted that in the instant case the success or otherwise of the preliminary point is dependent on which rule is applicable. She also

pointed out that based on the Disciplinary Committee (Appeal Rules) there are burdens placed on the GLC as the respondent that are usually placed on the appellant under the CAR. The GLC is expected to act with alacrity, as per the rules, and the appellant has 28 days to file an appeal.

[15] It was argued that, since the appeal was not filed within the time prescribed by the relevant provisions it was not properly before the court. Further that any appeal filed otherwise than in accordance with the provisions of the applicable law for bringing an appeal was a nullity and of no effect. In support of this submission learned Queen's Counsel relied on the Court of Appeal's decision in **Strachan v The Gleaner Company** SCCA No 54/1997 judgment, delivered 8 December 1998, where it was held that a non-compliance with the provisions of the law applicable to bringing an appeal, is a nullity and of no effect and goes to the jurisdiction of the Court to hear the appeal. (See **Crosbie Salmon** at paragraph 21.)

[16] Mrs Minott-Phillips pointed the court to section 9(b) of the Judicature (Appellate Jurisdiction) Act (JAJA) which states that:

"There shall be vested in the Court of Appeal such other jurisdiction and powers as may be conferred upon them by this or any other enactment."

She asked the court to note that the LPA by virtue of section 16(1) conferred jurisdiction on the Court of Appeal to hear appeals from the Disciplinary Committee's proceedings; and is one such enactment as provided for by section 9(b) of JAJA.

[17] Mr McPherson submitted that there is a distinction between the Disciplinary Committee (Appeal Rules) and the CAR. He argued that the CAR dealt with judgments and the Disciplinary Committee rules in rule 5(1) dealt with the pronouncements of orders findings and decisions based on section 6 of the LPA. He argued that he was not appealing any order, finding or decision of the Disciplinary Committee but was in fact appealing its judgment and therefore the appeal or proceedings in the notice of appeal is not pursuant to the LPA, but was filed pursuant to the CAR 1.9 and 1.10.

[18] He went on further to submit that it was possible for an appellant to appeal directly to the Court of Appeal by virtue of the CAR. In response to queries from the court, he submitted that the Disciplinary Committee (Appeal Rules) only applied if the appeal was being made pursuant to the LPA. Mr McPherson insisted that the Disciplinary Committee Rules only applied to findings, orders and decisions and that his appeal was in relation to a judgment of the Disciplinary Committee made on 30 January 2016. In support of his contention he brought the court's attention to the fact that the Disciplinary Committee's ruling was contained in a document entitled "Judgment of the Disciplinary Committee". Mr McPherson also submitted that the notice of appeal filed on 14 March 2016 was properly filed within the 42 days required by the CAR.

[19] Mrs Minott-Phillips was asked to respond to Mr McPherson's submission that he was appealing a judgment of the Disciplinary Committee and not an order, finding or decision. Learned Queen's Counsel argued that the distinction being made by Mr McPherson was meaningless. She noted that the courts routinely handed down judgments but at the end of the day it is an order which is made. She also pointed out

that the CAR speaks to orders of the court as well. She dismissed his assertions that there is a dual approach in accessing the Court of Appeal in relation to appeals from the Disciplinary Committee and argued that he had no choice in the matter.

Analysis

[20] The issue to be determined in this matter is which of the rules of court is applicable to an appeal from the Disciplinary Committee of the GLC. In particular, whether it is the CAR or the Disciplinary Committee (Appeal Rules) which govern appeals under the LPA and which is also referred to in section 16 of that Act. In the light of this it is necessary to set out the relevant provisions dealing with the jurisdiction of the Court of Appeal.

[21] It is perhaps convenient to start with the provisions of JAJA. Section 9 of JAJA which deals with the jurisdiction of the Court of Appeal states:

“There shall be vested in the Court of Appeal-

(a) subject to the provisions of this Act the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;

(b) **such other jurisdiction and powers as may be conferred upon them by this or any other enactment.**” (Emphasis added)

[22] The LPA and the Disciplinary Committee (Appeal Rules) govern all aspects of the legal profession including the requirements for qualification, the conduct of attorneys-at-law licensed to practise law in Jamaica and all disciplinary proceedings against any such attorney. In the light of the fact that the decision being challenged emanates from

proceedings pursuant to the LPA it will also be helpful to set out the relevant sections of that Act. Sections 16 and 18 gives the Court of Appeal the jurisdiction to hear appeals challenging decisions made pursuant to the LPA. Section 16 deals specifically with appeals from the Disciplinary Committee and provides that such appeals are to be made to the Court of Appeal. Section 16 states:

“(1) An appeal against any order made by the Committee under this act **shall lie to the Court of Appeal** by way of rehearing at the instance of the attorney or the person aggrieved to whom the application relates, including the Registrar of the Supreme Court or any member of the Council, and **every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court**.

(2) The lodging of an appeal under subsection (1) against an order of the Committee shall not operate as a stay of execution of the order unless the Court of Appeal otherwise directs.” (Emphasis added)

[23] It is clear therefore, that section 16(1) of the LPA established the jurisdiction of the Court of Appeal to hear appeals from the decision of the Disciplinary Committee of the General Legal Council. The section also provides that the procedure to be employed or adopted in appealing any decision of the Disciplinary Committee is to be governed by the rules of court.

[24] Mr McPherson is contending that he filed his appeal pursuant to the CAR and that the time limited to file an appeal under those rules would be 42 days as stipulated by those rules. On the other hand, it was learned Queen’s Counsel contention that the Disciplinary Committee (Appeal Rules) would be the applicable rules of court.

[25] Mr McPherson did not cite any authority in support of his submission that a distinction could be drawn between an appeal of a judgment of the Disciplinary Committee and an appeal of its orders, finding or decisions. This is perhaps not surprising since, as learned Queen's Counsel noted, no meaningful distinction can be made for the purposes of an appeal. It is common practice for these words to be used interchangeably and Mr McPherson's only basis for drawing such a distinction seems to be the fact that the Disciplinary Committee's findings and reasons for the orders that it ultimately made were encompassed in a document entitled "Judgment of the Disciplinary Committee".

[26] The real issue here is that the CAR (as amended) allows 42 days under rule 1.11(1) for the filing of an appeal from the date of judgment whilst under the Disciplinary Committee (Appeal Rules), rule 5(1) permits a shorter period of 28 days within which to file the appeal. The dilemma facing Mr McPherson is that if rule 5(1) is the applicable rule, his notice of appeal is filed out of time and learned Queen's Counsel's contention that it is a nullity would be correct.

[27] The CAR 1.11(1) provides:

"1.11 (1) The notice of appeal must be filed at the registry and served in accordance with rule 1.15 -

(a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;

(b) where permission is required, within 14 days of the date when such permission was granted.; or

(c) in the case of any other appeal within 42 days of the date on which the order or judgment appealed against was made.” (Emphasis added)

[28] Whilst rule 5(1) of the Disciplinary Committee Appeal Rules states:

“The notice of appeal shall be filed with the Registrar and a copy thereof shall be served on the Secretary of the Committee or Council as the case may be and on every party directly affected by the **appeal within 28 days from the date of the pronouncement of the order findings or decision appealed against.**” (Emphasis added)

[29] Mr McPherson having filed his notice of appeal well after 28 days required by rule 5(1) had passed submitted that the notice of appeal had been filed within the 42 days stipulated by the CAR. This may very well be the case but if the provisions of the CAR are not applicable then he would still need to apply for an extension of time before the appeal can be allowed to proceed.

[30] He was unable to argue that section 16 does not include final orders which would bring legal proceedings to an end which made it synonymous with or equivalent to a judgment. The decision being appealed is the final decision or order pursuant to the Disciplinary Committee’s powers under the LPA. In legal parlance “order” is used in a number of ways and based on the context will take on a different meaning. Further, these words are often used interchangeably. “Order” is also used to mean, based on the context, directions or directives given in legal proceedings, as well as the judgment handed down when a matter is finally disposed of.

[31] In **R v Recorder of Oxford, ex p Brasenose College** [1969] 3 All ER 428 at 431 Bridge J in considering the meaning of the word "order" opined:

"The word 'order' in relation to legal proceedings in itself is ambiguous; clearly it may mean, perhaps, a linguistic purist would say that its most accurate connotation was to indicate, an order requiring an affirmative course of action to be taken in pursuance of the order, but it is equally clear that the word may have a much wider meaning covering in effect all decisions of courts."

[32] The reference in section 16 of the LPA to "any order made by the Committee" includes final orders made after an application has been heard in full and a determination made. In **R v Recorder of Oxford** Lord Parker CJ, in construing the meaning to be ascribed to the word "order" in a statute, made the following statement:

"...it is in my mind perfectly clear that looking at the sections in question in this Act, the answer can only be that the dismissal of a complaint was an order made on the determination of the complaint."

[33] An examination of the relevant sections dealing with the powers of the Disciplinary Committee will be helpful in determining whether section 16 of the LPA includes orders made on the determination of the application. Section 12(4) (a) – (f) list the possible orders that the Committee is empowered or authorised to make after hearing an application under the section. Section 12(4) states:

"On the hearing of any such application the Committee may, as it thinks just, make one or more of the following orders as to –

(d) Striking off the Roll the name of the attorney to whom the application relates;

- (e) Suspending the attorney from practice on such conditions as it may determine;
 - (f) The imposition on the attorney of such fine as the Committee thinks proper;
 - (g) Subjecting the attorney to a reprimand;
 - (h) The payment by any party of costs of such sum as the Committee considers a reasonable contribution towards costs; and
 - (i) The payment by the attorney of such sum by way of restitution as it may consider reasonable,
- so, however, that orders under paragraphs (a) and (b) shall not be made together."

[34] Section 15 then stipulates how the Disciplinary Committee should record its decision. It is clear from the powers of the Disciplinary Committee under section 12 and the provisions of section 15 that the orders contemplated by section 16 of the LPA where it states "[a]n appeal against 'any order' ..." includes final orders made after the hearing of evidence in the proceedings. The orders made in relation to Mr McPherson's matter are final orders and should be appealed or challenged based on section 16 of the LPA.

[35] The Disciplinary Committee (Appeal Rules) specifically states that the CAR would be applicable to the extent that it does not conflict with its provisions. Rule 11 states:

"In so far as they do not conflict with these Rules, **the Court of Appeal Rules**, 1962 Title I – Preliminary and Title II – Civil Appeals from the Supreme Court shall apply to appeals under Ss. 16 or 18 of the Act as they apply to civil appeals from the Supreme Court." (Emphasis added)

[36] In addition, the rule of statutory interpretation which states that a general provision cannot derogate from a special provision would also be useful in resolving this matter. Since the Disciplinary Committee (Appeal Rules) were specifically created to regulate the procedure for pursuing appeals pursuant to the LPA those would be the applicable rules and not the CAR which are general rules in relation to appeals.

[37] In **Crosbie Salmon** the learned judge of appeal, in examining the relevant provisions of the LPA and the provisions of both the Disciplinary Committee (Appeal Rules) and the CAR in order to determine whether the former had been repealed by the latter, ruled at paragraph [14] that:

“On close examination of the relevant provisions of the Act, the DCR and the CAR I concluded that the appellant’s submissions concerning the repeal of the DCR are misconceived and that learned Queen’s Counsel’s submission that the DCR are extant is quite correct. The DCR, made pursuant to the Judicature (Rules of Court) Law and the Act, together with the prevailing court of appeal rules are the rules of court for the purposes of section 16(1) of the Act. They are separate rules covering the same subject matter, working together except where the CAR conflicts with the DCR, in which event, by virtue of rule 11 of the DCR, the DCR prevails...”

[38] In **Crosbie Salmon** counsel’s approach was to submit that the Disciplinary Committee (Appeal Rules) had been repealed. That submission failed. In this case, Mr McPherson took the novel approach that there were two ways in which one may access the Court of Appeal to appeal a decision of the Disciplinary Committee. He contends that the Disciplinary Committee (Appeal Rules) would only be applicable if he was appealing an order, finding or decision of the Disciplinary Committee. He further

contends that since he is appealing its judgment, then his access to the Court of Appeal is regulated by the CAR. However, it is clear that in order to appeal a decision of the Disciplinary Committee there is but one approach and so Mr McPherson's submissions are misconceived. This is because section 9 of JAJA makes it clear that jurisdiction is vested in the Court of Appeal by this section and any other enactment conferring such jurisdiction. Where the jurisdiction of the Court of Appeal is established by a specific enactment, the general provisions are not applicable unless there is a lacuna in the specific provisions. An appellant does not have the option of selecting which jurisdiction to utilize. In the instant case the statute that gives the Court of Appeal jurisdiction is the LPA and the mode of accessing the court must be through the means provided by that Act.

[39] Mr McPherson's contention that he is appealing a judgment and was therefore exercising a different option or route in his appeal by going under the CAR is untenable and unsupported by any authority. In any event the sanctions which were imposed on Mr McPherson are contained in the orders made by the Disciplinary Committee as set out in paragraph 3 and those orders are what he is ultimately seeking to appeal against.

Conclusion

[40] In light of the above, the rules of court that would be applicable in determining the time within which an appeal challenging the decision of the Disciplinary Committee should be filed are the Disciplinary Committee (Appeal Rules). The LPA also contemplated that section 16 would be applicable to any challenge in relation to all

orders made by the Disciplinary Committee including orders made that determined the applications.

[41] The time within which the notice and grounds of appeal should have been filed is 28 days as stated in rule 5(1) of the Disciplinary Committee (Appeal Rules) 1972. The appeal filed by Mr McPherson was filed after the time stipulated by those rules and is therefore not properly before the court. The notice and grounds of appeal filed are therefore null and void and of no effect.

[42] At this stage Mr McPherson would need to apply for an extension of time in order to rectify or regularise the documents already filed if he still intends to pursue the appeal. It should be noted that rule 7 of the Disciplinary Committee (Appeal Rules) gives the Court of Appeal the jurisdiction to abridge or enlarge the time prescribed by the Rules "where this is required in the interest of justice".

PHILLIPS JA

ORDER

1. The preliminary point succeeds;
2. The document filed 14 March 2016 and headed "Notice of Appeal" having been filed outside the prescribed time allotted by the Disciplinary Committee (Appeal Rules) is declared a nullity and is hereby struck out;
3. Costs to the General Legal Council to be agreed or taxed.

