[2014] JMCA App 27

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 1/2014

APPLICATION NO 77/2014

BETWEEN	**ARLEAN BECKFORD**	**APPLICANT**
AND	**DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Paul Beswick, Miss Carissa Bryan, Miss Keiva Marshall and Kayode Smith instructed by Juliet Bailey and Company for the applicant

Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the respondent

10, 17 June, 8 July and 19 August 2014

IN CHAMBERS

PHILLIPS JA

[1] This is an application in which Miss Beckford seeks a stay of execution of the judgment of the Disciplinary Committee of the General Legal Council (the Committee) delivered on 1 May 2014, in respect of complaint no 52/2013, in the matter of Winston Rowe v Arlean Beckford, pending the hearing of the appeal filed by her (paragraph 1 of the application).

[2] The decision of the Committee was that:

> "1. The Attorney Arlean Beckford is suspended [from] practice for a period of two (2) years from the date of this judgment.
>
> 2. The Attorney Arlean Beckford is to pay costs of these proceedings in the sum of $125,000.00 of which $50,000.00 is to be paid to the complainant and $75,000.00 is to be paid to the General Legal Council."

The proceedings below

[3] The complaint in this matter was filed on 31 January 2013 by Mr Winston Rowe. It concerned a sale of land transaction wherein Mr Rowe complained that the applicant had collected the deposit and closing costs of approximately $2,000,000.00, but the transaction had not been completed. The grounds of his complaint were that he had not received information in relation to the progress of his business when he had reasonably requested the same; and that the applicant had acted with inexcusable negligence in the performance of her duties, and in so doing, had failed to maintain the honour and dignity of the profession. The notice of hearing was posted on 20 June 2013 for the hearing date of 13 July 2013. On that day the applicant attended and, according to the notes of proceedings of that day, indicated to the panel that she had received a copy of the complaint when it had been filed previously, but had not responded to it, and at that moment could not recall what her position was in relation to it. She indicated that, although she was prepared to read a copy of the complaint given to her then by the panel, she had only received the notice of hearing the day

before, and she asked the panel not to proceed with the hearing of the complaint as she had received notice of the hearing late.

[4] The panel was of the view that the applicant, who had received the complaint before the receipt of the notice of hearing, ought to have responded to the Committee in respect of the complaint, but had failed to do so. Additionally, the complainant who was present indicated that he was migrating and his daughter "was kicked out of school because of no execution of sale". The panel therefore, although the applicant stated that she was not in a position to proceed on that occasion, refused her application for an adjournment and commenced hearing the evidence of the complainant. By the end of that day's hearing, eight exhibits had been tendered. These related to: correspondence from the applicant to the complainant giving details of the transaction and sending documents for his signature; the applicant writing to the registrar of the Caribbean Maritime Institute where the complainant's daughter was attending, indicating that funds would soon be available from the sale transaction; the applicant submitting a preliminary statement of account showing a balance due to the complainant of $5,232,750.00; the receipt by the applicant of the certificate of title for the premises; the receipt by the complainant when the title was returned to him; the application setting out the allegations against the applicant; and a notice requiring completion of the sale, made on behalf of MacKoy Dannavan Mckenzie, signed by his attorneys-at-law.

[5] The hearing was adjourned for continuation, with the Committee noting that the applicant had the right to cross-examine the complainant. On 14 September 2013, the

matter was adjourned as the full panel hearing the matter was not present. However, the applicant and the complainant were present. The continuation of the hearing was re-scheduled for 2 November 2013.

[6] On 2 November 2013 both the complainant and the applicant were again in attendance. On that date the applicant made two preliminary objections that:

1. The panel was not properly constituted as Mrs Debra McDonald was currently sitting on another panel that was hearing allegations against the applicant similar to the matter that was before the panel and would therefore be presumed to be biased.

2. The matter should be stayed until criminal proceedings in the Resident Magistrate's Court against the applicant were through as the findings of the Committee would greatly prejudice the applicant.

[7] It was the applicant's position that Mrs McDonald and two other members of the Committee had commenced a hearing in another related complaint, and had received evidence from the complainant in the instant matter in respect of the said transaction, namely the purchase of property being a lot of land with a two bedroom house constructed thereon, at 122 Gordon Boulevard, Ensom City, in the parish of Saint Catherine, and from the complainant and Tesha Norman, the other party in another matter with similar facts. It was submitted that Mrs McDonald would have known of that situation, yet she had not informed the panel hearing the complaint relating to the instant case of, nor had she disqualified herself. This, the applicant said, tainted Mrs

McDonald and the panel hearing the matter, and she would not participate in the hearing before the panel thus constituted. The Committee rejected both preliminary objections and the applicant refused to continue to participate in the proceedings. The Committee adjourned for the delivery of the judgment which was given on 1 May 2014, when the orders set out in paragraph [2] were made.

[8] In paragraph 22 of the decision of the Committee, pursuant to section 15(1) of the Legal Profession Act, the Committee set out its findings which are summarised below:

1. The complainant as vendor had retained the applicant to act on his behalf in a land transaction. The applicant accepted the retainer to act in the matter. The applicant represented that she had prepared the agreement for sale but the complainant had not received a copy of the same. A notice requiring completion of the sale was served on the complainant, which made reference to an agreement for sale between the parties and stated that the purchaser was ready and willing to execute the transfer and pay the balance of the purchase price in accordance with the terms of the agreement.

2. Although the agreement for sale was not produced, it was reasonable to conclude and the Committee so concluded that an agreement for sale had been executed by the parties and a deposit paid to the applicant.

3. The applicant had failed or neglected to forward to the National Housing Trust, the purchaser's lender, the stamped documents and the title in order for the sale to be completed.

4. The failure to take steps to complete the transaction resulted in the complainant being unable to assist his daughter in completing her course of study at the Caribbean Maritime Institute, and he also lost the opportunity to purchase another property in May Pen in the parish of Clarendon. He had obviously suffered loss and inconvenience due to the applicant's actions.

5. On 25 January 2013 the applicant returned the complainant's duplicate certificate of title in respect of the land that was the subject of the transaction, without any explanation as to what had become of the same.

6. The complainant made several requests for information as to the status of the transaction, but he was not provided with any information. The applicant also failed or neglected to advise the complainant as to the payment of the deposit and what had happened to it. She also failed or neglected to account for any sums paid to her.

[9] The Committee therefore found that as there was no information that there were any specific conditions of sale that would have prolonged the completion of the sale, the sale which would have commenced about February 2012, ought to have been completed in July 2012. However, that had not been done, and consequently, the

notice to complete had been issued in November 2012, yet still the sale had not been completed, and the certificate of title for the property had been returned to the complainant in January 2013, without explanation. On these facts the Committee felt that the applicant's conduct constituted neglect of a deplorable nature and found the applicant guilty of professional misconduct in breach of canon 1(b), canon IV (r), canon IV (s), and canon VII (b) (ii) of the Legal Profession (Canons of Professional Ethics Rules) 1978.

[10] Having made those findings the Committee made the following statement under the heading "SANCTION" at paragraph 26 of the decision:

> "With regard to the findings and the misconduct on the part of the attorney, the panel is of the view that it is unacceptable and inexcusable for an attorney charged with the conduct of a matter on behalf of a client to fail or refuse to provide information or documentation relevant in the matter to the client. The fundamental nature of the relationship between an attorney and his/her client is that of Principal and Agent. In the circumstances, the Principal is entitled to have full knowledge of the details of the transaction at all times. Further, the Attorney should at all times protect and advance the interests of the client and take all steps as are necessary to avoid acting in a manner which will result in prejudice to the client."

The committee accordingly made the orders referred to previously in paragraph [2] herein.

The appeal

[11] The applicant filed her notice of appeal on 11 May 2014, asking this court to reverse the decision of the Committee, and to give judgment in favour of the applicant. There were 14 grounds of appeal stated in the notice of appeal which as framed, in my view, seemed to be addressing the applicant's contention that her appeal has a good chance of success. In essence, these were that the panel as constituted ought not to have heard the matter as it resulted in prejudice to the applicant, because she had not received a fair hearing, as the matter had not been heard by an independent and impartial tribunal; the applicant faces criminal proceedings in the Resident Magistrate's Court and the decision would prejudice the outcome in that court; the Committee failed to consider and assess matters which were properly before it, including that the complainant had not paid for work undertaken by the applicant, and so had come to a wrong conclusion; the Committee had breached the rules of natural justice; the Committee had made orders which were harsh and oppressive; the Committee had treated with certain evidence improperly; and the Committee had failed to permit the applicant sufficient time to prepare and to mount a good, proper and adequate defence.

[12] On 29 May 2014, the applicant filed an amended notice of appeal, which contained five amended grounds of appeal. These new grounds of appeal all referred to service of the notice of hearing in respect of the complaint, and as they formed one of the main planks of the applicant's submissions to me in the application for stay in respect of her possible success on appeal, I will set them out below in their entirety:

"1) Notice of hearing of the complaint dated the 18th day of June 2013 and posted by registered mail on the 20th June 2013. [sic]

2) The Notice of Hearing of the Complaint fixed for hearing on July 13 2013 was deemed served by registered mail on 11 July 2013 and was received by the Appellant on 12 July 2013.

3) The Notice of Hearing bearing date the 28th day of April 2014 and posted by registered mail on the 28th day of April 2014 in respect of hearing fixed for 1st day of May 2014. [sic]

4) The respondent in proceeding with the hearing of the complaint was in breach of rule 5 of the 4th Schedule of the Legal Professions [sic] (Disciplinary Proceedings) Rule [sic] which requires not less than 21 days notice between the date of service and the date of the hearing.

5) The Appellant has been deprived of due process and the hearing of the complaint in which she was found guilty of professional misconduct was not conducted in accordance with either the rules of natural justice or the Legal Professions [sic] (Disciplinary Proceedings) Rules."

[13] On 16 June 2014 the applicant filed a further amended notice of appeal with a new ground of appeal 9, which reads as follows:

> "9. That the Applicant/Appellant was exposed to and suffered the risk of bias and prejudice as the Chairman of the Panel, Mrs Pamela Benka Coker Q.C. and Mr Charles E Piper have a practice relationship wherein the former acts as a consultant in the practice of the latter. The Applicant/Appellant asserts that this relationship raises potential bias and/or as one is used to accepting the opinion and advise [sic] of the other and therefore may not have assessed the arguments and/or evidence with an independent mind."

[14] The grounds of appeal, in my view, fall under three main heads namely:

(i) The service of the notice of hearing of the complaint was improper and not in accordance with the rules.

(ii) The composition of the panel of the Committee was inappropriate, biased and therefore not independent or impartial, and so was in breach of the principles of natural justice.

(iii) Proceeding with the disciplinary hearing while criminal proceedings were pending in the Resident Magistrate's Court was prejudicial to the applicant.

The application for stay of execution

[15] The application for stay of the Committee's decision was filed on 11 May 2014, and the orders sought were based on 18 grounds set out therein, which mirror the grounds stated in the notice of appeal set out in paragraph [11] herein, both documents having been filed on the same day.

[16] The applicant swore to an affidavit in support of the application on 14 May 2014, which merely re-stated the grounds set out in the application and stated further, that should the judgment be enforced before the hearing of her appeal she would face "real and genuine hardship", and "professional and financial distress, loss and damages". She reiterated that there had been procedural unfairness and breach of the principles of natural justice. She contended that the findings of the Committee were not supported by the weight of the evidence. She stated that she had ongoing matters before the

Committee and the various courts of the island and if the stay was not granted, she would suffer financial loss and be ruined. She maintained that the notice of appeal filed raised powerful and substantive legal arguments for the consideration of the courts and she therefore had a good prospect of success on appeal.

[17] The applicant filed an affidavit of urgency simultaneously with the application and the affidavit in support stating that the matter was one of urgency and reiterating that she was facing absolute professional and financial distress, loss, damages and genuine hardship.

[18] Subsequent to the commencement of the hearing of the application for stay on 10 June 2014, and which was adjourned part-heard and set for continuation on 17 June 2014, the applicant filed on 16 June 2014, an amended application. That application sought an additional order which reads as follows:

> "2. That the General Legal Council is ordered to publish a notice in the Jamaica Gleaner stating that they [sic] are [sic] withdrawing the previous Notice, as an appeal has been filed in the Court of Appeal, which may or may not reverse the decision of the General Legal Council."

[19] The respondent filed two affidavits sworn to by the secretary of the General Legal Council, on 9 and 16 June 2014 respectively. She deposed to the fact that the order of the Committee suspending the applicant had been filed with the registrar of the Supreme Court on 20 May 2014, and that the order had been duly published in the Sunday Gleaner on 18 May 2014. She exhibited the documents evidencing the same. In the further affidavit, she exhibited the affidavit of Angella Davis, the office attendant

of the respondent, who had deposed and attached to her affidavit the notice of hearing of the Committee scheduled for 13 July 2013, a letter from the Post Master General informing of the movement of that article in the post, and a note of a conversation between Ms Delores Allen, Post Mistress of the General Post Office, of 13 King Street, and Mrs Pamela Benka-Coker QC chairman of the panel of the Committee which heard the complaint.

Submissions

On behalf of the applicant

[20] Counsel for the applicant submitted that pursuant to the Court of Appeal Rules (CAR), namely rule 2.11(1)(b), a single judge of appeal has the jurisdiction to grant a stay of execution of the judgment of the Committee until the determination of the applicant's appeal. Counsel further submitted that the applicant had satisfied the two pronged test laid down by Staughton LJ in the case of **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887, that: (1) Without the stay of execution the applicant will be ruined; and (2) His appeal has some prospect of success.

[21] Counsel submitted further that as established by Clarke LJ on behalf of the court in the later English Court of Appeal case of **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ 2065, the exercise of the court's discretion to grant a stay of execution will depend on the whole circumstances of the case, and whether there is a risk of injustice to one or both of the parties if the court grants or refuses a stay. Counsel submitted that on the facts of this

case, I should exercise my discretion and grant the application to stay execution of the judgment.

[22] It was counsel's contention that the applicant had shown, based on the grounds set out in the application and notice of appeal, that the appeal had some prospect of success. In respect of the issue of improper service, counsel relied on rule 21 of the fourth schedule to the Legal Profession (Disciplinary Proceedings) Rules, which states that service of any notice of hearing or documents required by the rules to be served, may be effected by registered post at the attorney's last known place of abode and that shall be proof of service. However, counsel submitted, it was clear that a letter cannot be deemed served at the moment of registration of posting. Additionally, the dicta in **George Hylton v Georgia Pinnock and Others** [2011] JMCA Civ 8 would suggest, he submitted, that service only occurs when the document is actually received, and, he said, the respondent had an obligation to prove that that had occurred. As a consequence, he stated, for certainty, and to give clarity and effect to the rule, a deemed date of service must be prescribed. Accordingly, rule 6.6 of the Civil Procedure Rules 2002 (CPR) sets out the deemed dates of service in respect of certain methods of service, which he maintained is a fair test for proof of service, and in respect of registered post, the deemed date stated is 21 days after the date indicated on the postal receipt. Counsel relied on the case of **Melvin Godwin v Swindon Borough Council** [2001] EWCA Civ 1478 for the proposition that there should be a date of service which is certain and not subject to challenge "on the grounds of uncertain and

potentially contentious facts". The period of 21 days would therefore, he submitted, be relevant to the instant case.

[23] Counsel referred to rule 5 of the fourth schedule of the Act, which states that once, in the opinion of the Committee a prima facie case has been shown, the Committee shall fix a date for the hearing of the complaint and shall serve the notice of hearing, with a copy of the application and the affidavit on the attorney, being not less than 21 days before the hearing. Counsel submitted that as in the instant case, the notice was dated 18 June 2013 and was posted on 20 June 2013, it would have been deemed served on 11 July 2013, and the hearing on 13 July would therefore have been procedurally flawed, in that the required notice period would not have been possible.

[24] The applicant, he stated, only received the notice on 12 July 2013. The applicant, he submitted, was entitled to 21 days notice, pursuant to rule 5 of the rules, commencing from 11 July 2013, which would have expired on 1 August 2013. The disciplinary hearing of the Committee which took place on 13 July 2013 therefore would have been ineffectual, ought to be set aside, and the grounds of appeal relating to improper service of the notice of hearing must succeed.

[25] Counsel relied on **Ernest Davis v The General Legal Council** [2014] JMCA Civ 20, a decision of this court, to support his submission that the matter of due process is to be taken seriously, as this court has shown in several cases. In that case, he submitted, there had been a failure to prove that there had been service of the notice

at all, and in those circumstances the appeal had been allowed and the orders of the Committee quashed and set aside. In the instant case, he argued, there had also been a breach of procedural fairness, as there had been a failure to provide the required period of 21 days' notice. This, he said, was even more important when the applicant had indicated at the hearing on 13 July 2013, that she had not had enough time to prepare her case. The application for the stay of execution of the judgment should therefore be granted on this basis pending the hearing of the appeal.

[26] In respect of the issue of bias and breach of the principles of natural justice, the applicant referred to and relied on section 16(1) and (2) of the Constitution of Jamaica that a defendant in either a criminal or civil legal proceeding is entitled to a fair hearing by an independent and impartial court or authority. Counsel also referred to the statement of the learned authors, HWR Wade and C F Forsyth, of that notable text on Administrative Law, 10th edition at page 380, namely;

> "Nemo judex in re sua. A judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased."

Counsel submitted that as a member of the panel hearing the current complaint, Mrs Debra McDonald, was also sitting on another panel hearing disciplinary proceedings of a similar nature against the applicant, and she should have informed the other panelists of this situation and recused herself, and having failed to do so, the applicant had been severely prejudiced. Additionally, counsel submitted, Mrs Pamela Benka-Coker and Mr Charles E Piper had ruled adversely to the applicant's interest in former proceedings

which also contributed to the panel as constituted on its face, being prejudiced toward the applicant. Counsel also referred to the fact that both counsel had a business relationship in that the former was a consultant to the other, which was also detrimental to a hearing before an impartial and independent tribunal. However, although this ground formed part of the further amended notice of appeal, counsel conceded that that was not an objection taken by the applicant before the Committee and no evidence to support it had been placed before me. Counsel took refuge in the fact that it was a fact of some repute, as "the letterheads" confirmed it and, he doubted that the fact of the relationship would be denied, and it would therefore be a matter to be argued before the court. Counsel therefore maintained that coupled with the clear breach of rule 6.6 of the CPR and the bias inherent in the constitution of the panel, the applicant's right to a fair hearing had undoubtedly been breached, and a stay should also be granted in this regard.

[27] In respect of the issue of proceeding with the disciplinary hearing when criminal proceedings were pending, the applicant relied on the Privy Council decision of **Donald Panton, Janet Panton and Edwin Douglas v Financial Institutions Services Limited and Others** [2003] UKPC 86. Counsel referred to the fact that the disciplinary proceedings were not civil but quasi-criminal proceedings with grave penalties. They were not concerned, as in civil proceedings, with loss and compensation where the burden of proof is lower, thus any adverse findings in disciplinary matters arising out of the same facts would be relevant and of probative value in the criminal proceedings and the risk of prejudice would be that much higher. Therefore, the disciplinary

proceedings ought to have been stayed pending the determination of the criminal proceedings.

[28] On the question as to whether the applicant would be ruined if a stay is not granted and whether she is likely to suffer irremediable harm, counsel submitted that as the applicant has ongoing matters in several courts both she and her clients stand to suffer great financial losses and ultimately ruination if the stay is not granted. Additionally, as the appeal may take at least nine months to be heard, the applicant's practice may be destroyed and may never recover, whereas the respondent stands to lose nothing, as, if the respondent is successful on appeal, the sanction ordered against the applicant will take effect then. Counsel also made it clear that the action of the respondent in not giving due notice of the hearing of 2 November 2013, to the applicant prevented her from being able to take advantage of the protection of section 12A of the Legal Profession Act.

<u>On behalf of the respondent</u>

[29] The respondent submitted that, as pursuant to section 15 of the Legal Profession Act, the order of the Committee had been filed with the registrar and the suspension of the applicant from practice had been published, the court had no power to grant the order asked for in the amended application for stay. The applicant could have asked the Committee to make an order suspending the filing of the order, pursuant to section 12A of the Act, but she had not done so, and pursuant to section 16 of the Act, the filing of the appeal does not operate as a stay of execution of the order, unless the Court of

Appeal so orders. Counsel therefore argued that only a mandatory order or injunction could avail the applicant at this stage and the single judge of appeal had no authority to make such an order. Counsel relied on **Watersports Enterprises Limited v Jamaica Grande Limited and Others** SCCA No 110/2008, Application No 185/2009, delivered on 4 December 2009 for that submission and the dictum of Panton P in **Norman Washington Manley Bowen v Shahine Robinson et al** [2010] JMCA App 28 for a general statement in respect of the extent of the powers of the single judge as set out in the CAR. Counsel also stated that there was no evidence that the costs claimed were exorbitant, that the applicant was unable to pay them or that any special circumstances existed why the order for costs ought to be stayed. In the absence of any such evidence, counsel argued, the costs ought to be paid.

[30] Counsel accepted the principles of law referred to by counsel for the applicant, with regard to the grant or refusal of the stay of execution of a judgment as laid down in **Linotype-Hell Finance v Baker** and **Hammond Suddard Solicitors,** but stated that the latter case was pellucid that "the evidence in support of an application for stay needs to be full, frank and clear", failing which the stay will be refused as the applicant "must produce cogent evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal". Counsel submitted that the risk relevant to the respondent was to the profession and the members of the public, as one of the functions of the respondent is upholding standards of professional conduct.

[31] Counsel contended that the applicant had not provided any evidence that she had some chance of success on appeal and commented that "it was curious" that the

applicant had not provided the Committee with any information of the circumstances which led up to the order for her suspension. Counsel submitted that although the notice of appeal raised several grounds of appeal, no evidentiary material had been provided in substantiation of them. Counsel was adamant that the issue of improper service had no merit as the CPR was inapplicable to the Committee's proceedings. Counsel stated that, "nothing within the scheme of the rules requires a deemed date of service, and, it is submitted, none ought to be imported from extraneous sources". Counsel submitted that rule 8 of the disciplinary rules permits the Committee to proceed in the absence of the applicant, the only requirement being to ensure that service has been effected.

[32] The Committee, she stated, must satisfy itself that service has been effected by proof of posting to the last known address of the applicant. Counsel contended that **Davis v General Legal Council** affirms that it is the date of posting that is determinate of service and indicates that there must be evidence that the notice was in fact posted, which was done in this case. Additionally, she submitted, the evidence of the secretary of the General Legal Council, Miss Davis, had indicated that the actual date of service was clear, not just the date of posting. The applicant therefore had been given the required notice of the hearing, and had more than sufficient time to mount a good and arguable defence.

[33] With regard to the issue of the breach of the principles of natural justice, counsel submitted that a complaint that a member of the panel sat on another panel hearing substantially the same facts in an application against the applicant, was not a ground

for disqualification on the basis of bias but perhaps would be a ground for consolidation of both matters. Additionally, counsel submitted, the members having made adverse rulings against the applicant would also not automatically disqualify them; more evidence would be required to establish whether, based on the nature of the rulings, disqualification was necessary. Counsel relied on **R v Ruel Gordon** (1969) 14 WIR 21 and **Barrington Frankson v General Legal Council** (**ex parte Basil Whitter at the instance of Monica Whitter**) [2012] JMCA Civ 52 in support of the submissions that there was no evidence to establish bias in the circumstances of this case.

[34] Counsel submitted that there was no prejudice in proceeding with the disciplinary hearings, while criminal proceedings were pending, as pursuant to section 12B of the Act the Committee may proceed unless to do so would be prejudicial to the fair hearing of the criminal proceedings. However, counsel submitted, the applicant had failed to satisfy the Committee that there were special circumstances to warrant a stay of the proceedings. As indicated previously, the applicant, counsel stated, could have requested the suspension of the filing of the decision of the Committee until the criminal proceedings had been determined, but she failed to do so.

[35] In the circumstances, counsel posited that since there had been no evidence other than the mere statement of the applicant that she would suffer loss and experience genuine, financial hardship, and as there was no basis to conclude that the appeal has some prospect of success, the most just order would be to refuse the stay and to make an order for the speedy hearing of the appeal.

On behalf of the applicant in reply

[36] Counsel submitted that a single judge of appeal has the power under rule 2.11(1)(e) to order the withdrawal of the publication relating to the applicant's suspension from practice in the Sunday Gleaner. Counsel also reiterated that **Hylton v Pinnock** confirms that the operative date of service is the actual date of service, and therefore the hearing on 13 July was in breach of the rules, and the four month period before the second sitting of the Committee on 2 November 2013, could not cure that, and make the proceedings fair. Counsel maintained that the instant case was clearly distinguishable from **R v Ruel Gordon** and **Frankson v General Legal Council**. Counsel submitted finally, that the evidence was that the applicant was a sole practitioner and any claim of her not being able to practise, or that the loss of her practice, would not amount to financial ruin, was not "consonant with reality".

Discussion and Analysis

[37] Rule 2.11(1) of the CAR sets out the powers of a single judge of appeal and states that the judge may make orders:-

> "(a) for the giving of security for any costs occasioned by an appeal;
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal;
>
> (c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal
>
> (d) as to the documents to be included in the record in the event that rule 1.7 (9) applies and

(e) on any other procedural application."

There is no question that the single judge has the power to grant a stay of execution of the judgment of the Committee, as prayed for in paragraph 1 of the amended notice of application for court orders filed on 16 June 2014.

[38] However, with regard to paragraph 2 of the application, as indicated by Panton P in **Manley Bowen v Robinson**, for an application made to the single judge to succeed, the applicant must satisfy the judge that what is being sought falls within the compass of rule 2.11. On any review of the above provisions contained in the said rule, I am unable to see how an application for an order directed to the General Legal Council to publish a notice withdrawing the previous notice would fall within those provisions. In **Watersports Enterprises Limited v Jamaica Grande**, I stated that the power of the single judge with regard to injunctive relief appears quite limited. The framing of the relief claimed in the application is by way of a mandatory order, as the application is requiring the General Legal Council to do a specific act, but rule 2.11(1)(c) concerns an injunction preventing a party to an appeal from dealing, disposing or parting with possession of the subject matter of the appeal. That is not applicable to the matter before me. Rule 2.11(1)(e) refers to any other procedural application, which must in keeping with the tenor of the rule relate to matters which fall within the ambit of the process of the appeal through the courts, for instance, for applications to extend the time to file skeleton arguments, authorities, records of appeal and the like. Paragraph 2 of the application would therefore be wholly misconceived and must be refused.

[39] With regard to the exercise of the discretion to grant or refuse a stay of execution of the judgment, the discretion is an unfettered one, and the rules have not sought to fetter that discretion. The principles guiding the grant or refusal of the stay have been set out in **Linotype-Hell Finance v Baker** as referred to earlier, and relaxed somewhat in **Hammond Suddard Solicitors**, with which I agree. The focus of the court is on the risk of injustice to one or other or both parties, if the stay is granted or refused. If the stay is refused will the appeal be stifled? If it is granted and the appeal fails will the judgment be able to be enforced? This court has in several cases endorsed those principles, and made it clear that the interests of justice are an essential element in the decision to grant or refuse a stay.

[40] I do not agree with counsel for the respondent that as the order has been filed with the registrar and the operative part of the order relating to the suspension of the applicant from practice has been published in the Sunday Gleaner that I have no power to order a stay of execution of the decision of the Committee. Pursuant to section 15(3) of the Act, the order once so filed shall be enforceable in the same manner as a judgment or order of the Supreme Court to the like effect. This court clearly has the power to stay execution of judgments of the Supreme Court, and the rules (CAR) as indicated, give that power to the single judge of this court. I am also of the view, that the fact that the Act gives the Committee the power to suspend the filing of the order until the appeal is filed, or if the appeal has been filed, until the appeal has been determined, and that the order will therefore not take effect until thereafter filed, does not negatively affect the power of the single judge of appeal to hear the application for

stay, even though the application to suspend the order has not been made. In my opinion, failure to utilise the protection of the section, is not a deterrent to the hearing of the application for a stay. It is unfortunate that the notice for the delivery of the decision was dated and posted on 28 April 2014 and the decision given on 1 May 2014. However, the order was not published or filed until 18 and 20 May 2014 respectively; so there was some time to access the protection afforded by the Act.

[41] I will therefore examine the issues as I have identified them as being relevant to the real chance of success of the appeal, the balance of the risk of injustice to the parties, and the interests of justice generally.

Improper service

[42] With regard to these grounds as set out in the application for stay and the notice of appeal, the applicant's submissions depend entirely on the CPR being incorporated into the Legal Profession (Disciplinary Proceedings) Rules, set out in the fourth schedule to the Act. The rules, 1-21, delineate a specific regime for the hearing of disciplinary applications or complaints. There are particular provisions relating to, inter alia, the filing of applications and affidavits containing allegations of potential professional misconduct against attorneys-at-law, the fixing of dates for the hearing of the applications, the service of documentation, discovery and inspection of documents, the regulation of the proceedings, rehearings and publication of orders. On a detailed perusal of the rules, and giving them their natural and ordinary meanings there is no reference to, nor any intention that, any rule of the CPR is to be included and/or used

in any way to interpret them. To ascribe deemed dates of service to the rules in the fourth schedule would require the incorporation of the CPR. But rule 21, which deals with service, states that service may be effected by registered post to the last known place of abode or business of the person to be served, which shall be proof of service. In **Davis v The General Legal Council**, Panton P, on behalf of the court, in dealing with the proper interpretation to be accorded rule 21 in respect of what is required for proper service in keeping with the rules, stated:

> "The rules [require] that the letter is to be addressed and posted; there has to be proof that it is not only so addressed but was also posted and that would be proof of service…. What is required, and which has been the age old practice in Jamaica and other parts of the Commonwealth, is a slip which states 'Certificate of Posting' and it indicates the date and place of posting. If the index to the supplemental record of appeal page 14 is looked at, a proper certificate of posting of a registered article is there exhibited. Nothing less will suffice."

[43] It seems to me from the clear dictum of Panton P, that proof of service is not based on the deemed date of service as established by the CPR, but is based on the date that the letter was posted. In this case, the notice was posted on 20 June 2013, the hearing date was 13 July 2013, that seems to be sufficient proof that the applicant was served within the prescribed time period. The complaint by counsel for the applicant that a document cannot be served at the moment of posting seems to be a challenge to the fairness or the efficacy of the rules which requires a different platform. I must also state that I was equally unimpressed with the affidavit from the secretary of

the General Legal Council and the attachments thereto allegedly stating when actual service was effected.

[44] Counsel for the applicant has, however, prayed in aid the ruling in **Hylton v Pinnock**, but I am compelled to comment that that case concerned the interpretation of sections 139 and 140 of the Registration of Titles Act, and one must be careful not to draw analogies when the provisions are not the same. In any event, the ruling in that case was that there should be proof that the document was actually received at the named address. It was not necessary, however, to prove that the notice had come to or had been brought to the caveator's attention. The applicant, however, has stated that she received the notice on 12 July 2013; that does not negative the efficacy of the service required under rule 21, but relates to the procedure adopted in the hearing which appeared in all the circumstances, prima facie, to provide ample time for the applicant's response. The applicant had also indicated that she had received the complaint previously. It is therefore difficult to discern any chance of success in relation to these grounds.

Apparent bias

[45] The applicant has stated that she was prejudiced as a result of the impartiality of the panel. In the last century, bias was referred to in this way in **R v Barnsley County Borough Licensing Justices** [1960] 2 ALL ER 703 at 715:

> "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although nevertheless, he may have allowed it

> unconsciously to do so. The matter must be determined on the probabilities to be inferred from the circumstances in which the justices sit."

Nearly a century later the test for bias has changed substantially and in the House of Lords' decision of **Magill v Porter** [2002] AC 357, Lord Hope stated at page 494 that the test for bias is:

> "… whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

In this case the fair-minded observer, would have had to consider the following facts:

(i) There were two applications before the Committee before two differently constituted panels, although one member of the Committee was on both panels, and the applications were being heard contemporaneously.

(ii) Both applications were made on the one hand by the vendor (complainant) and on the other hand by either the complainant and the vendor/purchaser, relating to another conveyancing transaction, both of which had obviously gone wrong.

(iii) The applications were both against the applicant, and the vendor and the vendor/purchaser were both claiming that as a result of the applicant's actions or omissions the transactions had not been completed as they had envisaged.

(iv) The complainant had given evidence in the hearings related to both applications.

(v) The vendor/purchaser in one transaction had only given evidence in relation to that hearing.

The issue would be whether on the strength of that information alone, the informed observer would perceive that there was any apparent bias because one member was sitting on both panels which were hearing the applications contemporaneously.

[46] There was no evidence given indicating whether there were different allegations in respect of different breaches of the canons of professional ethical obligations, relative to the two matters before the Committee, or whether the member, Mrs McDonald could have been influenced by adverse information likely to have been adduced in one hearing, or whether she had made any statements or acted in any way that could have confirmed an unwarranted approach to the matter. It was all extremely speculative, and the claim of unfair prejudice was merely based on the submissions of counsel for the applicant which in his further submissions read as follows:

> "… It is incredulous we submit, to infer that there was no prejudice or room for prejudice where two separate hearings arising out of the same facts were being heard concurrently before the same adjudicator. Ms McDonald's ability to be a fair and impartial adjudicator to a great extent can reasonably be said to have been undermined by the transference of the views of the allegations in one matter to the next matter before the disciplinary panel while both matters were concurrently being heard. The risk of bias is in such circumstances, a clear and present danger."

As indicated there were no specific allegations mentioned, only the *ipse dixit* comment by counsel of the alleged obvious incredulity of the situation, which, in my view, is unhelpful.

[47] Counsel endeavoured to draw a distinction between the matter at bar and that of **R v Ruel Gordon**. In that case, counsel argued at the second trial that it was in breach of the principles of natural justice for the learned Resident Magistrate having convicted and sentenced the appellant for using the same vehicle on the same day at the same time without being the holder of a relevant road licence, acting on the same evidence, to be hearing a subsequent matter in respect of the same vehicle, as the appellant was charged for driving without being insured. The court held that:

> "The resident magistrate, who is a trained lawyer, must be taken to have disabused his mind of any knowledge he may have gained the previous trial, and must be taken to have applied himself to the issues presented to him in the case of the second information."

This ruling seems quite applicable to the matter at bar, and the concern and response of counsel for the applicant appeared to relate only to the contemporaneity of the hearings of the committee, in that they were both in train at the same time, without any conclusive findings having been made in one hearing before the other hearing commenced. But without any clear facts in respect of this complaint, it is difficult to see how the informed observer could perceive apparent bias in these circumstances.

[48] In **Georgette Scott v The General Legal Council**, SCCA 118/2008 delivered 30 July 2009, this court found that members of the panel who had acted on behalf of

clients against the appellant, when sitting on the panel hearing a complaint against the appellant could not be considered to be either actually or apparently biased, without more, as they were not acting as judges in their own cause. In **Frankson v General Legal Council**, the gravamen of the complaint was that an attorney and client relationship existed between Mrs Benka-Coker and Mrs McCaulay and they were members adjudicating together on the same panel, which could have raised an apprehension of bias on their part. In paragraph [82], Harris JA said this on behalf of the court:

> "It has not been shown that the two members of the panel had a direct or indirect interest in the outcome of the hearing against the appellant. The reputation and integrity of these members are unimpeachable. There is nothing to show that Mrs Benka-Coker could or would have influenced Mrs Mccaulay in making her decision. Mrs McCaulay is an attorney-at law, not a lay person. She is fully conversant with the law. Mrs McCaulay is independent and would have her own view of the case. Accordingly, she would bring to bear her own assessment of the evidence and make her own decision. Additionally, there is no link between the proceedings in which Mrs Benka-Coker was retained by Mrs McCaulay and the complaint against the appellant."

[49] Counsel for the applicant attempted to distinguish **Frankson v General Legal Council** to say that in that case the matter in which Queen's Counsel had been retained had been completed and further there was no link between the case in which she acted as counsel, and the one being heard by the panel in which she was a member, which was different from the instant case. I disagree, as in the instant case there are two matters, but the issue is what the details of the link between them were

as there is no evidence to explain exactly what the link is. The dictum of Harris JA is therefore very apt. All the members of the panels mentioned are trained lawyers with unimpeachable reputations and with independent minds and there is no information that any of them has an interest in the outcome of the case or is in a position to influence other members of the panel. The additional claim of bias therefore against Mrs Benka-Coker and Mr Piper that as they have made adverse findings against the applicant in other matters, the applicant could not receive a fair hearing may also be unsustainable on the basis of the above statements in **Frankson v General Legal Council**, which I accept as being relevant in the issues before me. Equally, although not properly before me, the claim of bias against Mrs Benka-Coker and Mr Piper sitting as members of the panel, based on the allegation that the former is a consultant to the firm in which the latter practises, would also, it seems, be covered by the principles expressed in **Frankson v General Legal Council**, which I accept as being relevant in the issues before me.

Disciplinary hearings prejudicial to criminal proceedings

[50] It was the duty of the applicant to persuade the Committee that the hearing of the complaint should await the completion of the criminal proceedings. In the Privy Council appeal from Jamaica, **Panton et al v Financial Institutions Services Limited**, the appellants were defendants in criminal and civil proceedings both arising from the same set of events. They applied for a stay of the civil proceedings until the criminal trial had been completed. Both the Supreme Court and the Court of Appeal

ruled against them. In agreeing with the courts below, Sir Kenneth Keith made this statement on behalf of the Board:

> "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 Board then concluded at paragraph 15 that they saw no reason to disagree with the position taken by the courts below as the appellants had failed to make out a case for a stay and the arguments against the application appeared to be compelling.

[51] It is true that the disciplinary proceedings could be described as quasi-criminal proceedings as the burden of proof is the criminal standard, but the onus is still on the applicant to show the real risk of unjust prejudice, which on the basis of the material before me, she has not endeavored to do. Additionally, section 12B of the Act permits the Committee to proceed to hear and determine the application before it unless to do so would in the opinion of the Committee be prejudicial to the fair hearing of the pending criminal proceedings. I am unable to say that the applicant has a good chance of success on appeal on this ground, as at this stage I am not aware of the charges before the criminal court and how, if at all, the continuation of the hearing of the complaint would have impacted adversely on the criminal proceedings, but the burden

remains on the applicant to show the prejudice, and how it would have affected her having a fair hearing.

[52] There is no doubt that the applicant being suspended from the practice of law will cause her irremediable harm. However, one cannot look at that fact in isolation. The interests of justice require that I assess the applicant's chances of success on appeal, which I have done and on that basis the application for stay of execution of the decision of the Committee of 1 May 2014 would have to be refused. I am also compelled to comment that I am surprised that the applicant has not attempted to address any of the substantive issues raised in the complaint, particularly when the sanction ordered against her is so severe. I am therefore also unable to address whether there is some prospect of success on appeal in respect of the sanction imposed, as there was no evidence put forward by the applicant on her behalf relevant to the allegations made against her, nor were any mitigating factors advanced on her behalf, by choice it would appear, as her counsel said that "we were not yet at that stage of the proceedings".

Conclusion

[53] In the light of all of the above, the application for a stay of execution of the decision of the Committee handed down on 1 May 2014 is refused. I recommend that the earliest date possible be scheduled for the hearing of the appeal. With regard to the issue of costs, while I recognise that ordinarily the General Legal Council would be entitled to an award of costs as it has succeeded on this application, as I do not think

that the applicant has acted unreasonably in pursuing this application, having considered all the circumstances, I make no order as to costs.