

JAMAICA

IN THE COURT OF APPEAL

APPEAL NO COA2020CV00027

APPLICATION NO COA2020APP00064

BETWEEN	DAWKINS BROWN	APPLICANT
AND	PUBLIC ACCOUNTANCY BOARD	RESPONDENT

Hugh Wildman instructed by Hugh Wildman & Company for the applicant

Mrs Susan Reid-Jones instructed by the Director of State Proceedings for the respondent

19 May and 5 June 2020

IN CHAMBERS (BY TELECONFERENCE)

STRAW JA

[1] The applicant (“Mr Brown”) is a businessman and an accountant. He was also a registered public accountant pursuant to section 11 of the Public Accountancy Act (the “PAA”). The respondent (“PAB”) is a body established under the PAA with its functions including, *inter alia*, taking disciplinary actions against registered public accountants for breach of the provisions of the said PAA and its regulations, and removing from the register persons who no longer qualify to be registered public accountants (see: sections 3, 4(2)(d) and (e) of the PAA).

[2] On 30 March 2020, Mr Brown filed a notice of appeal against the orders of the PAB which resulted in him being removed from the list of register of public accountants. He also filed a notice of application for court orders on 30 March 2020 requesting a stay of the decision of the PAB. In support of this application, an affidavit of urgency was filed on 1 April 2020. In response, counsel for the PAB filed a notice of objection to the application for court orders on 22 April 2020.

[3] On 6 May 2020, an amended notice of application for court orders was filed as set out below:

"A. A Stay of the decision of the Respondent made on March 18, 2020, to remove the Applicant from the Register of Public Accountants and pay to the Respondent, the sum of One Million Six Hundred Thousand Dollars (\$1.6 Million) towards costs and expenses of the proceedings from which the decision was arrived.

B. Costs of this application to be cost in the Appeal

C. Such further and other relief as this Honourable Court thinks fit."

[4] This application is, essentially, one for a stay of execution of the orders of the PAB and is the matter before me for consideration.

Chronology of events

[5] For context, it is useful to set out a brief chronology of events which gave rise to Mr Brown's removal from the register. These events, as set out, were taken from the PAB's decision dated 19 March 2020.

[6] A letter dated 29 July 2019 was received by the Registrar of the PAB from Vistra IE (Bristol) Limited in which a complaint was made against Mr Brown. Mr Brown was informed of the said complaint to which he responded by letter dated 20 September 2019. The PAB reviewed the complaint and Mr Brown's response and determined that there was a *prima facie* case for a disciplinary enquiry. On or about 8 October 2019, Mr Brown was informed by letter that there would be a hearing by the PAB on 31 October 2019.

[7] The proposed hearing date was not convenient to Mr Brown and a request was made for a date in November 2019. On 25 November 2019, the PAB proposed 28 and 30 January 2020. Mr Brown, through counsel Mr Hugh Wildman, suggested dates in February and March 2020. The PAB decided to proceed on 28 January 2020. On the same date, an application for an injunction was made to the Supreme Court to prevent the PAB from proceeding with the hearing. The application was made on the basis that the correct procedure had not been followed by the PAB. The injunction was refused and the disciplinary hearing proceeded on 28 and 30 January 2020. Final submissions were made on 18 February 2020. The PAB reserved its decision.

[8] Mr Brown stated in his affidavit filed 30 March 2020, that on or about 16 March 2020, he was informed (by his counsel) that the PAB would be giving its decision on 18 March 2020. Mr Brown indicated that he was advised by counsel that a public meeting was "not advised" in light of the COVID-19 pandemic.

[9] Mr Brown stated that he was subsequently informed by email on 24 March 2020, that the PAB met on 18 March 2020 and delivered its decision, which was also attached to the said email. The PAB's decision was as follows:

“DECISION

The Board decided that

- (i) The name of Mr. Dawkins Brown be removed from the Register of Public Accountants and that he be so advised.
- (ii) Mr. Dawkins Brown pays to the Board the sum of One Million Six Hundred Thousand Dollars (\$1.6 million) to cover the costs and expenses of and incidental to the enquiry.”

Principles relevant to a stay of execution

[10] Rule 2.11(1)(b) Court of Appeal Rules (“CAR”) provides –

“2.11 (1) A single judge may make orders –

(a) ...

(b) for a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal;”

[11] The principles relating to a stay of execution are well-settled and “fast becoming trite” as my sister McDonald-Bishop JA remarked in a recent judgment on behalf of this court in **ADS Global Limited v Fly Jamaica Airways Limited** [2020] JMCA App 12.

I find it convenient to adopt her concise statement of the principles:

“[23] ... There is ... no need for any detailed exposition on the applicable law. It suffices to say that the liberal approach laid down by Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and another** [1997] EWCA

2164, has been consistently adopted and applied by this court. See, for instance, **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30. **The proper approach, according to Phillips LJ in Combi is for the court to make the order which best accords with the interests of justice, once the court is satisfied that there may be some merit in the appeal.**

[24] In **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, Morrison JA (as he then was), having had regard to previous authorities, including, the well-known authority of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, stated that the threshold question on these applications is whether the material provided by the parties discloses at this stage an appeal with some prospect of success. **Once that is so, the court is to consider whether, as a matter of discretion, the case is one fit for the grant of a stay, that is to say, whether there is a real risk of injustice, if the stay is not granted or refused.**" (Emphasis supplied)

The hearing of the application

[12] I had the benefit of written submissions on behalf of Mr Brown and the PAB which were filed on 4 May 2020 and 13 May 2020, respectively. Further, on 19 May 2020, counsel for both parties made oral submissions by teleconference. At this time, I made the following enquires of counsel –

- (i) Whether any application for a suspension of the PAB's decision pending appeal was made pursuant section 13(4) of the PAA; and
- (ii) Whether Mr Brown's removal from the register of public accountants had taken place.

[13] In response to my first enquiry, counsel for Mr Brown indicated that there was some non-compliance on the part of the PAB (which it is not necessary to detail at this point) and as such Mr Brown did not avail himself of this statutory provision.

[14] In response to my second enquiry, counsel for the PAB, Ms Reid-Jones, indicated in the affirmative and that she would confirm with the Registrar of the PAB. True to her word, on 20 May 2020 copies of newspaper publications were provided which confirmed that the PAB's decision to *inter alia* remove Mr Brown from the register of public accountants was published. For present purposes, I will have regard to the general notice published in the Jamaica Gazette on 14 April 2020 which is *prima facie* evidence in the court of the fact that such an order has been given legal effect (see: section 26(b) of PAA and **National Housing Trust v Treebros Holdings Limited** [2018] JMCA App 21).

[15] At the close of the hearing, I directed counsel to a recent decision by a single judge of this court, **Don O Foote v The General Legal Council** [2020] JMCA App 2 and invited further submissions in response to whether the decision of the PAB to remove Mr Brown from the register was amenable to a stay of execution. Submissions on behalf of both parties were duly filed by 26 May 2020 and they have been considered and set out to extent that is necessary.

Issues to be resolved

[16] In determining whether to grant or refuse the stay of execution, the relevant issues to be resolved are as follows:

- 1) Whether Mr Brown's appeal has a real prospect of success;
- 2) Whether there is a real risk of injustice if the stay is not granted;
and
- 3) Whether the decision of the PAB relating to the removal of Mr Brown's name from the register is amenable to a stay of execution.

Issue 1: Whether Mr Brown's appeal has a real prospect of success

[17] Counsel for Mr Brown mounted several procedural and substantive challenges to the hearing by the PAB and the exercise of its disciplinary powers which resulted in the above-mentioned orders set out at paragraph [9].

Constitution of the PAB

[18] The main thrust of Mr Wildman's submissions was that the proceedings were a nullity. He took issue with the constitution of the PAB at the time of the disciplinary hearing and argued that, pursuant to paragraphs 1, 2 and 8 of the first schedule of the PAA, the PAB must have 10 members appointed by the relevant Minister for a period of three years and that the names of all the members must be published in the Gazette.

[19] Mr Wildman referred the court to a publication of the Gazette dated 20 September 2016 giving notice of the appointment of 10 persons to the PAB with effect from 2 May 2016 and 1 May 2019. It was undisputed that this was the last publication. It was submitted that in the absence of a further publication in the Gazette, there was in effect, no board in existence during the period of January to March 2020 when the

hearings relevant to Mr Brown were held. Reliance was placed on section 31 of the Interpretation Act, section 5 of the Gazette Act and the decision of this court in **National Housing Trust v Treebros Holdings Limited** [2018] JMCA App 21.

[20] It was submitted that this breach of the PAA meant that Mr Brown has a remedy *ex debito justitiae*, that is, as of right. He further submitted that the Minister's letter dated 23 April 2018 asking that the members of the PAB (as constituted at the last publication of the Gazette) hold over until a new board was appointed was of no effect as all appointments had to be published in the Gazette, which, up until the hearing, still had not been done.

[21] Mr Wildman further argued that the PAB was improperly constituted as persons, namely the Honourable Mr Justice Ian Forte (retired President of the Court of Appeal) and Ms Annaliesa Lindsay (attorney-at-law) should not have been allowed to be present and to influence the hearing. It was submitted that their participation rendered the whole proceedings illegal, null and void as the PAA did not provide for the PAB to engage advisors to participate and influence proceedings. Mr Wildman submitted that their participation amounted to an unlawful delegation of the PAB's duties.

[22] Mr Wildman submitted that Mr Brown's right to a fair hearing was also breached by the PAB insofar that it failed to make proper disclosure despite his request to be furnished with affidavits and relevant documents. He referred to regulations 14, 15 and 16 of the Public Accountancy Regulations ("the Regulations"). It was also contended that Mr Brown was unable to properly prepare his case for the hearing as he only

received a letter from the PAB. Reference was made to the cases of **Kanda v Government of the Federation of Malaya** [1962] AC 322 and **Oreilly v Mackman and others** [1983] 2 AC 237 in support of his submission that Mr Brown was entitled to know the case against him and present his own case. This amounted to a breach of the principles of fairness and natural justice.

[23] It was also submitted that Mr Brown was not afforded the opportunity to address the PAB on any mitigating circumstances which is provided for by regulation 33(1) of the Regulations.

Jurisdiction of the PAB

[24] Mr Wildman submitted that the dispute which gave rise to the enquiry was of a "litigious commercial nature" and that the PAB had no jurisdiction to hear the matter. Further, it was contended that the complaint was made by Vistra IE (Bristol) Limited, formerly named Radius (Bristol) Limited, a company (Vistra IE) which Mr Brown was unfamiliar; that there were therefore issues relating to privity of contract.

[25] Reference was made to a letter of engagement ("LOE") dated 11 April 2017 signed by Mr Brown on behalf of Crowe Horwath Jamaica and a Curt Olson of Radius (Bristol) Limited. Mr Wildman contended that the said LOE contained terms which stated that the LOE was not to be disclosed to any third parties and that it should be governed in accordance with the laws and courts of England and Wales. As such, it was submitted that the PAB had no jurisdiction to hear the complaint which was based on a

commercial agreement. Mr Wildman further questioned whether the PAB was competent to make findings in relation to matters of trust.

[26] Mr Wildman, in his oral submissions, also complained that due to the lack of proper disclosure, Mr Brown only became aware of certain things at the hearing. These included the death of the signatory to the LOE (presumably, Curt Olson) and the nature of the change from Radius (Bristol) Limited to Vistra IE (Bristol) Limited.

Bias

[27] The issue of bias was raised in respect of Mr Linval Freeman, one of the members of the panel. It was contended that Mr Brown and Mr Linval Freeman had multiple disputes in the past in their professional capacity as accountants and this ought to have precluded Mr Freeman from presiding over or participating in the hearing. The cases of **Wilmot Perkins v Noel B Irving** (1997) 34 JLR 396 and **Porter v Magill** [2002] 2 AC 357 were cited in support.

Submissions on behalf of the PAB

[28] In relation to the constitution of the panel, Mrs Reid-Jones submitted that paragraph 8 of the first schedule of the PAA states that there should be publication of the names of the members of the PAB as first constituted and at every change in membership. She contended that there was no such change since the last publication and the dates of the hearing relevant to Mr Brown. Further, she stated that all members of the PAB received a letter dated 23 April 2018 from the current Minister of Finance, the Honourable Nigel Clarke, requesting that they continue to serve until further

advised. Reference was made to sections 38 and 39 of the Interpretation Act which speak to the power of Ministers to make appointments. It was submitted that the Minister's letter legitimised the holding over of members beyond May 2019.

[29] Further, Mrs Reid-Jones referred to paragraph 10(7) of the first schedule of the PAA which provides, "[t]he validity of the proceedings of the Board shall not be affected by any vacancy amongst the members thereof or by any defect in the appointment of a member thereof". It was contended that this was a clear indication that proceedings, such as hearings of the PAB, are intended to be protected from invalidity caused by any defect regarding the membership of the PAB and as such the failure to publish the names of the members in the Gazette would not nullify the proceedings relevant to Mr Brown.

[30] In relation to the involvement of the Honourable Mr Justice Forte and Ms Lindsay, she submitted that section 5(1) of the PAA empowers the PAB to employ officers as it thinks fit for the proper carrying out of its functions and that the Honourable Mr Justice Forte and Ms Lindsay would fall in this category but that they played no role in the determination of the PAB.

[31] In relation to the issue of the fair hearing, she submitted that regulations 15 and 16 of the Regulations describe the process to be carried out when a complaint is received against a public accountant. She submitted that Mr Compton Rodney, the Registrar of the PAB, only received a letter of complaint from Vistra IE (Bristol) Limited;

that there were no affidavits and that the PAB is relying on a letter dated 19 October 2019 which was sent to Mr Brown and in which the complaints were fully set out.

[32] In response to the jurisdiction of the PAB, Mrs Reid-Jones submitted that the PAB had jurisdiction due to the complaint that came to it, which involved matters of accountancy.

[33] On the issue of bias, counsel submitted that while it is admitted that there had been previous professional contact between Mr Brown and Mr Freeman, there had been no disputes of the nature as alleged by Mr Brown. She submitted that the objective test of the fair minded and informed observer is the appropriate test to be applied, and there was simply insufficient evidence of any real possibility of bias on the part of Mr Linval Freeman.

Issue 2: Whether there is a real risk of injustice if the stay is not granted

[34] Mr Wildman submitted that there was a grave risk of injustice to Mr Brown if the stay is not granted. He contended that the flawed decision of the PAB has caused and continues to cause disruption in Mr Brown's business as it was made in the midst of the income tax filing season and is likely to affect Mr Brown's assets. In the circumstances, if the stay is not granted Mr Brown will suffer financial ruin.

[35] On this point, Ms Reid-Jones has commended the case of **Arlean Beckford v The Disciplinary Committee of the General Legal Council** [2014] JMCA App 27 and in particular the reasoning of Phillips JA at paragraph [52] where it was recognised that there was no doubt that the applicant being suspended from the practice of law

would cause her irreparable harm. However, the learned judge of appeal went on to state that this fact could not be looked at in isolation as the interests of justice required an assessment of the applicant's success on appeal. In so doing the stay of the execution of the decision of the General Legal Council was refused.

[36] Mrs Reid-Jones also submitted that, in like manner as it relates to the public interest in matters involving attorneys-at-law, any stay of execution on Mr Brown's behalf would be injurious to the public interest as well as other registered public accountants. She indicated that it would send the wrong signal if Mr Brown were permitted to resume his practice. Mention was made of considerations of the PAB relating to compliance with the Proceeds of Crime Act and the country's placement in relation to the perception by international agencies relevant to the maintenance of financial standards.

Issue 3: Whether the decision of the PAB relating to the removal of Mr Brown's name from the register is amenable to a stay of execution

[37] Mr Wildman, in considering the case of **Don O Foote v The General Legal Council**, submitted that P Williams JA was not correct in her conclusion that the order of the GLC striking an attorney from the roll was in effect a declaratory order, to which a stay of execution would not be amenable. He contended also that only a court could grant declaratory orders and this could not be effected by persons conducting disciplinary hearings such as the PAB.

[38] Further, the definition of "declaratory judgment" from Osbourne's Concise Law Dictionary (7th edition) was commended as instructive, "[a] judgment which

conclusively declares the pre-existing rights of the litigants without the appendage of any coercive decree". He contended that such an order of the General Legal Council in **Don Foote** was a coercive order which can be the subject of a stay, akin to the orders of the Supreme Court which are the subject of an appeal. Accordingly, it was submitted that any order made by the General Legal Council or the PAB can be subject to an appeal by virtue of statute and by extension, a stay of such order pending the appeal.

[39] It was contended that the reasoning of Phillips JA in **Arlean Beckford** was to be preferred and applied in the present matter; further, that a single judge of this court has the jurisdiction to grant a stay of the PAB's orders pending the appeal, notwithstanding the fact that Mr Brown was denied the right to ask for the suspension of the order by the PAB pursuant to section 13(4) of the PAA.

[40] Mrs Reid-Jones submitted that having regard to the authorities, in particular **Don Foote** and **Norman Washington Manley Bowen v Shahine Robinson and anor** [2010] JMCA App 27, the first order of the PAB relating to Mr Brown's removal is a declaratory order, a statement of a legal position, and is therefore not amenable to a stay. She submitted that the said decision of the PAB was similar to that of **Don Foote**, in its effect. The first order was declaratory in nature as it was really saying that Mr Brown's name has been removed and he is to be advised, which he was. This was a completed order. The second order relating to the payment of costs is also similar to the one made in **Don Foote**, and since it had not yet been done, it could be the subject of an application for a stay.

[41] Reference was also made to a decision of the Court of Appeal of Belize, the **Attorney General and others v Jeffrey J Prosser and others** (unreported), Court of Appeal, Belize, Civil Appeal No 7/2006, judgment delivered 8 March 2007 wherein applications were made for a stay against mainly declaratory judgments. She highlighted Sosa JA's reference to a decision of the Supreme Court of Nigeria, **Chief RA Okaya & ors v S Santilli & ors**, SC 200/1989, where one of the issues before that court was whether a defendant, who has filed an appeal against purely declaratory orders made against him, is entitled to apply for a stay of execution of those orders pending the hearing and determination of the appeal:

"[31] Proceeding now, I will point out that Agabje J completed his consideration of the issue as follows:

'The conclusion I reach is that there cannot be (sic) a stay of declaratory judgments ... It follows in my judgment that a defendant who has filed an appeal against a declaratory judgment or order is not entitled to apply for a stay of execution of that judgment or order. Such an application in the circumstances will be misconceived.' "

[42] Mrs Reid-Jones also sought to contrast the above-mentioned authorities, **Don Foote** and **Shahine Robinson** with **Arlean Beckford** and the approach of Phillips JA. Reference was made to Phillips JA's finding, at paragraph [40], that the single judge had the power to order a stay of execution of the decision of the General Legal Council which had been filed with the registrar of the Supreme Court and published:

"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.”

[43] Counsel, however, referred the court to paragraphs [10], [12] and [13] of the dicta of Morrison JA (as he then was) in **Shahine Robinson**, which was also referred to by P Williams JA in **Don Foote**, for my favourable consideration:

“[10] It will immediately be seen that the judgment is in substance declaratory, rather than executory, by which I mean that although it does make a pronouncement with regard to the 1st defendant’s status as a member of the House of Representatives, it does not purport to order the 1st defendant to act in a particular way, such as to pay damages or to refrain from interfering with the claimant’s rights, either of which would be enforceable by execution if disobeyed. The distinction between the two types of judgment is well expressed by Zamir & Woolf as follows (in ‘The Declaratory Judgment’ 2nd edn. para. 1.02):

‘A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-

existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position.'

...

[12] More to the point, in my view, is the further question that now arises, which is whether the court has any power to stay execution of a purely declaratory order. Although the word 'execution' is not defined in the CAR, it is, as Lord Denning MR observed in **Re Overseas Aviation Engineering (G. B.) Ltd** [1963] Ch. 24, 39, 'a word familiar to lawyers...[which] means, quite simply, the process for enforcing or giving effect to the judgment of the court'. This dictum is cited as authority for the definition, in almost identical terms, to be found in Halsbury's Laws of England (4th edn, vol. 17, at para. 401) and it clearly connotes, in my view, the setting in motion of some kind of process, directed at the party obliged by the terms of the judgment to give effect to it.

[13] In the work 'Declaratory Orders', 2nd edn, Mr P. W. Young Q C, an Australian author, makes the point (at para. 212), that 'The enforceability of a declaratory order is the

weak spot in its armour, as there is no sanction built into the declaratory relief'. And further (at para. 2408)-

'The effect of the court's order is not to create rights but merely to indicate what they have always been.... Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings. Thus if it is held that the decision of a licensing authority is void, there is no procedure whereby the court can validate those licences pending the hearing of an appeal.'"

Analysis and finding in relation to issue 1

[44] It is to be noted that I did not have the notes of the proceedings relevant to the disciplinary enquiry conducted by the PAB for my consideration. Mr Wildman has indicated that it has been requested but the PAB has yet to provide him with same. Regulation 31 clearly provides that notes of the proceedings are to be taken and provided to appellants upon payment of the requisite charges. It is expected that the notes will be made available for the hearing of the appeal which raises a number of disputes related to factual circumstances. In this regard, I did not think it prudent to assess whether Mr Brown had a realistic prospect of success in relation to the substantive issues raised.

[45] I did not find it necessary also to make a determination on every aspect of Mr Wildman's submissions in relation to the procedural challenges. Based on what was before me, I am of the view that there are some aspects of the appeal that do have some prospect of success. In particular, the arguments in respect of the constitution of

the PAB, and the effect of the failure to make publications in the Gazette as well as the issue of bias.

[46] In relation to the issue of the validity of the constitution of the PAB, the question is whether that board which was mandated to act for three years and which had been gazetted to that effect, would still be properly constituted merely by the written request of the Minister of Finance that the existing board members should hold over until a new board was appointed. The board had originally 10 members but five had ceased functioning through resignations and/or death. However, the five remaining members who conducted the disciplinary hearing did form a quorum (see: paragraph 10(4) of the first schedule of the PAA).

[47] Paragraph 8 of the first schedule also states that all the names of the members of the board as first constituted and every change of the members thereafter should be published in the Gazette. Mrs Reid Jones has submitted that the five board members were part of the original 10 appointed so there had been no change in the membership to attract the necessity for publication in the Gazette. However, the issue would have to be considered within the context of paragraph 2 of the first schedule which states that "the appointment of a member of the board shall, subject to the provisions of this Schedule be for a period not exceeding three years, and every member shall be eligible for reappointment".

[48] Even if it could be argued that there was no change in the membership so as to require a notice to be published in the Gazette, would the board still be constituted as

valid since the term of three years had expired since 1 May 2019? Could the re-appointment be accomplished merely by a letter from the Minister in the absence of further publication; also, in that regard, what would be the effect of section 39 of the Interpretation Act? Section 39 of the said Act does allow the Minister who has the power to appoint persons to a board to direct the person for the time being holding office to be a member of such board.

[49] Similarly, the effect of paragraph 2 of the first schedule as set out above would also have to be considered in conjunction with paragraph 10(7) of the said schedule. Paragraph 10(7) speaks to the validity of proceedings not being affected by vacancies or "by any defect in the appointment of a member thereof". If the board was found to be constitutionally invalid, would the application of paragraph 10(7), which speaks to defects in appointment, be able to cure the issue of constitutionality? These are issues that would have to be determined at the hearing of the appeal.

[50] In relation to the issue of bias, the material provided by the affidavit of Mr Brown alleges past disputes between himself and Mr Linval Freeman. Mr Brown contends that these raise a real danger of bias. He admitted in his affidavit that he did not raise this as a concern during the actual proceedings as he did not realise it was material; that he later raised these concerns with his attorney.

[51] Essentially, Mr Brown is seeking to raise fresh evidence in preparation for the appeal in relation to this issue of bias. These allegations by Mr Brown have not been properly answered by the PAB by way of affidavit evidence. No affidavit from Mr Linval

Freeman has been filed to contradict these assertions by Mr Brown. The issue that would have to be ventilated before the court hearing the appeal would be whether there is credible evidence of past disputes between Mr Brown and Mr Freeman; whether it would satisfy the principles for adducing fresh evidence as set out in **Ladd v Marshall** and “whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased” (see: **Porter v Magill**, [2002] 2 AC 357, 359). This issue could therefore not be determined at this stage of the proceedings.

Analysis and finding in relation to issue 2

[52] Where does the risk of injustice lie? Mr Brown has lost his ability to conduct his professional affairs and would be subject to criminal penalties if he attempted to engage in activities contrary to the PAA while unregistered. He had indicated, in particular, that he was in the middle of completing contracts with various clients and this would impact his ability to do so; that he could lose his company and cause further damage to his reputation as an audit and accounting professional and that he would suffer financial ruin. I do conclude that the risk of injustice to Mr Brown is quite substantial.

[53] I am mindful of the importance of the protection of the public interest and maintaining the integrity of professional standards as submitted by Mrs Reid-Jones. However, in weighing this issue, I consider that section 13(4) of the PAA allows for an application to be made for suspension of the PAB’s decision pending appeal. Parliament clearly contemplated that there could be a possibility that the PAB’s decision could be

suspended, that is, not take effect, until an aggrieved individual could have the matter determined on appeal to this court.

[54] Section 13(4) provides:

“Upon application to the Board made in the prescribed manner and within the prescribed period the Board may direct that any decision of the Board exercising any of the disciplinary powers conferred on it by this section shall be suspended while the person to whom the decision relates remains entitled to appeal against the decision in accordance with section 14 or while any such appeal by him awaits determination by the Court of Appeal.”

[55] I have been unable to locate any regulations which speak to the prescribed period and manner for such an application to be made. However, it is apparent that Mr Wildman failed to utilize the opportunity, afforded by section 13(4) of the PAA, to request that the order be suspended pending the appeal. At any rate, his failure to do so would not be a bar to a consideration of the present application (see also: **Paulette Warren-Smith v The General Legal Council** [2014] JMCA App 22 paragraph [22], **Don Foote** paragraphs [13] and [19], and **Arlean Beckford** paragraph [40]).

[56] In considering the risk of injustice to both parties therefore, I do accept that it would be weighed in favour of Mr Brown.

Analysis and finding in relation to issue 3

[57] Regrettably, in spite of my determination of issues 1 and 2, I am unable to grant the substantial relief requested by Mr Brown so far as it concerns his removal from the register of public accountants under the PAA. I considered the reasoning of my sister,

Phillips JA in **Arlean Beckford** and found, first of all, that there was a distinction between the Legal Profession Act ('LPA') and the PAA.

[58] In **Arlean Beckford**, following a disciplinary hearing pursuant to the LPA, the attorney had been suspended from practice for a period of two years and ordered to pay the costs of proceedings before the disciplinary committee of the General Legal Council. The applicant had filed a notice of application for a stay of execution of the Committee's orders on 11 May 2015. It is to be noted that sections 15(2) and (3) of the LPA provide:

"(2) The Committee shall, subject to rules under section 14, cause a copy of every such order and directions to be filed with the Registrar.

(3) Every order filed pursuant to subsection (2) shall, as soon as it has been so filed be acted upon by the Registrar and be enforceable in the same manner as a judgment or order and all directions of the Supreme Court to the like effect."

[59] At the time the matter for the stay of execution came before Phillips JA, the order of the Committee suspending the applicant had already been filed with the Registrar of the Supreme Court and the order had been duly published in the Sunday Gleaner. On 16 June 2014, during the continuation of the hearing before Phillips JA, the applicant filed an amended application seeking the following:

"[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'."

[60] In relation to that additional order, Phillips JA considered the powers of a single judge under the CAR and concluded at paragraph [38] of her judgment, that she had no power to grant such an order:

"[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."

[61] Phillips JA, however, concluded that the single judge of appeal had the power to order a stay of execution for the following reasons:

“[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.”

[62] There is no equivalent in the PAA to section 15(3) of the LPA on which Phillips JA’s reasoning was partially based. Also, she did not ultimately grant the orders requested for a stay of execution, so we do not have the benefit of any reasoning as to how such an order could be given practical effect in circumstances where the order had already been filed with the Registrar and published in the newspaper. This is certainly problematic, bearing in mind that rule 2.11 of the CAR would not permit a single judge to make an order directing the General Legal Council to publish a notice withdrawing the previous notice. The position of Mr Brown’s status under the PAA would be similarly affected in the circumstances where his name has been removed from the register and

such an order published in the Gazette. How would the effects of such an order be stayed at this stage?

[63] I do not consider it necessary to determine whether the order of the PAB removing Mr Brown from the register can be classified as purely declaratory or whether the PAB has the jurisdiction to grant declaratory orders, that is, “a formal statement pronouncing upon the existence or non-existence of a legal state of affairs”. In my opinion, such an order by the PAB appears to have a wider scope. The duties of the PAB as it relates to disciplinary hearings are of a quasi-judicial character. As a result of the decision made, Mr Brown lost his right to be treated as a registered public accountant with all the benefits which were conferred on him by statute.

[64] I have concluded therefore that status of the order for which the stay is being requested is the factor for consideration. In examining the status of such an order as given by the PAB, it is my opinion that it would have been amenable to a stay of execution, had the application been heard prior to the publication in the Gazette.

[65] My view of this matter is somewhat consistent with Mangatal JA (Ag)’s observations in **Paulette Warren–Smith**. In that case, there was no evidence before her that the order of the Committee striking the applicant from the roll of attorneys had been filed with the Registrar, as required by section 15(3) of the LPA. She opined that the application for the stay of execution was, as such, an application for the staying of the formal order with the Registrar of the Supreme Court. Having concluded that the applicant had some prospect of success on appeal and that the course less likely to

produce injustice was to grant the stay, Mangatal JA (Ag) granted a stay of the order of the Disciplinary Committee pending the determination of the appeal.

[66] I believe it is also appropriate to echo the sentiments of Mangatal JA (Ag) in relation to section 12A of the LPA which are equally apt in respect of section 13(4) of the PAA, “[i]t may well suit attorneys-at-law and their counsel to consider the relative suitability and convenience of making applications to the Committee [or Board] and exploring this other avenue of relief as opposed to, or before, making applications to this court for a stay”. It is to be expected that experienced and prudent counsel will always seek to protect the interest of their clients, by advising them of the most suitable path which avoids unnecessary costs and procedural delay”.

Conclusion

[67] Given the present state of affairs, the fact that the PAB’s decision has been published in the Gazette, I am of the view that no stay of execution can be granted in relation to the removal of Mr Brown’s removal from the register of public accountants. It is a fait accompli pending the outcome of his appeal. I will, however, grant a stay of execution as requested in relation to the order relevant to the costs and expenses to be paid by Mr Brown.

[68] I would recommend that the hearing of the appeal be accommodated as expeditiously as possible, having recognised the risk of injustice to Mr Brown, and in particular his inability to continue in practice as a public accountant.

[69] Having regard to all the circumstances, I order as follows:

- 1) The application to stay the decision of the respondent to remove the applicant from the register of public accountants is refused.
- 2) The application to stay the decision of the respondent to order the applicant to pay to the respondent, the sum of \$1,600,000.00 to cover the costs and expenses of and incidental to the enquiry is stayed pending the determination of the appeal.
- 3) The Registrar shall endeavour to set a date for the expedited hearing of this appeal.
- 4) There is no order as to the costs of this application.