**[2016] JMCA Civ 42**

**JAMAICA**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL NO 41/2011**

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

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| **BETWEEN** | **JANICE CAUSWELL** | **APPELLANT** |
| **AND** | **THE GENERAL LEGAL COUNCIL (ex parte ELIZABETH HARTLEY)** | **RESPONDENT** |

**W John Vassell QC and Courtney Bailey instructed by DunnCox for the appellant**

**B St Michael Hylton QC and Miss Anna Gracie instructed by Rattray Patterson Rattray for the respondent**

**13 April and 15 July 2016**

**PHILLIPS JA**

[1] This is an appeal from the decision of the Disciplinary Committee (the Committee) of the General Legal Council (GLC), delivered on 3 February 2011, refusing a preliminary point taken on behalf of the appellant, at the hearing of complaint no 90 of 2002. The preliminary point was that Mrs Elizabeth Hartley (the complainant), by whom the complaint was laid, was not authorised to lay the complaint against the appellant. The details of the decision appealed are that: (i) Mr Lester deCordova, client of the appellant and DunnCox, could subsequently ratify the conduct of Mrs Hartley in filing and pursuing this complaint without first getting his authority and (ii) the hearing should continue.

**Background facts**

[2] The appellant is and was at all material times a partner in DunnCox, a firm of attorneys-at-law. The complaint in this matter was instituted on 21 March 2002, under the Legal Profession Act (LPA), by Mrs Hartley against the appellant, requesting her to answer the allegations contained in the affidavit which accompanied the application. The application had been made on the ground that the facts stated in the said affidavit constituted conduct unbecoming the profession on the part of the appellant and the firm DunnCox in their capacity as attorneys-at-law. The application was signed by Mrs Hartley, Chartered Accountant, of Elmwood Terrace, Kingston 19.

[3] In the accompanying affidavit, Mrs Hartley stated that she was acting as agent for Mr Lester deCordova, and she deponed to the facts stated therein which grounded the complaint. She indicated that on 27 June 1973, Mr Altamont deCordova died leaving a will. In the will, he had named two executors, Lyndon Bethune and Oswald Lawrence. The attesting witnesses were D Grey and James A Gibbs. Mr Lancelot Cowan, a partner of Grant, Cowan & Chin See, were the attorneys who had been instructed to obtain the grant of probate in the estate. In 1978, the partnership of Grant, Cowan & Chin See merged with DunnCox. Mr Cowan continued to handle the matter until 1985 when it was passed to the litigation department of DunnCox.

[4] The will named two beneficiaries, Mr Lester deCordova, the son of Mr Altamont deCordova, and Beverley de Cordova, the daughter of Mr Altamont deCordova and Mr Lester deCordova's half sister. Mrs Hartley complained that to date the will had not been probated and there had been no explanation as to why the will had not been

probated by 1986. She stated that in 1986, the appellant had claimed that she had been informed that both executors had died and that she had not been made aware until 1992, that Mr Oswald Lawrence was still alive and prepared to participate in order to expedite the process.

[5] Mrs Hartley stated further that in 1993, Mr deCordova visited Jamaica. He appointed certain persons with power of attorney, one of whom was Mrs Karleen Hinds. Mrs Hartley stated that in 1999, Mr deCordova asked her to assist with the matter, particularly as both he and Mr Lawrence were elderly gentlemen.

[6] Mrs Hartley complained that when she contacted the appellant, she was informed that she had been unable to locate and communicate with certain persons; that files had been missing at the Supreme Court; and that letters of administration had been drawn up but not filed. She was informed, however, about the actions that were necessary for the grant of probate to be obtained. She indicated that she had discovered that one of the attesting witnesses had died in 1996, and throughout the intervening period had been residing at the address stated in the will.

[7] She stated that she had obtained as much information as she could; facilitated the signing of necessary documentation; sent the same to the offices of DunnCox; and the application with the necessary documentation had been filed in the Supreme Court in February 2000, and yet in May 2000, she had reviewed a request from the registrar of the Supreme Court for further information which had not yet been provided. As a consequence, she wrote to DunnCox in May 2000, and they replied to Mr deCordova,

appearing to express chagrin at her claim relating to their tardiness, implying, she stated, that she was being unreasonable in making such an allegation. It was her contention that the letter was merely providing excuses for the failure to obtain grant of probate, the fees having already been paid in advance for the same. She stated that she responded to that letter in June 2000, and had received no further communication from the attorneys since then.

[8] She therefore filed the complaint claiming that: (i) the attorneys-at-law had not provided her with information as to the progress of her business with due expedition, although she had reasonably required them to do so; (ii) they had not dealt with her business with all due expedition; and (iii) they had acted with inexcusable or deplorable negligence in the performance of their duties.

[9] The position of the appellant can be gleaned from a letter dated 23 April 2001, written to the Committee in response to the initial letter of complaint sent to the Committee before the official complaint was filed. She confirmed that the matter had been passed to the litigation department of DunnCox in 1985, by Mr Cowan (his firm having merged with DunnCox in 1978) for an application to be made to the Supreme Court, for leave of the court to have a copy of Mr Altamont deCordova's will admitted to probate, as the court's file containing the original will could not be located. The file was subsequently found, the application withdrawn, and the matter was passed to the appellant in 1986.

[10] The appellant indicated that she had encountered several difficulties in the conduct of the matter, including but not limited to: (i) having been inaccurately informed that both executors had died; (ii) endeavouring without success to obtain consent from the other named beneficiary for the application for a grant to be made in the new names as instructed; not being able to locate one of the donees of the power of attorney; preparing new documentation for another donee of the power of the attorney, which had to be sent to Mr deCordova in England, and then recorded at the Island Records Office; (iii) preparing further documentation for the grant of letters of administration in the names of the new donees; (iv) being unable to prove when requested the deaths of the executors, particularly when one was later found to be alive; (vi) further preparation of documentation for the application for a grant of probate in the name of the surviving executor, in lieu of the application for letters of administration; locating persons to verify the signatures of the attesting witnesses who had died, and preparing documentation to that effect; and (vii) finally filing the application for the grant of probate in January 2000, but being unable to provide answers to the requisitions from the registrar of the Supreme Court relating to the death of the other executor, Mr Bethune, due to lack of instructions.

[11] Subsequent to the filing of the complaint on 21 March 2002, as indicated, the appellant wrote to Mr deCordova on 5 May 2003, acknowledging receipt of information relating to the death of the sole surviving executor and advising him as to what was required in order to proceed in the matter in the light of that new development. She also referred to earlier correspondence to him, dated 19 May 2000, in which she had

stated that the firm no longer wished to act for him in circumstances in which they no longer enjoyed his (the client's) confidence. She indicated that:

> "Since our said letter Miss Elizabeth Hartley, presumably acting on your instructions, has filed a complaint against the signer with the General Legal Council and therefore, given the present circumstances, we feel that we are unable to continue to represent you in this matter.
>
> Please let us know to whom we should make delivery of all documents relating to this matter which are in our possession."

[12] On 5 March 2004, Mr deCordova wrote a very strident letter to the appellant firstly indicating that he had informed her some time previously that the complainant Mrs Hartley was acting on his behalf and had his full confidence. He queried why she had written to him instead of to her. He directed that she should pass on the advice that she had given to him in her letter (almost a year ago) to Mrs Hartley and their attorney, who was acting for him on the complaint to the GLC and that they would inform her "what is to done [sic]". He indicated that he was not prepared to undertake any further expense in relation to work that should have been done by the appellant years ago. He ended the letter by urging the appellant to write to Mrs Hartley and attorney-at-law, Miss Aisha Mulendwe, as soon as possible and not to write to him again.

[13] Mr deCordova wrote to the appellant again on 29 November 2004, reprimanded her for communicating directly with him and for not having completed the work requested of her, namely to obtain the grant of probate, and indicated that it was due to the industry of his agent Mrs Hartley that most of the issues which the appellant

claimed had been causing delay had been resolved. He remonstrated with her about her persistence in communicating directly with him and ignoring his appointed agent which he described as her "annoying behaviour". He ended the letter by stating that he was copying the same to the GLC "so that they can be further informed of [the appellant's] persistent unprofessional conduct".

[14] On 12 September 2006, Mrs Hartley made arrangements and collected the file in relation to the representation of Mr deCordova from the appellant and DunnCox.

**The ruling of the Disciplinary Committee**

[15] On 29 March 2008, the hearings before the Committee commenced and the complainant was cross-examined. The matter was then adjourned and when the hearings resumed on the 10 April 2010 reference was made to the fact that correspondence had been submitted to the Committee in the interim in relation to the query by Mr W John Vassell, QC, for the appellant, as to whether the panel had been provided with the authority by the complainant to make the complaint. The preliminary objection was then made on the basis that there was no evidence that the agency of the complainant to lay the complaint existed at the material time.

[16] Miss Mulendwe, counsel for the complainant, had submitted the power of attorney granted by Mr de Cordova to Ms Hartley. I have set it out in its entirety below.

"**POWER OF ATTORNEY**

**THIS POWER OF ATTORNEY** is made the 29th day of December 2006 by **LESTER GEORGE deCORDOVA** retired electrician of 31 Dobson Close, Swiss Cottage London, NW6 4RT England.

WHEREAS **ALTAMONT deCORDOVA**, late of 15 Cassia Park Avenue Kingston 10, in the parish of Saint Andrew, Taxicab Operator died on the 27th day of June 1973, Testate appointing Lyndon Bethune and Oswald Lawrence his executors but both having died without the said will being probated

AND WHEREAS the beneficiaries named in the said will, children of the deceased, the said **LESTER deCORDOVA** and **HAZEL EVADNEY deCORDOVA nurse of 25 Florence Avenue Hempstead Great Neck Long Island, New York 11550, U.S.A.** reside outside of Jamaica and are desirous of raising Letters of Administration with the Will Annexed and wind up this estate

**I LESTER deCORDOVA** for myself **NOW HEREBY NOMINATE CONSTITUTE** and **APPOINT ELIZABETH KATHLEEN HARTLEY** Management Consultant of 7 Elmwood Terrace Kingston 19 in the parish of Saint Andrew to be my true and lawful Attorney in Jamaica aforesaid for me and in my name and on behalf of or if necessary in the name of my Attorney to do permit and suffer any of the acts and things following, that is to say:-

1. To take all such steps as shall be necessary for Letters of Administration with the Will Annexed in the estate of **ALTAMONT deCORDOVA** deceased Testate aforesaid to be granted to my said Attorney by the Supreme Court of Judicature of Jamaica for my use and benefit and to enter into all such bonds, obligations and things as shall be necessary in relation to the premises.

2. (a) To see to the endorsement of the death of the said deceased on all Certificates of Titles in the name of the deceased for shares in any Company or Companies incorporated in Jamaica and to the vesting of the said shares in my Attorney and to the Transfer of the said shares to the beneficiaries thereof under the proper law covering estates and for such purposes to seal execute and deliver all such deeds, transfers, Instruments, Assignments and documents as my Attorney shall think fit.

(b) To sell and dispose of at such prices and upon such terms as my said Attorney may deem advisable all real and personal estate of the deceased in Jamaica and for such purpose to seal execute and deliver all such conveyances, contracts, deeds transfer, Instrument and applications under The Registration of Titles Act of Jamaica, Assignments and documents as such Attorney shall think fit.

3. To ask demand sue for recover [sic] and receive from all or any person or persons all or any sum or sums of money owing or payable or belonging to the estate of the deceased or to which his estate may be entitled and on payment thereof to sign seal and execute all receipts releases and other discharges for the same respectively.

4. GENERALLY to act for me, in relation to the estate of the deceased in Jamaica and in the legal proceedings necessary in respect thereof and to the getting in and realization and enforcement of payment of all assets belonging to the estate of the deceased as fully and effectually in all respects as I could have done if personally present and acting therein AND all and whatsoever my said Attorney shall lawfully do or cause to be done by virtue of or in exercise hereof I the said **LESTER GEORGE deCORDOVA** do hereby confirm and agree to ratify.

IN WITNESSING WHEREOF I THE SAID **LESTER GEORGE deCORDOVA** have hereunto set my hand an affixed my seal this 29th day of December in the year Two Thousand and

**SIGNED SEALED** AND **DELIVERED** )

by the said **LESTER GEORGE deCORDOVA** ) _____

at London, England ) **LESTER GEORGE deCORDOVA**

In the presence of: - )

_____

**NOTARY PUBLIC**"

It seemed fairly clear that there was no mention throughout this very detailed instrument, of any power given to Mrs Hartley from Mr deCordova to make a complaint to the Disciplinary Committee of the GLC, alleging negligent performance or otherwise, by the appellant in relation to the work that she had been engaged by him to do.

[17] The hearings before the Committee continued through 10 July and 6 November 2010, and the ruling of the Committee on the preliminary point was given on 3 February 2011.

[18] The Committee referred to the fact that on 23 March 2002, Mrs Hartley, acting as agent for Mr deCordova, had filed a complaint with the GLC against the appellant, and set out the details of the same, and the facts relative thereto, namely that the appellant had been engaged to obtain grant of probate in the estate of Mr Altamont deCordova, and that up until the filing of the complaint by Mrs Hartley against the appellant the said estate had not yet been probated.

[19] The Committee set out the chronology of the hearings and the preliminary point which had been taken by Mr Vassell and indicated that Miss Mulendwe had undertaken to provide the Committee with a power of attorney which had been given to the complainant dated 29 December 2006, the contents of which have been set out in paragraph [16] herein. The Committee noted that at the hearing of 10 April 2010, it had been agreed by all including Miss Mulendwe, that the power of attorney had not given Mrs Hartley the power to act as agent for Mr deCordova in bringing the complaint against the attorney, but was limited to her obtaining probate in the estate of Mr

Altamont deCordova and all matters ancillary thereto. Subsequent to that, Miss Mulendwe sought to rely on certain items of correspondence and emails to satisfy the panel as to Mrs Hartley's authority to lay the complaint, but that documentation was objected to by Mr Vassell, on the basis that the documentation contained hearsay statements. The panel found that the complainant had not satisfied any of the grounds which permitted a person acting pursuant to the Evidence Act to rely on hearsay documents as exceptions to the hearsay rule, and rejected the documents as inadmissible hearsay.

[20] The panel noted counsel's respective contentions. Miss Mulendwe submitted that Mr deCordova had ratified the actions taken by Mrs Hartley against the appellant in his letters, and by his silence from which one could infer that he had given her authority to act on his behalf in laying the complaint. Further, she argued that the appellant had known about Mrs Hartley and had accepted her as Mr deCordova's agent. On the other hand, Mr Vassell submitted that Mrs Hartley had not established that she had been authorized by Mr deCordova to act as his agent for the purpose of bringing and pursuing the complaint at the time when the complaint, was laid, and such authorization, he posited, must exist at the date of laying the complaint, and in the absence of that, the complaint was a nullity, and could not be retroactively ratified by the client.

[21] The panel reviewed the law on agency and ratification. They referred to one of the leading texts on the subject, namely, Bowstead and Reynolds on Agency, 16th

edition, article 13-20, paragraph 2-046, which set out the principle in this way in paragraph 9 of the ruling:

> "Where an act is done purportedly in the name or on behalf of another by a person who has no authority so to do that act, the person in whose name or on whose behalf the act is done may, by ratifying the act, make it as valid and effectual, subject to the provisions of Articles 14 to 20, as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all."

[22] The panel also relied heavily on the dictum of Jenkins LJ in **Danish Mercantile Co Ltd and others v Beaumont and another** [1951] Ch 680, where proceedings had been started in the name of a solicitor without the authority of the plaintiff. The panel noted that, in that case, the Law Lord had opined at pages 687-688 that:

> "I think that the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority so to do, or under an erroneous assumption as to the authority, does so at his own peril, and that, so long as the matter rests there, the action is not properly constituted. In that sense, it is a nullity and can be stayed at any time, provided that the aggrieved defendant does not unduly delay his application; but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action to adopt the proceedings, to approve all that has been done in the past, and to instruct the solicitor to continue the action. When that has been done then, in accordance with the ordinary law of principal and agent and in accordance with the ordinary doctrine of ratification, in my view, the defect in the proceedings as originally constituted is cured; and it, is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were, in the first instance, brought without proper authority."

The panel recognized however that acts which are a nullity and void cannot be ratified, but the panel put those in the class of criminal acts such as forgery of one's signature

as referred to in **Brook v Hook** (1871) LR 6 Exch 89 or forged promissory notes, which the panel stated could not be ratified, and therefore remained null and void.

[23] The Committee examined in detail the provisions of section 12 of the LPA and in particular noted the four persons that the Act gives the right to lodge a complaint against an attorney, namely: an aggrieved person, the registrar, the GLC and an agent of an aggrieved person. The panel referred to **General Legal Council ex parte Basil Whitter (at the instance of Monica Whitter) v Barrington Earl Frankson** [2006] UKPC 42, for the principle that when a statute gives someone the right to invoke some legal procedure by giving notice, he may do so either in person or authorise someone to do so on his behalf, unless the statute expressly requires a personal signature, and excludes the performance by an agent. The panel therefore concluded at paragraph 15 as follows:

> "If an aggrieved person can authorize someone else to bring a complaint against an Attorney on his behalf and the actual aggrieved person could have lawfully brought the claim, we cannot see why an authority given after the complaint is laid cannot ratify the agency. Ratification relates back to the very unauthorised act of the agent. The filing of a complaint against an Attorney under the **Legal Profession Act** is similar to filing suit as in the case of **Danish Mercantile** where the Solicitor had no authority to file suit. It is not in the nature of a criminal offence which can never be made right and therefore must be a true nullity, but more akin to a civil action which can be made good as was recognised by Kelly C.B. in **Brook v Hook** supra when he distinguished a criminal offence from a civil act and stated that a civil act was "**capable of being made good by subsequent recognition or declaration; but no authority is to be found that an act which is itself a criminal offence is capable of ratification." (page 100)**. From this statement it can be inferred that civil acts can be

> subsequently ratified unlike criminal acts which by its various nature could never be made acceptable by ratification. In the same case Martin J., who gave the dissenting judgment, made an important observation which we adopt and which is that:
>
> > **"If a contract be void upon the ground of it being of itself and in its own nature illegal and void, no ratification of it by the party in whose name it was made by another will render it a valid contract; <u>but if a contract be void upon the ground that the party who made it in the name of another had no authority to make it, this is the very thing which the ratification cures</u> and to which the maxim applies *omnis ratihabitio retrot rahitur et mandato a equiparature.*"**
> >
> > **No words can be more expressive. The ratification is dragged back as it were, and is made equipollent to a prior command."** (page 96) (emphasis as stated in the decision)

[24] The panel noted that Mr Vassell had been unable to provide any authority to support his contention, save **Craig v Kanseen** [1943] 1 All ER 108 which the panel found was not helpful as that case only stated, without more, that an act which was void could not be ratified. The panel found that there was no evidence to support the position that Mrs Hartley had been authorised by Mr deCordova to bring the complaint at the time that the complaint had been laid, but found that the two letters referred to in paragraph [12] had ratified the agency.

[25] The panel therefore finally concluded that Mr deCordova could subsequently ratify the conduct of Mrs Hartley in filing and pursuing the complaint without first getting the authority to do so, and thus found that the preliminary point failed, and that the hearing of the complaint should continue.

## The appeal

[26] Being dissatisfied with that ruling the appellant appealed. The grounds of appeal are as follows:

> "i. The learned panel erred in failing to appreciate the difference between cases where a principal's authority is required by an agent in order to validly initiate disciplinary proceedings under the Legal Profession Act, and cases where that authority is required to commence *inter partes* civil proceedings.
>
> ii. The learned panel accordingly fell into error by applying cases from the general Law of Contract, and cases in relation to the commencement of civil actions to the facts of the present case, in determining the question whether the unauthorized initiation of disciplinary proceedings by the Complainant could be subsequently ratified, and in so doing failed to properly consider and recognize that the present case involves the initiation of disciplinary proceedings pursuant to a limited statutory power conferred by section 12 of the **Legal [Profession] Act**.
>
> iii. The learned members of the panel erred in forming the view that only a criminal act, which can never be made right and / or made acceptable by ratification and is therefore a true nullity, could not be subsequently ratified.
>
> iv. The learned members of the panel erred in finding that the unauthorized initiation of the complaint was subsequently ratified when there was no evidence of any such ratification before it, or any clear expression by Mr. Lester DeCordova of ratification of Mrs. Hartley's actions in initiating the complaint. In the absence of any such evidence, the panel chose instead to infer from 2 letters dated March 5, 2004 and November 29, 2004 respectively that Mr. DeCordova subsequently ratified Mrs. Hartley's previously unauthorized actions in initiating the complaint purportedly as his agent."

At the hearing of the appeal, Mr Vassell indicated that he would not be pursuing ground of appeal (iv).

**Issues**

[27] In essence, in my view, the real questions in controversy between the parties are:

1. Can a complaint initiated by an agent in respect of disciplinary proceedings under section 12 of LPA be subsequently ratified by the principal, if commenced without the principal's authority?
2. Would the position be the same or different if the action were commenced without the principal's authority in *inter partes* civil proceedings? and
3. Is it only a criminal act which can never be made right, and which is not therefore amenable to ratification that is a nullity?

**Appellant's submissions**

[28] Mr Vassell pointed out that it had been established or, as he put it, conceded, that Mrs Hartley had no authority from the client Mr deCordova to file the form of complaint and affidavit in support dated and filed 21 March 2002, at the time that she had filed the same. It was Mr Vassell's contention that the Committee should have dismissed the complaint *in limine* without more as being a nullity. The Committee, he

stated would not have had any jurisdiction to hear and determine or otherwise entertain the complaint.

[29] Mr Vassell particularly challenged the finding of the Committee that since an aggrieved person could bring a claim and could authorize someone to do so then there was no reason why an authority given after the complaint had been laid could not ratify the agency. He also challenged seriously the finding that the filing of a complaint against an attorney was similar to commencing suit in a civil case.

[30] Mr Vassell submitted that the initiation of a complaint by an agent under the LPA had to exist as a fact and be so established for the complaint to be valid. Additionally, based on the nature of the complaint in the instant case, for example, negligence on the part of the attorney in the performance of the retainer, Mr Vassell submitted that the client was the only person in the legal relationship who could make the complaint or someone who he authorizes, but it cannot, Mr Vassell submitted, be done retroactively, which means subsequently ratified. Thus, Mr Vassell submitted, having not been authorized at the date of the filing, the complaint was a nullity and could not in law be ratified.

[31] Mr Vassell referred specifically to section 12 of the LPA and submitted that only certain specific persons were entitled to initiate disciplinary proceedings. The categories, he stated, were restricted as identified in the statute. Any initiation outside of the categories, Mr Vassell submitted, would make the complaint a nullity. In construing the provision strictly, the words must be given their plain and ordinary

meaning and further, if the regime established under the LPA is to be maintained in the public interest under the LPA, it must uphold standards, but at the same time, must not operate oppressively, inequitably or unfairly to attorneys. In the light of this, there was no need, Mr Vassell argued, to construe the statute as permitting unauthorized persons to initiate proceedings subject later to ratification. The interpretation of the statute points against any such construction, Mr Vassell argued, and the fact that Mrs Hartley may have mistakenly thought that she had authority to lay the complaint was irrelevant, and did not affect the said act from being a nullity and incapable of subsequent ratification.

[32] Mr Vassell referred to the Privy Council case of **General Legal Council ex parte Basil Whitter v Barrington Earl Frankson** which the panel had relied on, and submitted that the panel had erred, in that they had failed to appreciate the difference between initiating disciplinary proceedings pursuant to the LPA, and the commencement of *inter partes* civil proceedings. As indicated the former are pursuant to a limited statutory power and acting outside of that power makes the act void *ab initio*. Proceedings *inter partes*, he submitted, are for the enforcement of private rights.

[33] Mr Vassell submitted further that the ratio from **General Legal Council ex parte Basil Whitter v Barrington Earl Frankson** is set out in paragraph 4 of the judgment as follows:

> "The general principle is that when a statute gives someone the right to invoke some legal procedure by giving a notice or taking some other formal step, he may either do so in person or authorise someone else to do it on his behalf..."

The Privy Council, he argued "made no determination that, if the agency did not exist at the time of filing the complaint, that agency can be retrospectively confirmed by ratification thereby validating the complaint".

[34] Mr Vassell referred to the case of **Danish Mercantile Co Ltd and others v Beaumont and another** to explain why the Committee had erred in its decision, as it had relied on that and other cases which were dealing with matters relevant to the general law of contract, in respect of which subsequent ratification was feasible in certain circumstances. In fact, Mr Vassell noted, it was of some significance that the proceedings before the Committee once initiated could not be withdrawn without the leave of the Committee and any challenges to the decision of the Committee on appeal, were always designated with the attorney on the one hand, and the GLC on the other. It was never the attorney versus the complainant. Mr Vassell submitted further that the statute must contain express words that would permit a complaint that was void at its inception to acquire validity through the mere act of the true complainant subsequently filing a ratification of the complaint. The LPA he stated had no such express words contained therein.

[35] Mr Vassell referred to part 8 of the Civil Procedure Rules, 2002 (CPR) to submit that those rules "do not establish a permitted category of persons who can file actions, and the jurisdiction of the Supreme Court to hear and determine cases so commenced derives not from these rules but from the Judicature (Supreme Court) Act which is an unlimited jurisdiction." The situation is different, Mr Vassell argued, in respect of the LPA, as the jurisdiction is only triggered in relation to applications filed by persons in the

permitted class. In civil cases, if the matter was filed by a person without authority, in keeping with the principle enunciated in **Danish Mercantile Co Ltd and others v Beaumont and another**, the filing could be validated retrospectively. However as the proceedings before the GLC, a public agency, are quasi criminal (see **Arlean Beckford v Disciplinary Committee of the General Legal Council** [2014] JMCA App 27, paragraph [51] per Phillips JA), the public law doctrine becomes relevant and Mrs Hartley, not being a person falling into one of those specific categories stated in section 12 of the LPA, would have no standing.

[36] Mr Vassell referred to the fourth schedule of the Legal Profession (Disciplinary Proceedings) Rules, which requires the Committee to decide whether a prima facie case has been disclosed before the matter was set down for hearing by a panel. In the instant case, Mr Vassell contended that a prima facie case could not have been made out on a void complaint. That decision of the Committee was made on 22 March 2003, and based on the findings of the panel, the letters of ratification were dated 5 March and 29 November 2004. That determination made in respect of the application deciding on the prima facie case was therefore, Mr Vassell argued, made on a void complaint and thus without jurisdiction. Mr Vassell relied stridently on five cases namely: **Bowyer, Philpott & Payne Limited v Mather** [1919] 1 KB 419; **Re Pritchard (deceased)** [1963] 1 All ER 873; **Leymon Strachan v The Gleaner Company Limited and another** [2005] UKPC 33; **Shanks v Central Regional Council** (1987) SLT 410; and **Right v Cuthell** (1804) 5 East 490 for the general

proposition that acts void at inception are nullities and can never be ratified. In summary, Mr Vassell submitted as follows:

1. Disciplinary proceedings under the LPA are not akin to civil proceedings.
2. The question before the Committee fell to be resolved by interpretation of the statute, the LPA, and not by placing reliance on cases such as **Danish Mercantile Co Ltd and others v Beaumont and another**.
3. It is incorrect to conclude that because authority to file a complaint can be given before it is filed, there is no reason why it cannot be given afterwards.
4. Acts which are a nullity and therefore void, cannot be ratified.

**Respondent's submissions**

[37] B St Michael Hylton, QC, for the respondent, accepted, as the Committee had ruled, that the complainant had failed to establish that she had Mr deCordova's authority to file the complaint on 21 March 2002. However, he did not accept the appellant's position that the complaint was therefore a nullity and could not be ratified. Mr Hylton's contention was that the latter position was flawed, in that the complaint, he argued, was not a nullity, and could be ratified. He stated that the Committee was correct to find that disciplinary proceedings were akin to civil proceedings, which

proceedings could be ratified if commenced in the name of a person who was either an authorized person acting in excess of that authority, or an unauthorized person.

[38] Mr Hylton maintained further that it was a misreading of the statute, and a mischaracterization of the evidence, to attempt to categorize the complaint as a nullity. Mr Hylton referred to section 12 of the LPA and accepted that aggrieved persons can file complaints under that section, and that a client clearly fell under that description. He stated that, pursuant to **General Legal Council ex parte Basil Whitter v Barrington Earl Frankson**, an agent can file a complaint on behalf of a client. He referred to the dicta in that case to support the submission that although an affidavit must be filed to commence the process, it did not have to be personal in nature.

[39] In comparing the process of filing complaints under the LPA to civil proceedings, Mr Hylton argued that it was the same, as in order to have status to file a civil claim one must have a cause of action, and an agent can authorize a claimant to file a claim. It is also clear from the authorities, Mr Hylton submitted, that if the claim was filed unauthorisedly, though on the claimant's behalf, the claimant can subsequently ratify the unauthorized act of filing the claim. The filing is not a nullity because Mr Hylton posited, "the agent is not purporting to act in his own right, but was acting on behalf of a claimant who did have a cause of action, and so did have status to make the claim."

[40] Mr Hylton also referred to the dicta of Jenkins LJ in **Danish Mercantile Co Ltd and others v Beaumont and another** cited by the Committee in its decision, and adopted the principles stated therein. He further relied on the English Court of Appeal

case, **Presentaciones Musicales SA v Secunda and another** [1994] 2 WLR 660. The decision in that case, he insisted, gave support to the questions raised in the instant case, in that a writ which had been issued within the limitation period, but without authority (having been mistakenly filed by solicitors on behalf of their client, a Panamanian company) was held not to be a nullity, and that the nominal plaintiff could ratify and adopt the writ, notwithstanding the expiration of the limitation period.

[41] Mr Hylton drew the analogy to the instant case. He stated that in her affidavit Mrs Hartley said that she was acting as agent for Mr deCordova, even though she could not prove her agency at the time of filing the complaint. The appellant, he submitted, had recognised that she was acting in that capacity. The Committee was right, he maintained, to accept that the client could ratify and adopt the earlier filing.

[42] With regard to the evidence in this particular case, Mr Hylton posited that the Committee did not make a finding that Mrs Hartley was not authorised to file the complaint, but stated that "no evidence had been established to demonstrate that she was authorised". Mr Hylton submitted that that was as far as they could go, as certain documentation which Mrs Hartley wished to tender in evidence had been ruled as inadmissible hearsay. He also submitted that contrary to Mr Vassell's submissions, there was "no obvious injustice to the attorney being put in jeopardy" by an unauthorised complainant, as neither jeopardy nor injustice arose on the facts of the instant case.

[43] He pointed out that at all material times between 1999 and the termination of the appellant's retainer in 2006, both before and after the filing of the complaint, the

appellant had treated Mrs Hartley as the duly authorised agent of Mr deCordova. He argued that the appellant was no worse off, the complaint having been filed by Mrs Hartley, and she had not suggested that she would have done anything differently had it been otherwise. Her defence would have been the same.

[44] Mr Hylton therefore submitted that the Committee's decision was correct and ought to be upheld. Mr deCordova could and did ratify the actions of Mrs Hartley in filing and pursuing the disciplinary complaint against the appellant.

**Discussion and Analysis**

[45] Section 12 of the Legal Profession Act, where relevant, states as follows:

> "12 (1) Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by an attorney, that is to say-
>
> (a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect);
>
> (b) any such criminal offence as may for the purposes of this provision be prescribed in rules made by the Council under this Part.
>
> (2) In any matter or hearing before a court a Judge, where he considers that any act referred to in sub-paragraph (a) or (b) of subsection (1) has been committed by an attorney, may make or cause the Registrar to make an application to the Committee in respect of the attorney under that subsection.

In this subsection "court" means the Supreme Court, the Court of Appeal, a Resident Magistrate's Court, the Traffic Court or any other court which may be prescribed.

(3) Any application under subsection (1) or (2) shall be made to and heard by the Committee in accordance with the rules mentioned in section 14.

(4) On the hearing of any such application the Committee may, as it thinks just, make one or more of the following orders as to-

(a) striking off the Roll the name of the attorney to whom the application relates;

(b) suspending the attorney from practice on such conditions as it may determine;

(c) the imposition on the attorney of such fine as the Committee thinks proper;

(d) subjecting the attorney to a reprimand;

(e) the attendance by the attorney at prescribed courses of training in order to meet the requirements for continuing legal professional development;

(f) the payment by any party of costs of such sum as the Committee considers a reasonable contribution towards costs; and

(g) the payment by the attorney of such sum by way of restitution as it may consider reasonable,

so, however, that orders under paragraphs (a) and (b) shall not be made together."

[46] It is clear from a perusal of the above provisions and I accept, as both Queen's Counsel seemed to do also, based on a true and proper construction of the LPA, and the dicta of the Law Lords in **General Legal Council ex parte Basil Whitter v Barrington Earl Frankson**, that there are four types of persons who can lodge a

complaint under the statute requiring an attorney to answer allegations contained in an affidavit. These are as indicated previously in paragraph [23] herein, namely: (i) any person alleging himself aggrieved by an act of professional conduct committed by an attorney; (ii) The registrar of the Supreme Court; (iii) any member of the GLC; and (iv) an agent of the person aggrieved at (i).

[47] As indicated, in my view the real question of controversy between the parties is set out in paragraph [27] herein. In short- Was the complaint a nullity? Can it be subsequently ratified?

[48] Mr Vassell had argued that the fact that Mrs Hartley did not say that she was acting as agent on the application filed with the Committee, but had stated that she was so acting in the affidavit which accompanied it, was fatal to the application. I disagree with that proposition. Mr Vassell had also urged that a prima facie case could not be made out on a void complaint. However section 12(3) of the LPA states that any application filed pursuant to section 12(1) and 12(2) of the LPA, shall be made and heard by the Committee in accordance with rules mentioned in section 14 of the LPA, which states that the Committee may from time to time make rules regulating its procedure. The rules are contained in the fourth schedule to the LPA and are entitled, "The Legal Profession (Disciplinary Proceedings) Rules". Rules 3, 4 and 5 are applicable to this discussion.

[49] Rule 3 states that the application to the Committee requiring the attorney "to answer allegations contained in an affidavit, shall be in writing under the hand of the

applicant..." Rule 4 indicates that further information can be provided, and if in the opinion of the Committee, no prima facie case has been shown, the Committee can without requiring the attorney to answer the allegations, dismiss the application. If however, pursuant to rule 5, in the opinion of the Committee, a prima facie case has been made out, the secretary of the Committee shall fix a date for the hearing of the complaint, and shall also serve the same on the complainant and the attorney.

[50] It is clear from those three rules, cumulatively, that the application and the affidavit must be read together, and when that is done, it is also clear that making the application in the form attached to the LPA, the Canons alleged to be breached and the factual allegations in support of those alleged breaches, are set out in the affidavit, and constitutes the case that the attorney is required to answer. The application which is set out at the end of the fourth schedule and is described as "Form 1" contains this statement, "I, [name of complainant] the undersigned, hereby make application that [the attorney's full name] of [the attorney's last known address] attorney-at-law, may be required to answer the allegations contained in the affidavit which accompanies this application".

[51] The affidavit described as "Form 2", beside the letters (h) and (i), contain the statements, "set out the facts complained of" and "set out shortly the ground of complaint" respectively. The complainant is required to fill in accordingly as indicated "the compliant I make against the attorney-at-law is that he [set out ground of complaint]".

[52] There is no doubt that the two documents relate to each other, and are expected to be filed contemporaneously, and read together. The application refers to, and requires the attorney to answer the allegations set out in the affidavit. The submission therefore that Mrs Hartley having only made the statement that she was "acting as agent of Mr Lester deCordova" in the affidavit, and not in the application, is fatal to the application, is in my view without merit, and cannot avail the appellant.

[53] The issue as to whether the decision having been made that a prima facie case was made out before the ratification of the said decision would have resulted in that decision being fatal, requires consideration. I agree with Mr Hylton that if the court accepts that ratification of a decision made without authority can take place subsequently, and particularly in the circumstances of this case, then such ratification would be effective from the date of filing of the complaint, and would therefore encompass the date on which the decision was made by the Committee in respect of the prima facie case, which was made later.

[54] The real question therefore is whether the application which was filed by Mrs Hartley, without any mention of her acting as the agent of the client, Mr deCordova, with its accompanying affidavit, which did mention that she was so acting, both having been filed without authority at the time of filing, were simply void, and a nullity, to which life could not be given by ratification.

[55] Mr Vassell relied on four cases on this point, and I shall deal with them all in some detail as I think that the *rationes decidendi* of those cases are dispositive of the

appeal. In **Bowyer, Philpott & Payne Limited v Mather**, the facts taken from the head note of the case are as follows:

> "By the Public Health Act, 1875, s. 253: "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General." Sect 259: "Any local authority may appear before any court, or in any legal proceeding by their clerk, or by any officer or member authorised generally or in respect of any special proceeding by resolution of such authority, and their clerk, or any officer or member so authorised shall be at liberty to institute and carry on any proceeding which the local authority is authorised to institute and carry on under this Act:-"

The Divisional Court in the Kings Bench Division consisting of three judges: Darling J, Avery J, and Salter J held:

> "that the authority required by s. 259 of the Public Health Act, 1875, must be given by the local authority to their officer or member before proceedings are instituted, and cannot be given subsequently by the local authority passing a resolution purporting to confirm what their officer has done in instituting proceedings."

[56] As can be seen, similar issues arose in that case as in the case at bar. In **Bowyer, Philpott & Payne Limited v Mather**, the appellant contended that the respondent had no authority to institute the proceedings, given the specific provision of the Act and that the confirmation in the later meeting could not cure the defect, whereas the respondent relied on the fact that, as the officer of the council, he had the authority to institute proceedings, and even if he had not, the confirmation at the subsequent meeting could cure the defect. So too in the instant case where the respondent relied on the two letters dated 5 March and 29 November 2004, sent by Mr

deCordova, to ratify the complaint filed by Mrs Hartley two years previously. On page 423 in **Bowyer, Philpott & Payne Limited v Mather**, Darling J stated:

> "In my opinion that resolution was not sufficient to authorise the institution of the proceedings. There never was such an authorization of the institution of the proceedings as is required by s. 259. It seems to me that authority to institute proceedings within the meaning of s. 259 cannot be given subsequently to the proceedings being instituted by a confirmation of what has already been done."

Salter J said this on page 425:

> "I am of the same opinion. Sect. 253 of the Public Health Act, 1875, shows a clear intention on the part of the Legislature that those proceedings for the recovery of penalties should not be lightly instituted. Reading that section with s. 259 it is clear that the words in the latter section 'officer or member so authorised shall be at liberty to institute and carry on any proceeding,' must be confined to a case where the officer has received authority before the proceedings are instituted."

[57] It does seem clear from the *ratio decidendi* of this case that the doctrine of ratification operates differently in public law than in private law. In my view, in disciplinary proceedings which have as their raison d'etre the protection of the interests of members of the public, while maintaining standards in the legal profession, the intention of the legislature is made manifest that initiation of proceedings should not be lightly undertaken as the statute mandates that only certain persons can do so.

[58] The second case relied on by Mr Vassell is **Re Pritchard**, and the facts of the case referred to herein are taken from the speech of Upjohn LJ. He indicated that the plaintiff's husband had died leaving a will which had not made any provision whatsoever for her. The will was duly proved by the 1st and 2nd defendants, the executors named

therein. The plaintiff caused an originating summons to be issued in the Pontypridd District registry entitled, "In the High Court of Justice, Chancery Division. In the matter of the Inheritance (Family Provision) Act, 1938". The summons was issued against the two defendants claiming such reasonable provisions as the court might think fit should be made to her out of the estate of her husband. Unfortunately, and as Upjohn LJ stated, regrettably, the originating summons was issued out of the wrong registry. He stated that the learned registrar having heard arguments on the matter came to the conclusion that the district registry had no jurisdiction in the matter at all, and so the proceedings were a nullity. The appeal to the learned judge, Wilberforce J, affirmed the view of the learned registrar.

[59] Although counsel for the plaintiff conceded that the originating summons had been wrongly issued in the district registry, he contended that it was a mere irregularity. The case concerned whether the court should apply the English RSC, Ord 70, rule 1, which stated that the non-compliance with any rule should not render the claim void unless a judge so directed; but the proceedings could be set aside as being irregular. Lord Upjohn canvassed several authorities, a few of some antiquity, and stated that the RSC Ord 70 cannot apply when there are fundamental defects in the proceedings. He stated that "a fundamental defect will make it a nullity". He examined whether a nullity was one where a party was entitled to complain of the defect *ex debito justitiae,* or whether a useful test to decide whether the proceeding was a nullity was if the defect could not be waived. He ultimately decided that the authorities established the following types of nullities:

(i) Proceedings which ought to have been served but have never come to the notice of the defendant at all not including substituted service, or service by filing in default or where service has been properly been dispensed with;

(ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; and

(iii) Proceedings which appear to be duly issued, but failed to comply with a statutory requirement.

He finally concluded that although the district registrar had the powers of an officer of the Supreme Court, and exercised all the powers of masters in matters properly proceeding in the district registry,

> "[t]hey have no power whatever in matters which are not proceeding in the district registry and have no power to issue documents from the Central Office or from the registry other than their own."

Accordingly, Upjohn LJ opined that, as the registrar had no power to affix the seal of the Central Office, the document could not be treated as having been issued out of a department of the High Court, except that district registry. As a result, he stated, no proceedings had commenced. There had been a fundamental failure to comply with the requirements of a statute relating to the issuing of proceedings. Lord Upjohn therefore concluded that "it is not a mere irregularity". Indeed, he stated, that it was much more

than an irregularity. It was a nullity. It was also not possible for the defendants to waive that defect.

[60] Danckwerts LJ, in making his own comments, stated that the issuance of the originating summons was not a mere irregularity. He said that "it is quite plain that an originating summons is a procedure which can be used only in accordance with the Rules of the Supreme Court". He concluded that the originating summons was a nullity and had no operation. In his view,

> "[i]t has no more application to the matter to be decided than a dog licence. In this situation the provisions of RSC, Ord 70, have no application. The defect cannot be cured. It is impossible to transfer the proceedings to the Central Office because there are no operative proceedings to be transferred."

[61] In the Privy Council decision of **Leymon Strachan v The Gleaner Company Limited and another**, Lord Millett speaking on behalf of the Board fully endorsed Lord Upjohn's distinction between defects in proceedings which could and should be rectified by the court, and those which were so fundamental that they made the whole proceedings a nullity, and referred to the classes of nullity as outlined previously in paragraph [58].

[62] **Right v Cuthell** concerned a notice to quit given to a tenant under a proviso in a lease for 21 years. It stated that in case either landlord or tenant wished to put an end to the term at the expiration of the first 14 years, then six months notice in writing must be given by either of them respectively. The notice was signed by two of three joint tenants, executors of the original lessor, allegedly given on the part of all three. It

was held, that as a notice to defeat an estate, it must be such that the person to whom it was given can rely on it. Lord Ellenborough CJ stated that if only two of three had joined in the notice, the defendant could not assume that the third joint tenant was a party to it. The issue was whether the notice being brought later in the name of the third person was sufficient to ratify their act.

[63] The court found that ratification given afterwards was not sufficient. The tenant was entitled to a notice on which he could act with certainty at the time that the notice was given. The learned Chief Justice stated that "it must be done under a competent authority at the time". Gross J stated that the fact that the notice had been signed by only two persons out of three, the tenant was not bound by it. Lawrence J, confirmed that for the notice to be good it ought to be binding on all the parties concerned at the time when it was given, and "not to depend for its validity, in part, upon any subsequent recognition of one of them: because the tenant is to act upon the notice at the time, and therefore it should be such as he may act upon with security". LeBlanc J said that the notice to determine the lease should be signed by three, and was only signed by two and so it was not good. He further stated that "no evidence was offered to show that the two acted by the authority of the third". The notice was therefore held to be invalid and no subsequent recognition of the third executor could correct it.

[64] Lastly, in **Shanks v Central Regional Council**, the issue in that case was whether the directors of a company which was in receivership, could bring an action in the name of the company, without the consent of the receiver, or whether such an action was a nullity. The court held, on the particular facts, that the directors could

bring the action, Lord Weir, however, commenting on the submission of counsel that the action as originally brought was a fundamental nullity, and that no amount of amendment could cure such a nullity, stated that he agreed with counsel for the defendants, that if the action as originally laid was fundamentally null, then as a nullity it could not be cured by any means, and the purported amendment of the pleadings to effect the receiver as pursuing the action in the name of the company would be to no avail.

[65] So, in keeping with these authorities, as Mrs Hartley is not an aggrieved person, she could not therefore lay a complaint under section 12 of the LPA. Filing the complaint as she did, would result in the proceedings being as though they had never been started at all due to a fundamental defect in issuing the application, namely, it had not complied with the category of persons that could lay the complaint. Thus, even if the proceedings appeared to have been duly issued, they would fail as having been in breach of a statutory requirement, Mrs Hartley not being an aggrieved person as stated aforesaid, and there being no evidence that she had the authority to act as agent at the time of the issuing of the complaint, which the respondent cannot deny as a fact. The proceedings would therefore be a nullity as described by Upjohn LJ in **Re Pritchard**, and the subsequent letters could not cure the defect.

[66] The eminent author and professor of law, Edwin Peel, at Fellow of Keble College, Oxford, in his text "The Law of Contract," 13th edition, paragraph, 16-049, made this statement on the subject:

> "Although ratification is not confined to lawful acts, an act which is simply void in law cannot be validated by ratification. Similarly, a principal cannot become liable if the unauthorised contract is prohibited by statute: "life cannot be given by ratification to prohibited transactions". This is an additional reason for saying that a forgery cannot be ratified."

The proceedings therefore, before the Committee are clearly distinguishable from ordinary civil proceedings and are governed specifically by the LPA and in fact matters before the Committee require the criminal standard of proof (see **Campbell v Hamlet** [2005] UKPC 19). I accept that if they were civil proceedings simpliciter, then an unauthorised act could be subsequently ratified, and if it were possible in the instant case it would have related back to the date of filing, and embraced the prima facie decision which had been made later. However, I am not of that view, and based on all that I have stated, the proceedings were void as initiated and therefore ineffectual *ab initio*, and could not be subsequently ratified.

**Conclusion**

[67] In the light of the above, as indicated, in my opinion, the Committee erred in concluding that in the circumstances of this case the complaint could be later ratified having been commenced unauthorisedly. I would therefore allow the appeal, set aside the ruling of the Committee with costs to the appellant to be agreed or taxed.

**SINCLAIR-HAYNES JA**

[68] I have read the draft judgment of my sister Phillips JA and agree. Her reasoning and conclusion accord with my own views.

**P WILLIAMS JA (AG)**

[69] I too have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and the conclusion arrived at. I had nothing further to add.

**PHILLIPS JA**

**ORDER**

1. Appeal allowed.
2. Ruling of the Disciplinary Committee of the General Legal Council made on 3 February 2011 is set aside.
3. Costs to the appellant to be taxed if not agreed.