[2023] JMCA Misc 4

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTCE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA (AG)

MISCELLANEOUS APPEAL NO COA2021MS00013

APPLICATION NO COA2021APP00219

BETWEEN	**EARL FERGUSON**	**APPELLANT**
AND	**GENERAL LEGAL COUNCIL**	**RESPONDENT**

Keith Bishop and Ms Roxanne Bailey instructed by Bishop & Partners for the appellant

Mrs Caroline Hay KC, Sundiata Gibbs and Mikhail Williams instructed by Hylton Powell for the respondent

14,15,16 December 2021 and 29 June 2023

Attorney-at-law - Disciplinary Hearing - Application to discharge order of a single judge for a stay of proceedings - the principles to be applied - application to adduce fresh evidence - application to set aside the decision of the Disciplinary Committee of the General Legal Council - whether the Disciplinary Committee/ Panel had jurisdiction set aside its own decision - whether the Panel was *functus officio* - whether the principles of natural justice were breached - Rule 9, fourth schedule, The Legal Profession Act applied

F WILLIAMS JA

[1] I have read the reasons for the judgment of my learned sister, Dunbar-Green JA and they accord with my reasons for concurring in the order made by the court.

DUNBAR GREEN JA

Introduction

[2] On 31 March 2021, attorney-at-law, Earl Ferguson ('the appellant'), was found guilty of professional misconduct by the Disciplinary Committee of the General Legal Council ('the Committee'/'the Panel'), arising from a complaint against him by Wade Morris ('the complainant'). A sanction hearing was scheduled for 5 May 2021.

[3] By way of notice of application, dated 3 May 2021, the appellant applied to the General Legal Council ('the respondent') to set aside that decision, adduce fresh evidence and set a date for re-hearing of the complaint before a different panel.

[4] On 28 October 2021, the Panel ruled that it had no jurisdiction to grant the orders sought by the appellant, as case law had demonstrated that an application of this nature was to be made in the Court of Appeal where jurisdiction lies. Further, there was no merit to the application.

[5] Dissatisfied with that ruling, on 29 October 2021, the appellant filed notice and grounds of appeal challenging the Panel's decision declining jurisdiction. He sought orders that the decision of the Panel be set aside and that its orders be stayed pending the determination of the appeal.

[6] On 1 November 2021, the appellant also filed a notice of application for court orders, seeking an interim stay of execution of the Panel's orders, made on 28 October 2021, and, alternatively, a stay of the sanction hearing, which had been rescheduled for 3 November 2021.

[7] On 3 November 2021, a single judge of this court considered that application, and made an order staying the sanction hearing, pending the hearing of the appeal.

[8] On 15 November 2021, the respondent applied to discharge the order of the single judge.

[9] On 16 December 2021, this court considered both the application to discharge the single judge's order and the substantive appeal. After considering the written submissions and hearing oral arguments of the respective parties, we made the following orders:

> "1. Order for a stay of proceedings is discharged.
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> 2. Costs to be costs in the appeal.
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> 3. Appeal is dismissed.
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> 4. Costs to the respondents to be agreed or taxed."

[10] We promised to provide written reasons for making those orders. This is in fulfilment of that promise. The delay is regretted.

Proceedings before the Panel

The complaint

[11] The complaint against the respondent was made pursuant to section 12 of the Legal Profession Act ('the LPA'). The complaint was as follows:

> "1. [The appellant] has not accounted to me for all monies in his hand for my account or credit, although I have reasonably required him to do so;
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> 2. [The appellant] has not given full disclosure nor has he received approval and he has acted in a manner in which his professional duties and his personal interest conflict or are likely to conflict; and
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> 3. [The appellant] is in breach of canon I(b) [of The Legal Profession Act (Canons of Professional Ethics) Rules], which states that 'an Attorney shall at all times, maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member.'"

[12] Briefly, the allegations were that the complainant's father, Rudolph Morris, had retained the services of the appellant to sell property located at 4 Norbrook Terrace, Kingston 8 in the parish of Saint Andrew ('the property'). The property was sold for

$30,000,000.00. It was transferred to the purchaser on or about 31 December 2016, during the father's lifetime, but he did not receive the proceeds of sale. When the complainant, as executor of his father's estate, made enquiries, the appellant informed him that the proceeds of the sale had not been received.

[13] The complainant's investigation into the transaction revealed that the property had been sold between April and May 2017, the agent was paid his commission, and the sum of $26,369,347.00 was transferred to the appellant's bank account, by the purchaser. The appellant, in turn, transferred $9,320,000.00 to a Keith "Headley" Barton, and $1,000,000.00 to Roy "Torn" McFarlane, from the proceeds of sale, without being authorised/instructed to do so.

[14] Upon learning of these developments, the complainant threatened to report the matter to the police, and, in November 2017, the appellant transferred the sum of $5,000,000.00 to the complainant's account. In August 2020, the complainant received a second payment of $4,760,009.00, from the appellant.

The defence to the complaint

[15] The appellant contended that he made the payment to Mr McFarlane on the oral instructions of the deceased. According to the appellant, Mr Barton, who was a relative of the deceased's late wife, and had been residing at the property prior to the sale, refused to leave the property until suitable arrangements were made for him. So, part of the proceeds of the sale was ultimately used for that purpose.

[16] The appellant further indicated that the proceeds of sale were received in March 2017, that is, shortly before the death of the deceased, on 6 June 2017, following a period of hospitalisation, between April and June 2017.

[17] The appellant contended that the deceased provided no instructions regarding to whom the remaining sums from the proceeds of sale were to be paid. Notwithstanding, a payment of $5,000,000.00 was made to the complainant on the sole basis that he was

the son of the deceased. The appellant's contention was that he had no contractual obligation to the complainant, and ought not to have paid over any sums to him without a grant of probate or administration having first been obtained.

Hearing of the complaint and decision

[18] The Panel proceeded on the basis of affidavits of the parties, as well as oral evidence. As indicated at para. [1] above, the Panel ruled that the appellant was guilty of professional misconduct.

The fresh evidence application

[19] The appellant then sought orders from the Panel setting aside its decision, to admit fresh evidence, and for a re-hearing of the complaint before a different panel.

The purported fresh evidence

[20] The so-called fresh evidence included (i) a copy letter, dated 2 May 2014, purportedly written by the deceased confirming gifts to Keith Barton of $10,000,00.00, a property called 'the Sahara' located at 2 Maiden Street in Kingston and a plot of land located in Spanish Town in the parish of Saint Catherine; (ii) an affidavit of Keith Barton, sworn on 30 April 2021; (iii) a further affidavit of Earl Ferguson, sworn on 19 May 2021; (iv) an opinion by a handwriting expert in support of the appellant's contention that the signature on the Last Will and Testament of the deceased was the same as the signatures on a letter, dated 13 December 2016, in which the deceased supposedly authorised the appellant to conduct business on behalf of his deceased's wife estate at the Tax Administration of Jamaica); and (iv) a copy of the deceased's driver's license. The latter three documents were expected to prove that the copy letter, allegedly confirming the gifts to Mr Barton, was written by the deceased.

[21] As indicated at para. [4] above, that application was refused by the Panel on 28 October 2021; its written reasons being: (a) no re-hearing was possible based on the circumstances of the case, as the relevant rules which govern the Committee only permit a re-hearing under certain circumstances which the appellant's application did not fall

within; (b) the natural justice principle was upheld during the hearing of the matter as both parties were present, heard and had the opportunity to question each other; and (c) a fresh evidence application is usually made in the Court of Appeal. In support of reason (c) the Panel cited the case of **Dwight Reece v General Legal Council (Ex parte Loleta Henry)** [2021] JMCA Misc 1.

Proceedings before this court

Application before the single judge

[22] The application for a stay of the decision of the Panel/the sanction hearing was made before the single judge on grounds that, among other things, the Panel (a) erred when it declined to invoke the well-established and settled rules of natural justice to adduce the fresh evidence; (b) neglected and/or refused to invoke its exceptional jurisdiction and set aside its decision that was patently wrong; and (c) by its said action, had exposed the appellant to sanction and likely ruin.

[23] In support of that application, the appellant filed two affidavits, including an affidavit of urgency.

[24] The application and affidavits were served on the respondent on 2 November 2021, a day after they were filed.

[25] The application was considered on paper, by the single judge, and the ruling made, as indicated at para. [7] above.

Application by the respondent to discharge order of the single judge

[26] The respondent filed its application to discharge the order of the single judge, on grounds that:

> "1. Rules 2.9(4) and 2.9(5) of the Court of Appeal Rules (2002) ('the CAR') provide that a procedural application is to be dealt with on paper or by telephonic or other means of communication, but the Registry must give the parties 7 days notice of the hearing.

2. Rule 2.10(3) of the CAR provides that any order made by a single judge may be discharged by the court on an application made within 14 days of that order.

3. The Honourable Justice of Appeal Brown Beckford (sitting as a single judge) decided application No. COA 2021 APP 00202 one day after the Appellant/Respondent ('Mr Ferguson') served it on the Respondent/Applicant ('the Council').

4. The Council did not have an opportunity to make submissions on whether the order should have been granted.

5. In any event, Mr Ferguson's appeal does not have a real prospect of success which would warrant the granting of a stay of proceedings."

[27] The following is a summary of the parties' written and oral submissions.

For the applicant

[28] The applicant submitted that the exercise of discretion by the single judge to grant a stay of the sanction hearing was palpably wrong as the circumstances did not warrant an *ex parte* hearing. It was indicated that the application and affidavit were served on the applicant, on 2 November 2021, without any notice that the matter was to be heard before the seven-day minimum notice period which is required by the CAR.

[29] Relying on rule 2.10(4) of the CAR (now rule 2.9 of the CAR, by subsequent amendments), it contended that in cases where there was to be no oral hearing, the single judge must permit a respondent at least seven days' opportunity to present a 'paper reply'. The applicant was not allowed to do so, which violated the principle of *audi alterem partem*. **National Commercial Bank Jamaica Limited v Olint Corporation Limited** [2009] UKPC 16, in particular para. [13] was referenced to illustrate a failure to give notice when it would have been reasonably required.

[30] The applicant cited further para. [15] of **Greg Tinglin et al v Claudette Clarke and another** [2020] JMCA App 24, and **Calvin Green v Wynlee Trading and another** [2010] JMCA App 3, in support of its contention that the single judge did not act in

accordance with the principle that the court should make an order "which best accords with the interests of justice, once it is satisfied that there may be some merit in the appeal", and, therefore, erred in the exercise of her discretion.

[31] It was also contended that the appeal had no real prospect of success, for the following reasons.

(a) The respondent is a tribunal of limited jurisdiction whose governing rules do not allow it to re-open or re-hear complaints in the circumstances of the instant case. Rule 9 of the fourth schedule to the Legal Profession (Disciplinary Committee) Rules ('the Rules') permits the Committee to only re-hear a complaint where it was heard in the absence of either the complainant or the attorney (or both), which did not apply in this case. (Reliance was placed on **Akewushola v Secretary of State for the Home Department** [2000] 1 WLR 2295 at pages 2300H-2301E for the principle that slips apart, a statutory tribunal in contrast to a superior court ordinarily does not possess any inherent power to rescind or review its own decisions. The case of **R (on the application of B) v Nursing and Midwifery Council** [2012] EWHC 1264 (Admin) para. [35], was also cited in support of that point.)

(b) The Panel was *functus officio* on culpability when it handed down its decision, on 31 March 2021. (**Wesley Dickins v The Parole Board for England and Wales & the Secretary of State for Justice** [2021] 1 WLR 4126 was cited for a definition and illustration of *functus officio*. **Paynter v Lewis** (1965) 8 WIR 318, particularly pages 320B and 321C, was also referenced to demonstrate that a magistrate was considered to be *functus*

officio after he had delivered a verdict and before the related sentence was passed.)

(c) There was no merit in the appellant's complaint about a breach of natural justice because he had actively participated in the hearings leading up to the decision (citing **Aris v Chin** (1972) 19 WIR 459, at page 465, in which Fox JA explained the meaning of natural justice and its application to a hearing that was similar to that in the instant case).

(d) The material sought to be adduced, by way of the fresh evidence application, did not, on the face of it, appear to meet the criteria for admission as the letter sought to be adduced did not indicate any instruction for the appellant to deduct the sum from the proceeds of sale nor did the letter unequivocally address the issue of any instructions for the payment of $10,000,000.00 to Keith "Headley" Barton.

[32] The applicant further contended that the exceptional remedy of a stay of proceedings (the sanction hearing) was not appropriate in this case. Learned King's Counsel, Mrs Hay, contended that any power by a single judge to stay proceedings must rarely be used, and approached cautiously by any court. The cases of **Omar Guyah v Commissioner of Customs & others** [2015] JMCA Civ 16, **Kern Spencer v Director of Public Prosecutions and Attorney General of Jamaica** (unreported) Court of Appeal, Jamaica, Application No 121/2009, judgment delivered 24 June 2009, and **Cable & Wireless Jamaica Ltd v Eric Jason Abrahams** [2021] JMCA App 19 were cited in support of that submission.

For the respondent/appellant

[33] For the purposes of this application, the respondent has been referred to as 'the respondent/appellant'.

[34] It was indicated, on the respondent's/appellant's behalf, that the date for hearing of the application for the stay was not available at the time of service, and that that information was only obtained on 2 November 2021. This was followed by an email notification on 3 November 2021 from the Court of Appeal's Registry that the stay had been granted after a consideration on paper, by the single judge. In any event, the respondent had been alerted to the application for a stay when it was served with documents, including the affidavit of urgency.

[35] Mr Bishop placed reliance on rule 1.7(2)(b)(c) and (i) of the CAR, which empowers the court to vary the time for compliance with a rule, practice direction, order or direction, and to adjourn or bring forward a hearing; or to deal with a matter without the attendance of any of the parties. He also placed reliance on rule 2.10(3) which allows for procedural applications to be dealt with on paper, telephonic or other means of communication other than by way of an oral hearing. Rule 1.7(8) which permits a party to apply to dispense with compliance with any rule, was also invoked. These provisions were said to vitiate the argument that there had been an error in procedure.

[36] Counsel also submitted that there was no merit to the respondent's contention of a breach of the principle of *audi alterem partem*.

[37] As regards whether the respondent's/appellant's case had any real prospect of success, Mr Bishop, submitted that the provisions of section 14(4) of the LPA - that an application, enquiry or proceedings before the Committee is deemed to be legal proceedings as used in Part II of the Evidence Act - meant that the Panel could approach the receipt of fresh evidence as would a judge of the Supreme Court or Parish Court. He also contended that other provisions in the LPA clearly indicate that an order of the Committee is to be treated similarly to an order of the Supreme Court. Therefore, by parity of reasoning, the Panel had powers akin to a trial judge who had the "exceptional jurisdiction" to reverse a decision prior to the sealing of the order of the court. Such discretion, it was argued, extends to receiving fresh evidence and was applicable to the

decision of the Panel because the Panel's decision had not been perfected and could not have been without a sanction hearing.

[38] Counsel extended his last point as follows:

(i) natural justice required that the fresh evidence be adduced under an exceptional/inherent jurisdiction which the Panel possessed;

(ii) since an order of the Committee is to be treated similarly to that made by a judge of the Supreme Court, the Panel had jurisdiction to admit fresh evidence, set aside its decision and order a re-hearing of the complaint, provided it was not *functus officio* (contending that it would not become *functu*s officio at the end of the disciplinary hearing, but after the sanction hearing);

(iii) the discretion of a judge of the Supreme Court to vary or set aside his/her own order, unless it is perfected, is also exercisable by any Panel of the Committee;

(iv) by its composition, as stipulated in the LPA, the Committee is akin to a judge, and therefore has inherent jurisdiction;

(v) the Committee's jurisdiction is derived from rule 10 of the fourth schedule of the Rules, that allows proceedings to ensue on affidavit evidence, and section 14(4) of the LPA, which provides that, "an application to, or an enquiry or proceedings before, the Committee shall be deemed to be legal proceedings within the meaning of that expression, as used in Part II of the Evidence Act", This is indicative of Parliament's intention that the Committee should have the same powers as a judge of the Supreme Court and the Parish Court, to apply the principles of natural justice when required in appropriate cases;

(vi) para. 8 of the third schedule and para. 14 of the first schedule of the LPA, when read together, grant immunity to the Committee for any act done in good faith in the course of its operations;

(vii) this was a fit case for a stay of proceedings, as the appellant faced likely disbarment which could have irreparable effects even if he ultimately succeeded in the appeal; and

(viii) this case fell into the rare category of cases for a stay of proceedings because the credibility of witnesses would have been impacted by the fresh evidence.

[39] Counsel made reference to para. [65] of **Owen K Clunie v General Legal Council** [2014] JMCA Civ 31, as an authority that supports the argument that natural justice required the Panel to give the appellant an opportunity to be heard; and **Paul Chen-Young et al v Eagle Merchant Bank Jamaica Limited and another** [2018] JMCA App 7, paras. [14]-[45], in support of the contention that the Panel had an inherent jurisdiction to hear the fresh evidence application. **Ladd v Marshall** [1954] 3 ALL ER 754, **R v Parks** [1961] 3 ALL ER 633 and **Tan Sai Tiang v Public Prosecutor** [2000] SGHC 4 were cited to support the argument that the fresh evidence was capable of being admitted.

[40] As regards the question of whether the Panel was *functus officio*, the respondent/appellant relied on **Hunter v Chief Constable of West Midlands Police and others** [1981] 3 ALL ER 727, **R (on the application of Demetrio) v Independent Police Complaints Commission** [2015] EWHC 593 (Admin), **Hussmann (Europe) Ltd v Ahmed Pharaon (Formerly Trading as Al Ameen Development and Trade Establishment** [2003] EWCA Civ 266 **('Hussmann Ltd v Pharaon'),** and **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2015] JMCA App 39A.

[41] Additionally, he relied on **Omar Guyah v Commissioner of Customs & others** para. [32], **Greg Tinglin et al v Claudette Clarke and another** paras. [50]-[52], **Calvin Green v Wynlee Trading Ltd and another** para. [12] for the principles which should guide the court in an application for a stay of proceedings. **Brian Smythe v R** [2018] JMCA App 3, **Oswald James v R** [2021] JMCA App 7 and **Delroy Officer v Corbeck White (in her capacity as representative of the estate of Berthram White, deceased)** [2016] JMCA Civ 45 were cited to support the respondent's/appellant's contention that the stay of proceedings was appropriate.

[42] Counsel agued, finally, that the challenge to the Panel's decision was general, and not specific to its ruling on the application to adduce fresh evidence, and for the complaint to be heard *de novo.*

[43] This submission was refuted by counsel for the applicant who argued for the appeal to be restricted to the narrow issues raised in the notice of appeal, namely the Panel's ruling on fresh evidence and a re-hearing of the complaint. King's Counsel added that the applicant was not prepared to respond to any challenge to the Panel's substantive decision of 31 March 2021.

Discussion and disposal of the application to discharge the single judge's order for a stay of proceedings

[44] This court is empowered by rule 2.10(3) of the CAR to vary or discharge a single judge's order within 14 days of that order. In exercising our discretion, we considered the overriding objective of dealing with cases justly (see para. [20] **ADS Global Limited v Fly Jamaica Airways Limited** [2020] JMCA App 12). Furthermore, we were guided by the principle that the appellate court must defer to a judge's exercise of discretion, and must not interfere merely on the basis that it would have exercised the discretion differently (see **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, para. [20]). Accordingly, we decided that we would only disturb the single judge's exercise of discretion if it were shown that she erred in principle, particularly if she failed

to take into account relevant matters or failed to balance the factors fairly (see **Roache v News Group Newspapers Ltd and others** [1998] EMLR 161).

The single judge's exercise of discretion

[45] There was no dispute as to the single judge's jurisdiction to make orders in the absence of the parties (see rule 1.7(2)(i) of the CAR). There was also no real issue as to whether a single judge has the authority to grant a stay of proceedings. That question was settled in **Cable & Wireless Jamaica Limited v Eric Jason Abrahams**. The contention was that it was wrong for the single judge to have granted a stay of proceedings in the circumstances of this case – particularly, where the applicant had been served with the application, the time for a response under the CAR had not expired, and it is asserted that the appeal disclosed no reasonable prospect of success.

[46] Rule 2.9 of CAR stipulates, in part, that:

> "2.9 (1) Any application (other than an application for permission to appeal) to the court must be made in writing in form D 1 in the first instance and be considered by a single judge.
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> (2) Where service is required notice of such application must be:
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> (a) served on every other party; and
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> (b) filed with an endorsement admitting service and/or affidavit of service.
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> (3) Where the record has been referred to a single judge under rule 2.8 the application is wherever practicable to be considered by that judge.
>
> (4) So far as practicable a procedural application is to be dealt with on paper or by telephonic or other means of communication other than an oral hearing.
>
> (5) The registry must give the parties to the appeal at least 7 days notice of any hearing."

[47] This rule prefers that, in applications of this nature, oral hearings be dispensed with but it requires the registry to give notice to the parties of "any hearing" (rule 2.9(5)) which means that both oral and 'paper hearings' generally require notice. In our view, the purpose of that requirement accords with the applicant's reasoning that where there is to be no oral hearing it should be given at least seven days to present its paper reply. Instead, the single judge considered and decided the application, the day following service on the applicant, without any indication to the applicant that the application would be considered on paper. There was, therefore, no reasonable opportunity for the applicant to respond to the said application.

[48] The applicant contended that the single judge's indication that she had to act with expedition as the sanction hearing was scheduled for the same day must be reviewed against the principle of *audi alterem partem*. That principle was considered by the Privy Council in **National Commercial Bank Jamaica Limited v Olint Coporation Limited** where, at para. [13], Lord Hoffman made the following observation:

> "…a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction…*or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will equally be no reason why the applicant should not have given shorter notice or even a telephone call. Any notice is better than none."

[49] In the instant case, the applicant is a statutory body with quasi-judicial powers, under sections 11 and 12 of the LPA, to hear and determine complaints against attorneys-at-law. There is no question that the public interest requires that such matters be dispensed with expeditiously; but, given the serious nature of a stay of proceedings (including the likely prejudice to the complainant by the delay of the sanction hearing) the single judge should have availed herself, at the very least, of the alternative of

telephonic or other communication with the applicant, for it to know that time for its submissions was being abridged. This would have been consistent with the Board's position in **National Commercial Bank Jamaica Limited v Olint Corporation Limited** - that where notice is required, some notice is better than no notice (see also **Evan Rees and others v Richard Alfred Crane** [1994] 2 AC 173, at pages 191G - 192H, where Lord Slynn of Hadley observes that there might be circumstances where natural justice does not require that a person must be given a chance to answer, for example, when the urgency of the situation requires it, but cautions against adopting that procedure as an absolute rule; and para. [51] of **Omar Guyah v Commissioner of Customs and others** where this court addressed the serious nature and effect of a stay of proceedings).

[50] The principle of *audi alterem partem* does not imply that there must always be a hearing of both sides, but that each party must be afforded an adequate opportunity of advancing its case (see **Aris v Chin** [1972] 19 WIR 459, page 465). The single judge cannot be faulted for wanting to act swiftly on an application that affected a sanction hearing which was scheduled for proximate commencement. However, the circumstances were not so urgent as to justify proceeding solely on the appellant's documentation without any communication with the applicant and an opportunity for it to make submissions as to why her discretion should not have been exercised as prayed.

[51] Although the denial of an opportunity to be heard was a compelling basis on which to discharge the order, we went on to examine the relevant factors for granting or refusing a stay of proceedings in the context of the material that was before the single judge, as well as relevant principles in/of law; the critical question being, whether in all the circumstances, including the prospect of success on appeal, the sanction hearing should have been suspended, pending the determination of the appeal.

Application of the test for granting/refusing a stay of proceedings

[52] At para. [15] of **Greg Tinglin et al v Claudette Clarke and another**, this court reiterated the test for determining whether to grant a stay, viz.:

"[15] The resolution of the single question of whether the stay should be granted depends, of course, on the application of the relevant law that governs such applications to the circumstances of the case. The law in this area is well settled…It suffices to say that the approach is for the court to make the order, which best accords with the interest of justice, once it is satisfied that there may be some merit in the appeal (see **Combi (Singapore) Pte Limited v Ramnath Sriram and another** [1997] EWCA 2164).

[16] In a later case, **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, Clarke LJ stated the applicable principles in these terms:

> 'Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?'

[17] In **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, Morrison JA (as he then was), having had regard to previous authorities, 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 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."

[18] Therefore, the two primary questions to be considered are:

i. **whether the appeal has some prospect of success; and**

ii. **where lies the greater risk of injustice if the court grants or refuses the application?**" (Emphasis added)

Did the appeal have some prospect of success?

[53] The application for a stay was supported by an affidavit of Earl Ferguson, filed on 1 November 2021 and an affidavit of urgency, filed on 2 November 2021, in which he outlined the background to this matter, and referred to the documents in support of the fresh evidence application.

[54] In the first of these affidavits, the respondent/appellant deposed, in part, as follows:

> "That I verily believe I have a real prospect of succeeding on this appeal. On the other hand, should a stay not be granted, then I will [sic] ruined, since I verily believe that had the newly adduced evidence been available to the panel, that the panel would have made its decision in my favour. On the other hand, there is no prejudice to the respondent if the relief sought is granted, whereas I would be deprived of my right to a fair hearing and will be sanctioned and this may resultantly put a blot forever on my good name."

[55] This was the background against which we reviewed the threshold question of whether the appeal had some prospect of success. We were mindful that the submissions bearing on this question overlapped with those in the appeal and that if the single judge's order was discharged, because the appeal lacked some prospect of success, then inevitably the appeal would fail.

[56] Having, therefore, reviewed the material, the submissions of counsel and the relevant legal principles, we were satisfied that there was no reasonable prospect of success, and, consequently, no need to consider the risk of injustice to the parties.

[57] That said, we were, nonetheless, of the view that the refusal of the stay of proceedings would not have unduly prejudiced the respondent/appellant as the decision had already been made as to his culpability and any reputational harm to him would have already occurred as a result of that decision.

Disposal of the application to discharge the single judge's order for a stay of proceedings

[58] In all the circumstances, a stay of proceedings was not appropriate. For that reason, we made the order at para. [9] above, discharging the single judge's order for a stay of the sanction hearing. Our full reasons are consolidated into those for the refusal of the appeal below.

Consideration of the substantive appeal and reasons for refusal

The grounds of appeal

[59] The appellant's grounds of appeal were:

> "a. The Disciplinary Committee of the Respondent erred in law when it breached the rules of natural justice when it declined and/or refused to adduce fresh evidence on the grounds that its authority is circumscribed and prescribed in Part IV of the Legal Profession Act and the Proclamations, Rules and Regulations thereto;
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> b. The Disciplinary Committee of the Respondent erred in refusing to invoke its jurisdiction under natural law to do all that is required to ensure that the trial process [sic] notwithstanding the fact that the rules of natural justice have been upheld by the Court of Appeal in the **Owen Clunie v General Legal Council** [2014] JMCA Civ 31 and in several cases by the Judicial Committee of the Privy Council;
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> c. The Disciplinary Committee of the Respondent erred in law in holding that it does not have exceptional jurisdiction to reverse an oral or written decision prior to perfection of the order; and
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> d. The Disciplinary Committee of the Respondent erred in law in holding that the said Disciplinary Committee is *functus officio* after it announces its decision and/or signs the written decision of the Disciplinary Committee notwithstanding the fact it has not convened and completed a sanction hearing."

[60] Accordingly, the appellant sought the following orders:

> "a. That the decision of the Disciplinary Committee made on October 28, 2021 be set aside; and

b. That the said orders made on October 28, 2021 be stayed pending the hearing of the appeal."

A summary of the parties' respective submissions

[61] The parties' submissions, as regards the substantive appeal, were, in the main, similar to those made on the question of whether the appeal disclosed any reasonable prospect of success, in the application to discharge the order for the stay of proceedings. Those submissions and the related authorities are summarised below to avoid repetition as far as practicable.

For the appellant

[62] The appellant's main arguments rested on four planks: (i) natural justice; (ii) the quality of the fresh evidence sought to be adduced before the Panel; (iii) that the Panel had exceptional/inherent jurisdiction; and (iv) that the Panel was not *functus officio* at the time of the application for a re-hearing.

[63] In addition to the cases cited above, the appellant relied on the learned authors of Phipson on Evidence 18th edition, at page 406, on the trial judge's "exceptional jurisdiction" to reverse an oral or written judgment prior to sealing of the order of the court and, accordingly, the discretion to receive new evidence after judgment had been given, but before an order was drawn up.

For the respondent

[64] The respondent made four main arguments in its response to the grounds of appeal: (i) the respondent is a tribunal of limited jurisdiction whose governing rules do not allow it to re-open/re-hear complaints in the circumstances of this case; (ii) the Panel was *functus officio* on the question of culpability when it made its decision on 31 March 2021; (iii) to get the relief he now seeks, the appellant's route was to appeal the Panel's decision on culpability, made 31 March 2021; and (iv) there has not been a breach of natural justice by the Panel.

[65] In extending its first argument, King's Counsel submitted that as a creature of statute, the Panel had jurisdiction only to do what the LPA (or any other statutory instrument or procedural rule) expressly permitted. The cases of **The Natural Law Party of Canada et al v Canadian Broadcasting Corporation** (1993) 77 FTR 73 (TD), **Akewushola v Secretary of State for the Home Department,** and **R (on the application of B) v Nursing and Midwifery Council** were cited in support. In support of its submission that the Panel was *functus officio*, the respondent relied on the previously mentioned cases of **Wesley Dickins v The Parole Board for England and Wales & the Secretary of State for Justice** and **Paynter v Lewis**. On the natural justice point, raised by the appellant, the respondent relied on **Aris v Chin** and **Lamont v Fry's Metal Ltd** [1985] IRLR 470.

Discussion and disposal of appeal

The narrow issue

[66] As indicated earlier, counsel for the appellant sought to broaden the scope of this appeal, but we endeavoured to contain it within the strict boundaries of the grounds of appeal filed, and the decision of the Panel to which it pertained. The primary issue was whether the Panel had the power to set aside its own decision and order a re-hearing in the circumstances of this case. This required an examination of the Panel's jurisdiction and whether it was *functus officio* when the application was made.

The jurisdiction point

[67] The Committee's discretion to re-hear a matter is set out in very clear terms in rule 9 of the fourth schedule of the Rules. That discretion can be exercised when an application is determined in the absence of either or both parties. Within a month of the relevant determination, either party may apply to have the matter re-heard. It is consequent on any such re-hearing that the Committee may "amend, vary, add or reverse any of its findings, directions or orders made upon the previous hearing".

[68] Rule 9 provides:

> "(1) Where, pursuant to rule 8, the Committee determines an application in the absence of either or both of the parties, any such party may within on calendar month after receiving the information referred to in rule 8, apply to the Committee for a re-hearing upon giving notice to the secretary and the other party.
>
> (2) The Committee may grant an application for a re-hearing under paragraph (1), upon such terms as to costs or otherwise as the Committee thinks fit, if the Committee is satisfied that it is just that the case should be re-heard.
>
> (3) On a re-hearing under this rule, the Committee may amend, vary, add to or reverse any of its findings, directions or orders made upon the previous hearing."

[69] Rule 9, therefore, determines the boundaries of the Committee's powers to re-open a case. The availability of fresh evidence is not a basis for invoking that rule. Moreover, any re-hearing of a complaint is not as of right. It requires an application and the Panel hearing the application must be satisfied that it is just to re-hear the matter.

[70] In arguing that the Panel had an inherent power to admit the fresh evidence and reverse its decision, the appellant pointed to **R (on the application of Demetrio) v Independent Police Complaints Commission**. The facts, in summary, were that an IPCC investigator completed an investigation and final report about a police officer's conduct, the conclusion being that there was no case for the officer to answer in respect of a particular allegation. Consequently, the police commissioner considered that there should be no disciplinary action relating to that allegation and the Independent Police Complaints Commission ('IPCC') agreed.

[71] Subsequently, the IPCC Commissioner stated that she was minded to reopen the investigation, having formed the view that the investigation had been seriously flawed. The Commissioner of Police sought judicial review to quash the decision of the IPCC and for an order restraining the IPCC Commissioner from carrying out a further investigation, on grounds that the IPCC had no power to do so under section 10 of the Police Reform Act, 2002 and the statutory code in schedule 3 of the 2002 Act (which sets out the general functions of the IPCC). It was also posited that the IPCC became *functus* in respect of

the particular allegation when it acquiesced in, and thus implicitly agreed with the Police Commissioner's view that there should be no action against the police officer.

[72] The IPCC argued, to the contrary, that it could revisit a decision and report, for good reason, in the absence of any express prohibition against doing so in the statutory scheme, coupled with the strong public interest considerations which underpin the legislation.

[73] In handing down the decision of the court, dismissing the Commissioner of Police's claim, Burnett LJ stated at para. 42:

> "42. It is important to bear in mind the different roles played by the actors in these investigations. The investigator makes no decision. He has a preliminary role…which includes expressing his opinion on whether there is a case to answer…"

[74] At paras. 44 and 45, Burnett LJ opined:

> "44. What is the IPCC to do if it receives a report following a local or supervised investigation which on examination it considers to be seriously inadequate but there is no appeal or such a report following an IPCC or IPCC managed investigation where no appeal mechanism exists for the complainant? We accept that there is no express power in the 2002 Act enabling the IPCC to ask for further work to be done…
>
> 45. … Nonetheless, in the absence of an express prohibition, we reject the submission that the IPCC has no power to seek further information in respect of a report it considers defective. Section 10(6) enables the IPCC to do anything calculated to facilitate the carrying out of its functions…That includes the power to seek further information as set out above."

[75] Clearly, the court made a distinction between the investigative and adjudicative functions of the IPCC, pointing out at paras. 52 and 56 that the quasi-judicial decisions of the IPCC were irrevocable:

> "[52] …The cases in which the question whether the IPCC's decisions made when acting as an appellate body are irrevocable include *R (Dennis) v Independent Police Complaints Commission* [2008] EWHC 1158 (Admin) in which Saunders J concluded that a decision made and promulgated by the IPCC as the appellate body under paragraph 25 of Schedule 3 was irrevocable. We respectfully agree with that conclusion. In such cases the IPCC is acting in a quasi-judicial capacity determining a dispute between parties. But it does not answer the question in this case where the function of the IPCC is to conduct an investigation in accordance with its functions and play its part in determining whether PC Huntington will face disciplinary charges, and if so what they will be…
>
> 56. In our judgment the arguments advanced by the Commissioner take little or no account of the public interest in the effective investigation of alleged police misconduct, or of the duties and functions of the IPCC identified in the 2002 Act." (Italics as in the original)

[76] That decision does not support the appellant's position at all. The function which the Panel performed was quasi-judicial, not investigative. The complaint before it was not akin to the laying of a criminal charge pursuant to an 'investigative' process but an 'inquisitorial' proceeding (see **Barrington Earl Frankson v The General Legal Council (ex parte Basil Whitter at the instance of Monica Witter)** [2012] JMCA Civ 52, para. [88]). Its decision on culpability was therefore irrevocable, save in the circumstances narrowly prescribed by the LPA or within "the limit of the power to correct accidental errors which [did] not substantially affect the rights of the parties or the decision arrived at" (see **R (on the application of B) v Nursing and Midwifery Council** per Lang J at para. [35], applying **Akewushola v Secretary of State for the Home Department** where Sedley LJ stated that a statutory tribunal does not possess the inherent power to rescind or review its own decision; and **The Natural Law Party of Canada et al v Canadian Broadcasting Corporation**, at pages 3-4, where McKeown J determined that he did not have the jurisdiction to grant the relief sought because the Federal Court of Canada was a statutory court and had no inherent jurisdiction).

[77] The case of **Hunter v Chief Constable of West Midlands and others**, cited by the appellant, was also unhelpful on this point, as it pertains to the power of a court to permit fresh evidence.

[78] As regards the question of whether in the interest of justice, the Panel ought to have reopened the hearing of the complaint, **Lamont v Fry's Metals Ltd** was cited by the respondent. That case concerned the exercise of appellate power by the UK Employment Appeals Tribunal in ordering the re-hearing of a matter. The Court of Appeal overturned the decision, observing at page 475 "[t]here is no rule that a clear miscarriage of justice must necessarily lead to a re-hearing." In the case before us there was no appellate power vested in or being exercised by the Panel (see section 16 of the LPA and rules 2 and 3 of The Disciplinary Committee (Appeals) Rules, 1972, which respectively make it clear that the Court of Appeal has jurisdiction to hear appeals against orders of the Committee and set out the procedure; and rule 2.2(1) of the CAR which gives the power to the appellate court to receive fresh evidence).

[79] These authorities are consistent with the view that a statutory tribunal derives its powers from the statute that governs its operations or some other legislation. Specifically, there was no authority cited in this appeal that supports the view that a statutory tribunal, without express authorisation, has the inherent power to re-open or re-hear a matter. Neither does any section of the LPA and the rules referenced by the appellant support his contention that the Panel had any larger statutory powers to re-open a case than those contained in rule 9 of the Rules.

[80] We also failed to see how **Owen K Clunie v The General Legal Council** supports the appellant's argument that natural justice behoved the Panel to admit the purported fresh evidence. Not only is it doubtful whether the purported fresh evidence would satisfy the test for admissibility; but more to the point, the circumstances were materially dissimilar to those in **Owen K Clunie v The General Legal Council**. That case concerned the failure to afford the appellant the right to be heard at his sanction hearing. This led to the sanction being quashed and the matter remitted to the Committee

for a sanction hearing to be held. The question before the instant Panel had nothing to do with fair play or the duty to be heard but with its jurisdiction to grant a re-hearing based on fresh evidence.

[81] For these reasons, we concluded that the Panel did not have the jurisdiction to revisit its decision. Grounds one, two and three of the appeal therefore failed.

The *functus officio* point

[82] A tribunal can perform distinct functions in a continuing proceeding. The Committee's determination of culpability is distinct from the sanction hearing, albeit they are not entirely discrete functions (see **Dwight Reece v General Legal Council (Ex parte Loleta Henry)**. The cases below illustrate how distinct functions or actions can operate to determine whether a tribunal is *functus officio.*

[83] In **Paynter v Lewis**, a case that rejected the notion that a magistrate could revisit a finding of guilt after he had adjudicated on it, Wooding CJ said at page 320:

> "… **Once a magistrate has accepted a plea of guilt or has adjudicated and found a defendant guilty or not guilty, he is *functus* officio as regards the commission or non-commission of the offence and accordingly he has no power to alter the conviction or acquittal as the case may be**…[and it is immaterial that] a conviction or acquittal has been formally entered or not, **or whether a conviction has or has not been followed by the imposition of a sentence or of an order:** once there has been a conviction or acquittal, to borrow the language of Judge Chapman J. ([1963] 3 ALL ER at p 951), 'the guillotine falls and the court which has made that adjudication *is functus officio'* so far as concerns such guilt or innocence." (Italics as in the original) (Emphasis added)

[84] In **Wesley Dickins v The Parole Board for England and Wales & the Secretary of State for Justice**, a distinction was made between a decision and the communication of the reasons for it. The High Court of England and Wales dealt with rule 28 of the Parole Board's Rules under which a party may apply to the Parole Board for it to reconsider a case "on grounds that the decision is – (a) irrational, or (b) procedurally

unfair." The Parole Board, having decided that an applicant was eligible for release, changed its mind and purported to re-open its decision to consider a fresh allegation that the applicant had recently received contraband from a visitor.

[85] In allowing judicial review of the Parole Board's decision to re-open the case, the court found that the Parole Board's power to reconsider was confined to irrationality and procedural unfairness as enumerated in rule 28, and that the Parole Board's decision was not irrational in the "Wednesbury" sense of being "a conclusion so unreasonable that no reasonable authority could ever have come to it" (referencing **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223, pages 233-234). At para. 70, the court observed, " [but] the Board was functus when it made its Decision and Parliament has not given the Board the power to reconsider its decision in such circumstances".

[86] The concept of *functus officio* was defined and applied at paras. 52-54*:*

> "The concept of functus officio arises when 'a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it': *Demetrio* [2016] PTSR 891 at para 42…The panel had made its decision, if it had recorded its reasons for it, but the parties had not yet been informed of it. Since the Board is a creature of statute with no inherent jurisdiction, the starting point at which it becomes functus must be the statutory scheme…Both section 28(6) of the Crime (Sentences) Act 1997 and rule 25(I) require the Board to 'decide' whether a prisoner is suitable for release…The subsequent communication of reasons to the parties would seem to be administrative."

[87] At paras. 52-56, Stacey J expressed no difficulty with the reasoning that the Parole Board, being a creature of statute and bound by rules, became *functus officio* once it had made its decision, even if that decision had not been communicated to the parties.

[88] In his submissions counsel for the appellant sought to draw parallels between decisions in civil proceedings, based on the principle that the Supreme Court has the power to vary or set aside its decision at any time before it 'perfects judgment'. That

principle was affirmed in **Re L and B (Children)** [2013] UKSC 8, a case referenced in **Wesley Dickins v The Parole Board for England and Wales & the Secretary of State for Justice** and about which Stacey J observed at para. 60:

> "The central difficulty... is that the case of [**Re L and B(Children)**] was specific to civil courts, by reference to their history and the authorities specific to the civil court's jurisdiction and CPR which are not the same as the Rules, statutes and case law that the Board is required to follow as a creature of statute without inherent jurisdiction."

[89] The salient point is that rules cannot be imported to ascribe jurisdiction to the Committee that it does not have by some express authority. The Committee has no power analogous to that of a judge beyond that given to it by statute or the rules under which it is governed. It is noteworthy that no rule has been cited that deals with the 'perfection' of any decision of the Committee.

[90] In **Hussmann Ltd v Pharaon**, cited by the appellant, an arbitrator made a first award which was found by the court to be invalid. An order was therefore drawn up to declare that first award as being of no effect. The arbitrators subsequently made a second award but it was challenged on the basis that the arbitrator's jurisdiction had lapsed after it made the first award. On appeal, account was taken of "Mustill and Boyd, *The Law and Practice of Commercial Arbitration* in England, 2nd edition and Thomas *Appeals from Arbitration Awards,* 1994" (see para. 79 of the judgment), both of which were said to prefer the position that the arbitrator's jurisdiction should not end if the award was declared to be of no effect or if it was set aside. The court arrived at a similar conclusion, observing, among other things, at paras. 82 and 83, that there was no good reason why the matter should come to an end when "[an] *invalid* final award, in excess of jurisdiction," was declared to be of no effect.

[91] These authorities reinforce the established principle that after a decision is made, by a statutory tribunal, it can only be varied if there is an express power to do so. Otherwise, the route to challenging the decision is by way of an appeal.

[92] It stands to reason that an inferior tribunal, bound by the statute and rules under which it is established and required to operate (or by any other statutory authority), lacks jurisdiction outside of that framework. So that although the arguments on 'jurisdiction' and 'functus *officio'* are dealt with separately, this is for convenience only because being '*functus officio'* effectively means there is no jurisdiction to deal with the relevant matter, point of law, or relevant function that has been discharged.

[93] The authorities have clearly established that the Panel had no power to re-open the case after delivering its decision on 31 March 2021 when the issue of culpability was announced. Rule 5(1) which provides for a notice of appeal to be filed within 28 days "from the pronouncement of the order, findings or decision appealed against", bears out the distinction between the decision on culpability (which is determinative of that question) and the sanction hearing (which deals exclusively with the sanction to be imposed). Although desirable, it is not required that the sanction hearing be commenced or completed before there is an appeal of the decision on culpability. Accordingly, we found no merit in ground four.

[94] It was unnecessary for us to delve into **Winston Finzi and Mahoe Bay Company Ltd v JMMB Merchant Bank Limited**, and other cases which were cited in the submissions. They were either distinguishable or did not take us beyond the authorities to which we have referred. It should be noted, however, that in **Winston Finzi and Mahoe Bay Company Ltd v JMMB Merchant Bank Limited**, Morrison P noted that the authority to vary the costs order after it was despatched to the parties was incidental to his authority under section 30 of the Judicature (Appellate Jurisdiction) Act.

Conclusion

[95] The respondent's powers and functions are circumscribed by the LPA and the rules governing its jurisdiction. It has no inherent jurisdiction. Therefore, the Panel had no jurisdiction to re-open the case after it had decided the issue of the appellant's culpability.

[96] There was no authority cited by the appellant that compelled us to a contrary view.

[97] There being no merit to the appeal, we dismissed the appeal and made the orders outlined at para. [9] above.

BROWN JA (AG)

[98] I, too, have read, in draft, the reasons for judgment of Dunbar Green JA. They accord with my reasons for concurring with the decision of the court.