JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO COA2019MS00010

APPLICATION NO COA2019APP00256

BETWEEN	**DON O FOOTE**	**APPLICANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Douglas Thompson, John Givans, Able-Don Foote and Craig Carter instructed by Douglas A B Thompson for the applicant

Mrs Sandra Minott-Phillips QC and Litrow Hickson instructed by Myers Fletcher and Gordon for the respondent

14, 15 and 22 January 2020

IN CHAMBERS

P WILLIAMS JA

[1] This is an application by the appellant, Don O Foote ('the applicant'), seeking, inter alia, the following order:

> "1. That pursuant to section 16(2) of the Legal Profession Act, the sanction of the Disciplinary Committee ordered against him on November 23rd, 2019 be stayed pending the determination of this Appeal."

[2] Over several days commencing 30 May 2018, the Disciplinary Committee ('the Committee') of the General Legal Council ('the GLC') had heard a complaint made against the applicant by a former client. On 20 July 2019, the Committee gave their decision in which they found that the applicant was in breach of the canons specified in the complaint and was therefore guilty of professional misconduct.

[3] The decision of the Committee at the sanction hearing on 23 November 2019 was set out in the following terms:

> "1. The Respondent shall be struck from the roll of Attorneys entitled to practice in the several courts in Jamaica.
>
> 2. He will pay the sum of Two Million Three Hundred and Thirty Three Thousand Three Hundred and Thirty Three Dollars and Thirty Three Cents ($2,333,333.33) as restitution to the Complainant.
>
> 3. He will pay costs to the General Legal Council in the amount of One Hundred Thousand Dollars ($100,000.00)."

Preliminary point

[4] In the submissions advanced on behalf of the Committee, Mrs Minott Phillips QC pointed out that the order at paragraph 1 has already been filed with the Registrar of the Supreme Court as required by section 15(2) of the Legal Profession Act ('the Act'). It was submitted that so far as that order is concerned, the Committee has done all that it ought to, thus an order for stay against the Committee had been rendered nugatory.

[5] Further, it was submitted that as regards the order as to costs, this court rarely stays an order for payment of costs unless there are very special circumstances. It was contended that the applicant has not identified any special circumstances taking this case out of that general rule.

[6] Queen's Counsel further submitted that the nature of the order made was such that the applicant was not required to do anything, which meant it was not an executory order. In effect, she contented, the applicant was seeking to undo the striking off and be restored from being struck off. This, she submitted, could not be done.

[7] Mr Foote noted that a judge of this court had in fact already granted a stay. He submitted that the jurisdiction for the granting of a stay rests with this court, especially in circumstances where an injustice has been occasioned which flowed from an entire proceedings being a nullity and in which the applicant had been treated unfairly.

[8] Mr Foote noted that the applicant had not been made aware that the order had been filed. He contended that since an appellant has 28 days within which to file an appeal, the time to apply for a stay should be linked to that time.

[9] Counsel for the applicant also urged that I consider the recent decision from this court of **Ian H Robins v The General Legal Council** [2018] JMCA App 38, where a stay was granted pending the outcome of the appeal.

The relevant provisions of the Act

[10] Section 12(A) of the Act provides:

"(1) The Committee shall have power, upon the application of a party against or with respect to whom it has been made an order to suspend the filing thereof with the Registrar.

(2) The filing of an order may be suspended under this section for a period ending not later than-

(a) The period prescribed for the filing of an appeal against the order; or

(b) where such an appeal is filed, the date on which the appeal is determined.

(3) Where the filing of an order is suspended under this section, the order shall not take effect until it is filed with the Registrar and if the order is an order that an attorney be suspended from practice, the period of suspension shall be deemed to commence on the date of the filing of the order with the Registrar."

Section 15(2) and (3) of the Act provides:

" …

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

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

Section 16(2) of the Act provides:

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

Discussion

[11] It is firstly significant to note that when the hearing of this application commenced, the fact that the applicant had failed to utilise section 12A(2) of the Act was a cause of concern. However, at that time, I had not yet seen the notes of the proceedings which had taken place on the date the sanction was imposed.

[12] These notes were subsequently supplied and it was revealed that the following exchange had taken place: -

> "(Panel delivers sanction)
>
> Thompson: I have heard your ruling and wish to put on record our intention to appeal and therefore ask that it be stayed.
>
> Panel: We are not in a position to stay our own ruling. That is a matter for the Court of Appeal."

[13] This exchange revealed that the applicant, in asking that the ruling of the Committee be stayed, was not asking for the relief stated in the Act, that is, a suspension of the filing of the order. This may have misled the Committee. The Committee in responding the way it did, was correct, in that the matter for a stay was properly for the Court of Appeal. It is however unfortunate that the Committee did not recognise that since, in effect, the applicant was seeking to stay the sanction, this could have been achieved by a consideration of the exercise of their powers to suspend the filing.

[14] Having not had a proper consideration of this desire to have the sanction not take effect, the applicant did not file his appeal until 12 December 2019. The order was filed

the day before. It is not disputed that the applicant was not then aware of the fact that the order had been filed.

[15] The formal order of the Committee filed on 11 December 2019 was in the following terms:

> "**PURSUANT TO THE FOREGOING FINDINGS THE COMMITTEE UNANIMOUSLY HEREBY ORDERS THAT:-**
>
> Pursuant to section 12(4) of the Legal Profession Act as amended:
>
> 1. The Attorney-at-law Donovan Foote is struck off the roll of Attorneys entitled to practice in the several courts of the island of Jamaica.
>
> 2. The Attorney Donovan Foote is to pay to the Complainant the sum of $2,333,333.33 in restitution.
>
> 3. The Attorney Donovan Foote is to pay costs to the General Legal Council in the sum of $100,000.00."

[16] The issue of whether there can be a stay of the order striking off an attorney in circumstances where the formal order has been filed has been the subject of observations in two decisions from single judges of this court. In **Paulette Warren-Smith v The General Legal Council** [2014] JMCA App 22, Mangatal JA (Ag) indicated that she was of the view that an application for a stay of execution was essentially an application for the staying of the filing of the formal order with the Registrar of the Supreme Court (see paragraph [15]).

[17] She had this to say in relation to the effect of section 12A of the Act at paragraph [22]:

> "[22] Here again, whilst the existence of this section does not in my view deprive the applicant of the right to apply to this court for a stay of the order, or suspension of its filing with the Registrar of the Supreme Court, it does seem that this section may provide for relief that is analogous to a stay granted by the court. It may well suit attorneys-at-law and their counsel to consider the relative suitability and convenience of making applications to the Committee and exploring this other avenue of relief as opposed to, or before, making applications to this court for a stay."

[18] In **Arlean Beckford v Disciplinary Committee of the General Legal Council** [2014] JMCA App 27, Phillips JA had this to say at paragraph [40]:

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

[19] I am of the view that whilst the filing of the order of the Committee may not impact on the subsequent hearing of an application for a stay of execution in this court, the nature of the order being sought to be stayed must have some significance.

[20] In **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams** [2010] JMCA App 27, Morrison JA, as he then was, in considering an application for a stay of a judgment, demonstrated the necessity for determining the nature of the judgment. He had this to say:

> "[10] It will immediately be seen that the judgment is in substance declaratory, rather than executory, by which I mean that although it does make a pronouncement with regard to the 1st defendant's status as a member of the House of Representatives, it does not purport to order the 1st defendant to act in a particular way, such as to pay damages or to refrain from interfering with the claimant's rights, either of which would be enforceable by execution if disobeyed. The distinction between the two types of judgment is well expressed by Zamir & Woolf as follows (in 'The Declaratory Judgment' 2nd edn. para. 1.02):
>
> > 'A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order

> which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position.'

….

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

[13] In the work 'Declaratory Orders', 2nd edn, Mr P. W. Young Q C, an Australian author, makes the point (at para. 212), that 'The enforceability of a declaratory order is the weak spot in its armour, as there is no sanction built into the declaratory relief'. And further (at para. 2408)-

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

[21] In my view, the order contained in paragraph 1 of the orders made by the Committee was in the nature of a declaratory order. Once the orders are filed and thereby become enforceable, it was declared that the status of the applicant was that he stood struck off from the roll of attorneys-at-law and was no longer entitled to practice in the several courts in Jamaica. Such an order, therefore, could not be made the subject of a stay. The other two paragraphs purport to order the applicant to do some things, namely, to pay restitution and to pay costs. These orders are clearly executory and can be stayed.

[22] Before leaving this consideration of the preliminary point, I think it is necessary to comment on two matters that were raised by the applicant. Firstly, it was pointed out that a single judge of this court had already granted a stay. On 19 December 2019, the matter came on for consideration on paper in the absence of both parties and without any submissions from the respondent. At that time, F Williams JA ordered that "an interim stay be granted to 14 January 2020 when the matter should be set for an inter-partes hearing". The matter having been considered in that manner and having been made interim is clearly no barrier to my considering the matter a fresh and making a decision based on the material before me, which would not have been available to my brother. Certainly, there is no evidence that the fact that the order had been filed was put before him.

[23] In the case of **Ian H Robbins v General Legal Council**, an order for a stay of sanction was made by consent. One significant feature was that the applicant/appellant undertook to limit his legal practice to one case outside of this jurisdiction. The respondent subsequently sought to discharge the consent and one of the bases on which

this application was made was that it had been discovered that the applicant/appellant had been counsel on record in a matter before the local courts at a time when he had asserted that he had not practiced in this jurisdiction. Significantly, the facts and circumstances are peculiar to that matter and, as such, I do not find it of much guidance in this matter before me.

[24] I am satisfied that there are orders made in the sanction that are executory and therefore the question of a stay does in fact arise.

The applicant's submissions

[25] Counsel for the applicant initially indicated that he would be dealing primarily with three of the 13 grounds of appeal that has been filed as being those most relevant to this matter. He subsequently also made submissions in relation to a fourth ground. Submissions were therefore made in relation to the following grounds:

> "A. The Applicant has an appeal of significant merit with strong prospects of success and will be ruined in his professional and personal life if the stay is not granted. Furthermore, the stay of proceedings is required in the interest of justice.
>
> B. The Committee acted with irregularity in the conduct of the proceedings by permitting a Third Party to be present throughout the hearing and/or to coach the Complainant in the giving of her evidence, contrary to Rule 4 of the Legal Profession (Disciplinary Proceedings) Rule and thereby deprived itself of Jurisdiction or rendered the proceedings null and void.
>
> C. The Committee deprived the Appellant/Attorney of his Constitutional and common law right to a fair hearing to wit:

1. Made adverse findings of fact prior to the testimony of the Complainant;

2. Commented on the evidence and/or credibility of the Complainant during the No Case submission;

3. The Committee relinquished its role as neutral umpire;

4. Descended into the arena by virtue of a plethora of interventions (112) or in the alternative prosecuted the case against the Appellant/Attorney by asking leading questions in respect of key ingredients of the offences in circumstances where they ought to have proceeded on the affidavit as evidence-in-chief;

5. Failed to keep the proceedings sterile, thereby occasioning a miscarriage of justice by the complainant being coached and prompted by a third party throughout the course of her testimony.

D. The Committee unreasonably rejected the uncontradicted consistent evidence of a Justice of the Peace which evidence was reasonable and probable and ought to have cast doubt on the complainant's contradicted evidence. The basis of the error i.e. 'the failure to actually place the challenged document in the hands of the witness for him to verify them as being the ones he saw the complainant sign and which he witnessed…' Was an unreasonable one having regard to the following factors: -

    1. The Justice of the Peace testified by video link pursuant to a recommendation made by the Panel;

    2. The Justice of the Peace had given an affidavit which he was cross examined on by the Complainant; the line of questions posed to the Justice of the Peace made it clear which documents they were referring to;

3. There was no necessity to place the documents in the Justice's hand as: (i) it was already exhibited (ii) The Justice's memory needed no refreshing as he gave clear evidence and (iii) the precepts governing previous inconsistent statements did not apply."

[26] In relation to ground B, counsel for the applicant submitted that in allowing a third party to remain, the Committee was in breach of rule 14 of the Fourth Schedule of the Act which provides:

> "The committee shall hear all applications in private, but shall pronounce their findings in public."

[27] Counsel submitted that this was a breach which rendered the entire proceedings a nullity. The Committee, he submitted, did not have any discretion in this matter, as the rule in using the word 'shall' was clearly mandatory. The Committee, being a creature of statute, was obliged to follow the provisions setting out its procedure. Counsel contended that it was not the duty of any party to object to the presence of any third party because this was a defect that could not be waived but went to jurisdiction. Counsel referred to **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6; **Barrington Earl Frankson v The General Legal Council** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 52/1999, judgment delivered on 2 March 2004 and **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** [2005] UKPC 33 in support of these submissions.

[28] In response, counsel for the respondent submitted that there was no irregularity in having the partner to the complainant present at the hearing, given that he was not a

stranger to the proceedings. She also noted that the applicant not only indicated he had no objection to the presence of this person, but he also had his partner present at some of the sittings. It was submitted that if there was a breach, it was not one which rendered the proceedings a nullity.

[29] In relation to ground C, counsel for the applicant submitted that the cumulative effect of the matters that were set out was that the applicant was deprived of a fair hearing. Counsel urged that all persons, including the guilty, should be afforded a fair trial (see **Barry Randall v R** (2002) 60 WIR 103).

[30] Counsel also referred to **Oscar Serratos v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates Civil Appeal No 26/2004, judgment delivered on 28 July 2006, where this court viewed, as an unfortunate error, comments made by the Resident Magistrate in a ruling on a no case submission which suggested that she was satisfied that important ingredients of the offence had been proved. This became one of the bases on which the conviction was quashed.

[31] Counsel for the respondent, in the written submissions, countered that the matters complained of in ground C raised the question of unconstitutionality. It was submitted that this ground is commonplace in appeals of disciplinary striking off orders. The mere allegation, it was urged, was not sufficient basis for granting the order sought.

[32] In relation to ground D, counsel sought to demonstrate the unreasonableness of the Committee's view of the failure of the applicant to put the document in dispute in the hands of the Justice of the Peace who had purportedly witnessed the signing of the

document. Counsel urged that this too contributed to the applicant being denied a fair hearing.

[33] In response, this ground was dealt with briefly. The respondent contended that it was open to the panel to refuse to give weight to the evidence of the Justice of the Peace for the reasons it did.

Discussion

[34] The principles that are applicable to a stay of execution of a judgment are well settled. The principles laid out in **Combi (Singapore) Pte Limited v Ramnath Sriram and another** [1997] EWCA 2162 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, have largely guided the approach the court ought to take with regard to the consideration of whether a stay should be granted.

[35] Succinctly stated, in deciding whether or not to grant a stay, the two primary tests are:

(1) Whether the appeal has a real prospect of success; and,
(2) Where lies the greater risk of injustice if the court grants or refuses the application.

[36] I recognise that in ground A of the appeals, the applicant has in effect encapsulated the applicable principles. In addition, I note that the applicant has not

sought to challenge the findings of facts of the Committee in the grounds pursued in this application but raised issue with the procedure and conduct of the proceedings.

[37] In ground B, the applicant correctly identified the fact that the rules contained in the Fourth Schedule of the Act specify that hearings shall be in private. This, to my mind, means that the hearing cannot be open to any and every member of the public. This fact does not mean that persons related to the parties in the proceedings and who may be aware of the proceedings and who seek to be present should not be allowed to do so if there is no objection to their presence. From the notes of the proceedings, on one occasion, the applicant indicated that he did not object to the presence of the person identified as the partner of the complainant.

[38] In any event, I am not satisfied that this a breach that must result in the entire proceedings being rendered a nullity. There is no express statutory rule to that effect. There is nothing in the records that demonstrate in what way the presence of this person affected the fairness of the proceedings. Ultimately, to my mind, this is not a ground that has a real prospect of success.

[39] In **Barry Randall v R,** Lord Bingham of Cornhill, in delivering the advice of the Privy Council, at page 119, said:

> "But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty..."

[40] Having considered the matters complained of by the applicant, I am not satisfied that either individually or collectively they amounted to depriving the applicant of a fair trial. The interventions of the panel, to my mind, were not beyond what was permissible in ensuring that the relevant evidence was before them for their consideration.

[41] In relation to the complaint about the treatment of the evidence of the Justice of the Peace, I do not think it was unreasonable for the panel to have commented the way they did. Some documents had been admitted as a part of the case for the complainant which she asserted she had not signed. The Justice of the Peace may well have witnessed her signing some document, but, the fact is that he was not shown the documents the complainant had presented and was not invited to comment on them. There was no evidence that the documents the complainant had exhibited were the ones the Justice of the Peace said he had seen her sign.

[42] I cannot say that the applicant has a good chance of success on appeal on these grounds.

[43] On the second issue to be considered, there can be little dispute that being struck off the roll of attorneys will cause the applicant irremediable harm. I am obliged, however, to consider the role and function of the respondent. As the guardian of the legal profession, the respondent has a duty to protect the public from members of the profession who have been found to commit unprofessional conduct. Even more significantly, I have to consider the complainant who had been kept from what can be described as the fruits of a judgment obtained in her favour for seven years. I am

compelled to conclude that the course most likely to cause the least irremediable harm is to refuse the stay as requested. However, being mindful of the harm that will flow from this conclusion I recommend that there be an expedited hearing of this appeal.

[44] Accordingly, I make the following orders:

1. The applicant's application that the sanction of the Disciplinary Committee ordered against him on 23 November 2019 be stayed pending the determination of this appeal is refused.

2. The Registrar shall endeavour to set a date for the expedited hearing of this appeal.

3. Costs of this application to the respondent to be taxed if not agreed.