[2022] JMCA App 11

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2022APP00015

BEFORE: THE HON MS JUSTICE EDWARDS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

BETWEEN	**LISAMAE GORDON**	**APPLICANT**
AND	**DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Co for the applicant

Patrick Foster QC and Jacob Phillips instructed by Mayhew Law for the respondent

9 and 28 March 2022

EDWARDS JA

Introduction

[1] By way of a notice of application for leave to appeal, filed 25 January 2022, the applicant, Ms Lisamae Gordon, an attorney-at-law, sought permission to appeal the decision of Nembhard J ('the learned judge') made in the Supreme Court on 14 January 2022. On that date, in a written reasoned judgment, the learned judge refused the applicant's application for leave to apply for judicial review, as well as her request for permission to appeal. The applicant had also sought a stay of the disciplinary proceedings instituted against her before the Disciplinary Committee of the General Legal Council ('the Committee'), pending the outcome of the appeal, if leave were to be granted.

[2] On 9 March 2022, this court heard the application for permission to appeal and refused it, with costs to the Committee against the applicant Lisamae Gordon. These are our brief reasons in writing for doing so.

Factual and procedural background

[3] The applicant was brought before the Committee to answer charges in a disciplinary complaint filed by the complainants, Mrs Charmaine Barnett and Mr Baron Barnett, in respect of a property that was being sold by the applicant's former client, in which she had carriage of sale. The sale fell through, and the complainants could not recover monies paid in respect of the property.

[4] The facts of the case, in brief, are that the applicant was engaged by Mr Howard Jobson, who was the representative and son of the vendor, Ms Kathleen Robinson, to sell property situate at Orange Grove Estate in the parish of Trelawny, to the complainants. The complainants retained no attorney of their own to conduct the transaction. A sale agreement that the applicant had prepared was executed by the parties on 20 November 2014. It is common ground that the complainants, during the course of the transaction, paid US$10,000.00 directly to the applicant as a deposit on the sale.

[5] Subsequently, two further agreements were drafted due to discrepancies with the description of the property, purchase price, the deposit to be paid and the true vendors of the property. Though the second agreement was not signed, the third one had the appearance of being signed by the parties to the sale, although the complainants denied that they had signed it. The complainants paid over additional monies pursuant to the sale, and in all, a total amount of US$35,000.00 was paid.

[6] At some point, it was discovered, by another attorney retained by the complainants, that the title to the property, which was the subject of the agreement, was endorsed with a caveat and that a valid title could not be obtained. The title was, therefore, defective, and the vendors could not have passed a good title. When contacted, the agent of the vendor denied that there were issues with the title but, shortly thereafter, absconded with the monies paid by the complainants. The transaction fell through, and, according to the complainants, they could not locate Mr Jobson, the vendor, or the applicant. After several attempts by the complainants to get a response from the applicant

regarding the status of the sale and the whereabouts of Mr Jobson and the vendor, the applicant finally indicated she no longer represented the vendors.

[7] The result was that, at the time of the complaint, the complainants had paid over approximately US$35,000.00, in pursuit of the sale, with nothing to show for it.

[8] The complainants filed a complaint with the General Legal Council on 14 August 2018, alleging breaches of canons I(b) and IV (s). These canons provide, respectively, 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" and that, "in the performance of his duties, an attorney shall not act with inexcusable or deplorable negligence or neglect".

[9] A significant feature of the case was that the complainants had alleged that the applicant had also acted on their behalf in the sale by way of an oral agreement, and had undertaken to do a title search to ensure that there were no prohibitions to the passing of the title. This assertion was made despite their admission that there was no retainer agreement or retainer money paid by them to the applicant. The applicant denied acting on behalf of the complainants in the sale and deposed, in her response to the complaint, that she was never retained by the complainants, and that after the sale agreement had been redrafted by her to account for adjustments discussed by the parties, the transaction continued without reference to her. In her defence, she denied owing any legal responsibility to the complainants to refund the money paid, as, except for the US$10,000.00, the funds were paid directly to the vendor by the complainants. The US$10,000.00, she said, was paid by her to the vendor at the request of the complainants.

[10] The substantive matter was heard in a contested hearing by the Committee between 11 January 2020 and 22 February 2020 and, on 2 October 2021, it ruled that the applicant was in breach of canons I(b) and canon IV(s). The Committee found that the applicant was guilty of professional misconduct, and a date was set for the hearing as to the appropriate sanction to be imposed. On the date set for that hearing, counsel

for the applicant Mr Wildman, who had not been the attorney on the record for the applicant in the hearing of the substantive matter, objected to the proceedings and indicated his intention to seek judicial review in the Supreme Court, on the basis that the Committee had lacked jurisdiction to hear the substantive complaint.

[11] Subsequently, an application for leave to apply for judicial review was filed by the applicant on 16 December 2021 primarily on grounds that, since the applicant was not the attorney for the complainants as alleged in the complaint, they had no standing and, therefore, the Committee lacked the jurisdiction to hear the complaint.

[12] On 11 January 2022, the application was heard by Nembhard J, who refused it on the basis that there was no arguable ground, with a realistic prospect of success, the complainants being "aggrieved persons" under section 12 of the Legal Profession Act (LPA). She also found that, the Committee, having not acted *ultra vires* the LPA, the applicant had a suitable alternative remedy in an appeal of its decision to the Court of Appeal.

[13] The applicant filed this application before this court, seeking leave to appeal the decision of Nembhard J and a stay of the disciplinary proceedings ('the sanction hearing'), on grounds that the learned judge erred, in not granting leave for judicial review, by failing to appreciate that:

i. the respondent's jurisdiction was based on the complaint filed by the complainants, and that said complaint was based on the allegation that the applicant was their attorney-at-law and not as an "aggrieved person as contemplated by section 12(1) of the LPA";

ii. the applicant is only required to respond to allegations contained in the affidavit evidence filed by the complainants;

iii. once the respondent had found that the applicant was not the attorney for the complainants, it had no further jurisdiction to continue the hearing;

iv. only persons who have standing can make a complaint pursuant to section 12 of the LPA; and

v. in the absence of sworn evidence supporting the complaint, the complaint would have failed to comply with section 4(1)(a)(b) of the LPA and, therefore, the proceedings against the applicant are null and void and of no effect.

[14] Before indicating the reasons for not agreeing with Mr Wildman that the learned judge fell into error, it may be prudent to set out, just briefly, what the Committee found.

The findings of the Committee on the disciplinary complaint

[15] The Committee found that there was a *prima facie* case made out on the complaint for a hearing to be held. Having heard evidence, it found that, although the applicant was not retained by the complainants to act for them in the sale, as the attorney with carriage of sale, she nonetheless had certain responsibilities to the purchasers which she failed to carry out. Those responsibilities, the Committee found, encompassed the duty to ensure that the title could be passed and that it did not have any encumbrances on it that would interfere with the sale, as well as a duty to protect the money involved in the transaction.

[16] The Committee was of the view that, where money is to be paid over to the vendor, the attorney with carriage of sale must have the consent of the purchasers to do so, and must ensure that that money can be refunded to the purchasers if the transaction falls through. The applicant, it found, was not relieved of these duties by the mere fact that she was not retained to act for the purchasers. The Committee also found that the applicant’s evidence that the title she had been shown by the agent for the vendor did not have the caveat endorsed on it, demonstrated that she had failed to do a proper title search before preparing any of the sales agreements.

[17] The Committee noted that neither subdivision approval nor the requirement for one to be done was reflected in the agreements, even though the subject property being sold was a small portion of a larger portion of land. It also noted the fact that the clause that required both parties to pay transfer tax did not accord with the Transfer Tax Act, and there was no indication that this had been brought to the attention of the complainants.

[18] The Committee, therefore, found that the evidence showed that it was clear beyond a reasonable doubt that the applicant had "acted in a manner contrary to the interests of the Purchasers and inevitably to their detriment, while at the same time facilitating the Vendor to be unjustly enriched" (see para. 20 of the Committee's decision).

[19] With the exception of the finding that the complainants did not retain the applicant in the sale, on which Mr Wildman relies to bolster his arguments, this court did not consider it necessary to this application to consider or make any determination on those other findings on the substantive case, which may well be the subject of further proceedings.

The application in the court below and judgment of Nembhard J

[20] The application for leave to apply for judicial review sought declarations that (i) the Committee had no jurisdiction to proceed with the disciplinary proceedings where there was no evidence to support the complaint of alleged breaches by the complainant; (ii) the finding of the Committee that the applicant was not the complainants' attorney precluded the Committee from continuing with the proceedings against the applicant; and (iii) the continuation of the proceedings, where the applicant was not the complainants' attorney-at-law, rendered the said proceedings illegal, null and void and of no effect. An order of certiorari to quash the continuation of the proceedings was also sought by the applicant, as well as costs in the application and such other relief as the court saw fit.

[21] The learned judge considered that the primary issue raised in the application for leave to apply for judicial review was whether the applicant had met the threshold for the grant of leave, and that the sub-issues to be resolved were (a) whether the respondent had acted *ultra vires* its statutory authority and (b) whether the applicant had a suitable alternative remedy.

[22] In assessing the issue and sub-issues, the learned judge in her written judgment at para. [40], first determined that the applicable test, as set out in **Sharma v Brown-Antoine** [2007] 1 WLR 780, had not been met, as the applicant had failed to establish an arguable ground with a realistic prospect of success. In coming to that finding, the learned judge considered that section 12(1) of the LPA empowered any "aggrieved person" to make an application to the respondent where that person alleges an attorney has been guilty of professional misconduct. Based on the authority of **Arlean Beckford v The General Legal Council** (unreported), Court of Appeal, Jamaica, Civil Appeal No 32/2005, judgment delivered 31 July 2007, the learned judge found that the definition of an "aggrieved person" was not restricted to an attorney/client relationship, and that it had a wide scope (see para. [36]). In that regard, she found that the complainants could not be described as mere busy bodies, and that the "factual matrix was sufficient" for the court to find that the complainants were persons aggrieved within the context of section 12(1) of the LPA.

[23] In respect of the second sub-issue, the learned judge found that since there was no evidence that the respondent had acted *ultra vires* its statutory authority, the correct procedure for the applicant to pursue was that of an appeal to the Court of Appeal, as set out in section 16(1) of the LPA.

[24] Lastly, in respect of costs, the learned judge found that the applicant's application was unreasonably made, and therefore, the respondent should get its costs (see paras. [48] and [49]).

The notice of application for leave to appeal to the Court of Appeal

[25] The application before this court was based on the following grounds:

> "I. The Learned Trial Judge erred in law in failing to appreciate that the basis of the Respondent's jurisdiction to adjudicate was based on the Complaint filed by the Complainants, that at the time the Complainants made the Complaint against the Applicant, they did so on the basis that the Applicant was in fact their Attorney-at-Law, and not as aggrieved persons as contemplated under **Section 12(1)** of the Legal Profession Act.
>
> II. The Learned Trial Judge erred in law in failing to appreciate that, under **Section 4(1)(a)(b)** of the **Legal Profession Act Rules** and **Regulations**, the Complainants must provide evidence on affidavit to the Respondent, of the nature of the allegations complained of against the Attorney-at-Law, and it is these allegations which the Attorney-at-Law is required to response [sic] to and not any other allegation, which is not supported by evidence on affidavit.
>
> III. The Learned Trial Judge erred in law in failing to appreciate that, once there is a finding by the Respondent, as was in the instant case, that the Applicant was not the Attorney-at-Law for the Complainants at the time of the transaction, the Respondent had no further jurisdiction to continue with the hearing and to make a finding that the Applicant was guilty of professional misconduct and to proceed with a sanction hearing.
>
> IV. The Learned Trial Judge erred in law in failing to appreciate that, **Section 12(1)** of the **Legal Profession Act** only provides for persons who have standing to make a Complaint.
>
> V. The Learned Trial Judge erred in law in failing to appreciate that, in the absence of sworn affidavit evidence supporting the Complaint, the proceedings against the Applicant are null and void and of no effect, as the Complaint would have failed to comply with **Section 4(1)(a)(b)** of the

> Legal Profession Act Rules and Regulations. See the Complaint of **Dr. Reinaldo Pino Bestard v Carlene McFarlane Complaint No. 193/2020**." (Emphasis as in original)

Submissions

A. <u>The applicant's submissions</u>

[26] Counsel Mr Wildman, on behalf of the applicant, submitted that the complainants were not persons aggrieved, as required by section 12(1) of the LPA and, therefore, the Committee had no jurisdiction to entertain the complaint. He argued that the learned judge's failure to appreciate this fact caused her to fall into error in not granting leave to apply for judicial review.

[27] Counsel asserted that the complaint and the affidavits of both complainants were based on the allegation that the applicant had acted as attorney-at-law for them. It was submitted that there was no general assertion that the complainants were lodging the complaint against the applicant in the capacity of "aggrieved persons" in accordance with section 12 of the LPA, but rather, the nature of the complaint filed was within the "narrow compass" of the specific accusation that the applicant was the complainants' attorney.

[28] The authority of **Causwell v The General Legal Council (*ex parte* Elizabeth Hartley)** [2019] UKPC 9 was relied on for the interpretation of that section in respect of who may bring a complaint.

[29] The gist of Mr Wildman's submissions was that the Committee made a jurisdictional error in going on to find the applicant guilty of professional misconduct, where the main allegation in the complaint, that the attorney had acted for both vendor and purchaser, was not made out. It was submitted that, pursuant to Rule 4(1) of the Rules and Regulations of the LPA (as amended), the respondent's jurisdiction is based on the complaint and affidavit in support of the complaint, which set out the case the attorney is required to meet. The Committee, it was submitted, is not empowered to go outside the four corners of those documents.

[30] Counsel submitted further that the term "aggrieved persons" cannot be used to fill gaps that may have arisen in a complaint and the affidavit in support, and that the Committee "cannot be at large to find culpability on the part of the Attorney, on facts that were not before the [Committee] and which were never supplied to the Attorney, to put the Attorney on notice as to the case he or she is required to meet".

[31] Counsel sought to distinguish the present case from that of **Arlean Beckford**, in which it was said that this court proceeded on the basis that the relevant complaint and affidavit in that case contained enough facts to support the complaint and treatment of the complainants as "aggrieved persons". It was submitted that the opposite obtains in this case, where the allegations were narrowly framed. The Committee having exceeded its authority, it was submitted, the applicant was entitled to seek judicial review to quash the decision of the respondent and that appealing a decision which was null and void was not an adequate remedy.

[32] Counsel also challenged the validity of the further affidavits of the complainants filed before the Committee, which, it was submitted, did not comply with the requisite formalities. At the same time, counsel abandoned his reliance on the case of **Dr Reinaldo Pino Bestard v Carlene McFarlane** Complaint No 193/2020, as he could not produce any written judgment in that case, for this court to consider.

B. *The respondent's submissions*

[33] Mr Foster QC submitted that the learned judge's decision should be upheld as (i) the Committee did have the jurisdiction to hear the complaint and (ii) the applicant will have a suitable alternative remedy in the form of an appeal, once the disciplinary proceedings are complete.

[34] It was argued that, for the applicant to be granted leave to appeal, it must be shown that there is an appeal with a real chance of success, and in a case like this one, where the impugned decision relates to a refusal of leave to apply for judicial review, there will only be a real chance of success if the applicant can demonstrate that she has

"an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy".

[35] In the circumstances of this case, it was submitted that the applicant did not have a real chance of success, as there was no arguable ground for judicial review, the respondent having had jurisdiction pursuant to section 12 of the LPA to treat with the disciplinary complaint. The class of persons entitled to bring a complaint under this section, it was argued, includes persons other than a client of the attorney against whom the complaint is made.

[36] Furthermore, it was submitted, the applicant has available to her an alternative remedy pursuant to section 16(1) of the LPA.

[37] The authorities of **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMCA App 13 and **Danville Walker v The Contractor-General** [2013] JMFC Full 1 were relied on for the relevant test and approach the court should take in matters of this nature.

[38] In respect of the application for stay, the respondent submitted that there was no basis upon which a stay should be granted if permission to appeal is refused.

[39] In respect of the affidavit of Mr Barnett, the respondent submitted that, although it was not in perfect form, it was signed by the affiant and witnessed by a justice of the peace. Also, the Committee relied on it in addition to the *viva voce* evidence of that complainant. No harm, therefore, it was argued, was caused therefrom.

[40] There was no dispute regarding the applicable test for judicial review and this court proceeded on the basis that the learned judge applied the correct tests.

Issues

[41] This court considered that the sole issue for its determination was whether Nembhard J was wrong to conclude that the applicant did not have an arguable ground

for judicial review with a realistic chance of success. In assessing that issue, the court considered the question of whether there was any real chance of success regarding the ground that the Committee lacked jurisdiction to hear the complaint against the applicant.

[42] Mr Wildman hung his hat on defects which he said existed in the complaint and the affidavits in support of it, in that the complaint was that the applicant had acted as attorney-at-law for the complainants. Mr Wildman was of the view that there was no allegation by the complainants that they were aggrieved persons and, therefore, once it became clear that the allegation that the applicant had acted as the complainants' attorney-at-law was false, the Committee no longer had jurisdiction to try the matter.

[43] The flaws in Mr Wildman's reasoning became increasingly obvious as the legal framework applicable to making complaints before the Committee was examined against the complaint, the affidavit filed in support, and the applicant's affidavit in response. Legal precedent was also not supportive of Mr Wildman's contentions.

Discussion

[44] The Committee gets its jurisdiction from the LPA and the Legal Profession (Disciplinary Proceedings) Rules as variously amended ('the Rules'). Section 14 of the LPA provides for there to be Rules made by the Committee from time to time. The Rules in force at this time are those set out in the Fourth Schedule to the LPA, as amended by the Legal Profession (Disciplinary Proceedings) (Amendment) Rules 2014 and 2019.

[45] Section 12(1) of the LPA provides that "[a]ny 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".

[46] The LPA, however, does not define who may be considered an aggrieved person. Therefore, "aggrieved" must be given its usual and natural meaning. It follows that any person with a grievance would be an aggrieved person. In this case, the complainants

did not allege any grievance with the attorney-at-law acting as their attorney. That fact merely formed part of the narrative as regards their grievance with how the sale was conducted, which left them out of pocket and without the land they were purchasing.

[47] This court, in the case of **Arlean Beckford**, considered, at pages 5-9, the question of who was an aggrieved person. In doing so, it examined statements made in the case of **Ex parte Sidebotham** [1880] 14 Ch D 458. In that case, James LJ referred to "a person aggrieved" as one who has suffered a legal grievance, or one against whom a decision has been made which deprives him of something or wrongfully refuses him something or wrongfully affects his title to something. The case of **Attorney General for Gambia v Pierre Sarr N'Jie** [1961] AC 617 was also considered by this court in **Arlean Beckford**. In that case, Lord Denning pointed out that the definition in **Ex parte Sidebotham** was not exhaustive. He noted that the words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. He went on to note that although it did not include mere busybodies, it did include anyone with a genuine grievance (see page 634 of that case as quoted at page 6 in **Arlean Beckford**). Having examined the cases, this court found that the words had a wide scope within their use in the LPA and were not restricted to a lawyer/client relationship.

[48] Mr Wildman sought to distinguish the case of **Arlean Beckford** from the instant case. He said it was distinguishable because the affidavit in support of the complaint, in that case, was fulsome and outlined all the things the complainant was alleging the attorney had done. In the instant case, he said, there was only the mere assertion that the applicant acted as their attorney-at-law. There were no other allegations, he said, for a *prima facie* case to go to a hearing. Furthermore, he continued, the Committee having heard the matter and having found that the applicant was not the attorney for the complainants, it meant that the applicants were not persons aggrieved, and the Committee, therefore, ought to have found that they had no standing. At that point, he said, the Committee lost its jurisdiction.

[49] Rule 3 of the Rules provides that an application to the Committee requiring an attorney to answer allegations of misconduct in an affidavit must be in writing in form 1 of the schedule to the Rules and must be sent, along with a supporting affidavit in form 2 of the Schedule, stating the matters of fact on which he relies in support of the application. The procedure prior to the hearing is set out in Rule 4 (as amended). It is useful to set out that rule in full. It states as follows:

> "4.— (1) Before fixing a day for the hearing of any application under rule 3, the Committee—
>
> (a) may require the applicant to supply such further documents or information relating to the allegations as the Committee thinks fit; and
>
> (b) shall serve on the attorney against whom the application is made a copy of the application and the affidavit in support thereof, together with all other relevant documents and information.
>
> (2) An attorney who is served under paragraph (1)(b) shall, within forty-two days of such service, respond in the form of an affidavit, to the application.
>
> (3) Upon the expiration of the period mentioned in paragraph (2), the Committee shall consider the application and the response thereto (if any), and if the Committee is of the opinion that-
>
> (a) a *prima facie* case is shown, the Committee shall proceed in accordance with rule 5;
>
> (b) no *prima facie* case is shown, the Committee may dismiss the application without requiring the attorney to answer the allegation.
>
> (4)…"

[50] The rules, therefore, require the filing of a complaint with a supporting affidavit, and if a *prima facie* case is shown, a hearing date is to be set and a notice is to be sent to the complainant and the attorney. The attorney is required to file an affidavit in

response. Rule 7(2) also provides an avenue for any party to make a preliminary objection by notice, seven days before the hearing, stating the nature of the objection and the grounds thereof.

[51] It is useful at this point to set out the affidavit filed in support of the complaint. The complaint itself was made on the usual form of complaint in Form 1 of the Schedule to the Fourth Schedule and adds nothing to the discussion. It was indicated in the form of complaint that it was made on the ground that the matters of fact stated in the supporting affidavit constituted conduct unbecoming of the profession. The affidavit was drafted in the format of Form 2 in the Schedule entitled "Form of Affidavit by Applicant" and read as follows:

> "(a) We, Charmaine and Barron Barnett
>
> make OATH and say as follows:
>
> …
>
> Facts:
>
> 1) On November 20, 2014 we entered into an agreement in which Ms. Gordon was to serve as legal representative in facilitating the purchase of property from a Ms. Kathleen Robinson.
>
> 2) Property is part of Orange Grove Estate in the parish of Trelawny. The agreed-upon purchase price was eight million Jamaican dollars. We agreed to pay $15,000 US dollars as an initial deposit and an additional $3,000 US dollars within 6 months of the initial deposit with the remaining balance due on or before November 11, 2017, the scheduled closing date. It was understood that [the] attorney would conduct a title search and would ensure that there are no prohibitions to sale (no liens, injunctions, legal incumbrances etc).
>
> 3) To date, we have paid $35,000 US dollars. After numerous unreturned calls/text messages to

seller and Ms. Gordon, we became suspicious and engaged another attorney to review the matter for us. It was at that time that we found out that the property cannot be sold and seller [sic] will be unable to deliver a clear title.

4) In essence, we have paid $35,000 US dollars and we have nothing to show for it. To make matters worse, our attorney is completely ignoring us.

5) We believe we are entitled to the full refund of the $35,000 US dollars that we have already paid.

The Complaint we make against the Attorney-at-law is that:

1) She is in breach of Canon 1(b) which states that, 'An attorney shall at all times maintain the honor and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which she is a member.

2) She has acted with inexcusable or deplorable negligence in the performance of her duties." (Emphasis as in original)

[52] This affidavit was signed by both complainants and sworn to before a notary public. It, therefore, conformed to the requirements of the LPA, which only require the ground of the complaint to be set out "shortly". It is clear from the allegations in this sworn affidavit accompanying the complaint that Mr Wildman's contention that the complainants, in this case, did not complain as aggrieved persons, but that instead, their complaint was specific to the issue of the applicant having acted as their attorney-at-law, was unsustainable. As pointed out by Queen's Counsel Mr Foster, the complaint was much broader than any allegation that the applicant had acted as the complainant's attorney. The allegations were that there was a sales agreement for which the applicant had carriage of sale; several monetary deposits were made; no title was passed despite this; title could not have been passed because there was a defect in it; and that despite an assurance by the applicant that a search would have been done, none was conducted. It was further alleged that the applicant did not respond to queries in respect thereof, and the vendor for whom she acted could not be found. A refund was being sought. This was the gist of the complaint made to the Committee.

[53] Mr Wildman also relied on the case of **Causwell v The General Legal Council**. However, we did not find this case to be of any assistance to the applicant at all. The Judicial Committee of the Privy Council, in that case, agreed that section 12 of the Act excluded mere busybodies but it also found that the section was couched in broad terms and permitted anyone aggrieved by relevant misconduct to bring a complaint (see para. 23).

[54] There was a complaint and an affidavit in support alleging misconduct in the instant case. The attorney was notified of the complaint and filed an affidavit in response. The Committee found that there was a *prima facie* case to go on to a hearing. A hearing date was set, and the applicant submitted to the Committee's jurisdiction and participated in the hearing. No preliminary objection was made to the jurisdiction of the Committee, although it was not necessary to ground this court's decision on that fact.

Can Nembhard J's decision be impugned?

[55] The learned judge heard an application for judicial review and found that there was no want of jurisdiction in the Committee and that, in the absence of such, there was a suitable alternative remedy. There is no contention that she applied the wrong tests in making her determination. We see no reason to disagree with her assessment of the application before her.

[56] In the narrow sense of compliance with the statutory requirements for commencing a disciplinary hearing, the jurisdiction of the Committee was established. The learned judge was correct to find that the complainants qualified as "aggrieved persons" under section 12(1) of the LPA and were not mere busybodies.

[57] Mr Wildman's complaint of a lack of jurisdiction, in, perhaps, a much wider sense of the word, where he asserted that once it became clear at the hearing that the applicant was not the attorney-at-law for the complainants, the Committee lost its jurisdiction, because the jurisdiction to hear the matter was based on the complaint that the applicant was not the attorney at law, was also shown to be a fallacious argument. The learned

judge was, therefore, correct to find that the Committee did not act *ultra vires*, and was not "relieved" of its jurisdiction, even in the face of a finding by the Committee that the applicant was not the complainants' attorney-at-law.

[58] The case of **Causwell v The General Legal Council** made it clear that there are three categories of persons entitled to complain. Those three categories are (a) any aggrieved person(s), (b) the Registrar of the Supreme Court and (c) any member of the GLC. The court also pointed out that the aggrieved person may complain through an agent, and made it clear that there need not be any attorney/client relationship existing. Therefore, the Committee could not have lost its jurisdiction, narrowly defined, on the sole basis that the applicant was not the complainants' attorney-at-law, the Committee having already found, correctly in our view, that the complainants were persons aggrieved by the applicant's actions or inactions. In other words, contrary to the assertions made by Mr Wildman, there was no basis for the Committee to find that the complainants had lost their *locus standi* because the applicant was proved not to be their attorney-at-law in the sale.

[59] The learned judge was, therefore, also correct to find that there was no arguable ground with a realistic prospect of success, based on these fallacious arguments.

[60] In the wider sense of jurisdiction, Mr Wildman complained that there was no affidavit outlining the nature of the allegation against the applicant and, therefore, there was nothing on which the Committee could find that a case against the applicant was made out. Mr Wildman said that, if there was no affidavit alleging misconduct by the applicant, then the Committee had no jurisdiction to hear any case of misconduct against the applicant. For this contention, he relied on the case of **Allinson v General Legal Council of Medical Education and Registration** [1894] 1 QB 750. Lord Esher MR, in that case, in reference to the objection raised by counsel that there was no evidence on which to find the plaintiff guilty said this, at page 760:

> "[I]f there was no evidence upon which the council might fairly and reasonably say that the plaintiff had been guilty of

> "infamous conduct in a professional respect," they went beyond the jurisdiction given to them by the Act in entertaining the case and proceeding to adjudicate upon it. If there was no such evidence, they ought to have declined to interfere."

[61] Mr Wildman contended that there was no *prima facie* case shown for the Committee to embark upon the hearing, and therefore it lacked jurisdiction.

[62] The affidavit of the complainants in support of the complaint set out at para. [51] above, shows that that argument was also unsustainable.

[63] The applicant relied on the case of **Anisminic Ltd v Foreign Compensation Commission and Another** [1969] 2 AC 147. This case, on its facts, deals with the exercise of the jurisdiction of a compensation tribunal, but is more widely known for the statements made therein on the issue of jurisdiction and the general nature of the court's supervisory function *vis-a-vis* its appellate function. The facts are irrelevant to this discussion and the principles outlined in the case do not in any way support the applicant's contentions. The decision in **Anisminic** was a majority decision of the House of Lords per Lord Reid, Lord Pearce and Lord Wilberforce. Lords Morris of Borth-y-Gest and Pearson gave dissenting opinions. All their Lordships outlined, to some degree, the principles involved in determining the question of whether a tribunal lacks jurisdiction.

[64] Lord Reid, at page 171, spoke of jurisdiction in its narrow and original sense where a tribunal is entitled to embark on an enquiry. He, however, also spoke of jurisdiction, which one may consider to be in a wider sense, where a tribunal properly embarked on an enquiry, but in the course of doing so, it failed to do something which caused its decision to be a nullity. Lord Reid gave examples including cases where a tribunal: makes a decision in bad faith; makes a decision where there is no power to make it; fails to act with natural justice; misconstrues the provisions which grants the power to do an act; and refuses to take into account matters remitted to it or takes into account matters not within its powers and giving a decision based on those matters. All these are factors

which, if they exist, would affect the jurisdiction of the tribunal, and if it does any of these things, its decision would be considered a nullity. However, said Lord Reid, if a tribunal makes an error in deciding a question, without doing any of the above, it is entitled to do so without losing its jurisdiction and its decision will be valid subject only to correction on appeal.

[65] At page 182 of that judgment, Lord Morris of Borth-y-Gest, in examining the question of when a tribunal could be considered to be acting outside of or to have exceeded its jurisdiction, said this:

> "If a particular issue is left to a tribunal to decide, then even where it is shown (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to the wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters which are left to a tribunal for its decision such errors will be errors within jurisdiction."

[66] Further, at page 187, Lord Morris considered the following statements made in Halsbury's Laws of England, 2nd Ed Vol 9 para. 1493, as follows:

> "Where the proceedings are regular upon their face and the magistrates had jurisdiction, the superior court will not grant the writ of certiorari on the ground that the court below has misconceived a point of law. When the court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence. (See now 3rd ed., (1955), vol.11, p. 62)."

[67] Although Lord Morris dissented on the question of the interpretation and effect of an "ouster provision" in a section of the relevant legislation, the principles expressed by him, as stated above, still hold true. Lord Pearson agreed with the principles on jurisdiction and that if a tribunal acted in excess of its jurisdiction, it was subject to the

court’s intervention in the exercise of its supervisory function. He too dissented on the question of whether the tribunal, in that case, had exceeded its jurisdiction.

[68] Lord Wilberforce, at page 210, noted that the cases in which a tribunal could be held to have exceeded its powers were not limited to those in which it lacked the power to embark on an enquiry in the first place, nor to where a condition precedent had not been satisfied. There were cases, he said, where, having validly entered into an enquiry, it made an invalid decision, not merely an erroneous one. The latter, he said, would involve the tribunal asking the wrong question or applying the wrong test. Lord Wilberforce indicated that the court had to make a crucial distinction between the tribunal doing something “which is not in the tribunal’s area” and “doing something wrong within that area”. The question is whether the tribunal was acting within its powers when it made the decision it did.

[69] Lord Pearce, at page 195, also looked at the various ways lack of jurisdiction could arise, which was in keeping with the rest of their Lordships’ assessment. He considered the lack of jurisdiction in the context of an absence of the required formalities or conditions precedent. He also considered the lack of jurisdiction in the context of a tribunal making an order where there was no power to make it or departing from the rules of natural justice. The other category he considered was where the tribunal asked itself the wrong questions or took account of things it was not directed to take account of. In the latter sense, the tribunal would have stepped outside of its jurisdiction by doing something Parliament did not direct it to do. The courts, Lord Pearce said, must be careful to distinguish between their supervisory function and their appellate function.

[70] In the instant case, the LPA gives the Committee the power to determine whether there is a *prima facie* case for a hearing to be held. Based on the affidavits before it, the Committee determined that there was a *prima facie* case in this matter. That was within its power to do. If, in making that determination from the material it had, it came to the wrong answer, that was an error made within its jurisdiction. In keeping with the reasoned principles expressed in **Anisminic**, judicial review (a supervisory function)

would not be available where the tribunal acted within its jurisdiction but made some error of law or fact, which would enable the person affected to appeal to the court to exercise its appellate function. The applicant failed to show how any of the incidents affecting jurisdiction outlined in **Anisminic** occurred in this case.

[71] Mr Wildman's final assault was against the form of the additional affidavit evidence provided by the complainants. He complained that they were not in the usual format. He pointed out that the purported affidavit of Mr Barnett did not conform to the stipulated requirements of section 3 of the Interpretation Act, in that, an affidavit is defined therein as including "any document in relation to which an affirmation or declaration has been made by any person allowed by law to affirm or to declare instead of swearing". Mr Wildman pointed out that Mr Barnett's affidavit was not sworn to, as it carries no jurat. The Committee, he said, ought not to have taken cognizance of it.

[72] Mr Foster, however, maintained that this was not an issue raised before the Committee or the judge below. In any event, he said, the applicant submitted to the jurisdiction of the Committee and oral evidence was led at the hearing. The applicant, he said, could not now legitimately complain about the form of the affidavit.

[73] Mr Barnett provided an affidavit, dated 27 December 2019, consisting of one paragraph. It purports to be sworn by him before a named witness, but as there is no indication of the capacity of that witness, the jurat, as Mr Wildman maintained, was thereby defective. In this single paragraph, Mr Barnett alleged that the applicant represented both the vendor and the purchaser and, although there was no written retainer in respect of the purchaser, there was an oral agreement. Mrs Barnett also provided an affidavit consisting of seven paragraphs, which was undated. It purported to be sworn to before the same named witness as in Mr Barnett's affidavit, but in Mrs Barnett's affidavit, it is indicated that the person was a Justice of the Peace for the parish of Saint Ann. There is, however, no stamp or seal of the Justice of the Peace affixed. The jurat, as complained by Mr Wildman, was, therefore, some may say, defective. That affidavit exhibits copies of the sales agreements, survey diagram, copies of the payments

made as a deposit on the land, and emails to and from the applicant. The affidavit also repeats allegations in the affidavit of complaint with some elaborations.

[74] It is not necessary for the determination of this application to consider the evidential value of those two affidavits and their attachments. What is clear, however, is that, even without these two affidavits, and based on the original joint affidavit of the complainants, the Committee could have found a *prima facie* case to proceed to a hearing. The Committee also held oral hearings in which the applicant fully participated. The questions of what evidence should be taken into account and how it was received at the oral hearing are issues for a different forum. If the Committee wrongly took account of irrelevant material or considered evidence that it should not have considered, such an error, if it is indeed an error, was one it would have made whilst acting within its jurisdiction.

[75] This court did not have first-hand sight of the applicant's affidavit in response to the complaint, which was placed before the Committee. Oral evidence was heard by the Committee. In its written decision, the Committee first referred to the complaint and the facts contained in the affidavit accompanying it. It also referred to the defence contained in the applicant's affidavit filed on 22 October 2019. In that affidavit, the Committee pointed out, she admitted to representing the vendor in the sale but denied representing the complainants. She admitted to being asked to prepare a sales agreement and being presented with a title. She also admitted to receiving US$10,000.00, which she paid over to the vendor as she was asked to do. She additionally admitted to communicating with the complainants by email, and telephone, even though she never met them. She said she had been required to redraft the sales agreement to reflect the deposit of US$35,000.00 and to change the description of the property, which she did, but stated that she did not collect that sum from the complainants. After she redrafted the sales agreement, she heard nothing further from either party to the sale, until the complaint was made.

[76] The form of the later affidavits by the complainants was not an issue raised before the learned judge and, therefore, she made no ruling on it. However, it is clear that based on the affidavit in support of the complaint and the response by the applicant, the Committee could not be faulted for finding that a *prima facie* case had been made out for it to proceed to conduct a hearing. The format of the two defective affidavits by the complainants did not, in any way, affect the jurisdiction of the Committee. Mr Wildman's contentions in this regard are unmeritorious.

[77] In any event, counsel's main contention, to which he held fast to the end, is that the complaint was made against the applicant as attorney-at-law for the complainants and not as "aggrieved persons", and that, therefore, the Committee had no jurisdiction to embark on a hearing. Having floundered before the court below, that jurisdiction argument gained no greater traction in this court. There was no basis on which this court could interfere with the discretion of the learned judge to refuse leave to apply for judicial review.

[78] We also agreed with the learned judge that, there being no evidence that the Committee acted with any want of jurisdiction, the applicant's remedy lay in utilising the avenue of redress afforded by section 16 of the LPA, which provides for appeals against any order made by the Committee to be made to the Court of Appeal, and that appeal is by way of a rehearing. In the face of that, there was no necessity to consider the issue of a stay.

[79] Rule 1.8(7) of the Court of Appeal Rules (CAR) provides that permission to appeal will only be granted where there is a real chance of success. Mr Wildman failed to show any arguable point with any real chance of success and, for those reasons, we made the decision set out in para. [2] above.