[2021] JMCA Civ 15A

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

MISCELLANEOUS APPEAL NO 5/2016

BETWEEN	**NORMAN SAMUELS**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Written submissions filed by Samuels Samuels for the appellant

Written submissions filed by Myers Fletcher & Gordon for the respondent

20 September 2021

(Considered on paper pursuant to rule 1.7(2)(j) of the Court of Appeal Rules, 2002)

MCDONALD-BISHOP JA

[1] On 26 March 2021, the court delivered judgment in the substantive appeal in this matter, recorded as **Norman Samuels v General Legal Council** [2021] JMCA Civ 15 ('the substantive judgment'), in which the following orders were made:

> "1) The appeal is allowed, in part.
>
> 2) The Committee's decision made on 2 August 2016, that the appellant is guilty of inexcusable and deplorable negligence, in breach of Canon IV(s), is set aside and a verdict of not guilty of professional misconduct under Canon IV (s) is entered on the record.

3) The fine of $800,000.00 imposed on the appellant in paragraph (ii) of that order is set aside and is to be repaid to the appellant forthwith.

4) The decision of the Committee that the appellant is guilty of professional misconduct, in breach of Canon IV(r), for failing to provide the complainant with all information as to the progress of his case with due expedition, and the sanction of a reprimand for that offence, are affirmed.

5) The award of costs in the sum of $40,000.00 to the respondent in the proceedings below is set aside; the said sum is to be repaid to the appellant forthwith.

6) The respondent shall pay 65% of the appellant's costs of the proceedings below to be agreed or taxed.

7) The order for costs of $20,000.00 to the complainant to be paid by the appellant is affirmed.

8) 75% of the costs of the appeal to the appellant against the respondent to be agreed or taxed.

9) If the parties (or any of them) are of the view that a different order as to costs should be made in respect of the proceedings in this court and/or in the proceedings below (as set at paragraphs (5), (6), (7) and (8) of this order), they shall, within 14 days of the date of this order, file and serve written submissions for such different order(s) to be made.

10) If no submissions are filed and served within the time stipulated at paragraph (9) of this order, the orders at paragraphs (5), (6), (7) and (8) shall take effect as the final orders of the court in relation to costs of the appeal and the proceedings below."

[2] As can be seen, orders 5 to 10 relate to the issue of costs. Order 9 permits the parties, within 14 days of the order, to file and serve written submissions if any of them was of the view that a different order as to costs should be made in respect of the proceedings in this court and/or in the proceedings below, as set out at orders 5 to 8.

[3] Both parties have filed written submissions pursuant to order 9. The appellant's position is that the provisional orders should stand as final, while the respondent contends that a different order should be made. Therefore, this judgment is concerned solely with the issue of costs regarding the proceedings in this court and below.

The submissions

[4] Though the parties were permitted to file and serve written submissions in relation to orders 5 to 8, both parties' written submissions on costs were limited to orders 6 and 8, which, respectively, provide that the respondent shall pay 65% of the appellant's costs in the proceedings below to be agreed or taxed and 75% of the costs of the appeal to the appellant against the respondent to be agreed or taxed.

[5] On behalf of the respondent, it is submitted that the appropriate costs orders should be that each party bears its costs of the appeal and in the proceedings below. The respondent contends that the general rule that costs follow the event should give way to the principle that the respondent should not bear the burden of an adverse costs order as a regulator. Counsel for the respondent cited a public policy reason for this position, which, essentially, is that the respondent is charged by section 3(1)(b) of the Legal Profession Act ('LPA') with upholding standards of professional conduct and that the fear of potentially adverse costs orders on an appeal from disciplinary proceedings, where a charge is ultimately held to be unsuccessful, may have a "chilling effect" on the exercise of its functions.

[6] Reliance is heavily placed on the case of **Baxendale-Walker v Law Society** [2007] 3 All ER 330 ('**Baxendale-Walker**'). In that case, the Court of Appeal of England and Wales reasoned, in part, that the general rule on costs in civil litigation should not apply against the Law Society in disciplinary proceedings brought by it against solicitors on the premise that:

> "[34] …The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs

> decisions in such litigation — dealing with it very broadly, that properly incurred costs should follow the 'event' and be paid by the unsuccessful party — would appear to have no direct application to disciplinary proceedings against a solicitor."

[7] Reliance is also placed on an excerpt from The White Book Service 2007: Civil Procedure Volume 1 ('the White Book'), where the learned authors, at para. 44.3.8.1., said this:

> "**A regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. Absent dishonesty or a lack of good faith a costs order should not be made against the regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded.** In considering making such an order the court must consider, on the one hand, the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions, without fear of exposure to undue financial prejudice, if the decision is [sic] successfully challenged..." (Emphasis supplied)

[8] The thrust of the respondent's arguments is that "[i]n the absence of a finding by this court that the [respondent] acted dishonestly or not in good faith, a costs order should not be made against it either in respect of the proceedings below or of the appeal".

[9] The appellant disagrees. He contends that "[t]here is nothing in the circumstances of this case to displace the general rule that costs follow the event". Reliance is placed on rule 1.18 of the Court of Appeal Rules, 2002 ('CAR') and, by extension, rule 64.6 of the Civil Procedure Rules, 2002 ('CPR'). The appellant also prayed in aid the opinion of Morrison JA (as he then was) in **Capital and Credit Merchant Bank Limited v Real Estate Board** [2013] JMCA Civ 48, para. [13].

[10] Counsel for the appellant submitted that the **Baxendale-Walker** principle is not applicable, and, therefore, that case ought to be distinguished from the instant case. They maintained that the court has already exercised the necessary discretion in relation to costs and that the orders as to costs should not be changed as the court's decision clearly warrants the orders made. They cited the judgment of **Ernest Davis v General Legal Council** [2014] JMCA Civ 20 and [2015] JMCA Civ 33 ('**Ernest Davis**') as an example of a case in which this court awarded costs against the respondent. Counsel further argued that the respondent could not "at this stage cloak itself with its role as regulator to avoid a justified cost [sic] order".

Discussion

[11] Section 17 of the LPA empowers the court in these proceedings to "make such order as to costs before the [Disciplinary Committee of the respondent ('the Committee')] and as to the costs of the appeal as the court may think proper". Therefore, as in general civil proceedings, the award of costs in respect of the proceedings before the Committee and on appeal is in the court's discretion. Nevertheless, the discretion is subject to the requirement that it be exercised judiciously.

[12] Parts 64 and 65 of the CPR apply to the award and quantification of costs of an appeal by virtue of the operation of rule 1.18(1) of the CAR. Thus, once the court decides to award costs, these specific rules become relevant for its consideration for the proper exercise of its discretion.

[13] The rule, which generally applies, is that 'costs follow the event' as embodied in rule 64.6(1) of the CPR. There, it is stated that if the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the successful party's costs. Exceptions are, of course, allowed to this rule, and its application is subject to the overriding objective of the CPR to deal with the case justly in accordance with rule 1.1(10)(a) of the CAR.

[14] In deciding whether to grant an order for costs, the court must have regard to all the circumstances. This includes, in so far as is pertinent for present purposes, such matters as the conduct of the parties both before and during the proceedings; whether a party has succeeded on particular issues (even if the party has not been successful in the whole of the proceedings); whether it was reasonable for a party to pursue a particular allegation or raise a particular issue, be it in proceedings below or on appeal; and the manner in which a party has pursued a particular allegation or issue (see rules 64.6(3) and 64.6(4)(a), (b), (d) and (e) (ii) and (iii) of the CPR).

[15] Counsel for the respondent have relied on **Baxendale-Walker** in advancing the argument that in the absence of a finding by this court that the respondent acted dishonestly or not in good faith, a costs order should not be made against it. Counsel's argument that the respondent should not be held liable in costs on the basis advanced by them does not avail the respondent for several reasons that will now be outlined.

[16] With respect and deep interest, I have acknowledged the pronouncements of the High Court and Court of Appeal of England and Wales in **Baxendale-Walker**. But, as counsel will no doubt appreciate, the court is not obliged to follow the English position. Instead, as the starting point, this court must pay due regard to the statutory regime in this jurisdiction governing the issue of costs and, ultimately, must make an order that is required in the interests of justice, having regard to section 17 of the LPA, the unique circumstances of the case and the overriding objective.

[17] Nowhere in the LPA, CAR or CPR is there any rule that applies specifically to the question of costs relating to the respondent's position as a regulator. Nor is there any principle that is shown to exist in case law within this jurisdiction that restricts the power to award costs against the respondent because it is a regulator. It is, indeed, true, as counsel for the appellant has argued, that decisions have emanated from this court in which adverse costs orders were made against the respondent without a finding that it acted dishonestly or not in good faith. See in this regard, **Ernest Davis** (as highlighted by the appellant); **The General Legal Council v Barrington**

Frankson [2013] JMCA App 32; and **Jennis Anderson v Eileen Boxill (A member of the General Legal Council)** [2018] JMCA Civ 22. However, it should be noted that nothing indicates that the court in those cases was ever required to consider the issue raised for consideration in this case. I will, therefore, not contend that this court is bound by those authorities in which adverse costs orders had been made against the respondent.

[18] Admittedly, although **Baxendale-Walker** is not binding on this court, I have found the reasoning of both the High Court and the Court of Appeal, in that case, to be instructive and reasonably persuasive. It, however, offers very little help to the respondent in advancing its case before this court. There is nothing in the courts' reasoning, on which the respondent relies, that has the effect which the respondent contends for, namely, that it should not be held liable to pay costs to the appellant because of its standing as a regulator. The essence of the principle that the respondent has prayed in aid is that: **"...Absent dishonesty or a lack of good faith a costs order should not be made against the regulator..."** (Emphasis added)

[19] However, the principle extracted from **Baxendale-Walker** and the White Book clearly shows that the award of costs against a regulator is not limited to circumstances where there is a finding of dishonesty or lack of good faith. Instead, the principle states that the court may award costs against a regulator where "there is good reason to do so". It means then, on the learning from the respondent's own authority, that the court may impose costs against the respondent if there is a good reason to do so, even if it had acted honestly and in good faith.

[20] This analysis is taken even further with a closer examination of the position of the High Court of England and Wales in **Law Society v Adcock and another** [2007] 1 WLR 1096 ('**Law Society v Adcock**'). There, Waller LJ examined the dicta of Moses LJ, who, in delivering the judgment in **Baxendale-Walker**, had made the statement referred to in the White Book. Moses LJ noted that the principle had been derived from several cases, particularly the three principles distilled by Lord Bingham in **City of**

Bradford Metropolitan District Council v Booth [2000] COD 338. However, in commenting on this, Waller LJ stated:

> "39 I would agree that Moses LJ has put the matter too highly in favour of a regulator. Lord Bingham of Cornhill CJ does not, as I understand him, suggest that there should be a presumption, one way or another; he simply makes clear that there are particular circumstances to bear in mind where a public body or a regulator is concerned."

[21] The Court of Appeal in **Baxendale-Walker**, while recognising the differences in approach of Moses LJ in **Baxendale-Walker**, at first instance, and Waller LJ in **Law Society v Adcock**, approved Moses LJ's approach. It opined that his approach to the issue "did not go further than the principles described" by the court in its judgment. The court agreed with the High Court's finding that the tribunal erred in ordering the Law Society to pay the solicitor's costs on the basis that the first allegation against him had failed and costs followed the event. The court stated, in part:

> "[39] …As *Bolton's* case demonstrates, identical, or virtually identical considerations apply when the Law Society is advancing the public interest and ensuring that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint before the tribunal. **Unless the complaint is improperly brought**, **or for example, proceeds as it did in *Gorlov's* case as a 'shambles from start to finish'**, **when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The 'event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because**

> **properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations to the public disadvantage.**"
> (Emphasis added)

[22] I accept the view that the respondent's position as the regulator of the legal profession and its concomitant statutory duty to act in the public interest should be crucial considerations in determining whether a costs order should be made against it in disciplinary proceedings in which it is the unsuccessful party. Its public duty to maintain the professional standards of the legal profession cannot be downplayed or ignored. It is, therefore, accepted that in cases in which attorneys-at-law may be successful in disciplinary proceedings brought against them by the respondent, the general rule that costs follow the event should not automatically apply or even be the starting point.

[23] As the authorities also show, however, the respondent's role as a regulator is only a factor to consider in balancing all the circumstances relevant to making a costs order. Although the Court of Appeal in **Baxendale-Walker** approved Moses LJ's approach, I nevertheless find that Waller LJ's opinion that Moses LJ had placed the principle too high in favour of the Law Society is of some persuasive worth. Even though the Court of Appeal did not share his view regarding Moses LJ's approach, I do believe that this court must be careful not to place any principle relating to costs "too high in favour of" the respondent, given the statutory power of the court to make such order as to costs that "it may think proper" and its overriding duty to deal with cases justly. Therefore, I share the view reflected in the reasoning of Waller LJ in **Law Society v Adcock** that there can be no presumption, one way or another, that costs should or should not be awarded against the respondent given its position as a regulator.

[24] In my view, the court should eschew making any hard and fast rule, which could be perceived as an inflexible principle of law, that costs should not be awarded against the respondent unless it acted dishonestly and in bad faith as the respondent is contending. I will, therefore, not consider myself bound by any such principle or policy

that would restrict an award of costs against the respondent only to the specified circumstances delineated by its counsel. Based on **Baxendale-Walker**, the same authority the respondent has relied on, the court may make an adverse costs award where there is a good reason to do so. One of the good reasons identified by the court is when the "charge was improperly brought". However, in my view, there can be no exhaustive list of the matters which would constitute good reasons in the determination of whether a costs order should be made against the respondent in a given case. Which matters would amount to a good reason must be resolved by an objective consideration of all the prevailing circumstances of the particular case against the backdrop of the overriding objective to deal with the case justly**.**

[25] It is against this background of the law that I have considered the burning question at hand, namely, whether there is any good reason to award costs against the respondent in the circumstances of this case.

[26] In the substantive judgment, the court arrived at a provisional position that there are good reasons not to make the appellant bear all of his costs of the proceedings below and on appeal. The bases for the provisional costs orders are stated at paras. [114] to [122] of the substantive judgment and will only be repeated, in part, where necessary. Those reasons have now been augmented in the light of the submissions made by counsel on both sides, and the authorities brought to the court's attention.

[27] As the reasoning in the substantive judgment shows, the appellant has succeeded on the more substantial questions relating to liability and sanction. His degree of success prompted the court to opine that he was entitled to 65% of the costs of the proceedings below and 75% of the costs of the appeal. The court took into consideration the importance and weight of the issue on which the appellant was successful. We considered that the more serious charge than that complained of by the appellant's client (the complainant), that the appellant acted with inexcusable or

deplorable negligence in the performance of his duties, was initiated by the Committee, of its own motion.

[28] We opined in the substantive judgment that the Committee sought to have the complaint amended, at the material time, because of what appeared to have been its honestly held belief that it had the legal and factual basis to have that charge laid against the appellant. For that reason, it cannot be said that it acted dishonestly or in bad faith. Unfortunately, however, it turned out on appeal that it was wrong in both fact and law to so hold. When the Committee ordered the amendment, it failed to appreciate that the charge had no prospect of success. Consequently, the new charge laid against the appellant based on the amendment was erroneous in law and improperly brought because it should have been clear to the Committee that no prima facie case of negligence would have arisen on the facts at the time the amendment was made. The pronouncement of the English Court of Appeal in **Baxendale-Walker** emphasised above, at para. [21], contemplates that the respondent should not be "exposed to the risk of an adverse costs order simply because **properly brought proceedings were unsuccessful"** (my emphasis). It seems to follow logically then that different considerations regarding costs must be applied when proceedings are **improperly brought** at the instance of the respondent.

[29] Furthermore, not only did the Committee cause a more serious charge to be laid against the appellant, but it also caused the charge to be laid at a very late stage. The amendment was made four years after the original complaint and after the complainant had closed his case, and the appellant was giving evidence in response to the original complaint. Admittedly, the Committee had the power of amendment, even at that late stage of the proceedings. This power to allow an amendment is derived from rule 17 of the Legal Profession (Disciplinary Proceedings) Rules ('the Disciplinary Proceedings Rules'). Rule 17, however, explicitly states, in so far as is immediately relevant:

> "…if such amendment or addition be such as to take the attorney by surprise or prejudice the conduct of his case, **the Committee <u>shall grant an adjournment of the</u>**

hearing upon such terms as to costs or otherwise as to the Committee may appear just." (Emphasis added)

[30] As a result of the Committee's order that the new charge be added, the hearing had to be adjourned, and the complainant's case was re-opened for the Committee to investigate this new charge. There is no question that the appellant would have been taken by surprise by this development. He was required to answer to a new charge at a very late stage of the proceedings and had to realign his case to meet it. There is no indication that the adjournment was granted for the amendment to be made "on terms as to costs or otherwise" in accordance with rule 17 of the Disciplinary Proceedings Rules. Furthermore, at the end of the case, the Committee made no allowance, in the appellant's favour, for any relevant consideration related to the late amendment. Instead, it awarded costs against him in favour of the complainant and itself.

[31] Interestingly, in making the adverse costs award against the appellant, the Committee considered that "a lot of unnecessary time and expense" was wasted by him in defending the allegation that he negligently did not apply for a case management conference. It formed the erroneous view that this had resulted in the claim being struck out although a proper check of the court records would have shown otherwise. As stated at para. [116] of the substantive judgment:

> "[116] At paragraph 14 of the sanction decision, the Committee stated that one of the factors it considered in awarding costs was the '**technical objections which the Attorney through his Attorney felt constrained to make notwithstanding that it was clear that the Attorney had failed to have applied for a Case Management Conference**' (emphasis mine). It then continued:
>
> > '... Rather than seek to resolve the matter the Attorney instead sought to place the complainant to strict proof **which this Panel was disappointed in as a lot of unnecessary time and expense was therefore incurred**.'" (Emphasis added)

[32] The appellant had every right to defend the late charge laid against him by the Committee, which was much more serious than the complaint that the complainant had brought. There is no question that a "lot of unnecessary time and expense was incurred", but contrary to the views of the Committee, it was not due entirely to the conduct of the appellant. The waste of time was more a result of the Committee's error in causing a new and more serious charge to be laid against the appellant on the basis that he negligently did not apply for a case management conference.

[33] As it turned out on the appeal, the Committee erred when it directed the complainant to take steps after his case was closed to file a new complaint against the appellant that proved to be insupportable in fact and law. Unfortunately for the Committee, nothing turned on the evidence it had used as a basis for the amendment, which could have appropriately grounded the charge of deplorable and inexcusable negligence. That charge was not justified. It was in these circumstances that the appellant had to continue to engage the services of counsel and expend more of his time and energy to defend the more serious charge and to put forward a plea in mitigation of sanctions in relation to it. It is, therefore, not fair that he should be left to bear his costs resulting from that very late and unnecessary amendment that also necessitated an adjournment. Nor is it fair that the self-represented complainant, who, in actuality, did not make any complaint that necessitated the amendment, should bear the costs relating to that aspect of the proceedings.

[34] Rule 64.6(5) of the CPR permits this court to make several orders as to costs. It may order that a party pays, among other things: a proportion of another party's costs; costs relating to particular steps taken in the proceedings; and costs relating to a distinct part of the proceedings (see rules 64.6(5)(a), (e) and (f) of the CPR).

[35] In my view, the respondent should absorb the costs incidental to the amendment. The Committee itself expressed the view that the appellant had wasted time in his effort to defend the issue regarding his failure to apply for a case management conference. It then concluded that the costs to be awarded against him in

the proceedings should be $60,000.00 ($40,000.00 to itself and $20,000.00 to the complainant). The Committee gave no reasons for granting that sum, and in the proportion it did. Still, in light of the sanctions imposed for the two offences, it seems fair to assume that the award of costs in that sum was significantly informed by the appellant's conduct in defending the more serious charge that the Committee caused to be brought against him. The charge was brought on the premise that he had not applied for a case management conference, which caused the complainant's claim to be struck out in the Supreme Court. That premise was faulty as the claim was extant, and the appellant was not required to apply for a case management conference.

[36] Any amendment in civil and criminal proceedings should be informed by the dictates of the interests of justice. These proceedings have been classified as quasi-criminal by case law. Therefore, the court's need to ensure that justice is done and should manifestly be seen to be done is no less imperative than in criminal proceedings. Having examined all the circumstances of the case, particularly relating to the amendment to introduce a more serious charge after the close of the complainant's case, which turned out to be improper in law, I find that the interests of justice are in favour of the appellant being compensated in costs. Therefore, I believe he ought not to bear all his costs of the proceedings below and on appeal as submitted by the respondent.

The costs of the proceedings below

[37] The Committee had seen it appropriate to award costs of $60,000.00 against the appellant in the apportionment indicated above, having considered, as a factor, what it viewed as the waste of time in litigating the issue regarding the application for a case management conference. It did not expressly take into account, as a material consideration, that an adjournment had to be granted for the amendment to be done, which is now proved to have been a waste of the appellant’s time. Having borne in mind the respondent's status as the regulator of the legal profession, I believe that it is only fair that it pays costs to the appellant for a part of the proceedings below.

Considering the very late amendment, which would have taken the appellant by surprise, and the aspects of the proceedings that flowed from the decision to add the new charge, including the adjournment that was granted for the amendment to be made, I would award the sum of $50,000.00 to the appellant as a reasonable sum. I have made allowance for the fact that the appellant was held liable for professional misconduct for which he was reprimanded. He was ordered to pay $20,000.00 to the complainant, which was upheld on the appeal. There is no objection to that order from the appellant. Accordingly, it stands.

[38] Therefore, my provisional view that the respondent should bear 65% of the costs of the proceedings below is replaced with a final proposal that it pays the fixed sum of $50,000.00 to the appellant representing a portion of the appellant's costs in the proceedings below.

The costs of the appeal

[39] The same considerations that have informed the decision regarding the proceedings below have also been applied to determine the order that should be made on appeal. The appellant was successful on the most significant aspects of the appeal, which relate to the charge that was erroneously brought following the amendment.

[40] When the submissions were made at the hearing of the appeal, the respondent did not concede that the charge of deplorable and inexcusable negligence was wrongly laid by the Committee. Instead, it insisted on advancing arguments to uphold that improper charge without a reasonable basis to do so in fact or law. Counsel for the respondent put forward different bases, in support of that charge, that were not relied on by the Committee in granting the amendment or coming to its decision. Accordingly, it was not reasonable for the respondent to defend that particular issue and raise new arguments in relation to it in the glaring light of the Committee's decision, the applicable law and the relevant facts of the case.

[41] When everything is considered in the round, I find that the appellant was far more victorious on the substantive appeal than the respondent because he succeeded on the critical issues. The court in the substantive judgment had ascribed a provisional value of 75% of the costs of the appeal to reflect that degree of success. In my opinion, that assessment should remain undisturbed.

Conclusion

[42] I have considered the illuminating submissions of counsel for the respondent regarding the relevance of the respondent's role as a regulator in determining whether an adverse costs order should be made against it. Having done so, I have not identified anything in the circumstances of this case, when considered within the context of the applicable law, which was compelling enough to change the provisionally held view that the respondent should pay a portion of the appellant's costs in the proceedings below and on appeal.

[43] The costs awarded in the proceedings below relate to the steps taken in the proceedings to amend the complaint to initiate and pursue the more serious charge of inexcusable or deplorable negligence. The appellant had to expend more time and effort defending that charge and seeking to mitigate the consequences of an adverse finding against him up to the sanction hearing. The respondent must be mindful that the power to amend must be exercised judiciously and particularly so in a quasi-criminal or criminal context. It should also recognise that the consideration of fairness does underlie rule 17 of the Disciplinary Proceedings Rules. Accordingly, I would award the sum of $50,000.00, which is not only informed by the need to ensure that the appellant is treated fairly but is also reflective of my appreciation of the respondent's standing and duty as the regulator of the legal profession and the caution required on the part of the court not to stifle the power of the Committee to grant amendments in proceedings before it.

[44] The order concerning the costs of the appeal is not made against the Committee simply because the appellant was successful, in part, on the appeal. But instead, it is

made because I have had regard to how the respondent sought to pursue the issue relating to the negligence charge on appeal. Therefore, having had regard to the need to ensure that justice is done in keeping with the overriding objective and the general requirement of fairness, I conclude that there is a good reason in all the circumstances for costs to be awarded in favour of the appellant against the respondent both in the proceedings below and on the appeal.

Disposal of the appeal on the issue of costs

[45] For the foregoing reasons, I would make an order for costs in the sum of $50,000.00 to the appellant in the proceedings below but maintain the provisional order in respect of costs of the appeal being 75% to the appellant.

[46] Accordingly, I would hold that the proposed orders now be made part of the court's final order.

SINCLAIR-HAYNES JA

[47] I have read the draft judgment of McDonald-Bishop JA on costs. I agree with her reasoning and conclusion and have nothing useful to add.

F WILLIAMS JA

[48] I, too, have read in draft this judgment on the question of costs of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

ORDER

1. The provisional order (no. 6), made by this court on 26 March 2021 that the respondent shall pay 65% of the appellant's costs of the proceedings below to be agreed or taxed, is set aside and substituted therefor is an order that, the respondent shall pay the appellant the sum of $50,000.00 for costs of the proceedings below.

2. The provisional order (no 8) of the said order made on 26 March 2021 that 75% of the costs of the appeal to the appellant against the respondent to be agreed or taxed, shall stand as the final order regarding the costs of the appeal.