[2017] JMCA App 25

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 1/2017

APPLICATION NO 78/2017

BETWEEN	**HAROLD BRADY**	**APPLICANT**
AND	**GENERAL LEGAL COUNCIL**	**RESPONDENT**

Paul Beswick, Christopher Dunkley, Donovan Malcolm and Miss April Grapine-Gayle instructed by Clough Long & Co for the applicant

Mrs Denise Kitson QC and David Ellis instructed by Grant Stewart Phillips & Co for the respondent

18 and 20 July 2017

IN CHAMBERS

STRAW JA (AG)

[1] This is an application for a stay of execution of the decision of the Disciplinary Committee of the General Legal Council dated 4 March 2017, which ordered that the applicant be struck off the roll of attorneys-at-law entitled to practice in the several courts in the island of Jamaica. The applicant has filed grounds and notice of appeal dated 10 April 2017, against that decision and has applied to a single judge of the Court of Appeal for the execution of the decision to be stayed pending the determination of the appeal pursuant to rule 2.11(1)(b) of the Court of Appeal Rules (CAR).

[2] The decision of the Disciplinary Committee arose from a complaint dated 18 March 2015, and lodged by the Factories Corporation of Jamaica Limited with the General Legal Council against the applicant. In the affidavit supporting the complaint, sworn on 24 March 2015, the managing director of the Factories Corporation of Jamaica Limited stated that the applicant had failed to account for funds delivered into his hands for the benefit of his client, the Factories Corporation of Jamaica Limited and that money remains outstanding to date.

[3] The applicant was found guilty of professional misconduct by the Disciplinary Committee as per canon VIII(d) as a result of breaches of canons I(b) and VII(b) of the Legal Profession (Canons of Professional Ethics) Rules.

[4] In support of the application for a stay of execution, the applicant has deponed to an affidavit sworn on 27 April 2017. At paragraph 6, the applicant stated that he is prepared to accept the conditions and limitations that the court may deem to be appropriate in granting the stay of execution, in light of any concerns that there may exist a risk to the public, akin to the complaint for which he was found guilty and subsequently ordered to be struck off the roll. Certain suggested restrictions are further detailed in a letter dated 27 May 2017, written by the applicant's attorneys-at-law, Clough Long and Company to Mrs Denise Kitson QC, counsel for the respondent. The suggested restrictions include a prohibition on the applicant engaging in any legal matters dealing with conveyancing, estate or any other matters involving carriage of funds. The letter also proposes supervision of the applicant's law practice by monthly reports to his attorneys-at-law as well as inspection of the applicant's working files by a

legal officer on behalf of the General Legal Council. The General Legal Council, however, through its counsel, has refused any such supervisory role of the applicant's law practice.

[5] The law in relation to the grant or refusal of a stay of execution pending the determination of an appeal is settled. My learned brother, F Williams JA, in the case of **Myrna Douglas and Jacqueline Brown v Easton Douglas** [2017] JMCA App 5, through paragraphs [25] and [26], aptly cited the appropriate principles to be applied in the exercise of the court's discretion to grant or refuse a stay of execution:

> "[25] In the case of **Combi (Singapore) Pte Limited v Ramanath Sriram and Sun Limited FC** [1997] EWCA 2164, Phillips LJ traced the history of the considerations governing the grant or refusal of an order for a stay of execution. He made reference to the case of **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887, stating the principles then operating to be:
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> > '...if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution.'
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> [26] The current standard by which the court assesses applications for a stay of execution was stated by Phillips LJ at page 3 as being as follows:
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> > '...the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of

> course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Ord 59, r 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal'."

[6] The dicta in **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Paul Lowe** [2011] JMCA App 1, also offer guidance in considerations of this nature. At paragraph [24] of the judgment, Harris JA stated as follows:

> "In balancing the risks in granting or refusing a stay, the evidentiary material before the court must justify an order for a stay. The risks would not only flow from the merit of a party's appeal but would also revolve around the question as to which party would be more likely to suffer harm."

[7] There are essentially then two issues to be considered: (i) the issue of prejudice or the balance of hardship to the parties; and (ii) whether there is some merit in the appeal or a good prospect of a successful appeal. I will look firstly on the issue of merit, that is, whether there is a good prospect of a successful appeal.

Merit of the appeal

Submissions of the applicant

[8] In his grounds of appeal, the applicant raised the issue of actual bias against the chairman of the panel of the Disciplinary Committee, Mrs Daniella Gentles-Silvera. Further, the affidavit of James Chong, sworn on 11 April 2017, a former client of Mrs

Gentles-Silvera from 2010 to 2011 (in a suit against the applicant), and the affidavit of Mr Joseph Giaimo (a United States of America based attorney-at-law, associated with Mr Chong), sworn on 30 March 2017, , both allege that Mrs Gentles Silvera expressed strong negative sentiments concerning the applicant's suitability as a practicing attorney during their dealings with her.

[9] Mr Chong deposed that the matter was later settled between the parties without Mrs Gentles-Silvera's involvement. However in his opinion, the applicant could not have received a fair and unbiased hearing with Mrs Gentles-Silvera being a part of the panel which heard the complaint against the applicant. Mr Giaimo, in his affidavit, likewise deposed that Mrs Gentles-Silvera could not be an impartial arbitrator in the disciplinary proceedings against the applicant due to the past hostility she had demonstrated towards the applicant.

[10] There is no dispute that the applicant would have been well aware of Mrs Gentles-Silvera's involvement in the claim (involving Mr Chong) and at no time did he raise an objection to her being a member of the panel during the process of the hearing before the Disciplinary Committee. However, Mr Chong has stated that Mr Brady would not have been aware of this alleged bias until after the decision of the Disciplinary Committee had been handed down. The applicant also has alleged that the bias of Mrs Gentles-Silvera is clearly reflected in the proceedings itself when she refused to grant an adjournment on 30 September 2016, at the request of his attorney-at-law, Mr Clough, to allow the completion of an audited financial report from UHY Dawyen, an auditing firm.

[11] That financial audited report was said to have been important for the said attorney-at-law to proceed in the disciplinary hearing, as the audit was to ascertain how much money was actually owing to the complainant by the applicant, if any. Subsequently, Mr Clough left the hearing when his request for an adjournment was not granted. For the applicant, it was also contended that Mrs Gentles-Silvera's bias was also exhibited when she refused to grant an adjournment at about 11:04 am (that same day) to allow the applicant time to take his medication, as he had alleged that he was critically ill. He indicated that he was not in a position to proceed and eventually left to seek medical attention.

[12] Mr Beswick, counsel for the applicant, submitted that crucially, the merit of the appeal has to be considered in the context that the applicant had no opportunity to rely on the audited statement which is the basis of his defence to the complaint against him. He also submitted that, in further considering the merits, this court does not have to make a determination as to whether or not there exists real bias but that in any event, the evidence before the court indicated that there was a high possibility of the presence of bias which would serve to invalidate the proceedings. Counsel relied on several authorities which included: **Meerabux George v Attorney General** [2005] UKPC 12, **R v Gough** [1993] AC 646; and **Porter and another v Magill** (2002) 1 All ER 465. Applying these authorities, counsel has stated that sufficient evidence has been raised to demonstrate that the applicant has been deprived of his right to a fair hearing.

The submissions of the respondent

[13] Mrs Kitson, referred the court to the affidavit of Mrs Gentles-Silvera sworn on 1 May 2017, where she has categorically refuted the allegations of Mr Chong and Mr Giama and further spoke to Mr Chong's retainer with her firm in relation to a complaint against the applicant. In relation to the other allegations, these also have been challenged by Mrs Gentles-Silvera and the other members of the panel, Mr Trevor Ho-Lyn and Mr John Graham in affidavits sworn by them.

[14] The record of the proceedings of the hearing into the complaint against the applicant has been exhibited to this court. Mrs Gentles-Silvera stated that the complaint against the applicant was heard over three days on: 30 September 2016, 17 January 2017; and 25 February 2017. It had been fixed to commence on 22 September 2017, however an adjournment was granted when Mr Raymond Clough appeared for the applicant and indicated that he was asked to appear that morning by the applicant but that he had no documents in the matter. Mrs Gentles-Silvera stated that the applicant had made no request that she recuse herself, although it was within his personal knowledge that she had represented Mr Chong in 2010 to 2011. In relation to the hearing of 30 September 2016, she stated that Mr Clough again requested an adjournment on the basis that the auditing firm required a further 30 days to complete an audit. She stated also that the panel considered the application but decided to commence the hearing given the serious nature of the complaint, the age of the complaint and the number of times the matter had come up for hearing prior to 30 September 2016, among other salient reasons. The affidavit of Mrs Gentles-Silvera as

well as the affidavits of the other two members of the panel, Mr Ho-Lyn, sworn on 11 May 2017 and Mr Graham, sworn on 11 May 2017 (which acknowledged Mrs Gentles-Silvera's statement of the proceedings as being accurate), indicated that at no time was the applicant critically ill on 30 September 2016, but that he had asked for an adjournment to take his medication after refusing to look at a document which was shown to him. Accordingly, the panel considered and properly refused that adjournment, whereby the applicant left the hearing and did not return until after the admission of evidence was completed.

[15] In relation to the audited statement, Mrs Kitson submitted that the request made on 30 September 2016, was that the auditors needed a further 30 days to complete their investigations. She submitted also that two months adjournment had been granted previously, between July and September 2016, for that purpose and on 22 September 2016, a further adjournment had been granted. She pointed out that on 30 September 2016, the matter was adjourned part heard to 17 January 2017, but that no audited account was produced up to that time. She also indicated that the court should bear in mind that on 25 February 2017, there was an admission by the applicant that the money was owed to the Factories Corporation of Jamaica Limited. Also, in an affidavit that he (the applicant) had made to the General Legal Council, sworn on 2 March 2017, it was indicated that the said audited investigation had actually revealed that certain funds had been transferred to the said complainant. However, that on 4 March 2017, he admitted that the transfer was related to a different transaction. The proceedings also revealed that, at the time of the final date of the sanction hearing on

25 February, 2017, the applicant had acknowledged that the money was owed and is still owing. It is to be noted that the sum owed to the complainant is in the amount of "$111,380,364.62 with interest on the sum of $102,302,061.56 at the rate of 4½ % per annum from the 1st October, 2016 until payment".

[16] Mrs Kitson, referred the court to the cases of: **Barrington Earl Frankson v The General Legal Council** [2012] JMCA Civ 52; **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2016] JMCA Civ 34; and **Arlean Beckford v The Disciplinary Committee of the General Legal Council** [2014] JMCA App 27. She submitted that there was no real prospect of success in relation to this appeal being pursued by the applicant and that the General Legal Council could not in any event supervise the applicant's proposed limited practice of law.

Analysis

[17] In analysing the factors that I must consider in relation to this application, I will bear in mind that it is not the function of the court to try issues on the affidavits. Based on all the evidence, the issue of real bias has been raised against Mrs Gentles-Silvera, the chairman of the panel. The test in relation to bias has been continually redefined. That test has now been modified to be one in which a fair minded, impartial observer who is cognisant of all the facts of the case would find that a decision-maker is biased. See **Porter and another v Magill**.

[18] The allegation of bias has been vigorously challenged by the respondent, thus it is clear that there are issues of facts to be determined. Not only has the issue of actual bias being challenged but also the issue as to whether or not the applicant was critically ill at the time an adjournment was sought and refused, as well as, whether any bias may have existed in relation to the refusal to grant any further adjournments for the applicant to receive an audited account. These are not issues that I can resolve.

[19] Depending on the resolution of these matters at the actual hearing of the appeal, the applicant may or may not be successful in establishing bias. It is to be noted also that an affidavit has been placed before this court from Mr Donovan Malcolm sworn on 18 July 2017, an associate attorney-at-law in the firm representing the applicant. In it, counsel referred again to apparently another audited account that is to be made available by 31 July 2017. I will only just comment that that audited account is not before me for my consideration and I can therefore place no weight on it or speculate as to what it may contain in considering this application. As I have said, the issue of bias has been raised and is to be resolved in the hearing of the appeal. However, in my view I cannot say that it is more likely than not that the appeal will prevail.

Balance of hardship or prejudice to the parties

[20] In considering the issue of the balance of hardship or the prejudice to the parties, the applicant has stated in his affidavit that he would be essentially ruined in many respects, as he is unable to complete or continue working on non-related conveyancing matters. He has stated also that this inability may well cause his clients to be exposed to liability, and that the clients have already paid on account and are

awaiting legal representation on his part. The applicant's counsel, Mr Beswick, has submitted that there is a great danger that the applicant will be ruined as the reputation of a legal practice is built over several years.

[21] There is no doubt that there is great risk to the applicant. On the other hand, I have considered that the General Legal Council is mandated to regulate the behaviour of attorneys-at-law. The applicant has been found guilty of breaches of the Legal Profession (Canons of Professional Ethics) Rules, including a breach relating to misappropriation of the funds of his client. The General Legal Council is the guardian of the profession at large and it has a duty to protect the public from unprofessional conduct of attorneys-at-law and to uphold the good name of the profession. There is an overriding and pressing concern related to the risk of allowing the applicant to continue his legal practice, even if he was to be supervised. It is also entirely unlikely that there could be any meaningful supervision of the applicant even if the General Legal Council was willing to do so.

[22] It is clear therefore, that there is a great risk to both parties whichever order is made. At the end of the day, the court has to decide which is less likely to produce injustice and, bearing in mind the considerations concerning the preserved strength of the appeal, I have concluded that the application for the stay of execution ought not to be granted. However, in light of the grave risk to both parties, I would suggest that an expedited appeal may be the best way forward.

[23] In the light of the foregoing, I make the following orders:

1. The applicant's application for stay of execution of the decision of the Disciplinary Committee of the General Legal Council, filed on 27 April 2017, is refused.

2. The costs of the application to the respondent to be agreed or taxed.