[2018] JMCA App 33

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 144/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**ABRAHAM DABDOUB**	**1ST APPLICANT**
AND	**RAYMOND CLOUGH**	**2ND APPLICANT**
AND	**THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL (ex parte DIRK HARRISON, Contractor General of Jamaica)**	**RESPONDENT**

Paul Beswick and Miss Terri-Ann Guyah instructed by Ballantyne, Beswick & Company for the applicant

Miss Carlene Larmond instructed by Rattray, Patterson, Rattray for the respondent

1 October and 15 November 2018

PHILLIPS JA

[1] This is an application for permission to appeal an order of Brown Beckford J given on 14 June 2018. In that order, the learned judge struck out the claim filed by Mr Abraham Dabdoub and Dr Raymond Clough (the applicants) with costs to the respondent to be taxed if not agreed. She refused leave to appeal, so the applicants have renewed their application pursuant to rule 1.8 of the Court of Appeal Rules 2002 (CAR). The application also sought other orders setting aside the orders made by the

learned judge; that the matter be remitted to the Supreme Court for a case management conference to be fixed in the Michaelmas term of 2018, or as soon as practicable thereafter; and costs to the applicants. It is clear, however, that this court could not grant the other reliefs prayed for (save costs) on an application for permission to appeal, as those were substantive reliefs claimed on appeal. When this was pointed out to counsel for the applicants, they concurred with that position. No more will therefore be said about that aspect of the application. It remains one only for permission to appeal the judgment of Brown Beckford J.

Background

[2] The action before the Disciplinary Committee (the Committee) of the General Legal Council (the respondent) was grounded on a complaint made by the Contractor-General, Mr Dirk Harrison, against the applicants, in their capacity as attorneys-at-law. The Committee had found that there was a *prima facie* case to answer, and as a consequence of that ruling, a trial date had been set for the determination of the matter. For whatever reason the application/complaint before the Committee was not heard, and having been adjourned, the applicants filed their fixed date claim form, which Brown Beckford J later struck out, and which is therefore the basis of the application before us.

[3] The applicants' fixed date claim form asked that the court grant nine declarations; give directions; grant an injunction; and give such other relief that the court may deem just. In essence, the declarations and reliefs prayed for included the following:

(1) a declaration that sections 23 and 24 of the Contractor-General Act did not apply to attorneys-at-law;

(2) declarations that the complaint of the Contractor-General had failed to disclose a *prima facie* case under the Legal Profession Act (LPA) and the rules in the schedule to the said Act, and the Committee therefore had acted *ultra vires*. There was no or no sufficient evidence to ground a *prima facie* case against the applicants;

(3) declarations that the complaint did not on its facts support the burden of proof required to satisfy a complaint under the LPA;

(4) a declaration that the actions of the Committee were in breach of the applicants' constitutional rights to a fair hearing by an independent and impartial tribunal; and

(5) a declaration that there was bias on the part of members of the Committee as members who sat on the panel to determine whether there was a *prima facie* case, were also fixed to hear the complaint itself.

[4] The directions sought related to a stay of the hearing of the proceedings. An injunction was sought to restrain the Committee from hearing any proceedings until the determination of the claim for the said declarations, or until further order of the court.

[5] On 10 July 2017, the Committee filed an application to strike out the claim on the basis that the claim was an abuse of the process, and had no reasonable chance of success. With regard to whether the claim was an abuse of process, counsel for the Committee submitted that the LPA prescribes the process if the applicants were dissatisfied with a decision of the Committee. It is by way of appeal. Having not utilised that stipulated process, the applicants were endeavouring to have the Supreme Court re-adjudicate the issue as to whether there was a *prima facie* case, and substitute its decision for that of the Committee, which counsel said was "impermissible" and an "improper use of the court's time".

[6] Counsel also contended that there was no reasonable chance of success in the claim since, *inter alia*: the question as to whether the provisions of the Contractor-General Act applied to attorneys-at-law was a matter for the Committee; merely stating that one's constitutional rights were being breached was not enough; and the applicants could not demonstrate that there was no alternate method of redress, bearing in mind the provisions of the LPA. Counsel also argued that since the Committee was an inferior tribunal, it was subject to judicial review, and yet that path had not been explored. This, counsel argued, was a further way of circumventing the lawful procedures available for matters of this nature. Counsel had also maintained that

the claim was one relating to public law, and if the applicants were claiming otherwise, they had not asserted any particular private law right that had been breached.

[7] Counsel for the applicants contended that they had a right to file a claim for declarations as to whether a *prima facie* case had been made out, and for the court to declare that there was nothing in the material before the court to support a finding of a *prima facie* case. It was their further contention that they were not seeking an appeal; and in any event, there could be, and there was nothing inherently improper with parallel claims, and ultimately parallel rulings. Counsel submitted that as a consequence, there was no basis to strike out the claim which was such a draconian step, particularly since there were other steps which could be taken. The declaratory claim was one recognised pursuant to Part 8 of the Civil Procedure Rules 2002 (the CPR) and the administrative order was detailed in Part 56. Counsel also contended that it was their right to choose which course they wished to pursue in order to obtain that particular remedy.

The decision of the learned judge

[8] It may be useful to summarise the reasons for judgment given by Brown Beckford J. The learned judge ruled that the application to strike out the applicants' claim was well founded as their claim was an abuse of process. She stated that although the applicants had sought to urge the Supreme Court to disturb the Committee's order, the appropriate course was for the applicants to have filed an appeal, which right, she stated, was given under the LPA.

[9] Against the background of submissions made by counsel for the parties, the learned judge identified various issues in controversy between the parties. The first was whether the applicants had an unqualified right to bring the proceedings. In reliance on **Abraham and Another v Thompson and Others** [1997] 4 All ER 362, she acknowledged that the right to unfettered access to the courts is well known and recognised. However, she also referred to Lord Diplock's comments in **Hunter v Chief Constable of the West Midlands Police and Others** [1982] AC 529, dealing with the abuse of the process of the court, which, he stated, cuts down on this unfettered right to access the courts. She further noted that rule 26.3(1) of the CPR preserves the court's power to strike out a statement of case or part of it on the basis of *inter alia* an abuse of process. At the end of her analysis on this issue, the learned judge concluded that the litigant did not have an unfettered unqualified right to access the court.

[10] The learned judge then considered whether, in the instant case, there were circumstances existing which should cause the court to fetter the applicants' right to access the courts. The judge reviewed cases dealing with the principle of a collateral attack on the decision of a court amounting to an abuse of process, although the court recognised that it should nonetheless be slow to strike out a claim. It was recognised that the court could do so if a similar question, then before the court, had already been decided by a competent court. The judge referred to cases out of this court, for instance, **The Minister of Housing v New Falmouth Resorts Ltd** [2016] JMCA Civ 20, which applied the principles emanating from **Hunter**, relating to the impact of conduct amounting to an abuse of the court's process on the litigant's right of

unfettered access to the court, and concluded that the principles were equally applicable to a decision from an inferior tribunal.

[11] The learned judge recognised that the applicants had acknowledged that the issues before the Committee were the same as those that were the subject of the claim for declaratory reliefs. The learned judge found that it was the right of appeal in section 16 of the LPA which superseded any other process. She stated that the principles in **Hunter** continued to "hold firm", and the court must strike out any matter which was a clear misuse of its process. She found that the fixed date claim form was an abuse of process and ought therefore to be struck out.

[12] With regard to the claim that sections 22 and 23 of the Contractor-General Act do not apply to attorneys-at-law, the learned judge having found that by asking for a declaration, the effect of which was to attempt to obtain a different interpretation to those provisions which had been accorded them by the Committee, indicated that that was a matter for an appeal.

[13] The learned judge noted that the alleged constitutional breach related to bias displayed by the members of the panel who were to sit to hear the complaint, as these members had also participated in the decision that a *prima facie* case had been shown to exist. But, she stated, that the application for recusal must be heard by the particular members of the panel hearing the complaint. In any event, she remarked that the claim for recusal cannot succeed based only on a prior adverse ruling. She therefore found that the application in this regard was premature.

[14] The learned judge referred to the overriding objective, stating that duplication in the litigation process, that is, the matter relating to the same facts and claiming essentially the same reliefs or result before the Committee and before the court, was not a good use of the court's time. Additionally, asking the court to convert the claim to one of judicial review would equally not be a good use of the court's time and process, as that had not been requested previously. Indeed, she noted that the applicants had indicated that they were not seeking relief by way of judicial review. The learned judge stated that this may well be because the complaint of the applicants was not one with the decision making process, but with the decision itself. She therefore found that the overriding objective favoured the striking out of the claim as it was not the best use of the court's resources.

[15] The learned judge thereafter granted the orders referred to in paragraph [1] herein, and also refused leave to appeal.

The application for permission to appeal

[16] An application for permission to appeal was thereafter made to this court. The applicants relied on 16 grounds in support of that application. I agree with learned counsel for the Committee that they appear to be the proposed grounds of appeal, and counsel has helpfully grouped these grounds into three main issues as set out below. I have utilized the issues as identified by counsel in my deliberations for the ultimate determination and disposal of this application. The issues are:

> "(i) Did the learned judge err when she ruled that the proper course for the applicants [to] have taken is an appeal

> to the Court of Appeal against the decision of the [Committee] that a prima face case had been made out or an application for a judicial review of that decision?" (Grounds (a) (d) (e))
>
> "(ii) Did the learned judge err in refusing to accept the applicants' submission that they can properly pursue declaratory relief under Part 8 of the Civil Procedure Rules?" (Grounds (c), (f), (g), (h), [j], (k), (l), and (n))
>
> "(iii) Did the learned judge err when, in respect of the alleged constitutional breaches, she ruled that the jurisdiction of the court was being prematurely provoked?" (Grounds (b), (i), [m] and (o))

Submissions before this court

Issues 1 and 2 - ought the applicants to have appealed the decision of the Committee that a *prima facie* case had been made out, or ought they to be permitted to proceed by way of their claim for declaratory relief?

[17] On the question of whether the applicants had a real chance of success on appeal, counsel for the applicants argued before this court that they were entitled to obtain declaratory relief, and the court could grant those reliefs at any time. Part 8 of the CPR permits such an application, and section 16(2) of the Constitution of Jamaica (the Constitution) preserves the entitlement to a fair hearing before an independent impartial tribunal established by law. The court, he argued, ought not to deprive the litigant of any route for relief which he had chosen (see **Ernest Davis v The General Legal Council** [2014] JMCA Civ 20). Counsel submitted that on a correct reading of section 16(1) of the LPA the court was required to do a "rehearing" of the matter. In the instant case, as it was a deliberation and determination by the Committee whether

a *prima facie* case had been shown to exist, and not one where *viva voce* evidence had been taken, section 16 of the LPA did not apply.

[18] Counsel for the applicants submitted further that since Parts 8 and 56 of the CPR envisage applications for declaratory reliefs and administrative orders, respectively, the court could have converted the matter into one for judicial review. Also, counsel submitted, that even if the court was of the view that permission to appeal cannot be granted in the particular circumstances, then the court should adopt a position that would preserve the rights of the litigant, and direct that the matter be remitted to the Supreme Court so that an extension of time could be granted for whichever appropriate application ought to be pursued.

[19] On these issues, counsel for the Committee submitted that section 16(1) of the LPA was clear and unequivocal, and an appeal of the tribunal's decision was the process that the applicants should have pursued. Counsel pointed out that the contention now being argued by counsel for the applicants that section 16 of the LPA was inapplicable, had never been raised in the court below, and was without merit in any event. Counsel submitted that the court below was correct when it stated that the right of appeal, specifically granted to the applicants, superseded any other process that they may have brought.

[20] Further, she indicated that the applicants could not proceed to judicial review as they could not establish that there was not an alternate method of redress, and in any event, no such application was before the court, as the applicants would first have had

to apply for leave to proceed by way of judicial review and they had not done that. The complaint by the applicants that there were no reasons as to why they could not proceed by Parts 8 or 56 of the CPR was inaccurate, and cannot avail them, as the learned judge gave detailed reasons for her respective conclusions. Counsel submitted that the authorities on which the applicants purported to rely did not assist them. The application, she contended, was without merit and should not succeed.

Issue 3: Were there any constitutional breaches? Did the learned judge err when she found that the jurisdiction of the court was being prematurely provoked?

[21] In respect of this issue relating to the grounds as set out, counsel reiterated their respective submissions made in the court below. Counsel for the applicants maintained that they had the right to pursue the claim for declaratory relief and especially since the decision of the Committee was not appealable, they had no alternative but to do so. To the contrary, counsel for the Committee insisted that the applicants were bound by section 19(4) of the Constitution, and must establish that there was no adequate and alternative method by which the alleged breach of their right to a fair hearing could be resolved, which they were unable to do. Counsel submitted that the applicants' request for the recusal of any member of the Committee was without merit. She stated that the decision of Brown Beckford J was correct on all issues.

Discussion and analysis

[22] As indicated, this is an application for permission to appeal. The rule is clear. It states that permission to appeal must first be sought in the court below. Permission to appeal was refused by Brown Beckford J, and so the applicants have renewed their

application before us pursuant to rule 1.8 of CAR. Rule 1.8(7) states that the general rule is that in a civil case, permission to appeal will only be given if this court or the court below considers that an appeal will have a real chance of success. The authorities are equally clear. They have stated that "real chance" does not mean a "fanciful" one (see **Swain v Hillman and Another** [2001] 1 All ER 91 and **The Contractor-General of Jamaica v Cenitech Engineering Solutions Limited** [2015] JMCA App 47).

[23] In the instant case, the learned judge has given detailed reasons for her decision to strike out the claim. She has said that the fixed date claim form filed by the applicants is an abuse of process. It is therefore incumbent on the applicants to demonstrate that they have a real chance of success of showing that she was plainly wrong when she exercised her discretion to strike out the claim. This court has been guided by the oft cited speech of Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] 1 AC 191, and followed in several cases in this court, where he stated at page 220 that:

> "...the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to

> be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

[24] It is not therefore for this court, on appeal, to exercise its own discretion in the matter, but to examine the material which was before the learned judge. This court must also ascertain whether, in all the circumstances, there was any chance that the appellate court, on review of the decision of Brown Beckford J, would find that the order made in the court below was such an aberration, that no judge regardless of his duty to act judicially, could have reached it.

[25] With regard to issues 1 and 2, it seems very clear to me that the applicants will not be able to demonstrate that section 16(1) of the LPA does not provide a right of appeal from the decision of the Committee. It reads:

> "An appeal against any order made by the Committee under this act shall lie to the Court of Appeal by way of rehearing at the instance of the attorney or the person aggrieved to whom the application relates, including the Registrar of the Supreme Court or any member of the Council, and every such appeal shall be made within such

time and in such form and shall be heard in such manner as may be prescribed by rules of court."

[26] It is pellucid that an appeal lies against any order of the Committee to the Court of Appeal. The decision of the Committee that a *prima facie* case has been made out is an "order" of the Committee. The appeal is by way of a rehearing of the order made by the Committee. The appeal can be made by any person aggrieved by the decision to which the application before the Committee related. The appeal shall be made in such form and in the manner dictated by the rules. The relevant rules are to be found in the Fourth Schedule to the LPA. Rules 4 and 5 read 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) Where the Committee dismisses an application pursuant to paragraph 3(b), the Committee shall make a formal order to that effect if required to do so by the applicant or the attorney against whom the application is made.

5.- In any case in which in the opinion of the Committee, a *prima facie* case is shown the Committee shall fix a day for hearing, and the secretary shall serve notice thereof on the applicant and on the attorney, in accordance with Form 3 or Form 4 of the Schedule (as the case may require), at least twenty-one days before the day fixed fur the hearing."

[27] It is clear that once the documentation has been sent to the attorney-at-law, and they have been given the required time period within which to respond to the allegations made in the complaint to the Committee, then it shall consider the application and any response thereto. Once it is of the opinion that a *prima facie* case has been shown, the Committee shall fix a date for the hearing of the complaint.

[28] There is no question that the applicants have an avenue of redress by way of appeal under the LPA where the right of appeal is provided. It will therefore be very difficult for the applicants to demonstrate, faced with the particular wording of section 19(4) of the Constitution, that the learned judge would have erred in declining to exercise her powers to otherwise remit the matter to the appropriate authority, having been satisfied that there was adequate means for redress for the alleged contravention. Section 16 of the LPA obviously provides that redress, and that is clearly the route that

the applicants ought to have taken. Any argument to the contrary does not seem sustainable.

[29] It is also very clear that the reliefs sought in the fixed dated claim form are the same reliefs that one can obtain under section 16(1) of the LPA. It does not appear to be arguable that the order referred to in section 16 of the LPA is not one made by the Committee in this case. There is no indication that the order could only be one in relation to which *viva voce* evidence had been taken. There is no such restriction in the said provision or elsewhere in the LPA, and I am of the view that that argument has no merit.

[30] The ruling by the court that any effort to proceed by way of declaratory relief under Part 8 of the CPR was merely a means of attempting to have the court re-adjudicate what had already been decided by the Committee and also to effect a collateral attack on its previous decision, appeared quite sound.

[31] Equally sound was the judge's conclusion that the applicants' suggestion that the court could have granted relief under Part 56 of the CPR would have met with similar insurmountable hurdles. There had been no such application before the court. Indeed, to the contrary, the learned judge had commented that the applicants had indicated that they were not pursuing an application for judicial review. In those circumstances, it is entirely unclear to me why the judge would have made any such order, particularly in the light of the provisions of section 16(1) of the LPA.

[32] It is clearly the LPA and the Committee rules in the Fourth Schedule which must be pursued for the ultimate determination of the issues in this case. This is also the situation with regard to sections 22 and 23 of the Contractor-General Act. These provisions state that the proceedings of a Contractor-General shall not be rendered void for want of form (section 22), and subject to certain exceptions, no proceedings shall lie against the Contractor-General in the performance of his functions under the Act (section 23). In my view, it was within the mandate of the Committee to assess whether any action of the applicants when dealing with the Contractor-General fell afoul of any duty owed by them as attorneys-at-law, under The Legal Profession (Canons of Professional Ethics) Rules, which guides the Committee when deciding whether an attorney is guilty of professional misconduct. Pursuing a claim for declaratory relief in those circumstances was therefore, in my view, without merit.

[33] Before concluding I would wish to comment on some of the authorities relied on by counsel for the applicants.

[34] In **Honourable Attorney General and Another v Isaac** [2018] UKPC 11, a Privy Council case from the Eastern Caribbean Court of Appeal, the main issue was whether the applicant's fixed date claim form, seeking various declarations and damages, was an application for judicial review for which leave was required. The Board dismissed the appeal as it found that *inter alia* the applicant was not seeking remedies of a judicial review nature. A similar situation obtains in the instant case. The applicants are seeking declarations as to the efficacy of the ruling of the Committee, a public body, which has directed a hearing into matters relating to the conduct of the

applicants as attorneys-at-law *vis-vis* the Contractor-General, dealing therefore with their private rights. There is no claim for certiorari, quashing the decision of the Committee, or mandamus, for the matter to be dealt with otherwise, or prohibition for the proceedings to be restrained. There was no question, therefore, that the application was not by its nature one for judicial review.

[35] **Peerless Limited v Gambling Regulatory Authority and Others** [2015] UKPC 29 is a Privy Council case arising from the Supreme Court of Mauritius relating to the exercise of the discretion of the judge to grant or refuse the application for judicial review. The Board allowed the appeal on the basis that the merits of the application were not considered; no reasons were given for the decision; and the draconian effect of the result. The facts of that case, therefore, bears no similarity to the case at bar. There was no question, and there had been no submission from counsel before Beckford Brown J, that the claim filed by the applicants was really one of judicial review, and there was no submission before us that the learned judge had exercised her discretion wrongly not to treat it in that way. There has been no attack or challenge in respect of the process, but as Brown Beckford J said, the challenge has been to the decision itself, which would not ordinarily support a claim for judicial review or for an administrative order.

[36] The court in **Ernest Davis** was, in my view, saying that once a right of appeal exists in the legislation, the appellant can proceed to pursue that right. The case does not say that if there are other processes available, it is the applicants' choice as to which route to pursue that matters. In any event, as already stated, the applicants did

not choose to pursue an application for judicial review, indeed to the contrary, they said they were not interested in pursuing such an application nor an appeal, but instead they filed a claim for declarations asking for the same relief, which, as I have stated, cannot be sustained.

[37] I fail to see the relevance of the Privy Council case of **Donald Panton and Others v Financial Institutions Services Limited** [2003] UKPC 86 and the Court of Appeal case of **Omar Guyah v Commissioner of Customs of Jamaica and Others** [2015] JMCA Civ 16, as both cases were dealing with concurrent criminal and civil proceedings based on similar facts, with regard to the question of the exercise of the court's discretion as to a stay of the civil proceedings until the criminal proceedings have been decided. These principles are inapplicable to the case at Bar.

Conclusion

[38] There is no doubt in my mind that that there is no merit in the proposed grounds of appeal challenging the decision of Brown Beckford J delivered 14 June 2018. The application for permission to appeal, although filed timeously, cannot succeed as the applicants have failed to demonstrate that that they have any real chance of succeeding on appeal. The issues arising from the decision of the Committee are matters which ought to be the subject of an appeal pursuant to section 16(1) of the LPA, and the fixed date claim seeking similar reliefs by way of declarations, can only be described as an abuse of the process, and was therefore correctly struck out by the learned trial judge. The court has the power inherently, and in the rules of court, to control its processes

and to protect it from misuse or abuse. I would therefore refuse the application with costs to the Committee to be taxed if not agreed.

P WILLIAMS JA

[39] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

PUSEY JA (AG)

[40] I too have read the draft judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

(1) Application for permission to appeal is refused.

(2) Costs to the Committee to be taxed if not agreed.