[2015] JMCA App 42

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 1/2015

APPLICATION NO 156/2015

BETWEEN	**JADE HOLLIS**	**APPLICANT**
AND	**THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Ms Carol Davis for the applicant

Mrs Daniella Gentles-Silvera instructed by Livingston, Alexander & Levy for the respondent

22, 23 September and 14 October 2015

IN CHAMBERS

PHILLIPS JA

[1] This is an application for a stay of the order of the Disciplinary Committee of the General Legal Council (the Committee) in relation to a complaint made against attorney-at-law Jade Hollis (the applicant), pending the hearing and determination of the appeal. The applicant had appealed the refusal of the Committee to stay proceedings before it, pending the outcome of criminal proceedings already in train,

relating to the same facts that were the subject matter of the complaint before the Committee.

Background

[2] The facts set out herein are gleaned from the affidavit of Mr Gregory Duncan, the complainant, dated 10 March 2014 and filed in support of his complaint to the Committee, the affidavits of Jade Hollis dated 6 and 12 March and 5 June 2015, filed in support of the application for a stay before the Committee and the affidavit of Jade Hollis filed in this court on 18 August 2015 in support of the application for a stay pending appeal.

[3] In March 2014, the applicant instituted civil proceedings against Mr Gregory Duncan, her former client, to inter alia recover advances made to him. These proceedings are continuing.

[4] In March 2014, Mr Duncan made a complaint to the Committee in respect of the applicant's representation of him in the sale of a number of properties. Mr Duncan claimed that: (i) the applicant failed to maintain the honour and dignity of the profession; (ii) failed to handle his business with competence and due expedition; (iii) acted with inexcusable negligence in the performance of her duties and (iv) failed to account to him for all monies in her hands for his account after requests were made to so do in breach of Canons I(b), IV(r), IV(s) and VII(b)(ii) respectively, of the Legal Profession (Canon of Professional Ethics) Rules.

[5] On 14 March 2015, the matter came before the Committee and Ms Carol Davis, counsel for the applicant, applied to have the hearing stayed since the applicant was recovering from major surgery in the United States of America and would be unable to return to Jamaica by the date scheduled for the hearing before the Committee. Counsel also submitted that there were criminal charges pending against the applicant that would be laid once she returned to Jamaica, based on a report made by Mr Duncan to the police and so the matter before the Committee should be stayed pending the outcome of the criminal proceedings. The Committee dismissed the application on the grounds that the applicant had not yet been charged with any criminal offences so there were no concurrent criminal proceedings and ordered the hearing to proceed. A notice of hearing was subsequently sent to the applicant informing her that the date for hearing was 13 June 2015.

[6] On 20 April 2015, after the applicant returned to the island, she was charged with four counts of fraudulent conversion with respect to complaints made by Mr Duncan arising out of facts similar to those stated in Mr Duncan's complaint to the Committee. The applicant appeared before the Resident Magistrate's Court for the Corporate Area on 15 May 2015 to answer to these charges. The matters were adjourned to 23 October 2015 for mention, to facilitate an accounting exercise being undertaken in respect of the accounts of both Mr Duncan and the applicant.

[7] On 13 June 2015, the day of the hearing before the Committee, Ms Davis made another application for a stay of the disciplinary proceedings until the criminal

proceedings had been completed. The basis upon which she made this application was that criminal charges had now been laid against the applicant based on allegations made by Mr Duncan relating to facts similar to those being alleged before the Committee. Should the hearing proceed, the applicant would be forced to file an affidavit and give evidence which would prejudice her defence. Ms Davis also submitted that the applicant was not in good physical health as a result of having just undergone major surgery and was experiencing physical stress as a result of the concurrent proceedings. Ms Davis also contended that the applicant was experiencing financial strain by having to instruct multiple attorneys in simultaneous civil, criminal and disciplinary proceedings.

[8] The Committee refused the application for a stay. The basis upon which the stay was refused was outlined in a report from the Committee dated 7 July 2015, attached to the said affidavit of Jade Hollis filed 18 August 2015. The Committee stated that financial constraints and physical stress could not be relied on in law, since the primary objective of the Committee was to examine the professional conduct of the attorney, preserve the profession's reputation and protect the public interest. Additionally, the Committee stated that it had not been persuaded that the claim of prejudice made by the applicant was a sufficient basis to grant a stay. The Committee thereafter indicated that it intended to continue with the hearing and Mr Duncan commenced his sworn testimony.

[9] As a consequence, the applicant filed a notice and grounds of appeal dated 18 August 2015. The grounds referred to, inter alia, the allegations that the Committee failed to give adequate consideration to the factors prejudicing the fair hearing of the criminal proceedings; the Committee had not considered the effect of a continuation of the proceedings on the appellant's right to silence in the criminal proceedings, and the Committee failed to consider that there would have been no real risk of injustice to the complainant, Mr Duncan, had the stay been granted.

[10] On the same day, the applicant also sought a stay of the order refusing the stay of the disciplinary proceedings and filed in this court a notice of application to that effect which was later amended on 26 August 2015 and which sought the following orders:

> "1. That the disciplinary proceedings in complaint No. 45/2014 made by Gregory Duncan against Attorney-at-law Jade Hollis be stayed pending the hearing and determination of the appeal herein.
>
> 2. Further and other relief.
>
> 3. Costs to the Appellant to be agreed or taxed."

[11] The grounds on which this application were made are:

> "1. The Appellant on 13th June, 2015 made an application to the Committee of the General Legal Council for a stay of the disciplinary proceedings given that the Appellant had been charged and faced criminal proceedings arising out of the same facts.
>
> 2. The Respondent refused the Appellant's application.

3. The Appellant has filed Notice of Appeal citing 12 grounds as to why the decision of the Respondent was in error and should be set aside.

4. The Appellant would suffer serious prejudice if the stay is not granted. In particular the purpose of the appeal would be nullified. Further the Appellant would be forced to file affidavit in the disciplinary proceedings which inter alia would prejudice her right to a fair trial, her constitutional and common law rights to silence and her constitutional right not to incriminate herself."

Preliminary objection

[12] Both the applicant and the Committee filed written submissions in relation to the application for a stay of the order refusing the stay of the disciplinary proceedings. However, on 22 September 2015 when the matter came up before me, these submissions were not canvassed because the Committee had filed a notice of preliminary objection on 7 September 2015 on the basis that the appeal was a procedural appeal which had been filed out of time and there was therefore no proper appeal before the court.

Submissions in support of preliminary objection

[13] Mrs Daniella Gentles-Silvera, counsel for the Committee, submitted that the appeal against the order of the Committee is a procedural appeal and therefore the notice of appeal should have been filed and served within seven days of the decision, pursuant to rule 1.11(1)(a) of the Court of Appeal Rules, 2002 (CAR). Since the Committee's decision was made on 13 June 2015 and the appeal had been filed on 18 August 2015, the appeal was clearly out of time and ought to be dismissed.

[14] Mrs Gentles-Silvera asserted that the appeal was a procedural appeal because in accordance with the definition of 'procedural appeal' stated in rule 1.1(8) of the CAR, the application had not decided substantive issues in the complaint. She further contended that the appeal did not fall within the exception to the definition of 'procedural appeal' stated in rule 1.1(8)(a) of the CAR which excludes "any decision made during the course of a trial or final hearing of the proceedings" because, counsel stated, the application and the decision were made before the hearing commenced. In relying on authorities such as **Catherwood et al v Thompson** [1958] OR 326-334, **Bryan Henry Robert Jonas et al v Tarachand S Barma et al** District Court of Ontario, dated 28 July 1987 delivered by Judge F J McDonald, **Garth Dyche v Juliet Richards and Michael Banbury** [2014] JMCA Civ 23 and the learned authors of Phipson on Evidence, 13th edition para 33-28, Mrs Gentles-Silvera submitted that in civil suits the trial began with the opening speech or with the taking of evidence of the first witness. Since the application for the stay and the decision to refuse the application were made before the taking of Mr Duncan's evidence, the application had not been made during the course of proceedings and the appeal was therefore procedural.

[15] She further submitted that although some procedural appeals may be interlocutory, rule 1.11(1)(b) would not apply since 11(1)(f) of the Judicature (Appellate Jurisdiction) Act states that permission to appeal can only be sought against orders made by a judge in the Supreme Court and not against orders of inferior tribunals such as the Committee. Moreover, section 16(6) of the Legal Profession Act provides that a

person aggrieved has the right to appeal an order of the Committee to this court and does not state that any leave to do so is required.

[16] Relying on **Abdulla C Marzouca Limited & Anor v Charles H Crooks** SCCA No 7/2007, Application No 9/2007, delivered 11 May 2007 and **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2013] JMCA Civ 9, counsel asserted that once the appeal is procedural, the notice and grounds of appeal must be filed within seven days of the decision being appealed against in accordance with rule 1.11(1)(a) of the CAR, and the failure to do so meant that the appeal was filed out of time, and consequently, there was no appeal properly before the court.

Submissions in response to preliminary objection

[17] Ms Davis submitted that this was not a procedural appeal since the definition of a procedural appeal found in rule 1.1(8) excludes decisions made during the course of proceedings. She asserted that on 13 June 2015 when the matter was called for hearing, the hearing commenced with the application having been made.

[18] In support of this contention she relied on the learned authors of Halsbury's Laws of England, 4th edition, volume 37 at paragraph 509, where it is stated that in civil proceedings an action begins when it is called on for trial. Ms Davis also pointed out that the notice of hearing that was served on the applicant pursuant to rule 5 of the 4th schedule to the Legal Profession Act, was equated with a notice of trial being served on the applicant and so, when the application for the stay of the proceedings was made on

13 June 2015, the date fixed for trial, the application for the stay commenced the hearing. Counsel also cited **Mr George Loizou v Mr Nathan Gordon and Mr Yianni Patsias** [2012] EWHC 90221, where Master Leonard stated at paragraph 47 that HH Judge Stewart, in **Sitapuria v Khan** (unreported, 10 December 2007), took the view that a contested hearing commences "when it opens (or just begins to open)". Ms Davis further submitted that the Committee itself demonstrated that in its view the proceedings had commenced, as it was noted in the report and the notes of the proceedings, that:

> "We do not agree with these submissions either and in the circumstances the application is dismissed and we intend to proceed with the continuation of the hearing."

[19] Ms Davis posited that since this was an application made at the commencement of the hearing, it remained a decision that was made during the course of the trial and hence it was not a procedural appeal. Once it is accepted that the appeal was not a procedural appeal, by virtue of rule 1.11(1)(c) of the CAR, the applicant's counsel submitted that she had 42 days to file the appeal. Consequently, the appeal was filed within the specified time and had been properly placed before this court.

Issues and analysis

[20] The submissions advanced in support of and in response to the preliminary objection raise two questions:

1. Is the appeal a procedural appeal?
2. Was the appeal filed within the specified time?

Issue 1: Is the appeal a procedural appeal?

[21] The definition of a procedural appeal is found in rule 1.1(8) of the CAR which states that:

> "**procedural appeal**" means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes –
>
> a. any such decision made during the course of the trial or final hearing of the proceedings;
>
> b. an order granting any relief made on an application for judicial review (including an application for leave to make the application) or under the Constitution;
>
> c. the following orders under CPR Part 17 –
> (i) an interim injunction or declaration;
> (ii) a freezing order as there defined;
> (iii) a search order as there defined;
> (iv) an order to deliver up goods; and
> (v) any order made before proceedings are commenced or against a non-party;
>
> d. an order granting or refusing an application for the appointment of a receiver; and
>
> e. an order for committal or confiscation of assets under CPR Part 53…"

[22] As indicated, Mrs Gentles-Silvera asserted that the appeal was a procedural appeal because it did not decide substantive issues and had not been made during the course of the proceedings and Ms Davis submitted that the appeal was not procedural since the application for the stay commenced the trial. It is clear from these submissions that a finding as to whether the appeal is procedural will depend on when

the trial began. For this analysis, I will examine various cases and the opinions of various learned authors.

[23] In **Wilmot Perkins v Noel B Irving** (1997) 34 JLR 396, before the commencement of a trial, the appellant's counsel asked the trial judge for an adjournment of the hearing and when he refused counsel asked the trial judge to recuse himself on the basis that there was a real danger of bias on the part of the learned trial judge. In deciding whether the judge's refusal to recuse himself from the matter was a ruling or order that was appealable, the court looked at when the application was made. Since the application was made before the commencement of the trial, it was an order that was appealable. Downer JA at page 410 - 411 made a statement that suggests that a trial begins where the plaintiff opened his case where he said:

> "It is important to grasp that both the application for an adjournment and the application for Ellis J to disqualify himself were taken before Mr Goffe, Q.C. opened his case on behalf of Irving…"

[24] In **Garth Dyche v Juliet Richards**, I utilized a quotation from Words and Phrases Legally Defined, 3rd edition, that had been adopted by the Canadian court in **Catherwood et al v Thompson** and which had been cited by Mrs Gentles-Silvera, which suggests that a trial began upon the hearing of evidence. At paragraph [26] of the judgment, I said:

> "As to when a trial is commenced, the learned authors of Words and Phrases Legally Defined, 3rd edition, state that:

> '...this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter[s] upon the hearing and examination of the facts for the purpose of determining the questions in controversy in the litigation…' "

[25] In **Bryan Henry Robert Jonas et al v Tarachand S Barma**, another Canadian case cited by Mrs Gentles-Silvera, Judge FJ McDonald said:

> "…I further hold the view that the 'hearing' or trial does not commence in civil actions until the first evidence is called…"

[26] There are a number of learned authors in legal discourse that have expressed their views as to when a trial commences:

(i) The authors of Civil Procedure: Cases and Materials, American Casebook Series published December 1976, at page 784 stated that:

> "Normally a case begins with plaintiff's opening statement."

(ii) In Civil Court in Action by David Barnard, published in 1977, at page 160, Mr Barnard stated that:

> "The hearing of the case begins with an opening speech by counsel for the plaintiffs…"

At page 161, Mr Barnard stated further:

> "Once the opening is concluded, the plaintiff proceeds at once to call his evidence…"

(iii) The authors John O'Hare and Robert N Hill in Civil Litigation, 6th edition, at page 527 stated that:

> "The plaintiff's advocate has the right to begin unless the burden of proof of *all* issues lies on the defendant. The

> advocate begins by making an opening speech outlining the facts and indicating areas of dispute, the legal principles involved, and the areas where a ruling will have to be made... The first witness for the plaintiff will then be called…"

(iv) Susan Blake in A Practical Approach to Effective Litigation, 6th edition, at page 556 in exploring the stages of a trial, lists the beginning as the claimant's opening speech which may be dispensed with, in any event. The next stage of the trial process is the hearing of the claimant's witnesses.

(v) Stuart Sime in A Practical Approach to Civil Procedure, 13th edition, at page 525 stated that the first stage in a trial is an opening statement that may be dispensed with followed by calling evidence on the claimant's behalf.

(vi) In Phipson on Evidence, 13th edition at paragraph 33-28 the learned authors said:

> "… When the trial has once been begun by an opening speech, the right to begin cannot be varied so that the other side's witnesses can be called first."

(vii) In Blackstones Civil Practice, 2006, the learned authors stated at paragraphs 59.39-59.40 that:

> "The trial judge will generally have read the papers in the trial bundle before the trial. It will often be the case that in those circumstances there is no need for an opening speech, which may be dispensed with… After the claimant's opening speech evidence will be called on behalf of the claimant…"

[27] Ms Davis cited the learned authors of Halsbury's Laws of England to show that a trial commenced when the matter was called for trial. However, to fully appreciate this argument, paragraph 509 from which this argument was taken must be read fully and in context. It states that:

> "An action or other proceeding for trial or hearing is listed in the Daily Cause List before a specified judge or court. When an action is called on for trial it is treated as having begun, for it is then before the court and becomes subject to the court's control and directions. It will be heard by the judge in one continuous, episodic unbroken sequence, day after day if necessary, however long the case may last. As a general rule it will be heard in open court as a public trial and will generally be conducted orally. After hearing the addresses of counsel on each side, opening and closing their respective cases, and the evidence of the parties and their witnesses and reading all the relevant correspondence and other documents and seeing any plans, photographs and other material adduced before him, the trial judge will decide the points at issue and will ordinarily deliver an immediate oral extempore judgment. In the rare cases where trial is with a jury there are variations in the course of the trial."

[28] Although at first blush counsel's argument appeared attractive, after careful perusal of the passage, it seemed clear to me that the authors of Halsbury's were explaining the trial process by stating that once the matter had been called, it was thereafter under the court's control, and it continued from day to day with the same judge, until judgment. In some ways, the authors agree with the notion that the trial begins with an opening speech, since they say that after addresses had been made and witnesses called, inter alia, a trial judge would decide the issue.

[29] As indicated, Ms Davis had referred to the case of **Mr George Loizou v Mr Nathan Gordon and Mr Yianni Patsias** which also seemed to suggest that a trial

begins at an opening speech. That case involved an assessment of costs payable to an attorney in circumstances where the conclusion of a claim at trial entitled the attorney to 100% costs and if the claim concluded before a trial had commenced the entitlement was 12.5%. It was held that the attorney was entitled to 100% costs in that case, since the claimant's counsel had opened briefly and the opening had given way to the defendants' application for an adjournment. However, as stated previously, Master Leonard had commented at paragraph 47 that the view was taken by HH Judge Stewart that "…a contested hearing commences when it opens (or just begins to open)".

[30] From an examination of the various cases and legal literature on the point, the consensus seems to be that a civil trial begins at an opening speech. But in the event that the opening speech is dispensed with, it begins when the first witness is called. In the case at bar there was no evidence of any opening speech having been made, and so the next step would have been the taking of the evidence of Mr Duncan. Since the application was made before Mr Duncan began giving his evidence, in my view, this was an application made before the commencement of the hearing that did not decide any substantive issue in the claim. The decision to refuse the stay of the proceedings was therefore not made during the course of the trial or final hearing of the proceedings, and also did not fall within any of the other exceptions in rule 1.1(8) of the CAR and was therefore a procedural appeal.

Issue 2: Was the appeal been filed within the specified time?

[31] Having found that the appeal was a procedural appeal, I must now assess whether it had been filed within the specified time. Rule 1.11(1) of the CAR provides that:

> "The notice of appeal must be filed at the registry and served in accordance with rule 1.15 –
>
> (a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;
>
> (b) where permission is required, within 14 days of the date when such permission was granted; or
>
> (c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was served on the appellant."

[32] It therefore follows, as was argued by Mrs Gentles-Silvera and as was stated by Smith JA in **Abdulla C. Marzouca Limited v Charles H Crooks** at page 7, that:

> "… Once it is accepted that the appeal is procedural as defined by Rule 1.1(8) then Rule 1.11(1)(a) applies and Notice must be filed within 7 days."

[33] Rule 1.11(1)(c) would not apply since it had already been determined that the appeal is procedural. Nevertheless, there are cases such as **Jamaica Public Service Company Limited and Rose Marie Samuels** [2010] JMCA App 23 and **George Ranglin, Nipo Line Limited et al v Fitzroy Henry and Fitzroy Henry v George Ranglin et al** [2014] JMCA App 34 which suggest that procedural appeals can also be interlocutory appeals. In fact in **George Ranglin, Nipo Line Limited et al v Fitzroy Henry and Fitzroy Henry v George Ranglin et al**, at paragraph [25] I said:

> "… Based on the application approach, it is my view that regardless of whether the CAR would seem to create a separate category of appeals known as procedural appeals, procedural appeals would by their very definition, being appeals from orders that do not directly decide the substantive issues in the case, readily fall into the category of interlocutory appeals."

[34] Where procedural appeals fall into the category of interlocutory appeals, which as stated in rule 1.11(1)(b) of the CAR require permission to appeal, that rule provides that the appeal should be filed within 14 days of the date when permission to appeal was granted. However, I agree with and find useful the submission of Mrs Gentles-Silvera that rule 1.11(1)(b) would not apply in the instant case because by virtue of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act permission to appeal is required in respect of certain orders made by a judge in the Supreme Court and not against orders of inferior tribunals such as the Committee. Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act states that:

> "11 (1) No appeal shall lie –
>
> …
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory order given or made by a Judge except –
>
> (2) In this section 'Judge' means Judge of the Supreme Court."

Section 16(1) of the Legal Profession Act states that:

> "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."

When these sections are read together, it is evident that there is no legislative provision for any application for permission to appeal an order of the Committee. It therefore follows that the appeal before this court is entirely procedural and ought to have been filed within seven clear days (in accordance with part 3 of the CPR) that is, on 23 June 2015 which would be seven days from the refusal of the application on 13 June 2015.

[35] In the instant case, the decision of the Committee had been made on 13 June 2015 and the appeal had been filed on 18 August 2015. Consequently, this procedural appeal was filed out of time and hence is not properly before the court.

Conclusion

[36] Since the appeal is a procedural appeal and had been filed out of time, it follows that there is no substantive appeal before the court upon which a single judge could exercise his discretion to grant or refuse a stay. In order to gain access to this court, the applicant may file an application for an extension of time to file the appeal in this court to be heard by the full court of appeal. A single judge has no jurisdiction to determine such an application. In my view, both applications should be placed before the full court to be heard together. In these circumstances, the preliminary objection is upheld and no decision can be made with regard to the stay of the order of the Committee because it is not an application that is properly before the court.

[37] The preliminary objection is therefore upheld. No order as to costs.