**[2018] JMCA Civ 3**

**JAMAICA**

**IN THE COURT OF APPEAL**

**MISCELLANEOUS APPEAL NO 5/2014**

**BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA**
**THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE P WILLIAMS JA**

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| **BETWEEN** | **HENRY CHARLES JOHNSON** | **APPELLANT** |
| **AND** | **THE GENERAL LEGAL COUNCIL (EX PARTE FERDINAND BRITTON)** | **RESPONDENT** |

**The appellant in person and Miss Amal Dockery instructed by H Charles Johnson & Co for the appellant**

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

**30, 31 January 2017 and 29 January 2018**

**McDONALD-BISHOP JA**

[1] I have read in draft the judgment of F Williams JA. I agree with his reasoning and conclusion and there is nothing that I could usefully add.

**F WILLIAMS JA**

**Background**

[2] This appeal arises from the appellant's dissatisfaction with a decision of the Disciplinary Committee of the General Legal Council (the committee) made on 15 November 2014. By that decision, the committee found the appellant to have been guilty of professional misconduct for having been in breach of canon IV(r) of the Legal Profession (Canons of Professional Ethics) Rules in that: (i) he failed to deal with a client's business with all due expedition; and (ii) he failed to provide his client with all information on the progress of a matter with due expedition when reasonably required to do so.

[3] Having arrived at those findings the committee ordered the appellant to pay a fine in the sum of $200,000.00, of which, when collected, the sum of $150,000.00 was to be paid to the complainant. That sum, along with costs in the sum of $28,000.00, was to be paid within 30 days of 15 November 2014.

**The complaint and evidence before the committee**

[4] The complainant, Mr Ferdinand Britton, a farmer and retired security guard, had filed a complaint against the appellant, a practising attorney-at-law, on 17 February 2011. In an affidavit filed the same day, Mr Britton deposed to having retained the services of the appellant on 10 November 2003 to seek compensation from a security company to which he had formerly been employed. He was awarded damages against the company on 4 April 2008 but, up to the time of filing his complaint, had not been able to collect any part of his judgment. He had been informed that a writ of seizure

and sale was filed in early 2010. Follow up action by the appellant in having the matter resolved Mr Britton described as "far fetch". Also, he stated that he had never been provided with all information on the progress of his matter despite reasonably requesting the appellant to do so.

**The committee's reasons**

[5] The following are the most important parts of the committee's findings in relation to this matter, contained in its written decision:

> "We find that the complaint has been established. The Attorney acted for the Complainant and obtained a judgment on the 4th April, 2008. One year later the Attorney filed an application for a Writ of Seizure and Sale date stamped 29th May, 2009. There is no explanation for the delay of one year between obtaining the judgment and the making of the application. However, by letter dated 3rd June, 2011 the Attorney wrote to the General Legal Council explaining the difficulties encountered up to that date in obtaining the issue of the Writ of Seizure and Sale. No explanation or report has been provided for the intervening two (2) year period since 2011 to the date of hearing of the complaint in April 2013 nor is there any indication that the Attorney considered any other means available to enforce the judgment."

[6] Additionally, the committee took the view that the breaches that it found that the appellant had committed were aggravated by the fact that the appellant had failed to attend the disciplinary hearing when required to do so. That in itself, it found, was a breach of canon I(f) of the Legal Profession Canons of Professional Ethics Rules, made pursuant to the Legal Profession Act (the Act).

**The appeal**

[7] By notice and grounds of appeal filed on 18 December 2014, the appellant ultimately sought orders *inter alia*: (i) that the order made against him to pay the sum of $228,000.00 be set aside; (ii) that there be a stay of execution until the determination of the matter; (iii) that there be a new trial or hearing of the matter; and (iv) that costs of the appeal be awarded to him.

[8] At the conclusion of the hearing of arguments we made an order staying the execution of the committee's order, pending the determination of the appeal.

[9] The grounds of appeal are that:

> "(a) The Council erred in finding that there was a prima facie case requiring the Appellant to answer to any allegations.
>
> (b) Notice of the hearing was served on the Appellant in less than the twenty one day requirement pursuant to section 5 of the Fourth schedule of the Legal Profession Act.
>
> (c) The Council erred in finding that the Appellant had failed to provide his client with timely information on the progress of the matter.
>
> (d) The Council erred in finding that the Appellant did not handle his client's matter expeditiously pursuant to the Legal Profession (Canons of Ethics) Rules paragraph IV (r).
>
> (e) The Council erred in law and fact in finding that the Appellant did not reasonable [sic] provide his client with information relating to the progress of his case with due expedition pursuant to the Legal Profession (Canons of Ethics) Rules paragraph IV (r)."

**The relevant provisions**

[10] Canon IV(r) of the Legal Profession (Canons of Professional Ethics) Rules under which Mr Britton brought both grounds of the complaint states that:

> "(r) An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably required by the client provide him with all information as to the progress of the client's business with due expedition."

**Issues**

[11] This appeal might be resolved by the consideration of four issues:

(i) whether the committee erred in finding that there was a *prima facie* case against the appellant (ground (a));

(ii) whether service of notice of the hearing(s) was deficient (ground (b));

(iii) whether the committee erred in finding that the appellant did not handle his client's matter with due expedition (ground (d)); and

(iv) whether the committee erred in finding that the appellant had failed to provide his client with timely information when reasonably requested to do so (grounds (c) and (e)).

**Issue (i) whether the committee erred in finding that there was a prima facie case**

**Submissions**

**For the appellant**

[12] The appellant submitted in summary that Mr Britton had no genuine grievance, as his case lacked substance: Mr Britton's case is more on the side of being vexatious or trivial. It was further submitted that this should have been apparent to the committee, as the appellant had provided it with a letter dated 3 June 2011, in which he had set out the procedural history of the matter and attached copies of relevant documents. The appellant further submitted that these documents provided a sufficient basis for the committee to have drawn the inference that he was not guilty of professional misconduct. There was a clear inference to be gleaned from the documents that he had done a great deal of work in Mr Britton's matter. In the light of this, the appellant further submitted, the committee erred in finding that there was a *prima facie* case worthy of being tried. He cited and relied on the case of **Arsenal Football Club Limited v Smith (Valuation Officer) and Another** [1979] AC 1, which considers the meaning of the term "aggrieved person". The appellant also submitted that the question of whether or not a grievance existed could only be decided after an investigation was conducted and none was carried out in this case.

[13] The appellant also cited the committee's decision in the case of **Marnol Limited and Noel Jumpp v Herbert Grant**, Complaint No 11/2003, decided 17 January 2003. He submitted that that case bears a factual similarity to his matter before the committee and yet, in contrast to his matter, on the major issues there was no finding

of professional misconduct against the attorney-at-law in that matter. The appellant submitted that his conduct in relation to Mr Britton's matter did not reach the level of professional misconduct as such a finding required proof of inexcusable or deplorable negligence.

**For the respondent**

[14] On behalf of the respondent, Mrs Kitson QC submitted that the question of what constitutes a prima facie case had been decided by this court in the case of **McCalla v Disciplinary Committee of the General Legal Council** (1994) 49 WIR 213. That case, she argued, considered the meaning of the phrase "prima facie case" as it was used in rule 4 of the Legal Profession (Disciplinary Proceedings) Rules as set out in the fourth schedule of the Legal Profession Act. She submitted that, in essence, that case decided that it meant: "a case serious enough to require a response from the attorney". In further support of her submission that a *prima facie* case had properly been made out before the committee, Mrs Kitson quoted dicta from Rattray P and Wright JA, the former of whom said as follows at page 230 of the judgment:

> "If the matter is trivial or frivolous there does not exist 'a prima facie case' for the committee to proceed to trial. Frivolous allegations may be made against attorneys at law, the frivolity of which is evident and this provides for the committee a process by which it can weed out insubstantial complaints and clear the list of matters unmeritorious.
>
> The provision is there for the protection of the attorney at law as well as the convenience of the committee…"

[15] Mrs Kitson also submitted in relation to the case of **Marnol and Jumpp v Grant**, that there are different canons requiring different types of proof of culpability.

For the most part, the canons in the two cases were different. In this case there had been sufficient evidence before the committee to have established the case against the appellant and so the case of **Marnol and Jumpp v Grant** was distinguishable. She sought to stress as well that no evidence had been provided to the committee to support the contentions that the appellant made before this court: that is, that apart from the letter of 3 June 2011 and the documents attached, there was no other documents or evidence addressing the particular issues before it.

**Discussion**

[16] In the case of **McCalla v Disciplinary Committee of the General Legal Council**, Wright JA (in a passage that Mrs Kitson also cited to the court) at page 249, opined as follows:

> "In my judgment, the provision...for the dismissal of the complaint where no prima facie case is shown simply indicates the meaning in the rule which is a case serious enough to require a response from the attorney. It would be ridiculous to summon an attorney to answer charges which are frivolous or misconceived. In such cases the prima facie case required by the rule would not have been shown."

[17] Keeping this dictum and that of Rattray P in mind, and considering that there was before the committee at the hearing, oral and affidavit evidence from Mr Britton alleging breaches of the relevant canon, it is apparent that the instant case was one "serious enough to require a response from the attorney". (The appellant in the case of **McCalla v The General Legal Council** appealed to the Privy Council. His appeal was allowed in part in a case that is reported at (1998) 53 WIR 272. However, that decision does not affect the validity of these dicta referred to on this issue).

[18] Although the appellant had sent to the committee the letter dated 3 June 2011 with documents attached seeking to explain the delay, there were issues still needing to be addressed at the hearing, which was held in default of the appellant's attending on several dates. The appellant's absence meant that there was no evidence from him for the committee to have considered in coming to its decision.

[19] The appellant, in his written submissions, at paragraph 3, also mentioned a letter that Mr Britton is said to have written to the Honourable Chief Justice, acknowledging that the delays in resolving his matter were due to inefficiencies in the operation of the court system and not to the appellant. There is no indication, however, that such a letter was ever sent to the committee or produced to it during the course of the hearing. Neither was it produced to this court. Additionally, in the affidavits that were attached to the letter of 3 June 2011, no mention is made of any of the challenges the appellant informed the court that he faced in obtaining for Mr Britton the fruits of his judgment.

[20] It seems to me in all the circumstances that it cannot be accepted that there was no *prima facie* case against the appellant. It is not beyond the bounds of possibility, as well, that, had the appellant attended the hearing and given evidence, the outcome could conceivably have been different. However, the appellant's contention in ground (b) of the notice and grounds of appeal is that he was not properly served and so this observation at this stage (as to a possibly different outcome) might be an appropriate point from which to move to a consideration of that ground and issue.

**Issue (ii): whether service of notice of the hearing(s) was deficient**

**Submissions**

**For the appellant**

[21] The appellant contended that notice was not served on him within the 21 days required by the relevant rule - that is, rule 5 of the Legal Profession (Disciplinary Proceedings) Rules. As a result, he argued, he was denied an opportunity to be heard.

[22] The appellant sought to rely on the case of **Ernest Davis v The General Legal Council** [2014] JMCA Civ 20. (That case was commendably brought to the court's attention by Mrs Kitson, although being, on the face of it, supportive of the appellant's case). The principal finding in that case that is of relevance to this appeal is this: the time-honoured and accepted method of proving service by registered mail is by the exhibiting of a "certificate of posting" issued by the postal service. The exhibiting of a list of names of persons to which registered mail has purportedly been sent, will not suffice.

**For the respondent**

[23] For the respondent, it was submitted that the appellant was given notice in excess of the 21 days specified in the Rules. It was further submitted that the appellant was given adequate notice of both hearing dates - that is, 6 April 2013 and 15 November 2014 in that the notice was mailed 36 days before the first hearing and at least 42 days before the second. It was pointed out as well that the appellant was served with the notes of evidence almost one year and five months before the second hearing date and yet still failed to appear. Mrs Kitson stressed in her submissions that

there is a duty on an attorney-at-law who is summoned, to "ensure his attendance" pursuant to canon I(f) of the Legal Profession (Canons of Professional Ethics) Rules. It was further submitted that the committee was entitled upon proof of service, to have proceeded with the hearing, as it did. She submitted, in addition, that failure to attend a disciplinary hearing when summoned to do so could itself be the subject of a separate complaint (referring to a previous decision of the committee in the matter of **Thomas Rose v Sean Kinghorn**, Complaint No 173/2010 decided on 12 January 2013).

[24] Mrs Kitson also pointed out to the court that, instead of appealing, the appellant could have sought relief from the committee in order to answer the allegations, pursuant to rule 9 of the Fourth Schedule of the Act.

[25] It was further submitted that the 21-day notice period is not mandatory but might be extended or abridged by the committee pursuant to rule 22 of the Legal Profession (Disciplinary Proceedings) Rules.

[26] In relation to the case of **Ernest Davis v The General Legal Council**, Mrs Kitson sought to distinguish it. She did so by stressing what she argued were the different facts and circumstances between that case and this appeal. The main difference that she sought to convince the court to accept is that in that case, a decision was arrived at by the committee on the basis of the hearing which the appellant did not attend and for which the committee did not provide proof of service of the notice by the accepted method. In this appeal on the other hand (she argued) there was at least one hearing to which the appellant was summoned and for which the

committee had provided the accepted proof of service; yet the appellant had failed to attend.

**Discussion**

[27] The main difference between the case of **Ernest Davis v The General Legal Council** and this appeal, that Mrs Kitson emphasized before us, is, to my mind, an important one. It means that, even if we should accept the decision in the case of **Ernest Davis v The General Legal Council** as binding on this court (which it is) and further accept that there was no proper proof of service in respect of the first hearing on 6 April 2013; there are other matters that ought to be considered. For one, the proceedings were not completed and no adverse finding against the appellant was made on that first date or based on that hearing alone. On that date, the proceedings were adjourned after the evidence of Mr Britton was taken. A second consideration is that there are two other dates and events that are also worthy of examination. These are: (i) the mailing of the notes of evidence to the appellant on 21 June 2013; and (ii) the mailing of the notice of the hearing on 15 November 2014.

[28] In relation to the notes of evidence, there is, at page 7 of the supplemental record of appeal, a letter dated 21 June 2013 under the signature of the committee's secretary, which purports to enclose for the appellant, the notes of evidence of the proceedings of 6 April 2013. One thing that might be said of this on the appellant's behalf is that there is no proof of service or mailing of this letter. There are, however, two matters that might be mentioned in the committee's favour about the said letter. They are that: (i) the letter was sent to the same address as that to which the

certificate of posting for the second hearing was sent; and (ii) there is no requirement under the rules or canons for such a letter to be sent by registered mail.

[29] The relevant rules on this point are rules 5 and 21 of the Legal Profession (Disciplinary Proceedings) Rules. They read as follows:

> "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, and shall also serve on the attorney a copy of the application and affidavit. The notice shall not be less than a twenty-one days' notice.
> ...
>
> 21. Service of any notice or documents required by these Rules may be effected by registered letter addressed to the last known place of abode or business of the person to be served, and proof that such letter was so addressed and posted shall be proof of service. Any notice or document required to be given or signed by the secretary may be given or signed by him or by any person duly authorized by the Committee in that behalf."

[30] From a perusal of the rules, it is not apparent that notes of evidence are documents "required by these Rules" and so would be expected to be served by registered mail.

[31] The significance, however, of, especially, rule 21 comes into sharper focus when the mailing of the notice for the second hearing, held on 15 November 2014, is considered. Pages 5 and 6 of the supplemental record of appeal indicate that the notice was dated 25 September 2014 (page 5) and that the certificate of posting (page 6) appears to be stamped 2 October 2014 – that is some 45 days before the hearing. In light of this, it is fair to conclude that the requirements as to time were more than

doubly satisfied with the serving of this notice. The address to which it was sent is the same as that appearing at the foot of the appellant's documents filed in this court. There is also no evidence of the notice having been returned unclaimed or any other factor that might detract from the view that the service complied with the rules in all respects. Yet, the appellant still failed to attend the hearing. In these circumstances in which an adverse finding was made by the committee only after proper service of this notice on the appellant, the appellant's complaint on this ground must fail.

[32] We may now go on to consider the third issue.

**Issue (iii) whether the committee erred in finding that the appellant did not handle his client's matter with due expedition**

[33] It will be of assistance to set out a timeline of the steps that the appellant took in this matter - especially after the obtaining of the judgment - as follows:

| **Action** | **Date** |
|---|---|
| 1. Appellant retained | 10 November 2003 |
| 2. Action filed | February 2004 |
| 3. Damages awarded on assessment | 4 April 2008 |
| 4. Letter from attorney-at-law for security company to the appellant | 23 January 2009 (date on letter) |

| | |
|---|---|
| 5. Formal order re damages served on security company | 29 January 2009 |
| 6. Application for writ of seizure and sale filed | 29 May 2009 |
| 7. Requisition issued | 27 July 2009 |
| 8. Amended application for writ of seizure and sale filed | 4 March 2010 |
| 9. Requisition issued | 8 July 2010 |
| 10. Amended application for writ of seizure and sale filed | 23 July 2010 |
| 11. Requisition issued | 4 October 2010 |
| 12. Mr Britton files complaint | 23 February 2011 |
| 13. Amended application for writ of seizure and sale filed | 13 May 2011 |

[34] From the foregoing, a number of observations might be made, for example:

i. More than a year passed between the award of damages and the filing of the first application for the writ of seizure and sale. (April 2008 to May 2009 or items 3 and 6 on the list).

ii. Almost eight months passed between the issuing of the first, requisition and the taking of steps to address it (27 July 2009 to 4 March 2010 or items 7 and 8 of the list).

iii. Four months passed from the issuing of the last requisition, with no action, until Mr Britton filed his complaint (from 4 October 2010 to 23 February 2011 or items 11 and 12 of the list).

iv. Some seven months passed between the issuing of the last requisition and when the appellant acted to address it (from 4 October 2010 to 13 May 2011, or items 11 and 13 of the list).

v. From the written decision of the committee, up to the time of the hearing in 2013 it appears that the judgment was still not satisfied and the committee, had no evidence of any other steps taken to resolve the matter.

[35] Interestingly enough, at paragraph 2 of the appellant's written submissions filed on 31 December 2015, the appellant could reasonably be regarded as somewhat admitting to dilatoriness in the matter, as he states as follows:

> "Mind you, there were some excessive delays in getting the order signed for the sale and seizure of goods."

[36] However, the appellant did not admit to the delay in the matter being attributable to him; but sought to lay the blame at the door of the Supreme Court Registry (as is indicated in paragraphs 12-17 of his written submissions).

[37] In my view, the periods of inaction after the award of damages to the filing of the application for the writ of seizure and sale and the slow steps taken to address the requisitions, form a sufficient basis for the conclusion at which the committee arrived. In addition to the inaction, there was also before the committee no evidence or explanation for it to have considered concerning the problems that the appellant submitted to this court that he experienced in advancing the matter. For example he contended at paragraphs 11 and 12 of his written submissions that, in response to a particular requisition on an application for the writ of seizure and sale, amended documents were filed on 13 May 2011; but the order itself was not signed until 28 February 2012. No evidence of any challenges encountered, leading to this instance of delay was provided to the committee, however. Additionally, even if we accept, as the appellant sought to emphasize, that a fair amount of work was done on Mr Britton's behalf, that in itself would not be enough to counter the allegations against him, as the focus of the relevant provision is not just the doing of work; but the doing of work with "all due expedition". In light of this, it cannot be said that the committee was plainly wrong in its finding that the appellant did not handle the client's matter with due expedition. The committee's finding, therefore, ought not to be disturbed and so the ground of appeal related to this issue must also fail.

**Issue (iv) whether the committee erred in finding that the appellant had failed to provide his client with timely information when reasonably requested to do so**

**Submissions**

**For the appellant**

[38] In respect of this ground, the appellant submitted, in a nutshell, that Mr Britton had been kept abreast of the progress of his matter and that the committee had therefore erred in coming to such a finding.

**For the respondent**

[39] For the respondent, it was contended that, based on Mr Britton's affidavit of complaint and his *viva voce* evidence, the complaint had been made out and there had been sufficient material before the committee for it to have arrived at its finding.

**Discussion**

[40] The appellant's failure to have attended and participated in the proceedings meant that the committee had only the evidence of one of the parties in the matter to consider, apart from the appellant's letter of 3 June 2011 (with documents attached), which letter is not evidence. But even that letter might not have dissuaded the committee from accepting the evidence of Mr Britton, the letter having been framed as it was. For example, the appellant stated in the letter:

> "My office has informed me that on numerous occasions they have communicated to Mr. Britton the difficulty that they have been having with the court and that they are doing everything [sic] in their power to have the matter expedited."

[41] Thus framed, the letter makes the appellant appear not even to have first-hand knowledge of the matter. As such, it would hardly have inspired confidence in the committee to prefer that assertion over the evidence of Mr Britton.

[42] The appellant had also submitted that, from the documents that he had submitted with his letter dated 3 June 2011, the committee could and should have drawn the inference that there was no fault on his part. As a result of the appellant's absence from the disciplinary proceedings, however, the committee was left with only one account or evidence from only one side, Mr Britton's evidence standing largely unchallenged. There was sufficient evidence before the committee for it to have concluded as it did that the appellant was also in breach of the requirement to provide all information to Mr Britton about the progress of the matter in a timely manner when reasonably required to do so.

[43] Having found that the committee cannot be faulted for finding that the appellant failed to deal with the client's business with all due expedition and to provide the client with all information when reasonably requested to do so, I cannot see my way to agreeing with the appellant's contention that the committee erred in finding him guilty of professional misconduct. Therefore, the ground of appeal concerning this issue also fails.

**Re-hearing or appeal**

**Submissions**

[44] Mrs Kitson, for the respondent, submitted that the appellant, instead of appealing, might have been better served by applying to the committee for a re-hearing pursuant to rule 9 of the Legal Profession (Disciplinary Proceedings) Rules.

[45] The appellant, on the other hand, submitted that the avenue provided by rule 9 was an option available to him and was not a mandatory course to pursue before an appeal could be filed.

**Discussion**

[46] Rule 9 of the Legal Profession (Disciplinary Proceedings) Rules provides as follows:

> "9. Where the Committee have proceeded in the absence of either or both of the parties any such party may, within one calendar month from the pronouncement of the findings and order, apply to the Committee for a rehearing upon giving notice to the other party and to the Secretary. The Committee, if satisfied that it is just that the case should be reheard, may grant the application upon such terms as to costs or otherwise, as they think fit. Upon such rehearing the Committee may amend, vary, add to or reverse their findings or order pronounced upon such previous hearing."

[47] In the light of the previous discussion and conclusion that the service on the appellant of the second notice was in compliance with the relevant rule, it would perhaps have been difficult for the appellant to have satisfied the committee that, in the words of rule 9: "...it is just that the case should be reheard...". However, be that as it may, a reading of the rule shows that it imposes no condition or requirement that it be

resorted to first before an appeal is pursued. In my view, therefore, the failure of the appellant to first apply to the committee for a re-hearing does not affect his right to bring this appeal.

**Conclusion**

[48] Had the appellant not been absent from the proceedings after he was properly served with notice of it, and had he participated in those proceedings, it is not impossible that the outcome might have been different. However, with the appellant's absence from the proceedings, the committee was left with the mainly unchallenged account of Mr Britton, whose evidence it was entitled to accept. The committee had before it enough evidence to ground the two limbs of the complaint and cannot be said to have been plainly or palpably wrong or to have erred at all in making the findings that it did. In the result, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

[49] Finally, it must be said that it behoves attorneys-at-law who are properly served with notices to attend hearings of the committee to make every effort to ensure that they in fact do so. Their absence from such hearings can only be to their detriment in respect of the hearing itself and could lead to further disciplinary proceedings being brought against them.

**P WILLIAMS JA**

[50] I have read the draft judgment of F Williams JA and agree with his reasoning and conclusion.

**McDONALD-BISHOP JA**

**ORDER**

i. The appeal is dismissed.

ii. The decision of the Disciplinary Committee of the General Legal Council dated 15 November 2014 is affirmed.

iii. The stay of execution granted on 31 January 2017 is discharged.

iv. Costs of the appeal to the committee to be agreed or taxed.