[2017] JMCA App 43

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 6/2016

APPLICATION NO 191/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**OSWEST SENIOR-SMITH**	**APPLICANT**
AND	**GENERAL LEGAL COUNCIL**	**1ST RESPONDENT**
AND	**LISA PALMER HAMILTON**	**2ND RESPONDENT**

Bert Samuels, Mrs Denise Senior-Smith and Miss Bianca Samuels instructed by Oswest Senior-Smith & Co for the applicant

B St Michael Hylton QC and Miss Melissa McLeod instructed by Hylton Powell for the 1st respondent

John Vassell QC and Mrs Trudy-Ann Dixon-Frith instructed by DunnCox for the 2nd respondent

28, 29 and 30 November 2017

PHILLIPS JA

[1] On 24 October 2017, Oswest Senior-Smith (the applicant) filed a notice of application to adduce fresh evidence, namely the defence of the Gleaner Company (Media) Limited, being the 1st defendant in Claim No 2017HCV00031 filed on 11 May 2017 in the Supreme Court of Judicature of Jamaica.

[2] The grounds of the application were as follows:

1. The decision of the Disciplinary Committee of the General Legal Council (the Committee) was delivered on 24 September 2016, and the above defence was, as indicated, filed on 11 May 2017. It was served on 12 May 2017. The defence could not therefore have been obtained with reasonable diligence before the delivery of the decision of the Committee.
2. The defence is such that if this application was granted, it would have an important influence on the outcome of the appeal.
3. The defence is apparently credible.
4. Pursuant to rule 1.1(10) of the Court of Appeal Rules 2002 (CAR), the overriding objective of the rules is to deal with cases justly.
5. The overriding objective would not be furthered if the defence was not permitted to be adduced as fresh evidence.
6. The applicant would be severely prejudiced if this order was not made.
7. Fairness dictates and requires that this application be granted.

[3] The notice was accompanied by an affidavit filed by the applicant on 24 October 2017. In that affidavit, he indicated that he had lodged a complaint against Mrs Lisa Palmer Hamilton (the 2nd respondent) because of her having falsely and maliciously told G Smith J in the ongoing jury trial of **R v Bertram Clarke et al** that he had assaulted her.

[4] The following documents were before the Committee when it made its decision on 24 September 2016:

1. letter dated 2 February 2016 from the applicant to the Committee;
2. letter dated 24 March 2016 from the 2nd respondent to the Committee with the following documents attached:
    (i) relevant pages of the transcript in relation to the proceedings on 1 and 2 February 2016;
    (ii) the statement of Malike Kellier dated 24 March 2016;
3. letter dated 26 May 2016 from the applicant to the Committee;
4. the form of application against an the 2nd respondent dated 29 July 2016;
5. the applicant's affidavit in support dated 29 July 2016; and

6. the affidavit of 2nd respondent sworn to on 25 August 2016.

[5] The Committee made its order on 24 September 2016. It stated that:

(i) upon the application dated 29 July 2016 under section 12(1)(a) of the Legal Profession Act (the LPA);

(ii) upon having perused and considered the form of application filed by the applicant against the 2nd respondent and the affidavit evidence along with documentary evidence submitted by the parties; and

(iii) upon due consideration of the decision of the members of the Committee,

the complaint had not been made out against the 2nd respondent and it also unanimously ordered, pursuant to section 12(4) of the LPA, that the application be dismissed.

[6] Pursuant to section 16 of the LPA, an appeal from any order made by the Committee is by way of a hearing at the instance of the attorney or the person aggrieved to whom the application relates. The applicant filed his notice of appeal on 17 November 2016.

[7] In the application for fresh evidence before us, counsel for the applicant provided speaking notes. He referred to rules 1.1(10) and 1.7(2)(n) of CAR relying on the court exercising its powers to further the overriding objective for the purpose of

managing the appeal by dealing with cases justly. He referred to and relied on the principles applicable to the admission of fresh evidence on appeal in a case out of this court, **Russell Holdings Limited v L&W Enterprise Inc and Another** [2016] JMCA Civ 39, which cited and endorsed the well known decision of **Ladd v Marshall** [1954] 3 All ER 745, wherein three requirements were outlined:

> "(1) 'It must be shown that the evidence could not have been obtained with reasonable diligence at the trial'
>
> (2) '...the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive'
>
> (3) '...the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible'."

[8] He submitted that the applicant had satisfied the three pronged test, in that, the defence was not available at the time the Committee made its decision as it had been filed seven months subsequent, and he had not been given any notice as to when the decision would have been made and so he was not aware of the time it was going to be made.

[9] Queen's Counsel for the 1st respondent also relied on the principles set out in **Ladd v Marshall** and submitted that the failure to satisfy any of the criteria stated therein was fatal to the application. Whilst accepting that the defence could not have been obtained with reasonable diligence since it had been filed after the Committee had made its decision, Queen's Counsel submitted that the defence was not evidence, it was merely a statement of a party's case and an indication of the evidence he proposed to adduce. It had no probative value. Additionally, although accompanied by a statement

of truth, it was not supported by any evidence, could not be considered "credible evidence" and would not have had any impact on the outcome of the Committee's decision.

[10] Queen's Counsel for the 2nd respondent, in speaking notes, accepted that **Russell Holdings** had decided that the **Ladd v Marshall** criteria did not apply in interlocutory appeals and that a less rigorous approach should apply in such cases. He however pointed out that this court in **Desmond Greenfield v Eral Barton** [2013] JMCA Civ 5, without argument on the issue, applied those principles in what was an interlocutory appeal. Queen's Counsel relied on paragraph [42] of **Russell Holdings** which endorsed **Canada Trust Co and Others v Stolzenberg and Others (No 4)** (1998) Times, 14 May and indicated that, in any event, the applicant had not met that threshold, in that the applicant was aware of the 2nd respondent's position before the Committee made its order and could have put evidence before it. The defence would not have been of any significant benefit to the Committee as it was a pleading and as has been said in one case "was merely a pious hope of what the party hopes to prove at the trial". He further submitted that the endorsement of the certificate of truth had not changed the purpose or effect of the pleading and the certification would not elevate the document in a manner which would assist the Committee in its determination. Queen's Counsel submitted that there was argument to support the position that the decision of the Committee could be either final or interlocutory, but in any event, even if the relaxed approach identified in **Russell Holdings** applied to the fresh evidence application, the instant case would not have met the threshold.

[11] In our view, the issues in relation to this application are:

1. What are the rules applicable to an application to adduce fresh evidence?
2. Was the decision of the Committee an interlocutory or final order?
3. Depending on each case, what principles would apply?

[12] There is no question that the reception of fresh evidence on appeal in relation to a matter which was determined on the merits in a trial in the court below are governed by the principles set out in **Ladd v Marshall**. These principles however do not apply to interlocutory proceedings but apply strictly to trials and hearings on the merits (see **Canada Trust Co**). In those proceedings, the Court of Appeal appears to have a more general discretion for the admission of fresh evidence. This court in **Russell Holdings**, adopting the dicta in **Canada Trust Co** stated at paragraph [42] that:

> "The court in **Canada Trust Company** seems to have taken the view that in the exercise of its "general discretion" the court should consider factors such as; the nature of the interlocutory application, the reason why the evidence was not adduced in the court below, the opportunity provided for putting in evidence in the court below and the nature of the evidence sought to be put in."

[13] In **Canada Trust Co** however, the court was not making any pronouncement that all interlocutory appeals are to be dealt with in any particular way as circumstances differ greatly in interlocutory matters and therefore, setting rigid conditions in the exercise of the discretion applicable to all interlocutory appeals would not be the proper

approach. The court made it clear also that it would be wrong to encourage any notion that a party could have one round before the judge at first instance on the evidence as it then was, and hope to put in fresh evidence in the Court of Appeal if that failed. That fresh evidence would not be admitted.

[14] The regime before the Committee is specific and statutory. Upon the examination of the documents before it, and subsequent to 42 days of service of the form of application and affidavit of the complainant on the respondent attorney-at-law, and having considered the attorney's response, if any, and all information before it, the Committee shall, if a prima facie case is shown, proceed in accordance with rule 5 of the Legal Profession (Disciplinary Proceedings) Rules to fix a date for the hearing of the matter. If no prima facie case is shown, the Committee may dismiss the application without requiring the attorney to answer the allegation. It could be argued that if the Committee finds that there is no prima facie case, then the proceedings would be a final proceeding. It could also be argued that if the Committee finds a prima facie case, the application would proceed to a hearing and therefore the application could be considered interlocutory.

[15] In relation to this case, we do not think it is necessary in the light of the authorities, that we have to make a decision in relation to the debate at this stage.

[16] The defence attached to the affidavit of the applicant filed 24 October 2017, was clearly not available prior to the decision of the Committee. It has now been attached to an affidavit of the applicant in similar vein to that of the statement of Malike Kellier

which was attached to the affidavit of the 2nd respondent before the Committee for its determination on 24 September 2016. The defence of the Gleaner was verified by a certificate of truth. The defence was therefore stating that the facts pleaded were not false. We are of the view that some value must be accorded to this certification. Indeed, in part 22 of the Civil Procedure ("the white book"), 2003, volume 1, paragraph 22.0.2 it was stated "in certain circumstances, a statement of case may be relied on as evidence". Perhaps this may be apt at the prima facie stage of a Committee hearing.

[17] The issue in our view that the Committee would have considered relevant would have related to whether certain words were used on 1 February 2016. Was it that "he assaulted me" or "I felt that I was assaulted". To assist in their deliberation as to whether a prima facie case could have been established in respect of whether professional misconduct had occurred, it is arguable as to whether the defence could have assisted the Committee in that regard.

[18] There is no denying that as the reporter Miss Barbara Gayle was present in the court, the words used in the article could be capable of belief.

[19] In all these circumstances, we would therefore grant the application to adduce the applicant's affidavit filed 24 October 2017, with the defence filed to Claim No 2017HCV00031 as fresh evidence in the appeal. Costs of this application reserved for the determination of the appeal.