

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 13/2008

BEFORE: THE HON. MR. JUSTICE SMITH, J. A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.,

BETWEEN BRIAN ALEXANDER APPELLANT
A N D LAND SURVEYORS BOARD OF JAMAICA RESPONDENT

Lord Gifford Q.C., John Graham and Glenroy Melish instructed by John G. Graham & Co. for the appellant

Miss Amina Maknoon instructed by the Director of State Proceedings for the Respondent

February 16, 17, 18 and July 2, 2009

SMITH, J.A.:

1. The appellant, Mr. Brian Alexander has been a Commissioned Land Surveyor since March 14, 1977. The respondent, the Land Surveyors Board (the Board) is constituted by section 10(1) of the Land Surveyors Act (the Act). It consists of the Director of Surveys, the Registrar of Titles, three practising surveyors to be appointed by the Land Surveyors' Association of Jamaica, a life member of the Land Surveyors' Association, a representative of the Faculty of the Built Environment of the University of Technology and a member of the public appointed by the Minister. Section 10(3) gives the Board power to regulate its own procedure.

Background facts

2. On July 28 1999, Mrs. Erica Gaynair-Shilletto (the complainant) lodged a complaint with the Land Surveyors' Disciplinary Committee against the appellant. The complainant alleged professional misconduct and negligence against the appellant claiming that he had failed to undertake certain surveying work in relation to land known as Lot 283 Duncan Bay, Trelawny registered at Volume 1278 Folio 125 of the Register Book of Titles.

3. The Disciplinary Committee found the appellant guilty of professional misconduct and professional negligence, and pursuant to section 21 (4) of the Act reported its findings of fact to the Board. By letter dated December 7, 2001, the Board ordered that the appellant be suspended from practice for two years in respect of each charge and that the sentences should run consecutively.

4. The appellant pursuant to section 25 of the Act appealed the decision of the Board. The Court of Appeal on September 26, 2006 allowed his appeal and remitted the matter to the Board for the appellant to be afforded a hearing.

5. The Board granted the appellant a hearing and on January 30, 2008 ordered that the two year suspension from practice on each charge should run concurrently instead of consecutively.

6. This appeal is from the January 30, 2008 order of the Board.

Grounds of Appeal

7. On February 8, 2005, nine grounds of appeal were filed:

"(1) That the Board erred in their findings and/or conclusion at the recommendation of the Disciplinary Committee that the appellant was guilty of professional misconduct and professional negligence in that the findings are unreasonable and/or are not supported by the evidence.

(2) That the Board failed to re-examine the basis of the suspension which it ordered in 2001 but instead only chose to vary the terms of the said suspension.

(3) That the Board failed to take into account sufficiently or at all the evidence of the character witnesses adduced by the appellant.

(4) That the order of the Land Surveyors Board whereby the appellant is suspended from practice as a Commissioned Land Surveyor for two years is harsh.

(5) That the Board failed to take sufficiently into account or at all the fact that the appellant had hitherto had an impeccable record.

(6) That the Board in considering what would be an appropriate punishment failed to take into account the substantial financial

penalty that suspension from practice would involve for the appellant.

(7) That the Surveyors Board failed to take into account the mitigating factors that existed.

(8) That the standard of proof employed by the Disciplinary Committee is incorrect.

(9) Both the Surveyors Board and the Disciplinary Committee failed to give reasons or adequate reasons for the decision in the circumstances."

8. On October 27, 2008, the appellant filed two supplemental grounds of appeal:

(a) That the Respondent erred in not affording the appellant a hearing before a differently constituted panel of the Disciplinary Committee.

(b) That the Respondent erred in construing the decision of the Court of Appeal to mean that a meeting should be held to consider mitigating circumstances affecting the punishment to be meted out to the appellant.

9. **Ground 1**

As I understand it, the complaint in this ground is that the Board erred in finding that the appellant was guilty of professional misconduct

and professional negligence based on the recommendation of the Disciplinary Committee.

10. The findings and recommendation of the Committee are set out in their report to the Board dated May 12, 2001:

"The facts of the case are as outlined below:

- (1) Mrs. Gaynair-Shilletto contracted Mr. Alexander's services to prepare Surveyors report of Lot 283 Duncans Bay, Trelawny, registered at Vol. 1278 Fol. 125.
- 2) Mr. Alexander prepared the report on May 22 1996, indicating that the pegs on ground were in order.
- 3) Two receipts dated May 22, 1996 and June 11, 1996 for the amount of \$4,000.00 each, were issued to Mrs. Gaynair-Shilletto by Mr. Neville Shirley for the Report mentioned above.
- 4) On February 27, 1998, Mrs. Gaynair-Shilletto contacted Mr. Alexander to survey the said lot in order that she could properly fence the lot and she paid him \$11,680.00.
- 5) Mr. Alexander prepared a Surveyors Report dated March 16, 1998, indicating that the eastern and western boundaries were 10.6 feet and 13.1 feet too short respectively, according to old marks found on the ground. He recommended that a resurvey be done in order to facilitate issue of a new title.
- 6) Mrs. Gaynair-Shilletto insisted that Mr. Alexander do the resurvey as he was at fault in not discovering the discrepancies with the first Report. Mr. Alexander refused to do the survey without being compensated with \$8,953.75.

- 7) After many complaints about the charges for resurvey from Mrs. Gaynair-Shillette and inquiries from her Attorney-At-Law Dawn Satterswaite, Mr. Alexander revisited the site and found the original correct pegs and prepared a report indicating same on December 18, 1998.
- 8) By this time, Mrs. Gaynair-Shillette had fenced the lot in accordance with the incorrect pegs and started construction but her pump house was now encroaching on Lot 284 and half of her soak-away pit was also on Lot 284.
- 9) Mrs. Gaynair-Shillette requested \$30,000.00 from Mr. Alexander to help defray the cost of rectifying the existing problems, but he refused.

At the hearing, Mr. Alexander stated that Mr. Neville Shirley acted as his agent. He also stated that he and Mr. Neville Shirley visited the site on May 22, 1996 and found old pegs and replaced rusting pegs with new pegs.

Mr. Alexander, when questioned about his report of March 16, 1996, admitted that he should have shown the positions of the correct pegs. He also admitted that the lot should have been repegged in accordance with the deposited plans as there were no physical boundaries on the ground and a resurvey should not have been recommended. He also admitted that if he had done what he had been contracted to do in March 1998, there would have been no problem of encroachment in December 1998.

When Mr. Alexander was asked why he refused to assist his client with defraying the cost of rectifying the encroachment and wrong fencing, he said that he didn't think he was liable.

The Disciplinary Committee found that Mr. Alexander was guilty of both professional misconduct and negligence. On the charges of

professional misconduct, they were highlighted by the following facts:

a) Collecting money to repeg the lot and not completing the assignment in a timely manner, causing the client to incorrectly fence the lot and to encroach on Lot 284 with her soak-away pit and pump house.

b) Wrongly advising his client to do a resurvey when no physical boundary on ground departed from the registered boundary.

c) Altering the report of March 16, 1998 to show the positions of correct pegs and their misorientation when submitting documents to the Grievance and Complaints Committee of the LS.A.J.

d) We are of the opinion that he misled the Committee and misrepresented facts. For example failing to show an incorrect fence on his report of December 18, 1998 and stating to the Committee that the lot was unfenced at that time.

On the charges of professional negligence, they were highlighted by the following facts:

a) In his report of May 22, 1996, the Volume was incorrectly stated, no mention was made whether the restrictive covenants were complied with, and the type of physical boundaries to which the report refers were not stated.

b) Not showing on his report of March 16, 1998, the position of the correct pegs, and the fact that the incorrect pegs were 20 feet out of position.

c) Not searching for the correct pegs on March 16, 1998 as he was contracted to do

and identifying them on ground or replacing them if they were missing.

d) Not showing the incorrect fence or the encroachment of the pump house and soak-away pit on his report of December 18, 1998.

The Committee was of the opinion that because of the many blunders Mr. Alexander made on this job, he should have jumped at the opportunity to settle with the client for a mere \$30,000.00. We also felt that he showed no remorse for his actions and lacked an understanding of his responsibility to his client. We felt he would therefore repeat these actions under similar circumstances with another client.

The Committee therefore unanimously recommends that Mr. Brian Alexander's commission be suspend (sic) for a period of four years. "

11. It is necessary for this and other grounds to refer to the constitution and functions of the Board and the Disciplinary Committee. I have already referred to the constitution of the Board. The constitution of the Disciplinary Committee is under section 20 of the Act. Subsection (1) thereof states:

"20—(1) There shall be constituted a Land Surveyors Disciplinary Committee consisting of five practising surveyors who are holders of valid practising certificates and have not less than **five** years practice in the profession of land surveying, appointed by the Minister on the nomination of the Land Surveyors Association, so, however, that a member of the Board shall not be eligible for appointment to the Committee."

It should be observed that both the Board and the Disciplinary Committee are comprised of qualified and experienced surveyors. When it comes to

questions of professional misconduct or negligence their views are to be given the greatest weight.

The powers and functions of the Committee are set out in section 21 of the Act which provides:

“ 21.—(1) The Committee shall enquire into and hear all charges of professional misconduct, incompetence or negligence against a surveyor, and all charges against a student surveyor for breach of any of his articles of attachment (if he is a trainee) or of conduct which, if such student surveyor were a surveyor, would amount to professional misconduct, incompetence or negligence, and may for the purposes of such inquiry summon the surveyor or student surveyor against whom the charges are made to appear before it and may hear such witnesses, upon oath or otherwise, as it may consider necessary.

(2) The Committee shall—

(a) carry out its functions in accordance with the procedures set out in the Second Schedule;

(b) inform the Board in writing of any complaint received against a surveyor or student surveyor, within thirty days of receipt of such complaint; and

(c) submit to the Board, every three months, progress reports on any matter being investigated.

(3) ...

(4) The Committee, if it finds the surveyor or student surveyor guilty of the charge, shall report its findings of fact to the Board and may forward with such report

such recommendations as it may see fit to make."

It is important to note that section 21 (4) gives the Committee a duty and a power. If it finds the surveyor or student guilty, it has a duty to report its findings of fact to the Board. And it may forward with such report such recommendation as it sees fit to make.

12. The powers of the Board on receipt of the report are set out in section 22, subsection (1) which reads:

"22.—(1) The Board may, on receiving the report referred to in subsection (4) of section 21, together with such recommendations, if any, as may be forwarded therewith, take such action, including the withdrawal of or refusal to issue, for a stated period, a practising certificate, to the surveyor, the cancellation or suspension of the surveyor's commission or the refusal to issue a commission to a student surveyor, as it may consider fit and just."

13. Lord Gifford Q.C. in his usually helpful manner submitted that the proceedings before the Disciplinary Committee were fundamentally flawed as being contrary to the procedures laid down by the Act and/or contrary to natural justice and or resulting in charges being proved on which there was no evidence. In such circumstances, he contended, the Board had power under section 22 (1) supra "to take such action...as it may consider fit and just." The powers of the Board, he stated, were not limited to considering sentence but the Board could and should have

considered the irregularities relating to the Disciplinary Committee. This court, he contends, may exercise such powers as the Board could exercise and its remit is not limited to a review of the sentence.

14. I agree with Miss Maknoon that the Board has no power to set aside the Committee's findings of professional negligence and misconduct. A person found guilty of professional negligence or misconduct by the Committee is not given a right of appeal by the Act. There is no right of appeal unless expressly provided for. In my opinion the actions which the Board may take under section 22(1) are limited to the type of actions specified in the subsection. It is clear from the legislative scheme that the Board and the Committee have separate and distinct roles. The Committee is the tribunal of fact and the role of the Board is to determine what action if any should be taken based on the findings of fact by the Committee. The guilt or otherwise of the surveyor charged with professional misconduct and/or negligence is solely the prerogative of the Committee – section 21 of the Act. As Miss Maknoon submitted, the Board is obliged to accept the Committee's findings of fact. However, where the Committee makes recommendations, the Board is not obliged to accept them – see **Barrington Dawkins v Trevor Shaw** C.A. No.160/2001 delivered December 20, 2005 at pps. 12-13 and 22.

15. As stated earlier, a person convicted by the Committee has no right of appeal from that decision. Section 25 provides for a right of appeal from the decision of the Board. This section reads:

"Any surveyor or student may appeal to the Court of Appeal from any order of the Board cancelling or suspending his commission, withdrawing or refusing to issue his practising certificate, or refusing to issue his commission, as the case may be. Such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed from time to time by rules of court."

16. The authorities show that the right of appeal given to a party is to be construed as empowering the Court to substitute its own opinion for the opinion of the authority which made the decision if satisfied that the decision was wrong, see for example **Sagnata Investments Ltd v. Norwich Corporation** [1971] 2 QB 614.

17. On an appeal from a decision of the Board, this court has no jurisdiction to consider any alleged irregularities relating to the proceedings before the Disciplinary Committee. The Court's remit is limited to an examination of the action taken by the Board including, of course, the cancellation or suspension of the commission to practice as a surveyor. I accept the submission of Ms. Maknoon that whilst this court, in determining whether the decision of the Board to cancel, suspend, withdraw or refuse to issue a commission was reasonable and justified in

all the circumstances, will necessarily have regard to the findings of fact by the Committee and make a judgment on the proportionality of the penalty as compared with the findings of fact, it does not mean that there is a right of appeal against the Committee's findings of fact.

18. To impeach the finding of professional negligence and misconduct by the Committee, the appellant would have to apply to the Supreme Court for judicial review. He cannot do so by appealing to this court. Parliament in its wisdom chose not to give the right of appeal against the findings of the Committee, which largely depend on professional expertise and knowledge in the area of land surveying, but to leave it to the party to pursue judicial review which is more restricted in its scope and application. This ground, in my view, fails.

19. **Ground 2**

The complaint in this ground is that the Board failed to re-examine the basis of the suspension which it ordered in December 2001. It seems to me that this ground is completely unfounded. In compliance with the order of this Court made on September 25, 2006 in Appeal No. 2 of 2001, the Board met on June 20, 2007 and November 28, 2007. On both occasions the appellant and his counsel were present. The Board heard the appellant and his character witnesses. Mr. John Graham, counsel for appellant made submissions to the Board as to the appropriate action

that the Board should take. The Board deliberated for some time and varied its original order by reducing the suspension period. This ground must fail.

20. **Grounds 3, 5, 6, and 7**

The complaints in these grounds are that the Board failed to take into consideration the good character evidence adduced by the appellant, the substantial financial penalty that suspension from practice would involve for the appellant and the mitigating factors that existed. It is fair to say that these grounds as well as ground 2 (supra) were not argued by Lord Gifford in his oral submissions. However, they were not abandoned. These complaints are clearly baseless and should be given short shrift. It will suffice to quote the last paragraph of the Board's letter dated January 30, 2008 to the appellant informing him of the Board's decision. Having referred to the testimonies of the character witnesses, the appellant's intimation that because of the experience he had become far more careful in carrying out his duties and the submissions of counsel, the Board stated:

"(6) the Board has deliberated the matter and having taken into full account the testimonies given by the aforementioned character witnesses and the submission by counsel, Mr. Graham, has varied the original suspension from two (2) on each of the charges of professional misconduct and professional negligence to run

consecutively to two (2) years on each of the charges... to run concurrently.

The suspension will take effect from February 25, 2009."

21. **Ground 8**

The appellant complains that the Disciplinary Committee employed the incorrect standard of proof. At paragraph 6 of his affidavit filed on February 11, 2008, the appellant states:

"That I am advised by my attorney-at-law and I verily believe that the Disciplinary Committee failed to apply the proper standard of proof beyond a reasonable doubt in coming to its decision."

22. I have examined closely the minutes of the Disciplinary Committee meeting of 10th March 2001 and the Committee's report of its findings of fact to the Board dated May 12, 2001 and I have not been able to find anything on the face of these documents to suggest that the Disciplinary Committee did not apply the "beyond reasonable doubt" standard of proof.

23. Further, the Committee is not a judicial institution. It exercises quasi-judicial functions and in my view, the procedure is inquisitorial – see section 21(1). It is not subject to the strict rules of evidence as applicable in a court of law. In ***R v Deputy Industrial Inquiries Commissioner*** (1965) 1 All

ER 81 at 94 E-G., Lord Diplock made the following statement which I think is instructive:

"The requirement that a person exercising quasi judicial functions must base his decision on evidence means no more than that it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined or to show the likelihood or unlikelihood of the occurrence of some further event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer; but he may take into account any material which, as a matter of reason has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it, is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view of his."

The views expressed by Lord Diplock were described by Lord Lane CJ as appropriate in ***R v. Commissioner for Racial Equality*** (1980)3 All ER 265 at 272 where the Court was considering the procedure in quasi-judicial proceedings. It is clear, to my mind, that Miss Maknoon's submission that the criminal standard of proof beyond reasonable doubt is not applicable to the decision making process of the Disciplinary Committee is correct. This ground also fails.

24. **Ground 9 Failure of the Board and Committee to give reasons**

There is no statutory requirement for the Committee or the Board to give reasons for their decision. At common law there seems to be no general duty to give reasons for administrative or quasi-judicial decisions. And the mere fact that a decision making process is held to be subject to the requirements of fairness does not automatically or naturally lead to the further conclusion that reasons must be given – See **DeSmith's Judicial Review of Administrative Action 5th Ed.** para 9-039 to 9-041. However, it seems to me that fairness may require that a person aggrieved by a decision and who has a right of appeal from that decision, be provided with reasons for the decision. In such a case, a failure to give reasons, may, I should think, provide a basis for challenging an administrative decision. However, I need not dwell on this since both the Committee and the Board provided the appellant with reasons for their decisions.

25. The Committee's reasons were contained in its report to the Board **and** a copy of this report was sent to the appellant under cover of letter dated March 13, 2007. The report sets out its findings of fact, its reasons for finding the appellant guilty of professional misconduct and negligence and its reasons for recommending that he be suspended. The Board provided its reasons for its decision in letter dated January 30, 2008 to which reference has already been made. This ground also fails.

26. **Supplementary grounds a and b**

It is the contention of the appellant that on the remission of the matter to the Board by the Court of Appeal the Board was obliged to afford the appellant a fresh hearing before a differently constituted Disciplinary Committee and that the Board erred in hearing the appellant only on the issue of sentence. On the first appeal, this Court on September 25, 2006 made the following order:

"Appeal allowed. Matter remitted to the Land Surveyors' Board for the appellant to be afforded a hearing. Half ($\frac{1}{2}$) costs of the appeal and the application for stay of execution to the appellant to be agreed or taxed."

At a Board meeting held on June 20, 2007 in furtherance of the above Court order at which the appellant and his attorney-at-law Mr. Graham were present, the Chairman of the Board stated that the purpose of meeting was to hear from Mr. Alexander and his counsel as to what mitigating circumstances they might want to bring to the attention of the Board for its consideration. On the application of Mr. Graham the meeting was adjourned with a view to enabling the appellant to call witnesses as to his character.

27. On November 28, 2007 when the Board meeting was reconvened, the Board heard from Mr. Alexander, his character witnesses and his counsel in mitigation. The appellant now contends that it is a necessary implication of the Court's order that there was no fair hearing by the

Disciplinary Committee. The appellant says that a new panel should have been convened and the charges considered afresh by the Committee. The Board, the appellant contends, in convening a meeting to hear "mitigating circumstances" fell into error and acted in breach of law.

28. Miss Maknoon for the respondent, does not agree with the contention of the appellant. She submits that the Court of Appeal in remitting the matter to the Board for the appellant to be afforded a hearing, did not and could not, require the Board to go further than what the Act permits. The Board, she says, is limited to deal solely with the issue of sentencing. The Board, she argues has no power to remit the matter to the Committee for a re-hearing. She relies on sections 21, 22 and 25 of the Act and on the decision of this court in **Barrington Hawkins** (supra).

29. In my judgment, the submissions of Miss Maknoon are correct for the following reasons:

(i) Section 25 of the Act grants the appellant right to appeal from any order of the Board cancelling or suspending his commission, withdrawing or refusing to issue his practising certificate, or refusing to issue his commission as the case may be.

What was before the Court in the first appeal was an appeal against the order of the Board suspending his commission. This section gives no right of appeal against the findings of the Committee.

(ii) Section 22 (1) empowers the Board on receipt of the Committee's report and recommendation "to take such action including the withdrawal of or refusal of or refusal to issue, for a stated period, a practising certificate, to the surveyor, the cancellation or suspension of the surveyor's commission ... as it may consider fit."

As I have already said, in my opinion, the hearing before the Board is limited to the determination of what, if any, sentence should be imposed in accordance with subsection (1). In **Barrington Dawkins** Harrison JA said at p.13:

"It would seem from the legislative scheme that there is separation of powers between the Board and the Committee. The Committee is mandated to make a finding of negligence or professional misconduct and then to report its findings to the Board. The Board will thereafter decide on the course of action it will take in accordance with section 22(1)."

Harris JA (then Ag) said at p. 22:

"What is the scope and function of the respondent? Is it empowered to hear complaints against surveyors.

Section 21(1) of the Act expressly mandates the Committee and not the respondent to hear complaints. It does not assign the respondent any right to hear charges...

Section 24 provides for certain steps to be taken by the respondent on receipt of the Committee's report. On being furnished with the findings of the Committee, the respondent may take such 'action as it may consider fit and just'. This clearly demonstrates that the respondent's powers extend to sentencing only and are not contemplative of a re-hearing before the respondent of any charge which may be brought against a surveyor."

(iii) As I have stated before, this Court has no jurisdiction to interfere with the findings of the Committee. The Court has no jurisdiction to entertain any complaint concerning any alleged irregularities in respect of the proceedings before the Committee. Thus, this Court cannot direct the Committee to hear afresh the charges brought against the appellant. Further, this Court cannot direct the Board to remit the matter to the Committee, since the Board has no power so to do. On an appeal from the Board, this Court can itself do only what the Board is empowered to do, or, if there was a breach of natural justice, to remit the matter to the Board for a "rehearing" in accordance with section 22(1) of the Act.

30. One of the many authorities relied on by the appellant in his written submissions is ***Hughes v Architects Registration Council of the United Kingdom*** (1957) 2 All ER 436. In that case ***Hughes*** had been in practice as an architect and house agent since 1922. In 1934 he was registered as

an architect under section 6 (1) of the Architects (Registration) Act 1931, by virtue of which a person who had been practising as an architect could be registered under that Act without question of his qualifications by examination or otherwise. By section 7 (1) of the Act of 1931 the Architects' Registration Council on the report of the Discipline Committee could remove from the register the name of a person found guilty of "conduct disgraceful to him in his capacity as an architect". In 1936 the Council issued a code of professional conduct for registered architects and, among other things, therein laid down that a registered architect must not permit the business of house agency to form part of his practice. The code had no statutory force. At that time the Council conceded that no action should be taken in relation to architects who were carrying on a house agency business before they were registered as architects. The Council withdrew this concession at the end of 1955. In December 1956, the council on the report of the committee that the appellant was guilty of conduct disgraceful to him in his capacity as an architect, determined that his name should be removed from the register. The disgraceful conduct consisted in the appellant's practising both as an architect and as a house agent. The appellant appealed under section 9 of the Act of 1931 against the determination of the Council.

Section 9 of the 1931 Act is in the following terms:

"Any person aggrieved by the removal of his name from the register, or by a determination of the council that he be disqualified for registration during any period may... appeal to the High Court or Court of Session against the removal or determination, and on any such appeal the court may give such directions in the matter as they think proper, and the order of the court shall be final."

His appeal was allowed. The court held that it had the power to decide whether the conduct of the appellant was disgraceful conduct, because the right of appeal given by section 9 would be illusory unless the court were able to consider whether the appellant had been guilty of conduct which justified the removal of his name from the register.

31. In allowing the appeal Lord Goddard C.J. said at p. 440F-G:

"The only ground on which a person can be removed from the register is that he has been guilty of conduct disgraceful in his capacity as an architect. He is given a right of appeal against his removal. If therefore the Court cannot consider whether he has been guilty of conduct which justified his removal the right of appeal would be purely illusory. The right of appeal given by s.9 is a right of appeal against the finding, not against the degree of punishment, for the only sentence that can be imposed is removal from the register."

32. In the instant case section 22(1) empowers the Board "to take such action... as it may consider fit and just". Section 25 gives the aggrieved party the right to appeal from any order of the Board "cancelling or suspending his Commission, withdrawing or refusing to issue his practising

certificate or refusing to issue his commission.” On appeal, it seems to me that, essentially the complaint would be that the order of the Board is not “fit and just” having regard to the findings of the Committee. Thus under section 25 the right of appeal is against a particular type of punishment imposed by the Board and not against any findings of the Committee. In **Hughes** case Lord Goddard C.J. held that the right of appeal given by section 9 was against the finding not against the degree of punishment since the only punishment that could be imposed was removal from the register. It seems to me that the decision in **Hughes** is based on facts which differ materially from those in the present case.

33. **Ground 4**

In this ground the appellant complains that his suspension from practice for two (2) years is harsh. There can no doubt that the members of a professional disciplinary body are the people best equipped for weighing the seriousness of professional misconduct. For this reason, the Court will be reluctant to interfere with the exercise of the discretion of such a body – see **Ghosh v General Medical Council** Privy Council Appeal No. 69 of 2000 delivered June 18, 2001. In the **Ghosh** case at para. 34 Lord Millett in delivering the opinion of the Board repeated the following statement which the Board made in **Evans v General Medical Council** (unreported) Appeal No. 40 of 1984:

"The principles upon which this Board acts in reviewing sentences passed by the Professional Conduct Committee are well settled. It has been said time and again that a disciplinary committee are the best possible people for weighing the seriousness of professional misconduct and that the Board will be very slow to interfere with the exercise of the discretion of such a committee.

...The Committee is familiar with the whole gradation of seriousness of the cases of various type which come before them, and are peculiarly well qualified to say at what point on that gradation erasure becomes the appropriate sentence. This Board does not have that advantage nor can it have the same capacity for judging what measures from time to time required for the purpose of maintaining professional standards."

After this quotation his Lordship continued:

"For these reasons the Board will accord an appropriate measure of respect to the judgment of the Committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public."

However, his Lordship cautioned that the Court "will not defer to the Committee's judgment more than is warranted by the circumstances."

The comments of his Lordship although made in respect of the English General Medical Council are applicable to the Land Surveyors Board notwithstanding the fact that the functions of the General Medical Council are wider in scope. It is clear then from the authorities that the Court should only interfere with the decision of the Surveyors Board if the

sentence imposed on the appellant was unlawful or unreasonable or in the words of section 25 was not "fit and just".

34. The complaint against the appellant was made in July 1999. He was found guilty by the Committee in May 2001. He was suspended from practising for two (2) years by the Board. He appealed the Board's decision in 2001. His appeal was allowed in September 2006 and the matter remitted to the Board. In January 2008 the Board varied his sentence. It seems to me that it would not be fit and just after such a long delay that the appellant should now have to serve the sentence. He has for a long time been in a state of uncertainty about his fate. He is now 63 years of age. In my view, there is now little risk if any of his repeating the conduct which is the subject of the charges. Indeed, at the second hearing he is on record as saying that in light of what had happened, he has become far more careful in carrying out his work for his clients. In the circumstances, I would order that his suspension for 2 years be reduced to 1 year and that it commence as of February 25, 2008 with the result that he would now be able to practice his profession.

35. **Conclusion**

In light of the foregoing, I would dismiss the appeal save that I would vary the sentences from 2 years suspension to 1 year suspension on

each charge with the sentences to run concurrently as from February 25, 2008. I would make no order as to costs.

HARRISON, J.A.

I agree.

DUKHARAN, J.A.

I agree.

SMITH, J.A.

ORDER:

The appeal is dismissed. The two year suspended sentence is varied to one year suspension on each charge with sentences to run concurrently as from February 25, 2008. No order as to costs.