JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2023MS00006

APPLICATION NO COA2023APP00206

BETWEEN	**MARIO ANDERSON**	**APPLICANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Michael Williams for the applicant

Lemar Neale and Ms Chris-ann Campbell instructed by NEA|LEX for the respondent

3 October and 1 November 2023

IN CHAMBERS

SIMMONS JA

[1] This is an application for the stay of the sanction hearing to be undertaken by the Disciplinary Committee of the General Legal Council ('the Committee'), pertaining to attorney-at-law Mr Mario Anderson ('the applicant') who was found guilty of professional misconduct on 8 August 2023. The application, which was filed on 4 September 2023, is supported by the affidavit of urgency of the applicant filed on the same date and his supplemental affidavit sworn to on 2 October 2023.

[2] The grounds on which the application is based are:

(1) Rule 2.10(1)(b) of the Court of Appeal Rules, 2002 ('CAR');

(2) The applicant has a real prospect of successfully appealing the decision of the Committee as its finding that the applicant breached the Legal Profession (Canons of Professional Ethics) Rules ('the canons') is not supported by the evidence and/or is inconsistent with the weight of the evidence;

(3) That there is a greater risk of injustice to the applicant if the stay is not granted than that to the respondent if the stay is granted;

(4) That the appeal will be rendered nugatory if the stay is not granted; and

(5) The applicant will suffer irreparable harm to his reputation as an attorney-at-law if the sanction hearing proceeds and a penalty is imposed.

[3] On 19 September 2023, this court granted an interim stay of the sanction hearing until 3 October 2023. On 3 October 2023, the stay was extended to 25 October 2023. A further stay was subsequently ordered until 1 November 2023, to facilitate the delivery of this decision to the parties.

Background

[4] The order of the Committee which is the subject of this application has its genesis in a complaint that was lodged against the applicant by Ms Cresilda Chambers ('the complainant') dated 23 August 2022. The complaint was supported by the complainant's affidavit sworn to on 25 August 2022. Succinctly put, the complainant alleged that Mr Anderson, in his capacity as an attorney-at-law, failed to deal with her business and to provide her with information pertaining to the progress of her business with due expedition. Further, that he acted with "inexcusable or deplorable negligence in the performance of his duties".

[5] The court finds it sufficient to adopt the background as has been conveniently set out by the Committee at para. 2 of its decision, the details of which are recounted below:

> "2. On the 20th November 2019 the [c]omplainant retained the Kingston Legal Aid Clinic ('KLAC') to apply for Letters of Administration in the estate of Aneita Smith. By virtue of an Engagement Agreement, which she signed, a retainer fee of $20,000.00 was to be paid by the [c]omplainant and the fees for the legal work (which did not take into account the retainer fee) was estimated as being $100,000.00 plus a miscellaneous fee of $3,500.00. The retainer was to be paid before any work would begin. The [c]omplainant paid the retainer of $20,000.00 on the 20th November 2019. Over [the] months she made further payments to KLAC. Having paid the retainer, the [c]omplainant heard nothing further from the KLAC until they sent a letter dated the 20th December 2022. To date, the [c]omplainant has not received the Letter of Administration."

[6] The matter was heard by the Committee on 18 February and 8 August 2023.

[7] There is no dispute that Mrs Frances Barnes, who was an attorney-at-law at the Kingston Legal Aid Clinic ('KLAC'), was named as the attorney who would be dealing with the complainant's matter. It is also not disputed that the application for letters of administration was made by Mr Fabian Campbell, an attorney-at-law who was also associated with the KLAC.

[8] In 2021, upon the complainant's enquiry as to the progress of the matter, she was advised by an employee of the KLAC to attend their office to speak with the applicant. She was, however, required to pay a consultation fee of $6000.00. The complainant paid the fee and met with the applicant in December 2021. The complaint's evidence was that the applicant directed her to go to the Supreme Court to check on the progress of the file. The complainant did so and retrieved a requisition dated 30 October 2020, which she delivered to a paralegal at the KLAC.

[9] Having heard nothing from the KLAC, the complainant went back to the offices of the KLAC in March 2022, when she was advised that she needed to pay a further $80,000.00. Subsequently, there was a series of discussions between the complainant and a paralegal at the KLAC. However, the complainant was not provided with any update from an attorney-at-law and it was her evidence that she was advised that she was not

the applicant's client and that he was only seeking to assist her. The complainant paid a further $40,000.00 to the KLAC and was given a document that had to be signed and witnessed by a Justice of the Peace.

[10] On the Tuesday before the hearing before the Committee, the complainant for the first time was made aware that the application for letters of administration needed to be advertised in the newspaper.

[11] The Committee noted at para. 5 of its decision that during the hearing, it was disclosed that the application for letters of administration had been filed in the Supreme Court on 18 September 2020. It was also noted that the probate registry had issued a requisition dated 30 October 2020, for a correction to be made to the application. There was no other evidence that the complainant was provided with any further update pertaining to the progress of the matter.

[12] The applicant, in his affidavit in answer to the complaint sworn to on 7 October 2022, stated categorically that the complainant has never been his client as he had not been retained to act as her attorney-at-law. Rather, he asserted that there is another attorney-at-law on the record for the complainant. In summary, his evidence was as follows:

i. He is not responsible for any of the KLAC's matters before 17 October 2020 when the Barbican Law Clinic was engaged to provide services to the KLAC;

ii. At no time was he an employee of KLAC;

iii. There is another attorney-at-law on the record for the complainant;

iv. The complainant paid $6000.00 to the KLAC for a consultation with the applicant in December 2021. The complainant was advised by the KLAC that no further work could be done until she had settled her balance with their office.

v. That he was advised by the KLAC that the complainant had not settled the outstanding sums.

vi. He had not been retained or instructed by the KLAC in the complainant's matter and had not received any payment from the KLAC in respect of her matter. In the circumstances, he owed no duty to the complainant and is not responsible for any delay she experienced in the matter.

[13] In his affidavit in support of the application, filed 4 September 2023, the applicant included evidence in the form of an email from Mrs Barnes, dated 16 May 2022, pertaining to the terms of his engagement. That evidence, based on the record of the proceedings, had not been presented to the Committee. In that affidavit the applicant asserted that:

i. He had never been retained by the complainant as her attorney. He explained that the complainant's communication was limited to staff members of the KLAC, Mr Fabian Campbell, the attorney-at-law on record, or Mrs Frances Barnes, her previous attorney-at-law.

ii. The KLAC had a protocol in place to deal with matters that existed prior to his engagement.

iii. At all material times, the retainer agreement between the KLAC and the complainant remained in force. He expressed the opinion that the complainant's matter could not have been transferred to him without his and the complainant's express agreement, notwithstanding articles 2 and 3 of the retainer agreement. The applicant further stated as follows:

> "I have refused to act in matters prior to my contract with the [KLAC] taking effect in several matters due to conflict of interest, having no proper instructions, inconsistent instructions with that already noted on the file or other reasons."

iv. He could not represent the complainant until she paid all outstanding fees owed to the KLAC.

v. The KLAC did not file the application for letters of administration until September 2020. Thereafter, a requisition was issued by the court and sent to an email address that the applicant could not access.

vi. In January 2021, when the complainant attended the KLAC she was advised by the KLAC that the attorney who "sign to her file would call". This communication he said was indicative of the fact that he was not the complainant's attorney.

vii. In March 2021, the complainant was advised that she would be required to pay a consultation fee of $6000.00 to speak with the applicant. This he said would have been evidence that he was not an employee of the KLAC. Moreover, at this time the attorney assigned to her matter was still employed to the KLAC.

viii. During the period March 2021-December 2021, he would have had no responsibility to communicate with the complainant.

ix. When he met with the complainant in December 2021, the applicant advised her that it was likely that the court had issued a requisition. He, therefore, retrieved the suit number to "assist her and to get the matter moving at the [KLAC], not to prejudice her". The complainant obtained the relevant information and provided it to the KLAC.

x. The complainant's matter was "stalled" as the grant needed to be amended and re-filed. In addition, the complainant had not paid the required stamp duty and the application had not been advertised in the newspaper.

[14] The respondent opposed the application and relied on the affidavit of Dahlia Davis sworn to on 13 September 2023 and the affidavit of Dahlia Davis in response to the supplemental affidavit of Mario Anderson sworn to on 3 October 2023.

The notice and grounds of appeal

[15] The applicant, by notice of appeal dated 4 September 2023, has appealed the decision of the Committee based on some 13 grounds. The grounds of appeal in a nutshell challenge the finding of the Committee that the applicant was the complainant's attorney-at-law (grounds a to k). The issue of bias has also been raised (grounds l and m).

Principles relevant to a stay of execution

[16] The Committee having made its decision is entitled in the normal course of the proceedings to determine the appropriate sanction. Where a party, such as the applicant, has appealed against that decision an application may be made to this court for a stay of the sanction hearing pending the outcome of the appeal.

[17] It is well settled that the jurisdiction of a single judge of appeal to grant a stay of execution is governed by rule 2.10(1)(b) of the CAR which provides that:

> "A single judge may make orders-
>
> (a) …
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal."

[18] In **Earl Ferguson v General Legal Council** [2023] JMCA Misc 4, this court considered whether it was permissible for a single judge to grant a stay of the sanction hearing. At para. [45], the court concluded that "[t]here was no real issue as to whether a single judge has the authority to grant a stay of proceedings". The only question was whether the requirements for such relief had been satisfied. The court considered whether the appeal had some prospect of success. However, the risk of injustice to the

parties was not addressed as the court concluded that the applicant's appeal had no reasonable prospect of success.

[19] It is well established that the grant of a stay of execution is a discretionary power that is to be exercised having regard at all times to the interests of justice. The starting point in the determination of where the interests of justice lies, is the question of whether there is a good reason for a claimant to be deprived from the fruits of his judgment. As was explained by Morrison JA (as he then was) in **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16 ('**Channus**') at para. [10]:

> "[10] The jurisdiction of a single judge of appeal to grant a stay of execution is, as Phillips JA observed in **Reliant Enterprise Communications Ltd v Twomey Group and Another** (SCCA 99/2009, App 144 and 181/2009, judgment delivered 2 December 2003, para [43]) 'absolute and unfettered'. The starting point is, in my view, the well established principle that there must be a good reason for depriving a claimant from obtaining the points of a judgment… It is, in my view, essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay."

[20] In balancing the interests of justice, this court has explained that the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. In resolving this issue, the court as set out in **Sagicor Bank Jamaica Limited (formerly known as RBTT Bank Jamaica Limited) v YP Seaton and others** [2015] JMCA App 18 at para. [51]:

> "[51] Some material questions identified by the authorities as having a bearing on this question of risk of injustice are as follows:
>
> > (a) If a stay is refused what are the risks of the appeal being stifled?

(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?

(c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?

See **Hammond Suddard Solicitors v Agrichem International Holdings; Green v Wynlee Trading Ltd and Others** [2010] JMCA App 3 and Blackstone's Civil Practice 2004, paragraph 71.38."

[21] In **ADS Global Limited v Fly Jamaica Airways Limited** [2020] JMCA App 12, McDonald-Bishop JA, in addressing the applicable principles, stated:

"[23] The law governing a stay of execution of a judgment is well-settled and, by now, fast becoming trite. There is, therefore, no need for any detailed exposition on the applicable law. It suffices to say that the liberal approach laid down by Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and another** [1997] EWCA 2164, has been consistently adopted and applied by this court. See, for instance, **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30. The proper approach, according to Phillips LJ in **Combi** is for the court to make the order which best accords with the interests of justice, once the court is satisfied that there may be some merit in the appeal.

[24] In **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, Morrison JA (as he then was), having had regard to previous authorities, including, the well-known authority of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, stated that the threshold question on these applications is whether the material provided by the parties discloses at this stage an appeal with some prospect of success. Once that is so, the court is to consider whether, as a matter of discretion, the case is one fit for the grant of a stay, that is to say, whether there is a real risk of injustice, if the stay is not granted or refused."

[22] Based on the above cases, two questions arise in my consideration of whether a stay of the sanction hearing ought to be granted. The first question is whether the appeal has a real prospect of success. Secondly, I must determine whether the case is one fit for the grant of a stay, that is, whether there is a real risk of injustice if the stay is not granted.

Whether the appeal has a real prospect of success

[23] The Committee found that the applicant had breached canon IV(r) of the canons, which states:

> "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."

[24] In order to ground the charge under this section an attorney client relationship must exist between the complainant and the attorney against whom the charge has been laid. The question is therefore whether there were sufficient facts on which the committee could have concluded that such a relationship existed between the applicant and the complainant.

[25] Before considering the evidence, I have borne in mind the principles that guide an appellate court where a party seeks to challenge the findings of fact of the tribunal that heard the matter. In **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7, Brooks JA (as he then was) stated at paras. [7] - [10]:

> "[7] It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those

findings. Their Lordships re-emphasised that principle in their decision in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. The Board stated, in part, at paragraph 12:

> '...It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in *Thomas v Thomas* [[1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions**. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: Choo KokBeng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.' (Emphasis supplied)

[8] A comprehensive review of the various principles involved in this court's assessment of findings of fact, was made in two separate decisions of this court, which were handed down on 3 November 2005. The cases are **Clarence Royes v Carlton Campbell and Another** SCCA No 133/2002 and **Eurtis Morrison v Erald Wiggan and Another** SCCA No 56/2000.

[9] In the former case, Smith JA set out the principles that should guide an appellate court in considering findings of fact by the court at first instance. The other members of the panel agreed with the principles which he set out at pages 21-23 of his judgment:

'...The authorities seem to establish the following principles:

1. The approach which an appellate court must adopt when dealing with an appeal where the issues involved findings of fact based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was 'plainly wrong'. - See **Watt v Thomas** (supra), **Industrial Chemical Company (Jamaica) Limited** (supra); **Clifton Carnegie v Ivy Foste**r SCCA No. 133/98 delivered December 20, 1999 among others.

2. In **Chin v Chin** [Privy Council Appeal No. 61/1999 delivered 12 February 2001] para. 14 their Lordships advised that an appellate court, in exercising its function of review, can 'within well recognized parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a rehearing below.'

3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the finding of the trial judge- See Rule 1. 16(4)

4. Where the issues on appeal involve findings of primary facts based partly on

the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in **Watt v Thomas** (supra).'

[10] In the latter case, K Harrison JA, with whom the rest of the panel agreed, set out, at page 15, the following guiding principles:

> 'The principles derived from the [previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make'."

[26] The complainant, before the Committee, gave evidence that she met with the applicant at the offices of the KLAC and was given certain instructions in relation to her matter. She followed those instructions and, thereafter, waited to receive an update from the KLAC. In answer to a question posed by the committee as to why she was alleging that the applicant did not deal with her matter with due expedition, the complainant said:

> "Why I say that is because each time I go and when I do get information, they said that [the applicant] said to tell me that I am not his client…".

[27] The applicant, in his affidavit in answer to the complaint, asserted that the $6000.00 that the complainant paid was solely for a consultation and that he could not act for her until she paid the balance owed to the KLAC. This comment by the applicant is indeed curious in light of the provisions of the retainer agreement that the complainant had with the KLAC. The applicant, however, has not disputed that he met with the complainant in his capacity as an attorney-at-law. The complainant agreed in cross examination that she had no discussion with him pertaining to whether he would be acting as her new attorney and did not sign any other agreement indicating same.

[28] The finding of the Committee that an attorney and client relationship existed between the applicant and the complainant must be assessed in light of the context in which the complainant accessed the services of the applicant. In this regard, I have noted that the KLAC can only provide legal services through the attorneys-at-law who it has engaged. I have also noted that the applicant was not the first attorney to whom the complainant's matter had been assigned.

[29] It is notable that at the time when the applicant met with the complainant: (i) there was an existing retainer agreement between the KLAC and the complainant; (ii) the complainant had engaged the services of the KLAC to assist her with the filing of an application for letters of administration; (iii) the required deposit had been paid by her to enable the commencement of the matter and; (iv) the meeting took place at the offices of the KLAC. Para. 15 of the decision of the Committee states:

> "15 …under the engagement letter, **the KLAC expressly permitted the Complainant to pay the fees 'weekly or monthly' and specified that the only condition to the KLAC doing the work is that the retainer was to first be paid**. The only other payment that the KLAC said they may need upfront was the disbursements and expenses which they may incur on her behalf up to December 2021, the Complainant had paid $45,000.00, including the retainer. It was therefore wholly improper for the KLAC through the Respondent to be demanding first a consultation fee before she was able to see a lawyer and further payment before doing any further work on the matter as that was not a term of the engagement letter." (Emphasis supplied)

[30] The Committee having assessed the evidence of both parties accepted the complainant's evidence that she was not informed by the applicant that he would not be dealing with her matter. That was entirely within their purview as the tribunal of fact.

[31] The applicant has also asserted that the Committee erred in not considering the affidavit of Mr Maurice Saunders. That affidavit was exhibited to the supplemental affidavit of the applicant in support of this application. I have, however, noted that although the applicant referred to that affidavit at the hearing, Mr Saunders was not called as a witness and no application was made for the admission of the affidavit into evidence. In **General Legal Council Ex p Whitter v Frankson** [2006] 1 WLR 2803 Lord Hoffmann who delivered the decision of the Board stated at para. 9 where a complaint has been made pursuant to section 12 of the LPA,

> "9. …the affidavit is in the nature of a pleading: it has to contain the allegations which the attorney must answer but no more. The evidence to support the allegations will in due course be put before the Committee in accordance with the Legal Profession (Disciplinary Proceedings) Rules contained in the Fourth Schedule to the Act."

[32] The Committee was, therefore, not obliged to consider Mr Saunders' affidavit. Ultimately they rejected the applicant's evidence pertaining to whether he was responsible for the complainant's matter that had commenced before his engagement through the Barbican Law Clinic. The Committee stated at paras. 16 to 18 of its decision:

> "16. Under the engagement letter, the KLAC is entitled to secure the services of another Attorney to take their place as Attorney for the Complainant and nowhere is it stated that the attorney is to be separately paid. Accordingly, the [applicant] cannot rely on the Complainant not paying the balance of fees owed to the KLAC as an excuse for not doing the work or properly advising on the progress of her matter.
>
> 17. Interestingly, the [applicant] argues that his responsibility is limited to the consultation he had with the Complainant in December 2021. We do not agree with him, as the receipt was not issued by him but by the KLAC, therefore showing that the retainer/engagement agreement was still in place. The [applicant is not a new private Attorney…but was just another Attorney at the KLAC…
>
> 18. …the [applicant's] conduct in dealing with the Complainant's matter was certainly not businesslike [sic]. Apart from making her wait nine (9) months before seeing her because she did not pay the consultation fee, not contemplated by her engagement agreement, he never advised her what was needed until one (1) year later after seeing her in December 2021…"

[33] In my view, the Committee had enough evidence on which to conclude that an attorney and client relationship existed between the applicant and the complainant.

[34] In the circumstances, I am not persuaded that grounds a to k of the appeal have a real prospect of success.

Bias

[35] The issue of bias has been raised in the grounds of appeal. In **Georgette Scott v The General Legal Council** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal no 118/2008, judgment delivered 30 July 2009, this court found that the mere fact that a member of the disciplinary panel was opposing counsel in a matter in which the applicant represented the other party was insufficient to ground such a complaint. Panton P, who delivered the judgment of the court, stated:

"**Bias**

19 The appellant contended that there was bias on the part of the individual panel members and the constituted panel as a whole. The complaint in respect of Mr. Charles Piper, panel member, related to a suit filed by the appellant as attorney-at-law.... Mr. Piper appeared for the defendants.....

20 In respect of Mr. David Batts, panel member, the complaint is that there existed at the time of the hearing, litigation in which his firm appeared for one of the defendants and the appellant appeared for the claimant...

21 As far as Mrs. Pamela Benka-Coker, Q.C. the other panel member is concerned, the bias complained of is her failure, as chairman of the panel, to accept the complainant's proposal to withdraw his complaint against the appellant. This complaint would also affect the other members of the panel as they participated in the refusal to entertain the proposed withdrawal.

22 The appellant contends that the cases ***Re Medicaments and Related Classes of Goods*** *(No.2)* [2001] 1 WLR 700 and ***In Re Pinochet*** [1999] UKHL 1; [1999] 1 All ER 577 are relevant so far as this ground of appeal is concerned. Mr. Beswick submitted that Mr. Piper should not have sat on the panel as he was sitting in his own cause. According to him, Mr. Piper's presence on the panel alone invalidates the hearing. The existence of contested suits between the appellant and members of the panel, in Mr. Beswick's view, amounted to the existence of bias and forms a basis for the automatic disqualification of the panel. Mrs. Minott-Phillips pointed out that … it should be borne in mind that the attorneys-at-law are merely agents of the persons they represent.

23 I am experiencing some difficulty in appreciating the point that is being made by Mr. Beswick in respect of bias, so far as it relates to the instant case. For example, it has been said that by refusing to allow the withdrawal of the complaint, the head of the panel, learned Queen's Counsel, Mrs. Benka-Coker, has demonstrated bias. This submission is, in my view, unacceptable. From time to

time, during the course of an hearing, a Court or tribunal will find it necessary to make rulings. The making of a ruling as to the course of proceedings cannot, per se, be an indication of bias. In refusing to allow the withdrawal of the complaint, the panel was exercising a right which it had to hear the complaint. Bearing in mind the nature of the allegations, and the role of the Committee, the panel was entitled to say: "this is not a matter which should be withdrawn, let us hear it". It was not an indication that they had arrived at an adverse conclusion in respect of the appellant. The point being advanced on behalf of the appellant is, in my view, without merit. Support for this position comes from the erstwhile attorney for the appellant, Mr. Christopher Townsend who, at para. 4 above, told the Committee that he did not think that the Committee should have ignored the complaint and the evidence that they had already heard. He merely needed to be afforded the opportunity to cross-examine the complainant.

24 The principle that Mr. Beswick has urged as being applicable is that a man should not be a judge in his own cause. In the instant case, it is difficult to appreciate why it is thought that that principle is applicable. **The fact that a panel member is appearing as an attorney-at-law in a suit against the appellant cannot by itself amount to a reason for the disqualification of the panel member.** There is no evidence of any issue having arisen in the suit ***Hew v Sandals*** to lead to the view that Mr. Piper may have been a judge in his own cause. The first hearing of the complaint against the appellant took place before the suit ***Hew v Sandals*** was filed. There is nothing to indicate the existence of the likelihood of bias at the commencement of the hearing, and there has been nothing shown to have occurred after the filing of the suit that could possibly have led to the perception of the likelihood of bias. In fact, in ***Hew v Sandals*** the matter has been referred to the Dispute Resolution Foundation." (Emphasis supplied)

[36] In any event, the issue was not raised before the panel and the general rule is that a party will not be allowed to raise on appeal, an issue that was not before the court below, unless it concerns a matter of law. Rule 1.16(2) of the CAR states:

"(2) At the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless-

(a) it was relied on by the court below, or

(b) the court gives permission.

(3) However –

(a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but

(b) may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties have had sufficient opportunity to contest such ground."

See **National Commercial Bank Jamaica Limited & another v Green** [2014] JMCA Civ 19, para. [32].

[56] Having, therefore, reviewed the material, the submissions of counsel and the relevant legal principles, I am satisfied that there was no reasonable prospect of success, and, consequently, no need to consider the risk of injustice to the parties.

Risk of injustice

[37] As stated above, I am not satisfied that the applicant's appeal has a real prospect of success. Consequently, there is no need to consider the risk of injustice to the parties. However, if I am incorrect on this issue, it is my view that the refusal of the stay of proceedings would not unduly prejudice the applicant in light of the protective mechanism afforded by section 12A of the Legal Profession Act which provides as follows:

"Power to suspend filing of orders.

12A.-(1) **The Committee shall have power, upon the application of a party against or with respect to whom it has made an order, to suspend the filing thereof with the Registrar**.

> (2) The filing of an order may be suspended under this section for a period ending not later than-
>
> > (a) the period prescribed for the filing of an appeal against the order; or
> >
> > (b) where such an appeal is filed, the date on which the appeal is determined.
>
> (3) **Where the filing of an order is suspended under the section, the order shall not take effect until it is filed with the Registrar and if the order is an order that an attorney be suspended from practice, the period of suspension shall be deemed to commence on the date of the filing of the order with the Registrar**." (Emphasis supplied)

[38] The applicant may, if he so desires, make an application under this section at the relevant time. In this regard, I am also guided by the approach adopted by this court in **Earl Ferguson v General Legal Council** [2023] JMCA Misc 4 in which Dunbar-Green JA stated at para. [57]:

> "[57] the refusal of the stay of proceedings would not have unduly prejudiced the respondent/appellant **as the decision had already been made as to his culpability and any reputational harm to him would have already occurred as a result of that decision**." (Emphasis supplied)

[39] In the circumstances, I am not satisfied that the application ought to be granted.

Order

[40] The application for a stay of the sanction hearing is refused.