[2024] JMSC Civ 120

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV02233

BETWEEN	**DENVAN CODNER**	**CLAIMANT**
AND	**THE LAND SURVEYOR'S DISCIPLINARY COMMITTEE OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Mr. Orane Nelson and Ms Racquel Willis instructed by Thomwill Law for the claimant

Ms. Annaliesa Lindsay and Ms Karessiann Gray instructed by the Director of State Proceedings for the defendant

Heard: January 11, February 29 & October 14, 2024

Judicial Review – Student Surveyor served by registered post fails to appear at disciplinary hearing – Finding of guilt made in absentia–Sentence– Appeal from sentence–Judicial review of finding of guilt of Committee - Appeal from sentence to Court of Appeal –Challenge to finding of guilt and sentence concurrently in Supreme Court and Court of Appeal – No application for stay of proceedings in Court of Appeal – Court of Appeal reduces sentence before judicial review is complete – Effect on judicial review proceedings

Interpretation Act, section 52, Land Surveyor's Act, sections 20, 21 and 22, sections 5 & 6, Second Schedule

WINT-BLAIR, J

[1] This matter concerns the judicial review of the decision by the defendant, the Land Surveyor's Disciplinary Committee of Jamaica ("the Committee") to find the claimant guilty of professional misconduct. The claimant, in his attempt to challenge this decision, has filed a Fixed Date Claim Form[1] seeking the following orders:

a. *"Declaration that the hearing held on July 9, 2021, regarding charges brought against the applicant by the Land Surveyor Disciplinary Committee (LSDC) is null and void.*

b. *Declaration that the hearing held on July 9, 2021, is in breach of the applicant's legitimate expectations and principles of natural justice.*

c. *Certiorari quashing the decision made by Land Survey Disciplinary Committee in its report dated 16th March 2022.*

d. *Mandamus directing the respondents to convene another hearing of Land Surveyors Disciplinary Committee to hear any charges properly brought against the applicant.*

e. *That any enforcement of the recommendations made by the Land Surveyor Disciplinary Committee in the report dated March 16, 2022, be stayed until the determination of the Judicial Review.*

f. *An injunction preventing the Land Surveyors Board from refusing to issue a Commission as a Land Surveyor based on the recommendations made by the Land Survey Disciplinary Committee in the report dated March 16, 2022."*

Background

[2] At all material times, the claimant was a student surveyor. The defendant is a quasi-administrative tribunal established by Section 20(1) of the Land Surveyors Act ("the Act").

[1] Dated January 31, 2023

[3] By section 21 of the Act, the Committee has been conferred with the following powers:

> *"(1) 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) The Committee may find a surveyor or student surveyor to be incompetent if, in its opinion, the surveyor or student surveyor is suffering from a physical or mental condition or disorder of a nature and extent making it desirable, in the interest of the public, that he should no longer be permitted to engage in the practice of professional land surveying.*
>
> *(4) The Committee, if it finds the surveyor or student surveyor guilty of the charge, shall report its findings of fact the Board and may forward with such report such recommendations as it may see fit to make"*

[4] On July 9, 2021, the Committee held a disciplinary hearing in relation to complaints made against the claimant. The claimant was absent from this hearing which concluded with the Committee making findings of guilt for professional misconduct under the Act on the charges of:

i. portraying himself as a Commissioned Land Surveyor; and
ii. illegally doing boundary surveys; and
iii. failing to attend an Inquiry when summoned so to do.

[5] By letter dated 15th July 2021, after the disciplinary hearing, the claimant, through his attorney-at-law, Racquel Willis, wrote to Mr Jubert T. Masters, chairman of the Committee. The letter indicated that the claimant could not have appeared before the committee on July 9, 2021, as he did not become aware of the hearing until July 14, 2021, some five (5) days after the hearing.

[6] Pursuant to section 21(4) of the Act, the Committee made a report of its findings of fact to the Land Surveyors Board ("the Board") together with a report containing its recommendations. The Committee recommended to the Board that:

a. *"He be prevented from applying for a commission for a period of one year for failing to attend an Inquiry when summoned so to do"; and*
b. *"For blatant disregard of the laws disallowing him from practising as a Land Surveyor when not qualified as a Land Surveyor, and his obvious and blatant deficiency in his attachment training, he be disallowed from applying to be commissioned as land surveyor for three years".*

[7] The Board, as established by section 10 of the Act, is empowered to receive the report and recommendations of the Committee. Its powers are set out in section 22(1) of the Act which provides that:

> *"(1) The Board may withdraw, refuse to issue for a state 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.*
>
> *(2) On proof to the satisfaction of the Board that any surveyor or student surveyor has been convicted within two years of any offence against this Act, or of any offence involving dishonesty or moral turpitude, the Board may take such action as is provided for is subsection (1)."*

[8] On May 13, 2022, the claimant along with his attorney attended the meeting of the Board and made submissions in mitigation. By letter dated June 3, 2022, the Board advised the claimant that it had taken the decision to refuse to issue a commission to him, as a land surveyor, for a total of three (3) years with effect from May 13, 2022.

[9] The claimant appealed his sentence to the Court of Appeal and on November 7, 2023, which made the following orders:

> *"The Appeal is allowed. The court further orders that the decision of the Land Surveyor's Board of Jamaica refusing to issue the student surveyor Denvan Codner with a Commission as a Land Surveyor for three (3) years is set aside and a period of two (2) years is substituted therefor. The period is to run from 13 May 2022."*

[10] The claimant concurrently filed an application for judicial review in this court on July 15, 2022. There was no application for a stay of proceedings to the Court of Appeal and this court was not made aware that there was an appeal from sentence to the Court of Appeal until the point was taken in the trial by Ms Lindsay.

The Evidence

[11] The claimant gave evidence that as a student surveyor, he worked along with Mr. Fitz Henry, a Commissioned Land Surveyor and that he was assigned to Mr. Winston Scott, his principal. On Wednesday, July 14, 2021, he received an email from Ms Alexis McCatty, secretary to Mr Fitz Henry, containing the following attachments:

a. letter dated June 2, 2021, addressed to Mr. Denvan Codner signed by Jubert Masters, Chairman of Land Surveyors Disciplinary Committee;

b. letter dated June 2, 2021, addressed to Mr. Fitz M. Henry signed by Jubert Masters, Chairman of Land Surveyors Disciplinary Committee;

c. letter dated October 22, 2020, addressed to Mr. Glendon G. Newsome,

National Land Agency, 8 Ardenne Road Kingston 10, Jamaica from Mrs. Norma Birthfield-Ducally, Secretary of Huddersfield View Development Ltd Boscobel P.O., St. Mary;

d. letter dated November 10, 2020, addressed to Mr. Glendon G. Newsome, Senior Director of Surveys and Mapping Division, National Land Agency 23 1/2 Charles Street Kingston from Mrs. Norma Birthfield-Ducally, Secretary of Huddersfield View Development Ltd Boscobel P.O., St. Mary;

e. letter dated November 11, 2020, addressed to Mr. Glendon G. Newsome, Senior Director of Surveys and Mapping Division, National Land Agency 23 1/2 Charles Street Kingston from Mrs. Norma Birthfield-Ducally, Secretary of Huddersfield View Development Ltd Boscobel P.O., St. Mary;

f. the statement of Mrs Joana Fearon dated November 11, 2020.

[12] The claimant deposed that upon reading the documents, he noted that both he and Mr Fitz Henry had been summoned to a hearing of the Committee that ought to have been held on July 9, 2021. He averred that he immediately telephoned Mr. Ainsworth Dick, secretary of the Committee to indicate that he had only become aware of the hearing held on July 9, 2021, after receiving the aforementioned documents in the email from Ms. McCatty.

[13] He further informed Mr Dick that he did not receive the registered mail sent by the Committee which contained the Notice summoning him to the hearing on July 9, 2021. He was informed by Mr. Dick that the hearing was held in his absence and therefore he needed to retain the services of an attorney-at-law.

[14] The claimant retained the services of Ms. Racquel Willis, attorney- at-law, who wrote to the Committee[2], outlining the reason for his absence from the hearing. She further requested that the Committee consider rescheduling the hearing and that the charges against the claimant be outlined as they had not been stated in the copy letter from Mr Jubert Masters dated June 2, 2021. Ms Willis did not receive

[2] by letter dated July 15, 2021

a response from the Committee. The claimant deposed that he was never contacted by the Committee nor did he receive any notification of their findings from the hearing held on July 9, 2021.

[15] He deposed that he received a letter via email dated April 7, 2022, from Ms. Cynthia R. Edwards, secretary of the Board, indicating that it had received a report from the Committee with recommendations concerning charges of professional misconduct brought against him. His attorney responded requesting a copy of the Committee's report dated March 16, 2022, along with proof of service of said letter. A copy of the report was sent to his attorney by Ms. Edwards under a cover letter dated April 28, 2022, proof of service was not enclosed.

[16] The report disclosed that the Committee had made a finding of guilt for professional misconduct in that the claimant portrayed himself as a Commissioned Land Surveyor, illegally conducting boundary surveys contrary to the Act. It was also determined that he willfully or without just excuse failed and or refused to attend the disciplinary hearing.

[17] The request for proof of service of registered mail sent by the Committee was not honoured. His attorney wrote[3] to the Central Sorting Office requesting that a search be conducted. The results of the search proved inconclusive.[4]

[18] The claimant and his attorney attended the meeting of the Board on May 13, 2022, and made submissions in mitigation. By letter dated June 3, 2022, decided by way of sentence, to refuse to issue to the claimant a commission as a land surveyor for a total of three (3) years with effect from May 13, 2022.

Mr Codner denies the charges in the Committee's report and avers that had he been able to attend that hearing on July 9, 2021, he would have defended them, but he was not given the opportunity to do so. He argued that he was not intentionally absent from the hearing, as he could not have made a decision to attend a hearing he was not aware of. Further, his request for another hearing

[3] by letter dated May 12, 2022
[4] by letter dated June 20, 2022,

before the Committee went without response. He was notified of the findings of the Committee on July 9, 2021, only when his attorney requested and received a copy of the report from the Board. He added that non-disclosure of the charges before the hearing meant that neither he could not have responded to the charges.

The claimant contends that he did not willfully or without just excuse fail and/or refuse to attend the disciplinary hearing, as the summons sent was limited to the complaints made by Mrs. Norma Birthfield-Ducally and Jana Fearon without the charge of failing to attend. He argues that he should have been served a summons with a complaint outlining the charge of non-attendance with a hearing date scheduled.

[19] He stated that the committee breached the principles of natural justice and that any recommendations made to the Board out of the hearing held on July 9, 2021, ought to be null and void.

Defendant's Evidence

[20] Mr Ainsworth Dick, secretary of the Committee gave evidence[5] that at the material time, the claimant was attached to Mr. Winston Scott, his principal who was to oversee the claimant's training. Mr Scott had not sought permission from the Board to assign this training to Mr. Fritz Henry, as Mr Henry was not a designated principal under the Act.

[21] Mr Dick stated that the documents attached to the email which the claimant alleged to have received from Ms McCatty were not sent to Mr. Fitz Henry. Mr. Henry was only served with a summons[6] to appear as a witness. Contained in the summons was the complaint against the claimant only. The notice to the claimant was served along with the supporting documents[7].

[22] Mr Dick noted that when a complaint is received by the defendant, a meeting is

[5] Affidavit in response to the affidavit of the claimant in support of the Fixed Date Claim Form dated March 21, 2023
[6] By letter dated June 2, 2021
[7] The documents itemized a – f in the email dated July 14, 2021

held, and at that meeting, the members decide who is to be summoned and to whom notices are to be sent. Thereafter, the notices and summonses are packaged in envelopes of different sizes, and the chairman is usually tasked with posting each document via registered post.

[23] At the meeting that was convened, the notice to the claimant was packaged in a envelope of a different size from the summons and the said package contained a notice letter and complaints of Mrs Norma Birthfield-Ducally and Mrs Joana Fearon ("the complainants"). The summons to Mr. Fritz Henry and the complainants were packaged separately and sent via registered post on the same date and at the same time.

[24] Mr Dick became aware of a letter from Ms Raquel Willis then received a call from the claimant. He advised the claimant to speak with his attorney. He denied that the charges against the claimant were not outlined. Mr Dick stated that contained in the notice letter dated June 2, 2021, sent to the claimant, were copies of the complaints laid against him, the date, time, and place for the hearing, and the section which authorizes the Committee to hear the complaints/charges against the claimant. The claimant did not write to the Committee stating the reason for not attending the hearing or the fact that he retained the services of an attorney to interface with the defendant on his behalf and up to that point the Committee had received no communication from the claimant requesting leave to be heard by himself or through an attorney-at-law.

[25] The claimant had been given an opportunity to attend the hearing and to answer to the charge of professional misconduct. He had been properly served with a notice and failed to attend. The defendant did not receive the registered mail as undeliverable. The complainants who were sent summonses at the same time as the claimant, all attended the hearing on July 9, 2021.

[26] Mr Dick admitted that the request for another hearing was made and the defendant never responded. However, the defendant conducted its functions within the tenets of natural justice.

[27] Mr Dick notably said at paragraph 31 of his affidavit that the claimant was served with a notice along with supporting documents and not a summons. He added that a summons, under the Act, is to be served on a witness and not on the accused against whom a complaint has been made.

Submissions

Claimant

[28] Counsel for the claimant began by relying on the **AG of Jamaica & Ors v Machel Smith**[8] to submit that the effect of quashing an unlawful decision is to set it aside and deprive it of all legal effect from its inception. Counsel argued that the Board would not have the legal authority to sentence the claimant if a decision from which it obtains that authority was quashed. An order from this Court quashing the decision of the Committee means that the sentence against the claimant would collapse.

[29] Counsel for the claimant relied on **Royal Bank of Scotland v Citrusdal Investment Ltd**[9] and **Perry v Croydon Borough Council**[10] to submit that the instant matter and the matter which appeared before the Court of Appeal are proceedings in two different courts, with two different parties as defendants, two different issues, one being determination of guilt the other being sentencing. Thus, a stay would not be necessary. Despite the appeal being allowed by the Court of Appeal as it relates to sentencing, the instant court can still rule on the decision of the Committee under its jurisdiction for judicial review.

[30] Counsel further submitted that a decision was made by the Committee on July 9, 2021 at the conclusion of the disciplinary hearing, and this is supported by the report produced by the defendant. The claimant sought leave to apply for judicial review as neither the Board nor the Court of Appeal may enquire into the findings of the Committee.

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[8] [2020] JMCA Civ 67
[9] 1971 1 WLR 1469
[10] 1938 3 All ER

[31] Counsel relied on the case of R **v Office of Utilities Regulation ex parte World Telenet International Ltd Supreme Court**[11] to submit that the requirements of the Act are there to ensure that the purpose of a fair hearing to a student surveyor is achieved. Such a fair hearing would be achieved by a hearing of all charges so that no decision is made which is not based upon evidence provided to the defendant and there being the opportunity to assess whether the said evidence is credible and/or reliable. A fair hearing would be achieved by ensuring that the minimum notice period of the impending hearing is given to the student surveyor in order for counsel to be instructed and to appear on his behalf at the hearing if the student desires. Provision of a copy of the charges would also ensure a fair hearing by allowing the claimant to prepare his defence in advance of appearing at the hearing instead of finding of charges and/or allegations being raised for the first time in the hearing.

[32] In relying on the cases of **Chief Immigration Officer of the British Virgin Islands v Burnett**[12] and **Council of Civil Service Unions and others v Minister for the Civil Service (CCSU)**13**,** it was submitted that the relief sought by the claimant in the context of judicial review may be granted by the court. The defendant purported to exercise its power to convene a disciplinary hearing, hear evidence and make a decision as to the guilt of the claimant for professional misconduct all by virtue of statutory authority vested in it by the Act. This decision by the defendant was either quasi-judicial or administrative and did in fact affect the claimant. Further, the manner of arriving at the decision was either illegal or procedurally improper or both as submitted. The defendant breached the claimant's legitimate expectations and the rules of natural justice.

Illegality

[33] The claimant's absence on that day of the hearing could not have been raised before that date. It was observed by the panel on the day of the hearing that the

[11] No. M81 of 2000
[12] (1995) 50 WIR 153 (BVI)
[13] (1984) 3 ALL ER 935

claimant was absent, and an adverse decision was made against him for failing to appear despite no prior complaint being made about this charge and no hearing having been convened to inquire into his absence as is required by section 5 of the Second Schedule. In the absence of a charge, the defendant had no jurisdiction under section 21(1), to convene a hearing.

[34] The defendant was therefore not convened to hear the charge of failing to attend the hearing when it met on July 9, 2023, and could not have heard this charge. No evidence was led on this charge for which the claimant was found guilty; rather the defendant made its decision on the bare fact of its observation that the claimant was absent. The defendant was under a statutory obligation to have a complaint laid for the claimant's absence at the hearing of July 9, 2021, and then convene a separate disciplinary hearing for the determination of that complaint. This was not done by the defendant. The statutory breaches committed by the defendant are mandatory and go to the root of its jurisdiction to hear and determine the disciplinary charges at the hearing held on July 9, 2021.

[35] The defendant's duty under the Act to 'enquire' into and 'hear all charges... ' places on it an obligation to convene a disciplinary hearing, and not to summarily and/or without a hearing, make a decision on a charge not before it. The Act gives the claimant an opportunity to answer to the charges and to show cause why he ought not to be adjudged guilty of professional misconduct.

[36] Counsel submitted that no charges were disclosed to the claimant prior to the date of July 9, 2021, or at all. Therefore, a charge for failing to attend could not have been included. There could be no complaint in respect of a failing to attend before July 9, 2021, because there was no hearing. Pursuant to sections 21(1) and 21(2) of the Act and sections 6(1) and 6(2) of the Second Schedule of the Act, the defendant failed to inquire into and hear all charges. It must give no less than 30 days’ notice of hearing to a student surveyor; and it must provide a copy of the charges along with the Notice.

[37] Section 9(1) of the Second Schedule provides that the failure to attend a hearing

when summoned requires mens rea meaning '*neglects*' or '*fails*' to attend. Therefore, the defendant could only establish that the claimant was either negligent or willful in his absence from the hearing through a duly convened hearing with evidence showing either negligence or willfulness on the claimant's part. However, the defendant treated the claimant's absence as a strict liability offence, without proof of mens rea and despite the Act requiring that all charges be the subject of a hearing.

Procedural Impropriety

[38] The defendant is required by virtue of Section 6(1) of the Second Schedule to give the claimant thirty (30) days prior notice of an intended hearing into a complaint against him. It failed to do so in respect of the charge of failing to attend a hearing which it could not have logically done since it never laid a complaint for hearing in accordance with section 5 of the Second Schedule but merely found him guilty of this charge in the course of a hearing convened for a wholly different charge.

[39] Counsel submitted that the defendant acted in a procedurally improper manner by failing to include in the Notice sent to the claimant, or as a separate document, the specific sections, sub-sections, and/or wording of the Act identifying the charges against the claimant.

[40] A review of the defendant's report shows that it found the claimant guilty of p*ortraying himself as a Commissioned Land Surveyor (CLS) and illegally doing a boundary survey; and not attending/ failing to attend an enquiry when summoned to attend.* These charges correspond to section 36(1)(a) and/or section 36(1)(b) and/or section 36(1)(c) of the Act as well as sections 9(1)(a) and 9(2) of the Second Schedule; yet despite their relationship to charges in the Act, none of the specific sections of the Act were identified to the claimant in the Notice sent to him by the defendant as is required by the statute.

[41] It is trite that in the exercise of its quasi-judicial functions, a tribunal must pay due regard to the dictates of natural justice and to act in good faith. It is to ensure that the accused knows the accusations being made against him and has an opportunity to give his version of the events.

[42] The letter dated June 2, 2021, serves as Notice of the disciplinary hearing, apprising the claimant of the scheduled disciplinary hearing. It disclosed only that the defendant would be conducting an inquiry into the two complaints and the claimant was being summoned to appear at the enquiry, before the defendant, on the date and at the place stated therein. It is not disputed by the claimant that copies of the correspondence from the complainants setting out the factual allegations against the claimant were said to have been sent to him. His case is that he did not receive them, further, these letters could not constitute the charges as set out in the statute. Neither is there any substantial dispute on the defendant's case that it did not disclose the charges to the claimant prior to the disciplinary hearing of July 9, 2021.

Remedies

[43] Counsel submitted that certiorari is a discretionary remedy and the claimant's conduct may be considered. **Easton Wilberforce Grant**[14] and **the Minister of Commerce and Technology**[15] was cited for the submission that in the case at bar, the conduct of this claimant is not in issue and consequently, this does not fail to be considered and/ or if considered, ought to be determined in his favour. The claimant's livelihood has been affected by the refusal to issue a commission to him for three years; a direct consequence of the determination by the defendant that he was guilty of professional misconduct.

[44] Further, the claimant having served the penalty, without the sentence of the defendant being declared a nullity and or quashed, would start his career in the invidious position as a professional against whom disciplinary sanctions had been made. This may lower him in the eyes of potential clients and even possibly in the eyes of professionals in his fraternity.

[45] It was submitted that that an order of mandamus is also a discretionary remedy and the instant case is one of public interest as a statutory tribunal ought to be admonished for its refusal to discharge its functions in accordance with its

[14]Supreme Court No M107 of 2000
[15] SCCA No. 18/1998

governing statute. This is especially so since the defendant is the body set up perpetually to consider matters of professional misconduct and if not admonished and corrected, will likely continue to discharge its function contrary to the procedures clearly set out in the Act which it is to follow. The likelihood of any future breach of the Act and of surveyors' and or student surveyors' rights under said Act by the defendant will be averted by the grant of mandamus.

[46] It was submitted that the remedy of a declaration may be made in the claimant's favour. Notwithstanding that the defendant has adjudged the claimant guilty of professional misconduct and a sentence has been imposed, which the claimant has been serving, the grant of this remedy would still be useful. The declaration as to fault in the defendant's disciplinary procedure would mean that the sentence would be set aside as it is legitimized by the decision only. Additionally, mandamus for a rehearing of the charges for which he was not provided with disclosure would give the claimant the benefit of defending himself against the allegations of the complainants in the first case and explaining his absence in the second.

[47] Counsel concluded that an injunction was not necessary as it was the defendant's decision that is the subject of the judicial review proceedings.

Defendant

[48] Counsel for the defendant relied on Part 56 of the CPR to note that judicial review is concerned with ensuring that public bodies observe the substantive principles of public law and that the decision-making process itself is lawful. In relying on **CCSU**[16] and **Chief Constable of The North Wales Police v Evans**[17], it was submitted that the law is clear as to which administrative decisions are considered illegal. A decision is considered illegal if the public authority acts outside the powers conferred on it. This means that the task of the courts when determining whether a decision is illegal is essentially one of interpreting the nature and extent of the statute conferring the duty or power upon the decision-maker. The objective of the courts when exercising this power of construction is to enforce the rule of

[16] [1984] 3 All ER 935
[17] [1982] 1 WLR 1155

law, by requiring administrative bodies to act within the "four corners" of their powers or duties.

[49] Section 21(1) of the Act, gives the Committee the power to conduct an inquiry into charges of professional misconduct against a surveyor or student surveyor. A notice letter dated June 2, 2021 was sent to the claimant, it reads in paragraph 2:

> *"Under section 21 (1) of the Land Surveyors Act, you are hereby summoned to appear before this Committee at 11:00 am on Friday, 9th July 2021 at the Conference Centre of the Survey and Mapping Division (NLA), 23 ½/ Charles Street, Kingston."*

[50] The Committee exercising its powers to conduct an enquiry has the power to regulate its own procedures within the context of the legislation. The Committee advised the claimant of the charge, by referring to the section 21 which empowers it to hear charges against a student surveyor for professional misconduct. As such, the procedure adopted by the Committee was lawful and void of any procedural unfairness.

[51] The case of **Barrington Dawkins v Trevor L. Shaw on behalf of himself and all members of the Land Surveyor's Board**[18] was cited by Ms Lindsay for the proposition that natural justice was observed by the procedure adopted by the Committee. It sent a letter outlining the section that creates the charge and the letters of complaint in order that the claimant be given an opportunity to meet the charge and complaints alleged against him.

[52] In relation to procedural fairness, it is well established that the standards of fairness are not immutable, will change over time, are flexible, and are dependent on the legal and administrative context (see **R v Secretary of State for the Home Department ex parte Doody**[19]). In other words, procedural fairness depends on the facts and circumstances of each case. In considering what procedural fairness in the present context requires, an account must first be taken of the interests at stake. The procedure adopted by the Committee was procedurally fair to the

[18] Civil Appeal No. 160 of 2001 (December 2005)
[19] [1993] 1 All ER 151

claimant, in that the claimant was advised of the charge of professional misconduct prior to the hearing date, as same was contained in the letter dated June 2, 2021, which was sent via registered post to the claimant's address.

[53] The gravamen of the claimant's case hinges on the Committee prosecuting and finding as a fact that the claimant was guilty of professional misconduct arising from his non-attendance at the hearing held on July 9, 2021, for which no summons was issued. The provision at section 21(1) empowers the Committee to conduct hearings for charges of professional misconduct, it directs that the Committee should 'summon' the student surveyor. Section 8 of the Second Schedule of the Act, clarifies to whom a summons may be issued and section 6 (1) of the Second Schedule of the Act directs the Committee to send a 'notice' to the student surveyor against whom the hearing is to be held. It was submitted that the Committee is formed of lay persons who would not have appreciated the nuances or distinction between a 'notice' and a 'summons', considering the statutory framework.

[54] The claimant was given an opportunity to be heard in mitigation of sentence upon before the Board. The Board considered the submissions and decided on sentence. Even if the Court deems, this portion of the recommendation illegal, and the Court in exercising its supervisory jurisdiction, remits the matter to the Committee, the effect of this would be nugatory. In the circumstances, if the substantive recommendation made by the Committee is accepted by the Court as valid, the recommended sentence would be subsumed in the three (3) years given by the Board.

[55] In relation to declarations being sought by the claimant, Counsel relied on the pronouncements of the learned authors Wade and Forsythe in Administrative Law[21] to submit that:

> *"The declaration is a discretionary remedy...there is thus ample jurisdiction to prevent its abuse; and the court always has inherent powers to refuse relief to speculators and busybodies, those who ask hypothetical questions or those who have no sufficient interest. As was said by Lord Dunedin [in*

[21] 10th Edition, at page 481

Russian Commercial and Industrial Bank v British Bank for Foreign Trade [1921] 2 AC 438 at 448]-

The question must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

[56] In deciding whether to grant the declarations, the Court must ask whether or not the question is real in relation to every declaration sought by the claimant. Even if the Court were to find that the issue in relation to any declaration is real, it still has discretion as to whether or not to grant the same. Counsel submitted that declaration one sought by the claimant should not be granted. Firstly, the Committee brought one charge against the claimant for professional misconduct arising from the complaints. Further, the Committee complied with its statutory functions and notified the claimant of the charge prior to the hearing and in discharging its duty, the committee afforded the claimant a right and/or an opportunity to be heard in relation to the charges brought against him.

[57] Counsel further submitted that declaration two ought not to be granted, as the statutory procedures were followed and the claimant's rights were not breached as all the tenets of natural justice were afforded to him, particularly the right/opportunity to be heard at the hearing. Another tenet of natural justice is to ensure that a person charged is given notice of the charges that he may have to meet and the particulars of same so that he can properly answer and defend himself.

[58] On the evidence presented in the letter dated June 2, 2021, along with the letters of complaint, there was sufficient information therein to inform the claimant that his conduct fell within the definition of professional misconduct by a student surveyor. The claimant was made properly aware of the complaint made against him.

[59] Section 21 of the Act outlines the possible charges that may be maintained against a student surveyor, and they all form part and parcel of professional misconduct. In the details outlined in the complaint received from the complainants against the

claimant, it would be clear to any reasonable person, or in these circumstances, a student surveyor, that the relevant charge was one of professional misconduct. Therefore, there would have been no proven breach of the principles of natural justice in this regard.

[60] The claimant also sought a declaration on the basis that the hearing breached the principles of legitimate expectation. Counsel submitted that the claim of legitimate expectation has not been made out as a matter of law on the evidence. Legitimate expectation is a legal principle that must be borne out on the facts. Once the legitimate expectation is established the court will have the task of weighing the requirements of fairness against the overriding interest relied upon for the change of policy.

[61] In this case, the question is what was the claimant's legitimate expectation? The defendants assert that the only reasonable legitimate expectation that the claimant should have is that he would be notified of the charges and the complaint made against him and be given an opportunity to be heard, whether with the representation of counsel or not, in accordance with the legislative scheme.

[62] There is no evidence of another promise or assurance made to the claimant; nor any evidence to say that the Committee's past conduct or policy would have created any expectation legitimate or otherwise or to suggest that this situation has happened before or was handled differently. Therefore, without more, the Court cannot find that there was legitimate expectation in the sense meant by Lord Diplock in the **CCSU** case. This does not arise on the factual circumstances in the case at bar.

[63] In relation to an order of certiorari being sought by the claimant, Counsel relied on Wade and Forsyth in Administrative Law[23] which stated that:

> *"It cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this Court and quash something which is a determination or a decision."*

[23] 10th Edition, at page 517

[64] Counsel relied on the case of **Rex v London County Council**[24] and **Regina v Statutory Visitors to St. Lawrence's Hospital, Caterham Ex, Pritchard**[25], to submit that the question to be determined by this Court is whether the recommendation of the Committee falls to be a decision or determination. The Committee is empowered to hear charges against a student surveyor/surveyor, and in the event a finding of guilt is made the Committee, must submit to the Board its findings of fact in a report and may submit a recommendation according to section 21(4). Section 22 (1) of the Act, gives the Board the power to make a decision to issue a commission or not. The Board in making a decision may take such actions and may rely upon the findings of fact together with the recommendation.

[65] The Committee provides the Board with a report of its findings of fact along with any recommendation after a hearing. In essence, the Committee provides its opinion and material to the Board for the Board to inform the claimant of the finding of guilt and to allow the claimant an opportunity to be heard before the Board determines the sanction to impose. Thus, on that premise, the Committee has no power to make a decision that would adversely affect the claimant's rights.

[66] The Board does not arrive at a decision only on the findings of fact and any recommendation submitted as the claimant is given an opportunity to be heard before its determination of the matter. Therefore, it is clear that the Board determines the matter under this statutory regime and not the Committee, and said determination is only reviewable by the Court of Appeal. Therefore, the recommendation in the report dated March 16, 2022, does not fall to be a decision or determination of the matter. Any decision that is to be made is made by the Board. As such, the claimant has failed to establish that an order for certiorari can be granted in the circumstances.

[67] The claimant has sought an order for mandamus for the Court to direct the first defendant to convene another hearing to hear any charges properly brought against the claimant. In essence, the claimant is seeking a mandatory order from

[24] [1915] 2 K.B. 466
[25] [1953] 1 WLR 1158

the Court compelling the Committee to do an act, which the Committee had refused to do. The authority of **Re Maharaj and the Constitution of Trinidad and Tobago** ('Re Maharaj')[26] was submitted to contend that a failure to carry out a duty can constitute a refusal to act. However, the claimant would be required to show that there was a demand for execution and a refusal which followed.

[68] Pursuant to section 7(2) of the Second Schedule of the Act, the Committee conducted a hearing on July 9, 2021, having been satisfied that the claimant was duly served. Therefore, the claimant would not have been entitled to a right to a rehearing. Further, the claimant by way of a letter from his Attorney-at-Law dated July 15, 2021, advanced no basis on which such a demand could be made. In fact, there were no reasons purported, nor explanation given as to why the claimant would not have received or did not receive the registered post. Accordingly, the claimant has failed to establish that an order for mandamus can be granted in the circumstances.

[69] Among the orders sought by the claimant was that the enforcement of the recommendation of the defendant be stayed pending judicial review. Counsel submitted that no stay was imposed by the Court at the leave stage, and at this juncture of the proceedings, any such argument is moot. The Court ought to uphold the recommendation contained in the report dated March 16, 2022, of the Committee and dismiss the claim.

[70] The court is exercising its supervisory jurisdiction and the grant the relief sought by the claimant as a result of the process engaged by the Committee in arriving at its decision, i.e. the finding of guilt, is discretionary. In the circumstances, the court has the discretion whether to grant a remedy at all and, if so, what form of remedy to grant. In deciding whether to grant a remedy, the Court may take account of the conduct of the party applying and consider whether it has been such to disentitle the party to the relief sought. It was submitted that the case of **Williams v Home Office (No 2)**[27] held that the court may decline to grant relief if the effect of doing so renders the remedy unnecessary, futile, or academic.

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[26] (1966) 10 WIR 149- pages 151 to 152
[27] [1981] 1 All ER 1211

[71] In the instant matter before this Court, the claimant sought to appeal the decision of the Board. It is the function of the Board to impose a sanction upon the receipt of a finding of guilt and any recommendation submitted by the Committee. Following the finding and recommendation of the Committee, the Board imposed a sanction against the claimant. As he is entitled to do, the claimant appealed that sanction, directly to the Court of Appeal as provided in the Act.

[72] The Court of Appeal in November 2023 heard and determined the appeal based on the finding of guilt which could not have been challenged and was not disturbed at that time. However, the claimant had contemporaneously sought leave to apply for judicial review which was granted. Therefore, the claimant always knew, or ought to have known, of the concurrent proceedings commenced by him before both courts.

[73] It was therefore within his power and his discretion to pursue these matters in a manner that was in keeping with the overriding objective. The claimant also knew that the Court of Appeal's jurisdiction is only in regard to whether the appropriate sanction was imposed and, in those circumstances, ought to have requested a stay of that appeal hearing pending the judicial review application, if it were his intention to challenge the finding of guilt.

[74] Counsel relied on **Danville Walker v The Contractor-General of Jamaica**[28] to further submit that what we have here are two separate jurisdictions and two separate decisions being reviewed, one flowing from the other, however, each is distinct. In the circumstances, the parties before the judicial review Court are separate and distinct from the parties that were before the Court of Appeal, in the statutory appeal.

[75] As such, the Board was not joined as a party before this court as this is not permitted by way of statute. Therefore, the claimant would be estopped from challenging the finding of guilt in the judicial review Court, after he pursued his appeal before the Court of Appeal first, without having sought a stay of proceedings pending the decision of the judicial review Court to determine whether

[28] [2012] JMSC Civ. 31

the finding of guilt is lawful or not. The Court of Appeal acted as they did by imposing a sanction which was premised on the finding of guilt being in place at the time the appeal was being heard.

[76] Counsel argued that it ought not to be open to the claimant to now pursue his challenge to the finding of guilt, after submitting to the jurisdiction of the Court of Appeal with respect to the sanction, arising from the same factual circumstances. The challenge to the finding of guilt should have been pursued first. The claimant having elected to challenge the sanction in the Court of Appeal first without having applied for a stay has effectively acquiesced and/or accepted the finding of guilt. Thus, this court exercising its supervisory jurisdiction, after the sanction imposed by the Court of Appeal, would in effect be doing so as an academic exercise, as the sanction imposed by the Court of Appeal would still stand. Counsel concluded that this court ought not to act in vain, which is effectively what the claimant is asking it to do at this time.

[77] The conduct of the claimant in acquiescing to the finding of guilt before the Court of Appeal should be considered by the judicial review court as the claimant disentitling himself to the discretionary reliefs sought herein and refuse the orders sought herein.

Judicial Review

[78] The heads of judicial review from the **CCSU** case are set out here:

> *The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 at page 1161a that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court. Lord Diplock in Council*

of Civil Service Unions v Minister for the Civil Services [1985] AC 374 at page 410 F-H, discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:

By illegality as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By irrationality I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...

I have described the third head as —procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

The balancing and weighing of relevant considerations is primarily a matter for the public authority, not the courts (per Lord Green MR in Wednesbury, at page 231; and per Lord Hailsham in Chief Constable of the North Wales Police at page 1160 H). However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse."

[79] In **Chief Constable of The North Wales Police v Evans** at page 1160 paragraphs F-G, Lord Hailsham of St. Marylebone L.C opined as follows:

"But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law."

[80] In addition, our Court of Appeal has now added the grounds of unconstitutionality and proportionality as heads of judicial review. (See **Latoya Harriott v University of Technology**.) These additional grounds were not argued in this claim.

[81] The approach of the court in determining this claim is in the exercise of its supervisory jurisdiction. The role of the court is to review the decision-making process and not to decide whether the decision is correct or not. It is not for this court to substitute its own views on the merits of the decision made or to make a decision.

Issues

[82] Among the issues to be determined are:

i. Whether the claimant was properly served.

ii. Whether the charges were disclosed to the claimant.

iii. Whether the claimant had a right to a hearing.

iv. Whether the Board is the decision maker.

v. Whether the hearing was procedurally correct.

vi. The appeal from sentence.

vii. The effect of a grant of certiorari after the appeal from sentence.

Discussion

Issue 1: Whether the claimant was properly served.

[83] Section 6 of the Second Schedule to the Land Surveyors Act prescribes:

> *"6. -(1) The Committee shall give not less than thirty days' notice to a surveyor or student surveyor against whom a hearing is to be held, and any person or persons making the complaint against the surveyor -or student surveyor stating the time and place at which the hearing will be held.*
>
> *(2) The notice shall be served by registered post, bailiff or any recognized delivery service and shall contain a copy of the charge and any other relevant documents that form the subject of the hearing."*

[84] The Act prescribes how service may be effected and one method is by registered post. Posting by way of registered post is deemed service. Evidence to the contrary as provided by section 52(1) of the Interpretation Act is only allowable where there is no prescribed method of service.

[85] In the case of **Owen Clunie v The General Legal Counsel,**[29] which referred to the cases of **George Anthony Hylton v Georgia Pinnock (as Executrix of the Estate of Dorothy McIntosh, deceased)**[30] and **Linton Watson v Gilon Sewell et al,**[31] the Court of Appeal stated that non-service of the required documents was fatal to the proceedings.

[86] It is trite law that in construing a document or statutory instrument, the court must give the words being examined their natural and ordinary meaning. As a consequence, a meaning cannot be ascribed by the court to a particular provision in another statute under review when the provisions are worded differently. Caution is therefore required before ascribing by analogy a construction given in another case to an unrelated provision.

[87] Bearing that caution in mind, in the case of **Millard Dunbar V St Catherine Co-Operative Credit Union,**[32] Phillips, JA writing for the Court of Appeal looked at

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[29] [2014] JMCA Civ 31
[30] [2011] JMCA Civ 8
[31] [2013] JMCA Civ 10
[32] [2022] JMCA Civ 41

section 119 of the Registration of Titles Act and section 52 of the Interpretation Act and concluded:

> *"[30] The decisions of this court, to which we have been referred, demonstrate that section 52(1) of the Interpretation Act cannot be prayed in aid in interpreting section 119 of the ROTA for these purposes. In both* ***Hylton v Pinnock*** *and* ***Clunie v GLC****, Phillips JA referred, with approval, to the relevant finding of Smith JA in* ***Mitchell v Mair and Others*** *(unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 125/2007, judgment delivered 16 May 2008 ('****Mitchell v Mair'****). Smith JA held that section 52 of the Interpretation Act is excluded if there is a provision in any law to the contrary. He ruled that since the statutory provision under consideration speaks to "registered post", section 52 of the Interpretation Act, which speaks to "post" and "ordinary post", does not apply.*
>
> *[31] In his reasoning, Smith JA considered section 6 of the Election Petitions Act ('EPA'), which provided for the service of a petition within 10 days of presentation. The relevant portion of the section states:*
>
> > *"Service of the petition may be effected either by personal service or by registered post to the address of the respondent stated in the respondent's nomination paper."*
>
> *[32] On page 21 of the judgment, he specifically posed the question of "whether service is effected on the mere posting of the registered letter containing the documents[?]". On page 22, he went on to demonstrate that there was a distinction between the provisions of section 6 of the EPA and section 52 of the Interpretation Act. He pointed out that "section 6 of the EPA refers to registered post. Section 52 of the Interpretation Act speaks to post and ordinary post" (underlining as in original). He answered the question that he had posed for himself by stating, on page 23, "I am inclined to agree…that the language of section 6 of the EPA shows a 'contrary*

intention' and section 52 of the Interpretation Act does not apply". He continued on pages 23-24:

> *"…In my view section 6 provides a statutory method of serving … so that when the documents have been 'served' as directed, it is not necessary to show that the addressee has received them. Once the service is effected within the time prescribed and in the manner stated such service is valid. Since the validity of service does not depend on receipt, the date of receipt is irrelevant…."*

[33] In both ***Hylton v Pinnoc****k and* ***Clunie v GLC****, Phillips JA found that section 52 of the Interpretation Act was excluded from the interpretation of the provisions under consideration by the court. Based on those cases, it must be found that the stipulation in section 119 of the ROTA, about the use of registered post, excludes the operation of section 52(1) of the Interpretation Act, which allows for evidence contradicting service."*

[88] In **Davis v The General Legal Council**,[33] Panton P, on behalf of the court, in dealing with the proper interpretation to be accorded rule 21 in respect of what is required for proper service in keeping with the rules stated:

> *"The rules [require] that the letter is to be addressed and posted; there has to be proof that it is not only so addressed but was also posted and that would be proof of service…. What is required, and which has been the age old practice in Jamaica and other parts of the Commonwealth, is a slip which states 'Certificate of Posting' and it indicates the date and place of posting. If the index to the supplemental record of appeal page 14 is looked at, a proper certificate of posting of a registered article is there exhibited. Nothing less will suffice."*

[89] Under sections 6, 24(1), 31 and 37 of the Post Office Act and sections 69(3) - (4), 70 and 78 of the Post Office Regulations 1941, the contents of articles posted had

[33] [2014] JMCA Civ 20

to be kept private and postal clerks were under a duty not to disclose the contents of any registered article received by the post office.

[90] In the Post Office Regulations, 1941 made pursuant to the Post Office Act, section 78 provides as follows:

> "*78.- (1) No registered postal article will be delivered to the addressee unless and until he signs a receipt for it in such a form as the Postmaster General may require, or, if this is not practicable, unless and until the receipt is signed by some responsible person known to be permanently connected with the house or place to which the article is addressed, or by some person authorized by the addressee in writing to receive registered postal articles on his behalf.*

[91] The importance of these sections to the instant case is that the sender will know whether or not his registered article has been delivered for if it has not been, it will be returned to him. The evidence of the defendant is that the registered article posted to the claimant was not returned.

[92] The claimant's affidavit in support of the fixed date claim form states his address as the same one listed on the certificate of posting of a registered article, which is 3 Birch Way, Barbican Terrace, Kingston 6. There is no dispute that the address on the certificate is correct. It is numbered "*#2618"* and is stamped Spanish Town Post Office, June 3, 2021. There is evidence in the form of a letter from Mr Michael McPherson[35] signing on behalf of the Postmaster General regarding the posting of the registered article numbered R2618 on June 3, 2021, at the Liguanea Post Office. Their *"records proved inconclusive as to whether or not the letter was collected or returned to sender".*

[93] The article for Mr Winston Scott is addressed to 85 Market Street, Falmouth P.O. Trelawny. All the other registered items were received by their addressees.

[94] The claimant has denied receiving the registered article, in addition, the claimant

[35] Dated June 20, 2022, to Ms Racquel Willis, attorney-at-law for the claimant

adduced evidence by way of the affidavit of Alexis McCatty, secretary to Mr Fitz Henry, Commissioned Land Surveyor. She deposed that on July 14, 2021, she collected registered mail addressed to her employer Mr Henry, from the post office. She noted that the letter came from the Committee and opened it as she is authorized to do. The contents were addressed to the claimant. They are itemized in her affidavit and there is no need to reproduce them here, these are the items said to have been sent to the claimant. She was instructed to call the claimant and did so. She scanned and emailed the entire contents of the registered mail to the claimant at his request.

[95] The defendant responded to these allegations by way of the affidavit of Mr Ainsworth Dick, Secretary of the Committee. He averred that when a complaint is received, a meeting is held and the members of the Committee decide who is to be summoned and to whom notices are to be sent. He outlined that notices are differentiated from summonses in that they are sent out in envelopes of different sizes. The Chairman of the Committee is the one who mails these items.

[96] Mr Dick stated as follows:

> "*At the meeting that was convened, the notice to the Claimant was packaged in a different size envelope from the summons and the said package contained a notice letter and complaints of Mrs Norma Birthfield-DuCally and Mrs Joana Fearon. The summons to Mr. Fritz[sic] Henry and the complainants (Mrs Norma Birthfield-DuCally and Mrs Joana Fearon) were packaged separately and sent via registered post on the same date and time. A copy of the certificates of posting is exhibited hereto and marked AD-2 for identification*."

[97] Mr Dick did not say that in this instance the chairman mailed the registered articles, he told the court what usually obtains. I find that there is a discrepancy in the evidence between the place of posting in the letter from the Postmaster General said to be at the Liguanea post office and the stamp clearly visible on the Certificate of Posting which says the Spanish Town post office. There is no affidavit of service

from the person who went to the post office. Having said this, it is beyond doubt that the defendant posted a registered article to the claimant.

[98] Mr Dick said that a notice not a summons was sent to the claimant. He also said that the notices and summonses are usually packaged in envelopes of different sizes. At the Committee meeting, the notice to the claimant was packaged in a different envelope from the summons.[36] The evidence of Mr Dick is that the claimant was sent a notice not a summons. There was no need for different envelopes in this case.

[99] It seems to me that the reason for different envelopes of different sizes is that the notices are going to those against whom a hearing is to be held, pursuant to section 6 of the Second Schedule. While those appearing before the Committee pursuant to section 8 of the Second Schedule, are summoned to attend before the Committee for the purposes stated there.

[100] In **Special Sergeant Steven Watson v The Attorney General and others**[37], Brooks JA (as he then was), at para. [19], cited with approval Lord Reid's statement on this issue in **Pinner v Everett**[38], where he stated thus:

> *"[19] 'In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute."*

[101] In the more recent decision of **Jamaica Public Service Company Limited v Dennis Meadows and others**[39], at para. [54], the Court of Appeal quoted page

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[36] Paragraph 10
[37] [2013] JMCA Civ 6
[38] [1969] 3 All ER 257 at 258-259
[39] [2015] JMCA Civ 1

49 of Cross Statutory Interpretation, 3rd edition, in which the authors summarized the major principles of statutory interpretation as follows:

> *"[54] The learned editors of Cross' Statutory Interpretation 3rd edition proffered a summary of the rules of statutory interpretation. They stressed the use of the natural or ordinary meaning of words and cautioned against 'judicial legislation' by reading words into statutes. At page 49 of their work, they set out their summary thus:*
>
> > *'1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.*
> >
> > *2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.*
> >
> > *3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute....'"*

(see also **Robert Epstein v National Housing Trust and another**[40] in which McDonald-Bishop JA also applied that principle).

[102] Section 52(1) of the Interpretation Act provides:

> *"Where any Act authorizes or requires any document to be served by post, whether the expression 'serve', 'give' or 'send' **or any other expression is used**, then, unless a contrary intention appears, the service shall be*

[40] [2021] JMCA App 12

deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be ***delivered*** *in the ordinary course of post."*

[103] The question is whether the Act uses language that raises a contrary intention. If it does, then the Interpretation Act does not apply. Section 6(2) of the Second Schedule set out below, provides for service by registered post, as well as service by "*bailiff or any recognized delivery service*." The words "*recognized delivery service*" could include a recognized courier service as well as the ordinary post:

"6-(1) The Committee shall give not less than thirty days' notice to a surveyor or student surveyor against whom a hearing is to be held, and any person or persons making the complaint against the surveyor -or student surveyor stating the time and place at which the hearing will be held.

(2) The notice shall be served by registered post, ***bailiff or any recognized delivery service*** *and shall contain a copy of the charge and any other relevant documents that form the subject of the hearing."*

[104] The method of service has been prescribed by the statue. Arguably, the document once handed over for delivery is tantamount to being placed on a public post, where it can be easily seen and read by passersby. The word "post" comes from the Latin word *"postis,"* which means "doorpost" or "doorjamb."

[105] In my view, section 6 of the Second Schedule provides a statutory method of service. When the documents have been 'served' by one of the prescribed methods, it is not necessary to show that the claimant has received them. Once the service is effected within the time prescribed in the Act for notice to be given and in the manner set down in the statute then such service is valid. Since the validity of service does not depend on receipt, the date of receipt is irrelevant. The date of posting is the relevant date.

[106] In the case of **Linton Watson v Gilon Sewell,**[41] Phillips JA stated that the mere denial of receipt of registered mail was not sufficient to disprove service where there had been no evidence from the postal service that the claim form had been returned unclaimed.

[107] This means that the claimant's denial that he received the registered post coupled with the inconclusive records from the office of the Postmaster General that the registered article was delivered do not rebut the presumption that he was properly served or that the requirements as to service were not met. This is evidence that seeks to raise a contrary intention.

[108] The Act does not use language that gives rise to a contrary intention. Service by registered post is a prescribed method of service in the Act. The registered article was not returned unclaimed and the claimant's address was correct. In all the circumstances, the requirements of the statute as to service have been met. The claimant is deemed to have been properly served, the notice having been sent by registered post.

Issue 2: Whether the charges were disclosed to the claimant.

[109] Sections 6(1) and 6(2) of the Second Schedule of the Land Surveyors Act, provides that:

> *"6-(1) The Committee shall give not less than thirty days' notice to a surveyor or student surveyor against whom a hearing is to be held, and any person or persons making the complaint against the surveyor -or student surveyor stating the time and place at which the hearing will be held.*
>
> *(2) The notice shall be served by registered post, bailiff or any recognized delivery service and* ***shall contain a copy of the charge*** *and any other relevant documents that form the subject of the hearing."*

[110] Section 7(1) of the Second Schedule of the Land Surveyors Act provides that a

[41] [2013] JMCA Civ 10, at para [41]

person to whom notice has been served may be represented by an attorney-at-law at the hearing and shall be afforded reasonable opportunity to call or give evidence, to examine or cross-examine witnesses and to make submissions to the committee.

[111] Section 21 of the Act provides that the Committee shall hear all charges of professional misconduct, inter alia.

[112] It was argued by Ms Lindsay that the offences concerning professional misconduct are set out in sections 19(1), 19(5), and 21(1) of the Act, and sections 3(b), 9(1), 9(2) and 36(1) in the Second Schedule which creates criminal offences.

[113] The claimant avers that he did not receive a document containing a copy of the charges. The defendant, deposed through its secretary that it sent to the claimant, copies of the complaints laid against him, the date, time, and place for the hearing, and the section which charges and authorizes the Committee to hear the complaints/charges against the claimant.[42]

[114] The Act requires in section 21 that the Committee enquire into charges of professional misconduct, incompetence or negligence and for breach of articles of attachment. Therefore, it was necessary only to set out those three charges.

[115] In **Dawkins, Barrington v Trevor L. Shaw on behalf of himself and all members of the Land Surveyor's Board,[43] Barrington Dawkins**, Harris, JA(Ag) as she then was) said at pages 19-20:

> *"it is clear that the Act in endowing the committee with the right to carry out inquiry and hear charges against a surveyor empowers it to proceed as it deems necessary. It is not bound to hear witnesses or to hear evidence on oath. As a quasi judicial tribunal it would not be subject to the strict rules of evidence as applicable in a court of law; see R v Commission for racial*

[42] The notice letter dated June 2, 2021

[43] Civil Appeal No: 160 Of 2001

> *equality [1980] 3 All ER 265. The committee may be informal in its procedure more applying flexible standards and discretionary powers a court would only interfere with a tribunal's exercise of its discretion, if it is shown that it acted with malice bad faith or in breach of the rules of natural justice. A tribunal, in the exercise of quasi judicial functions must pay due regard to the dictates of natural justice. It must ensure that the party who comes before it receives a fair hearing that* ***a party must be given notice of any charge or complaint made against him and an opportunity of meeting such charge or complaint****." (emphasis added)*

[116] The claimant was given notice of the complaints, this accords with the statement of the law by Harris, JA. In any event, the charges not being specified in the notice letter would not have affected the claimant as had he attended the hearing he could have asked for an adjournment to rectify any issues of non-disclosure.

Issue 3: Whether the claimant had a right to a hearing

[117] In the case of **Dawkins**, the appellant entered a contract with Alumina Partners of Jamaica (Alpart) to provide and prepare a pre-checked plan for $2,000,000, with a completion date of May 15, 1999. The appellant delayed the completion of the contract. Alpart requested the plan on December 6, 2000, but the appellant did not comply. Alpart lodged a complaint with the Land Surveyor's Disciplinary Committee to enforce the contract. The Committee initiated an enquiry where the appellant was represented by counsel. It was adjourned for the appellant to submit supporting documents as to why he did not complete the contract.

[118] At the next hearing, the appellant, represented by different counsel, raised objections to the hearing process. At a further hearing the appellant was absent and the Committee concluded its enquiry without him. The Committee found the appellant guilty of professional misconduct and recommended that the appellant be suspended from practising as a land surveyor. The appellant wrote to the Chairman of the Board explaining why he failed to attend the enquiry enclosing a letter from Alpart who wished to withdraw the complaint. The Board reviewed the

letters and despite the Committee recommending a 2-year suspension, the Board imposed a lesser suspension of one year after considering the letters from the appellant.

[119] The Court of Appeal held that the Committee, as a quasi-judicial body, is not bound by strict rules of evidence during hearings. Its enquiry is governed by section 21 of the Land Surveyors Act. As long as the procedure follows the statute, there is no basis to challenge it. Natural justice requires a fair hearing before an impartial tribunal, and the appellant had legal representation and was heard. The Act allows the Committee to call witnesses as deemed necessary. The Committee had sufficient material to support its findings and recommendations, and there is no dispute that the contract work was not completed on time. The appellant's explanation for the delays was not accepted by the Committee.

[120] Harris J.A stated that section 22 does not explicitly grant a right to be heard for the appellant, but it is clear that he has a right to be heard in mitigation. In his letter dated September 13, 2001, the appellant requested that the Board consider its contents when deciding on the Committee's recommendation. The Board agreed to this request and subsequently determined an appropriate sentence. Harris J.A also noted that *"As a matter of law, the respondent was under a duty to accept the findings of the Committee."*

[121] The Board was legally required to accept the Committee's findings that the appellant was guilty of professional misconduct, as mandated by section 21(2) of the Act. The legislative framework establishes a separation of powers. It is the Committee which determines findings of negligence or misconduct, while the Board decides the appropriate action based on those findings under section 21(1). Harris JA stated that the Act grants surveyors a discretionary right to appear before the Board, allowing them to make representations in certain cases.

[122] The claimant has a right to be heard before the Committee, there is no right to be heard before the Board except in mitigation of sentence. The statute gives the Board no power to review the finding of guilt and it has to accept the

recommendation of the Committee.

Issue 4: Whether the Board is the decision maker

[123] With respect to the submission that the Board is the decision maker and not the Committee, the definition of finding of fact in Black's Law Dictionary,[45] reads:

> *"finding of fact. (18c) A determination by a judge, jury, or a jury, or administrative agency of a fact supported by the evidence in the record, usu. Presented at the trial or hearing<he agreed with the jury's finding of fact that the driver did not stop before proceeding into the intersection>. – Often shortened to finding."*

[124] The verdict of a jury is based on findings of fact, as is that of a judge sitting alone. It is the act of deciding the guilt of the defendant before the court or tribunal which is its decision or determination. In my opinion, the Committee performed the act of deciding the guilt of the claimant and in doing so fulfilled its statutory function. The Board has no power to do so and based its sentence on what had been placed before it by the decision maker.

Issue 5: Whether the hearing was procedurally correct

[125] The hearing was convened to enquire into complaints brought by civilians against the claimant. The claimant was properly served by registered post. The statute allows the hearing to take place in the absence of the claimant. The Committee considered the matters before it as well as the failure of the claimant to attend the hearing. This failure to attend was not the subject of disclosure.

[126] The claimant argues that he should have been served a summons with a complaint outlining the charge of non-attendance and a hearing date schedule and that the Committee breached the principles of natural justice as he was not notified of the charges. This is unquestionably so. The claimant was found guilty of "failing to attend an Inquiry when summoned so to do."

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[45] 10th ed.

[127] This was a finding of guilt based on a charge which did not form part of the originally convened hearing. The Committee used the following language in its report to describe the claimant's non-attendance: "[*totally ignored] the LSDC by not attending an enquiry he was summoned to attend...*" Basic principles of fairness as set out in the well-known case of **Doody** dictate that the conclusion drawn ought to have been based on evidence of which there was none.

[128] The Committee's process cannot be said to have been fair as the finding of guilt on the charge of failing to attend based on the claimant's having "*ignored"* the summons meant that the claimant had to make his submissions in mitigation on a charge he was hearing for the first time before the Board. The claimant said that he eventually received the documents from Mr Henry and he also received the report of the Committee when he went before the Board. He had no opportunity to be heard before the Board in his defence.

[129] The failure to give notice of and to convene a hearing on the charge of failing to attend was procedurally improper. The Committee's hearing and finding of guilt on the charge of failing to attend is also unlawful as the hearing was not convened for that purpose, the charge of failing to attend could not have been the subject of the hearing on July 9, 2021, and the Committee was without jurisdiction to enquire into it.

Issue 6: The appeal from sentencing

[130] Section 25 of the Act does not give the Board the power to review the findings of the Committee but only to consider mitigating factors in determining whether or not the recommendation of the Committee concerning the penalty is just and fair in light of its finding of guilt.

[131] An appeal from the sentence of the Board was heard and determined by the Court of Appeal. The appeal is not an alternate remedy. The statute establishes the review of a finding of guilt by the Committee to this court by way of judicial review and an appeal from sentence to the Court of Appeal.

The claimant failed to disclose to each court that he was before the other, this is attributed to sharp practice by counsel in pursuing this matter. He failed to apply for a stay of proceedings in the Court of Appeal in order to let this matter proceed first. This does not lock him out of the process of judicial review as he had no other recourse in order to pursue his conviction.

Issue 7:The effect of a grant of certiorari after the appeal from sentence

[132] *If an act is void then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity*.[46]

Conclusion

[133] The court concludes that the orders sought will be granted in part. The charges related to professional misconduct were properly before the Committee and heard by them, in the absence of the claimant who had been properly served. The finding of guilt on the charge of professional misconduct is valid. The finding of guilt on the charge of failing to appear is invalid.

[134] While the Judicature (Supreme Court) Act refers to mandamus, prohibition, and certiorari, it does not mention declarations. A declaration merely states a legal position but does not compel action by public authorities. A declaration informs but does not necessarily invalidate a decision unless the decision is deemed a nullity.

[135] In cases where an inferior tribunal's decision is a nullity, it does not require formal quashing to be invalid. However, decisions containing errors of law must be quashed to cease being effective. If a decision is declared null and void, a quashing order is unnecessary because the declaration alone renders the decision void.[47]

[46] MacFoy v United Africa Co. Ltd. [1961] 3 W.L.R. 1405 at 1409
[47] Gorstew Limited v Her Hon. Mrs. Shelly-Williams and Others [2016] JMSC Full 8

[136] The orders below are made as a result of the foregoing.

[122] Orders:

1) The Court grants an order of Certiorari quashing the findings and recommendation of Land Survey Disciplinary Committee in its report dated 16th March 2022 related to the charge of failing to attend.

2) The Court declares that the hearing on July 9,2021 into the charge of professional misconduct was lawful and the finding of guilt valid.

3) No order as to costs.

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Wint- Blair, J