JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

MISCELLANEOUS APPEAL NO COA2022MS00012

BETWEEN	**GENERAL LEGAL COUNCIL**	**APPELLANT**
AND	**JENNES VASHTI ANDERSON**	**RESPONDENT**

Written submissions filed by Grant, Stewart, Phillips & Co, attorneys-at-law for the appellant

Written submissions filed by Carol Davis, attorney-at-law for the respondent

14 June 2024

Civil procedure – Application for striking out – Defamation claim – Absolute privilege – Whether absolute privilege constitutes a bar to bringing a claim in defamation

Legal profession – General Legal Council – Disciplinary Committee of the General Legal Council - Civil Procedure Rules, 2002 rules 69.4, 26.1 and 26.3

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

STRAW JA

Introduction

[1] By notice of appeal filed on 1 November 2022, the appellant, the General Legal Council ('GLC'), seeks to overturn the decision of Carr J ('the learned judge'), given on 13 May 2022. On that latter date, the learned judge refused the GLC's application to strike

out the respondent's (Ms Jennes Vashti Anderson) ('Ms Anderson') claim for defamation and refused the GLC's request for summary judgment.

[2] Ms Anderson's claim for defamation has its roots in a complaint brought by a member of the GLC (Ms Eileen Boxhill) against her before the Disciplinary Committee of the GLC ('the Disciplinary Committee'). By that complaint, it was alleged that Ms Anderson had failed to file accountant's reports and/or declarations for the years 2000 to 2004, as she was required to do in her capacity as a then practising attorney-at-law within the jurisdiction. The complaint was laid in July 2006, by which time, Ms Anderson had been appointed a Resident Magistrate (now Parish Court Judge). Even though Ms Anderson had made a preliminary objection challenging the jurisdiction of the Disciplinary Committee to hear the complaint, in light of her appointment to a judicial office, she was found guilty of professional misconduct, and on 26 April 2014, she was reprimanded and ordered to pay costs of $350,000.00 ('the 2014 decision'). The 2014 decision and the reasons of the Disciplinary Committee were reduced to writing and published on the website of the GLC.

[3] On 31 July 2018, the 2014 decision was set aside by this court on the principal basis that the Disciplinary Committee had no jurisdiction over Ms Anderson, who was, at the time of the bringing of the complaint, a judicial officer (see **Jennes Anderson v Eileen Boxill (A member of the General Legal Council)** [2018] JMCA Civ 22 at paras. [33] – [93] ('the 2018 decision')). Ms Anderson now complains that notwithstanding the 2018 decision, the GLC continued to publish the 2014 decision on its website without any notation of the reversal of the decision. The GLC also made publication about the 2014 decision in its annual report, and according to Ms Anderson's claim, the GLC "invited, facilitated and or encouraged the republication" of the decision by others. These publications and republications, according to Ms Anderson, contained false statements which were defamatory of her character and geared towards subjecting her to ridicule and lowering her reputation in the estimation of others. This is the thrust of her claim against the GLC as contained in her amended claim form and particulars of claim, both filed on 29 September 2021.

[4] The GLC stridently refutes this claim and contends that it did not publish any material that was defamatory of Ms Anderson at any time, and further that any publications regarding Ms Anderson were true and published in circumstances which were absolutely privileged or subject to qualified privilege. The GLC also relies on the defence of fair comment and states that the decision of the Disciplinary Committee is a matter of record.

[5] In keeping with its defence, on 12 February 2021, the GLC filed an application seeking, among others, the following orders:

> "1. The Court do determine whether the words and/or publication, the subject matter of this Claim:
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> (a) Bears a defamatory meaning as alleged by [Ms Anderson] or at all;
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> (b) If the words/publication, the subject matter of this Claim, is capable of bearing a defamatory meaning as alleged by [Ms Anderson] or at all, whether those words were published in [sic] an occasion which attracts absolute and/or qualified privilege;
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> 2. If the court determines pursuant to paragraph 1(a) hereof that the words/publication was either not capable of bearing a defamatory meaning as alleged or at all, that the Claim be struck out and there be judgment for the [GLC].
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> 3. In the alternative and/or in addition, if the court determines pursuant to paragraph 1(b) hereof that the words/publication, the subject matter of this Claim, were published on an occasion which attracts absolute and/or qualified privilege that the Claim be struck out and there be judgment for the [GLC].
>
> …"

[6] This application was made pursuant to rules 69.4, 15.2(a) and 26.3(1)(c) of the Civil Procedure Rules, 2002 ('CPR'). It was this application that was heard and refused by the learned judge on 13 May 2022 and from which refusal the GLC now appeals.

The affidavit evidence before the learned judge

[7] The GLC's application was supported by an affidavit from its then Chairman, Allan Wood QC. By this affidavit, Mr Wood deposed to the establishment of the GLC and the Disciplinary Committee under sections 3 and 11 of the Legal Profession Act ('LPA'), respectively. He then set out the history of the complaint, gave an overview of the disciplinary hearing, including its outcome, and gave an overview of the decision of this court reversing the GLC's decision.

[8] Mr Wood asserted that after the disciplinary hearing, the 2014 decision was posted on the website of the GLC, in keeping with normal practice and that there was no direction in the 2018 decision requiring the 2014 decision to be removed from the website.

[9] Subsequently, on or about 22 July 2020, a letter was received by Mr Wood, in his capacity as Chairman of the GLC, from Ms Anderson. By this letter, Ms Anderson complained about the continued posting of the 2014 decision on the GLC's website. Mr Wood said he responded by letter dated 28 July 2020 advising Ms Anderson, among other things, that he would request the GLC to either remove the 2014 decision or post it alongside the 2018 decision. This response, Mr Wood says, was not an admission or acceptance that the GLC had defamed Ms Anderson. Both letters were exhibited to Mr Wood's affidavit.

[10] Also, in his affidavit evidence and with respect to the publication complained of in the GLC's annual report, Mr Wood stated that this was part of the GLC's statutory duty, in keeping with the LPA and the Public Bodies (Management and Accountability) Act. The laying of the report and the discussions on the report in Parliament were absolutely privileged. The relevant annual report was not exhibited to his affidavit.

[11] Ms Anderson, by affidavit in response to Mr Wood's affidavit, asserted that the defamatory matter appeared in a number of forms on the GLC's website, including as an

entire webpage accessible by way of multiple hyperlinks, as a portable document format ('PDF') download and in the form of summaries and snippets. These pages, documents, summaries and snippets were accessible on the World Wide Web, using various search terms and the summaries and snippets were also available by way of the cache feature on popular search engines.

[12] Ms Anderson said that subsequent to the receipt of her letter of July 2020, the GLC initiated a process to remove access to the 2014 decision by way of the GLC's website. By 28 July 2020, the webpage, as well as the snippets and summaries, were no longer accessible. However, the PDF version was still available because it was hyperlinked to other documents on the GLC's website, and it was not until about 31 July 2020 that those hyperlinks were deactivated. Ms Anderson stated further that:

> "[D]espite this, summaries of and snippets from as well as the material decision in its entirety could still be obtained from the web server that hosted the GLC website using popular search engines at least until mid-January 2021 for which I have documentary evidence."

[13] Ms Anderson was clear to establish that her claim for defamation did not relate to the 2014 decision itself but to the continued publication of the 2014 decision, after the 2018 decision. With respect to the GLC's defence raising the issue of qualified privilege, Ms Anderson stated that there are legal and factual reasons why that defence is inapplicable, and further that this is an issue to be resolved at trial.

[14] She also asserted, as it relates to the GLC's annual report, that there is no requirement for said report to be published on the GLC's website and that she took no issue with the laying of the annual report by the Minister before Parliament. She complained, however, that the facts concerning her case, as set out in the annual report, were inaccurate and defamatory in and of itself.

[15] Ultimately, Ms Anderson requested that the court refuse the GLC's application to strike out her claim, as there were issues joined between the parties that would need to be resolved after a factual inquiry.

The decision of the learned judge

[16] The learned judge, in rejecting the GLC's application, first considered whether the 2014 decision, as reported, was defamatory within the meaning of the Defamation Act and the case law. She concluded at paras. [13] and [14] of her reasons for judgment that:

> "[13] The report subsequent to the decision of the Court of Appeal falls squarely within the ambit of the definition of defamation as outlined in the Act. The report contains matter which [Ms Anderson] alleges is defamatory. The report is no longer true following the decision of the Court of Appeal, and there can be no doubt that it is injurious to the reputation of [Ms Anderson].
>
> [14] In applying the test as set out in **Bonnick v. Morris**, there can be no ambiguity as to the meaning or effect of the report. It charged that [Ms Anderson] was found guilty of professional misconduct, that she was reprimanded and fined. The ordinary reasonable reader having not had the benefit of the judgment of the Court of Appeal would accept the report and find that [Ms Anderson] was lawfully sanctioned by the GLC for misconduct. I find therefore that the report subsequent to the ruling of the Court of Appeal is defamatory matter which continued to be published on the website of the GLC."

[17] The learned judge then proceeded to consider the question of whether the GLC was entitled to summary judgment. This issue, she considered primarily on the footing of absolute privilege, which she stated was what the GLC relied upon in its submissions. The learned judge detailed the submissions of both parties at length. These submissions raised several issues for consideration. In particular, whether the GLC and Disciplinary Committee were separate bodies, such that the defence of absolute privilege, if applicable, would be that of the Disciplinary Committee only and not the GLC. Also, whether the GLC was permitted to publish reports of its decisions where not expressly authorized to do so by legislation.

[18] The learned judge stated that she found the timing of the publication to be compelling. She alluded to the argument on behalf of Ms Anderson, that the disciplinary hearing having ended several years prior, the privilege would not still have been applicable to the decision. But she noted that no authority was presented to her in support of that submission. In the circumstances, the learned judge concluded that the issues raised on behalf of Ms Anderson were matters for determination by a court, and that to engage in consideration of those issues at that stage, would amount to a mini-trial. Further, that Ms Anderson had demonstrated a case that was more than merely arguable. Therefore, an application to strike out the claim could not be maintained, and the application for summary judgment would also be refused.

Grounds of appeal

[19] The GLC relies on the following four grounds of appeal:

> "(A) The learned judge erred in finding that the publication of the decision of the Disciplinary Committee on the website of the General Legal Council subsequent to the ruling of the Court of Appeal on July 30, 2018 [sic] was defamatory of [Ms Anderson].
>
> (B) The learned judge failed to treat with and/or find that the decision of the Disciplinary Committee, as published without edit or commentary on the website of the General Legal Council, was clothed with absolute privilege and that that privilege remained extant notwithstanding the decision of the Court of Appeal allowing [Ms Anderson's] appeal and overruling the decision of the Disciplinary Committee.
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> (C) The learned judge erred in finding that notwithstanding the provisions of the Legal Profession Act, only the members of the Disciplinary Committee of the General Legal Council who participated in the hearing are entitled to the defence of absolute privilege.
>
> (D) The learned judge erred and/or was plainly wrong in the manner in which she exercised her discretion in finding that it would require an assessment in the trial court whether or not the privilege attaches to the report/judgment of the Disciplinary Committee subsequent to the judgment of the

> Court of Appeal and that to determine the question of pure law on the Applicant's Application would involve a mini-trial."

Submissions on behalf of the GLC

[20] It was indicated on behalf of the GLC that a request for summary judgment was no longer being pursued in light of rule 15.3(d)(iii) of the CPR, which states that summary judgment is not available in proceedings for defamation. In essence, therefore, the GLC seeks to have the claim struck out on the principal basis that the Disciplinary Committee's decision was not capable of bearing the defamatory meaning alleged and/or was not defamatory at all. Alternatively, that the publication was covered by absolute or qualified privilege.

[21] Counsel for the GLC addressed ground of appeal (C) first. In this regard, it was submitted that the learned judge appeared to have preferred the submissions of Mr Terrence Williams that the GLC and the Disciplinary Committee were separate bodies. It was submitted that the decisions of the Disciplinary Committee are, in fact, decisions of the GLC. As such, the 2014 decision was a decision of a quasi-judicial tribunal established by law, and the 2018 decision would not affect the absolute privilege attached to the 2014 decision. Reliance was placed on the cases of **Oswest Senior-Smith v GLC and another** [2018] JMCA Civ 26, **Dawkins v Lord Rokeby** (1875) LR 7 HL 744, **Royal Aquarium and Summer and Winter Gardens Society Ltd v Parkinson** [1892] 1 QB 431 and **Marrinan v Vibart** [1962] 3 All ER 380, in order to demonstrate, that proceedings before the Disciplinary Committee are quasi-judicial in nature and attract absolute privilege. Such privilege, it was submitted, extends not only to statements made during the currency of the proceedings and to participants in the proceedings but also to the decisions and/or rulings of the Disciplinary Committee. This privilege, which attaches to the decisions and orders, is not lost upon publication of the decision or ruling subsequent to the conclusion of the hearing.

[22] Counsel for the GLC asserted that this court should determine the following three issues:

> "I. Whether, based on the construction of the [LPA], only members of the Disciplinary Committee (DC) who had participated in the hearing which led to the decision at issue, could claim and/or be covered by absolute privilege;
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> II. Whether the privilege extends to the [GLC] in circumstances where the Disciplinary Committee of the [GLC] has no legal existence separate from the [GLC], and is merely a committee of the [GLC], which is appointed by the [GLC]; and
>
> III. Whether, if the privilege extends to the GLC, that privilege could be lost, subsequent to the promulgation of [the 2018 decision] in circumstances where the GLC merely continued to publish the decision of the Disciplinary Committee of the [GLC] on its website (either directly or through a cache search) without a notation that that decision had been overturned by the Court of Appeal."

[23] It was further submitted that a review of the LPA shows that absolute privilege attaches to the decisions of the Disciplinary Committee and that either on a literal interpretation of the LPA or by necessary implication, the privilege is that of the GLC. Reference was made to sections 3, 9(1), 9(5) and 11 of the LPA. Reliance was also placed on the case of **Lincoln v Daniels** [1962] 1 QB 237, in stating that the Court of Appeal of England recognized that disciplinary proceedings against barristers before Benchers of an Inn of Court were proceedings which attracted absolute privilege.

[24] Contrast was made between the establishment of the GLC and the establishment of the Disciplinary Committee. In particular, the fact of the establishment of the GLC as a body corporate capable of suing and being sued in its own name, with the absence of any such provision relating to the Disciplinary Committee and the absence of any other mechanism by which the Disciplinary Committee could have separate legal personality. It was contended that what the LPA provides for is the power of the GLC to constitute the Disciplinary Committee and that when constituted, the Disciplinary Committee is part of the GLC, and its decisions are decisions of the GLC.

[25] Counsel for the GLC endeavoured to distinguish the case at bar from the case of **McCalla v Disciplinary Committee of the General Legal Council** (1994) 49 WIR 213 ('the **McCalla** case'), which was relied on by Ms Anderson before the learned judge. It was asserted that the court did not find in the **McCalla** case that the GLC and the Disciplinary Committee were separate legal entities. Rather, it was held that the members of the GLC were separate from the GLC itself, such that members of the GLC could lay complaints against attorneys-at-law. Members of the GLC were given express statutory powers to lodge complaints, whereas the GLC itself was not given such powers. Counsel for the GLC accordingly rejected any argument that the **McCalla** case may be used to posit that the decision of the Disciplinary Committee is a decision from an entity that is separate from the GLC.

[26] Reference was made to the rules governing proceedings before the Disciplinary Committee, which counsel contends, demonstrates that the Disciplinary Committee operates in a court-like manner. As a result, the proceedings before the Disciplinary Committee and its decisions would attract all privileges that are attendant on a hearing before a court, particularly, absolute privilege. Sections 14(3), 14(4), 15 and 16 of the LPA are said to put the point beyond doubt. Sections 14(3) and (4) empower the administration of oaths and issuance of subpoenas, and expressly provide for proceedings before the Disciplinary Committee to be deemed legal proceedings within the meaning used in Part 11 of the Evidence Act. Section 15 requires the Disciplinary Committee to file copies of its orders and directions with the Registrar of the Supreme Court, subject to certain rules. Such orders are enforceable in the same manner as judgments and orders from the Supreme Court. Finally, under section 16, appeals from the decision of the Disciplinary Committee lie directly to the Court of Appeal.

[27] It was submitted that the GLC has the power, through its Disciplinary Committee, to publish decisions of the Disciplinary Committee based on rule 14 of the fourth schedule of the LPA, which stipulates that the Disciplinary Committee shall pronounce its findings and orders in public. Reliance was also placed on section 3(2) of the LPA, which gives the

GLC the "power to do all such things as may appear to it to be necessary or desirable for carrying out its functions …".

[28] It was further contended that the GLC, as regulator of the legal profession, in publishing its decisions, must be taken to be exercising a power that is necessary and consistent with its regulatory functions. This is said to be in keeping with the concept of open justice that is enshrined in the Constitution of Jamaica.

[29] Heavy reliance was placed on the case of **Addis v Crocker** [1960] 2 All ER 629, which concerned a claim of libel against the disciplinary committee of the Law Society. Counsel for the GLC used this case to argue, among other things, that the GLC's lack of jurisdiction over Ms Anderson did not negate the privilege attached to the proceedings and that the orders and decision of the Disciplinary Committee were an intrinsic part of the hearing. This privilege was also not negated by the 2018 decision and is the privilege of the GLC and not only the members of the Disciplinary Committee that participated in the hearing. In the circumstances, any attempt to disaggregate the privilege that attaches to the proceedings from the decision itself would render illusory the privilege which attaches to all aspects of the matter conducted before the Disciplinary Committee.

[30] In responding to the submissions on behalf of Ms Anderson, counsel said that it was not enough to contend that a statement that was once absolutely privileged could be rendered open to attack once subsequent facts or events changed the truthfulness of the original statement. Further, the so-called "internet rule" does not affect this position.

[31] Counsel for the GLC juxtaposed this case to a situation in which a judgment of a court continues to be published in a law report or on a website without comment after it has been set aside by an appellate court. Such a judgment does not lose the privilege which attaches, although it was overturned. Were that the case then every judge, litigant, advocate, witness or participating court personnel would be open to a suit for defamation once an appellate court has overruled a decision of a lower court. In the round, counsel submitted that any claim in defamation founded on any part or the whole of a decision

of the Disciplinary Committee is barred by the application of the doctrine of absolute privilege.

[32] As it relates to ground of appeal (D), it was submitted that the question of whether absolute privilege continued to attach to the 2014 decision, subsequent to the 2018 decision, was a matter of pure law, solely within the remit of the learned judge to determine. This determination, according to counsel, would be unaffected by evidence, and, therefore, there would be no mini-trial. In this regard, reliance was placed on the case of **Three Rivers District Council and others v Bank of England (No 3)** [2001] 2 All ER 513. Counsel for the GLC submitted that there were no factual issues in dispute and that the learned judge abdicated her case management responsibility and deferred her responsibility to a trial court. Further, the learned judge misapplied the principles set out by this court in the cases of **Somerset Enterprises Limited v Powell & National Export Import Bank of Jamaica Limited** [2021] JMCA Civ 12 and **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37.

[33] Counsel asserted that the question of whether absolute privilege attaches to an incident of alleged defamation is a matter of strict law to be determined at the interlocutory stage and relied on the case of **David Mayer v Francis Hoar** [2012] EWHC 1805 in making the point.

[34] Grounds of appeal (A) and (B) were argued together, being the grounds which concern whether anything complained of in the 2014 decision, subsequent to the 2018 decision, could be said to be defamatory of Ms Anderson. It was asserted that the finding of the learned judge that the words were defamatory and no longer true was premised on the ground that the privilege attached to the decision was lost. As such, the learned judge was plainly wrong.

[35] It was submitted that the learned judge erred in failing to grant the orders requested by the GLC.

Submissions on behalf of Ms Anderson

[36] Counsel for Ms Anderson filed written submissions as well as an addendum to those written submissions. The addendum is said to be a complete answer to grounds of appeal (B), (C) and (D) and also covers ground (A) in so far as the GLC relies on the defence of absolute privilege. It was further indicated in this addendum that the original written submissions are being argued alternatively to the submissions in the addendum. As such, the submissions outlined in the addendum to the written submissions, will be set out first.

[37] As it concerns the GLC's contention that the words contained in the offending publication were not capable of bearing a defamatory meaning because they were made in circumstances of absolute privilege, it was submitted that rule 69.4 of the CPR does not include any consideration of defences, such as absolute privilege.

[38] Issue is also taken with the GLC's submissions before the learned judge that the claim has "no real prospect of success". Counsel for Ms Anderson contends that the GLC has conflated the tests for summary judgment and striking out in circumstances where the requirements for each are different. It is contended that the phrase "no real prospect of success" is the test for summary judgment, which the GLC has conceded cannot be granted in a claim for defamation. On the other hand, the test for striking out is different and focuses on whether the statement of case discloses any reasonable grounds for bringing the claim. Counsel for Ms Anderson accepts that a claim for defamation may be struck out but submits that in the latter case, the focus is on the pleadings and whether they are deficient.

[39] It was submitted that there can be no pre-trial judicial ruling on the prospects of the claim outside of rule 69.4 of the CPR and, further, no ruling on the prospects of success, as concerns the defence of absolute privilege. In making these submissions, reliance was placed on the cases of **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009, judgment delivered 25 September 2009 and **Swain v Hillman** [2001] 1 All ER 91. In respect of these cases, it

was submitted that an inquiry on the potential for success of the claim is outside of the court's power on an application to strike out.

[40] In the alternative, the following submissions were made on behalf of Ms Anderson. On the question of whether the learned judge was wrong to find that the words concerned had a defamatory meaning (ground (A)), it was submitted that with respect to internet postings, publication is renewed every day. Such republications are new and separate causes of action, with their defamatory nature to be considered on each occasion. Further, references to a past censure or reprobation, without an explanation, maybe defamatory if published in circumstances which suggest that the taint upon character still subsists. Repeated internet publications may need to be updated when new facts occur, and failure to do so may result in the making of defamatory statements. In the instant case, the GLC warranted that its website would be updated following any further decisions on appeal, which was not done. The learned judge was correct to find that the words of the publication were capable of bearing a defamatory meaning as false utterances that are derogatory of one's professional standing have always been defamatory. Counsel for Ms Anderson relied on several cases, including **Sutherland v Stopes** [1925] AC 47, **Loutchansky v Times Newspaper Ltd and others (Nos 4 and 5); Loutchansky v Times Newspaper Ltd (Nos 2, 3 and 5)** [2002] QB 783, **Buchanan v Jennings** [2004] UKPC 36 and **Flood v Times Newspaper Ltd** [2011] 1 WLR 153.

[41] As it related to grounds of appeal (B) and (C) concerning absolute privilege, it was submitted on behalf of Ms Anderson that the privilege attaches to a publication on a protected occasion and not to the publication generally. It was further submitted that the protection is restricted to the currency of the proceedings or in contemplation of the proceedings. Therefore, even if a participant in proceedings republishes a statement outside of the protected occasion, privilege does not attach. Reliance was placed on the cases of **Munster v Lamb** (1833) 11 QBD 588, **Buchanan v Jennings**, **Law v Llewellyn** [1906] 1 KB 487 and the Canadian cases of **Elliot v Insurance Crime Prevention Bureau** 2005 NSCA 115 and **Porter v Shapiro** 2005 CanLII 80694 (ON CA).

[42] The case of **Addis v Crocker** was distinguished on the premise that the publication in that case was part of the judicial proceedings, which is not so in the present case.

[43] Further, the GLC's publication went beyond its statutory powers and did not fall within the performance of any official duty as an officer of the court. Reliance was also placed on the case of **Lincoln v Daniels** and Halsbury's Laws of England (Volume 20 (2014)) at para. 611, to assert that even the members of the Disciplinary Committee do not enjoy privilege in perpetuity but rather that the privilege ceases once the proceedings conclude. In any event, the GLC is not itself the Disciplinary Committee, it enjoys no privilege and has no lawful role in the publication of the decisions of the Disciplinary Committee.

[44] It was submitted on behalf of Ms Anderson that rule 14 of the fourth schedule of the LPA merely states that the Disciplinary Committee should pronounce its findings and decisions in public and that the rule does not authorize publication of decisions to the world at large. Further, the LPA allows the Disciplinary Committee to publish its decision in specified circumstances, namely where an attorney is suspended or struck off and also to the Registrar of the Supreme Court in general. In this case, the order being a reprimand meant that the powers to publish by the Disciplinary Committee were limited, and section 3(2) of the LPA does not extend these powers.

[45] Counsel for Ms Anderson further contended, referring to the **McCalla** case, that the GLC and the Disciplinary Committee are separate state organs and that the Disciplinary Committee does not form part of the GLC. This is said to be key to the fairness of the Disciplinary Committee's proceedings. The GLC has no judicial functions and its involvement in disciplinary proceedings is limited to appointment of the Disciplinary Committee and receiving fines and costs. Counsel asserted that there are many public bodies created by statute without being incorporated, citing **McBean v Gordon, Rowe and the Police Federation** [2019] JMSC Civ 141 in support.

[46] Reference was also made to section 15 of the Libel and Slander Act as it concerns the privilege which attaches to newspaper reports made after court proceedings, once fair, accurate and contemporaneous. Counsel contended that the GLC's report was neither fair, accurate, nor contemporaneous and was not in a newspaper. Thus, the privilege would not apply.

[47] With respect to ground of appeal (D), counsel maintained that the claim gives rise to factual disputes as well as novel legal points, with the result that the learned judge was correct in her approach not to consider the issues raised in an application for striking out. Reliance was placed on the cases of **Partco Group Ltd v Wragg** [2002] EWCA Civ 594 and **Smith (Enock) v Wilson (Kevin)** [2021] JMCA Civ 48. Counsel for Ms Anderson accordingly asks that this court dismiss the appeal.

Discussion and analysis

The basis for interfering with the learned judge's exercise of her discretion

[48] This court can only interfere with the learned judge's decision if it is shown that the exercise of her discretion was based on a misunderstanding of the law or the evidence that was before her or that her decision was palpably wrong (see **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 ('**AG v John Mackay**')). In the case of **AG v John Mackay**, Morrison JA (as he then was), at para. [20] stated the following:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[49] Although the learned judge considered the application for summary judgment, this is no longer relevant in these proceedings as the GLC has conceded that summary judgment is not available in the context of a defamation claim.

[50] Specifically relevant to rule 69.4, the learned judge had to determine whether the words as published were capable of a defamatory meaning and, if not, whether to dismiss the claim, enter judgment for the GLC, or make such orders as she determined just. Rule 69.4 of the CPR provides:

> "69.4 (1) At any time after the service of the particulars of claim, either party may apply to a judge sitting in private for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statements of case.
>
> (2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statements of case, the judge may dismiss the claim or make such other order or give such judgment in the proceedings as may be just."

[51] Also arising on the appeal, is whether the learned judge erred in refusing the application to strike out the claim on the basis that absolute privilege applied to the publication by the GLC. The application to strike out the claim was made pursuant to rule 26.3(1)(c) of the CPR, which gives a judge the general power, as part of case management, to strike out a statement of case or parts thereof, if it discloses no reasonable grounds for bringing or defending the claim. The learned judge indicated in her judgment at para. [17], that while the GLC "alluded to the defence of qualified privilege in their Notice of Application … in their submissions they relied solely on absolute privilege". The grounds of appeal also do not take issue with the learned judge's exclusion of a consideration of qualified privilege. This court is, therefore, not concerned with whether the learned judge ought to have considered the defence of qualified privilege in her deliberations.

[52] The two considerations (under rules 26.3(1)(c) and 69.4(1)) were not mutually exclusive but did involve separate considerations based on the legal questions to be considered. Concerning her assessment under rule 69.4(1), the learned judge stated at para. [10] of her judgment:

> "[10] The legal principles applied in making such a determination have been set out in several cases. Morrison, JA, as he then was in the case of **Deandra Chung v. Future Services Ltd. and Yaneek Page** started with a review of the Privy Council decision of **Bonnick v. Morris** and stated:
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> > '**I take as a starting point Bonnick v Morris et al [2002] UKPC 31, in which Lord Nicholls explained (at para. 9) the correct approach to determining whether a statement can bear or is capable of bearing the defamatory meaning alleged: 'As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in Skuse v Granada Television Ltd [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the [newspaper], reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant.**'" (Emphasis as in the original)

[53] The learned judge concluded that the application under rule 69.4 could not be maintained as the words were capable of a defamatory meaning. As indicated earlier, she stated at para. [14]:

> "[14] In applying the test as set out in **Bonnick v. Morris**, there can be no ambiguity as to the meaning or effect of the report. It charged that [Ms Anderson] was found guilty of professional misconduct, that she was reprimanded and fined.

> The ordinary reasonable reader having not had the benefit of the judgment of the Court of Appeal would accept the report and find that [Ms Anderson] was lawfully sanctioned by the GLC for misconduct. I find therefore that the report subsequent to the ruling of the Court of Appeal is defamatory matter which continued to be published on the website of the GLC."

[54] There is no basis to challenge her conclusions in this regard, either legally or factually, as the words are capable of bearing a defamatory meaning. However, the learned judge was also asked to consider whether the defamatory words were actionable in light of the defence of absolute privilege. She has the power to strike out a claim in a plain and obvious case where a party has no legal basis to proceed with the claim (rule 26.3(1)(c) of the CPR). The defence of absolute privilege would have been foreshadowed based on the factual circumstances set out in the claim form and particulars of claim. Concerning this issue, the learned judge concluded at paras. [32] to [34] of her judgment:

> "[32] The aspect of this case therefore, which I find most compelling is in relation to the timing of the publication. The report was published subsequent to the decision of The Committee which was rendered on the 26th of April 2014. The Court of Appeal decision was delivered on the 31st of July 2018. The letter which was sent to the Chairman of the GLC was dated the 22nd of July 2020. Two years had passed since the decision and the orders of The Committee were set aside by the Court of Appeal. It is the contention of [Ms Anderson] that even after the receipt of the letter and the correspondence in response, the offending defamatory matter remained on the website and was still accessible via hyperlinks. Counsel for [Ms Anderson] has argued that the 'hearing' ended several years before and as such the privilege could not still be applicable to the report. There has been no authority presented which deals specifically with that issue and it raises a question which begs to be addressed.
>
> [33] Having accepted that the words contained in the report are capable of causing harm to the reputation of [Ms Anderson] as she has outlined in her affidavit, it is my view that the issues raised on behalf of [Ms Anderson] are matters for determination by a court, as it requires an assessment of whether or not the privilege attaches to the report subsequent

> to the judgment of the Court of Appeal. To engage in such a discussion now would result in a mini-trial at this stage of the proceedings.
>
> **Conclusion**
>
> [34] The application to strike out cannot be maintained as the words are capable of a defamatory meaning. The sole issue for determination, based on this application, is that of the defence of absolute privilege and its applicability post the Court of Appeal decision. [Ms Anderson] has demonstrated in accordance with the authorities on summary judgment, a case which is better than merely arguable. In the circumstances therefore the application for summary judgment is refused."

[55] From this, it is evident that the learned judge did not engage in any consideration of the law on absolute privilege in relation to its applicability in the circumstances of this case. Absolute privilege is a complete defence to a claim of defamation, and if it can be successfully maintained, the claim should cease (see The Law of Tort (Common Law Series), Third Edition (December 2014) at para. 26.46 and **David Mayer v Francis Hoar**). Absolute privilege is attributed to proceedings before any court or judicial tribunal. The Halsbury's Laws of England, Volume 32 (2023) explains in respect of absolute privilege at para. 596 thus:

> "It applies not only to all kinds of courts of justice, but also to other tribunals recognised by law and acting judicially, including the Solicitors Disciplinary Tribunal, proceedings before the benchers of an Inn of Court … . In determining whether a particular tribunal or body is to be treated as a judicial one, such that its proceedings are covered by absolute privilege, the court will look to: (1) the authority under which that tribunal or body acts; (2) the nature of the question into which it is its duty to inquire; (3) the procedure it adopts; and (4) the legal consequences of the conclusion it reaches."

[56] The *sine qua non* of the grant of absolute privilege is that the tribunal is one recognized by law (see **Trapp v Mackie** [1979] 1 WLR 377 at 385). In **Lincoln v Daniels** at page 744, Sellers LJ also considered it to be relevant that the body is exercising a power given for the benefit of the public, such as the Inn of Court whose powers "are

enforced for the benefit of the public … in order to retain the trustworthiness and complete integrity of counsel in the performance of their duties in the administration of the law … ".

[57] The GLC is established under the LPA, which is concerned with the legal profession, including upholding the standards of professional conduct (see section 3(1)(b) of the LPA and para. [4] of the 2018 decision). Under section 11 of the LPA, the GLC is to appoint persons for the purposes of a Disciplinary Committee that investigates, hears and determines complaints of professional misconduct committed by attorneys-at-law. One of the purposes of maintaining discipline within the body of attorneys-at-law is for the protection of the public.

[58] In light of the functions of the Disciplinary Committee under the statutory authority of the GLC, absolute privilege is a substantive issue for determination in the case at bar. The GLC has submitted three questions (outlined at para. [22] above) for this court to answer in determining whether the learned judge erred. However, having perused the reasons of the learned judge, there is no finding, as indicated earlier, that absolute privilege could not or would not apply. The learned judge rehearsed the submissions of both counsel as to whether the GLC and the Disciplinary Committee were two separate and distinct legal entities. She also rehearsed their submissions in relation to the authority of the GLC to publish the decision of the Disciplinary Committee. She made no definite findings on these issues. She was careful to point out that the issue that she found "most compelling" was the timing of the publication (para. [32] of her decision). She concluded that whether the GLC, as a legal entity, could claim absolute privilege for the continued publication of the 2014 decision after the 2018 decision must be determined at a trial.

[59] The learned judge indicated that she could not determine the issues, as that would require a mini-trial. Although the GLC has submitted that it is merely a legal issue, a review of Ms Anderson's letter and the particulars of claim demonstrates that she took issue not only with the publication of the decision after 2018 but also with the publication of a summary of the decision set out in a tabular format on the GLC's website. This would,

therefore, beg the question of whether such summaries, in such a context, could also be subject to the defence raised by the GLC, that is, absolute privilege. These include issues surrounding the creation of internet links and the impact on responsibility for worldwide publication. Further, the averments in the pleadings as regards the role of the GLC, including its role in the publication of the decisions of the Disciplinary Committee, is a seminal issue for determination in this jurisdiction. When one considers the novel circumstances of the case at bar, it cannot be said that the learned judge was palpably or plainly wrong in determining that the matter required a trial.

[60] Grounds A, B, C and D would, therefore, fail.

[61] However, rule 26.1 of the CPR grants judges general powers of case management. In particular, rules 26.1(2)(f), (g) and (j) are relevant. They express:

> "Except where these Rules provide otherwise, the court may –
>
> …
>
> (f) decide the order in which issues are to be tried;
>
> (g) direct a separate trial of any issue;
>
> …
>
> (j) dismiss or give judgment on a claim after a decision on a preliminary issue; …"

[62] Whether absolute privilege applies in the case at bar, and the extent, if any, to which it may apply, could be treated as a preliminary issue for determination. This should facilitate mature reflection and submissions on all the issues and relevant authorities on the point. Such a decision could be made before the trial of the defamation claim. If absolute privilege obtains, the claim should be struck out. If it is determined that absolute privilege attaches only to certain aspects of the impugned publications, then those portions of the claim must be struck out. The matter should, therefore, be remitted to

the Supreme Court for a case management judge to consider whether any such orders under rules 26.1(2)(f), (g) or (j) should be made.

[63] In the circumstances of this case, the usual cost order, that is, costs should follow the event, is appropriate.

SIMMONS JA

[64] I have read, in draft, the judgment of Straw JA and agree with her reasons and conclusion. I have nothing else to add.

V HARRIS JA

[65] I, too, have read, in draft, the judgment of Straw JA and concur with her reasons. I have nothing else to add.

STRAW JA

ORDER

1. The appeal is dismissed.

2. The matter is remitted to the Supreme Court for case management orders to be considered before a different judge pursuant to rules 26.1(2)(f), (g) or (j) of the Civil Procedure Rules.

3. Costs of the appeal to the respondent to be agreed or taxed.