[2014] JMCA App 22

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 4/2014

APPLICATION NO 108/2014

IN THE MATTER of complaint by Linton & Marjorie Amos (Complainants) v Paulette A Warren-Smith, an Attorney-at-Law

A N D

IN THE MATTER of the Legal Profession Act 1971

BETWEEN	**PAULETTE WARREN-SMITH**	**APPLICANT**
A N D	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Leonard Green and Ms Sylvan Edwards instructed by Chen Green & Co for the applicant

Mrs Alexis Robinson instructed by Myers Fletcher & Gordon for the respondent

3 and 16 July 2014

IN CHAMBERS

MANGATAL JA (Ag)

[1] This is an application by the appellant, Paulette Warren-Smith ('the applicant'), seeking a stay of the judgment/order of the Disciplinary Committee ('the Committee') of

the General Legal Council ('the GLC'), made on 31 May 2014, until an appeal filed by the applicant can be heard.

[2] The judgment/order made by the Committee is as follows:

> "(1)The Attorney Paulette A Warren Smith, who practices from 14 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew is struck from the Roll of Attorneys who practice from the several courts of Jamaica.
>
> (2) The Attorney is to make restitution forthwith to Mr. & Mrs. Amos in the sum of US$48,766.00 plus interest of 3% per annum on the sum of US$24,766.00 from the 27th September, 2001 to the date hereof and interest of 3% per annum on the sum of US$24,000.00 from 12th April, 2003 to the date hereof.
>
> (3) The Attorney is to pay to the General Legal Council costs of $50,000.00."

[3] The Committee proceeded with the hearing on 1 February and 22 March 2014 before rendering its decision and order on 31 May 2014. The Committee heard the matter in the absence of both the complainants and the applicant, expressing itself satisfied that adequate and proper notice had been given to the applicant in respect of each hearing date. An affidavit, sworn to by the complainants on 15 December 2011 along with exhibits was admitted as exhibit 1. A copy of this affidavit was kindly provided to me by counsel for the GLC, Mrs Robinson. The copy reveals that this affidavit was sworn to in the State of New York, in the United States of America, seemingly before a notary. The copy of the affidavit and exhibits provided to me simply has the signatures of the complainants and a stamp that states "Fitz T.

Beaumont, Notary State of New York, #01-BE-4868957 Qualified in Bronx County, Commission expires Sept. 28th 2013". I cannot trace a signature of the notary on the copy of the affidavit handed to me. Nor is there a certificate of a clerk of the County Court exhibited to this affidavit indicating the date when the notary's commission will expire. At paragraph 7 of its decision, under the sub-head "Findings", the Committee stated, amongst other matters, that since the attorney had not responded when required to do so by the Disciplinary Committee and had not presented herself to dispute any of the allegations contained in the Complainants' affidavit "the Panel is left with no choice but to accept as the truth [sic] the affidavit, admitted in evidence as Exhibit 1 in its entirety and find that the ... allegations have been established beyond a reasonable doubt…." The Committee found the conduct of the applicant to be "egregious" and found that she was in breach of Canons IV(r) and (s), VII(b)(ii) and I(b) of the ***Legal Profession (Canons of Professional Ethics) (Amendment) Rules, 1983*** , which govern the legal profession in Jamaica.

[4] The applicant has set out 16 grounds for the application for a stay, including the following:

> "…
>
> (2) That the panel of the Disciplinary Committee improperly proceeded to hear the complaint in the absence of the Complainants and entered a Judgment on the basis of a sworn affidavit supporting the complaint.
>
> (3) That the Applicant was never personally served with the complaint and contrary to the findings of the said Panel did not receive any

actual notice concerning the hearing of the complaint brought against her.

…

(5) That the complainants' affidavit was improperly admitted by the panel in the absence of the complainants and there was no way to reasonably and properly testing [sic] the veracity of the allegations made therein.

(6) That in misdirecting itself the Panel came to erroneous and or improper findings of fact.

(7) That the Panel failed to take into account matters of mitigating circumstances in coming to its conclusions.

…

(9) That the Applicant/Appellant has a good and arguable appeal against the findings and sanctions imposed by the Disciplinary Committee.

…

(11) That the Panel did not and/or failed to apply and adhere to the rules of natural justice.

(12) That the judgment/orders made by the General Legal Council are manifestly harsh and excessive.

…

(14) That having failed to properly consider and assess the matters before it, the General Legal Council came to an erroneous/wrong conclusion."

[5] The application is supported by an "affidavit of Urgency" sworn to by the applicant, and filed 26 June 2014. In her affidavit, the applicant indicated that she was admitted to the bar as an attorney-at-law in 1991 and that she has been engaged in the practice of law from that time until the time of the order made by the Disciplinary Committee. In paragraph 4 of the affidavit, the applicant listed a number of places

where she has practiced as an attorney-at-law, including as legal officer with the Musson Group of Companies. This, she stated, was "from 2007 to the date of my recent resignation".

[6] The applicant attested that sometime in early June 2014, she was informed that there was an order made against her as described in paragraph [2] above. She indicated that she was quite surprised as she had no actual knowledge that a complaint was made against her by Linton and Marjorie Amos and had made all arrangements to have their matter dealt with and to have their names endorsed on the Titles as registered proprietors. She stated that from the documents shown to her, the address at which the GLC sought to have her served was care of 14 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew. She attested that she has not practiced at that address since 2007 (see paragraphs 8, 9 and 15 of the affidavit).

[7] At paragraphs 7, 10 - 12 and 18 - 20 the applicant stated as follows:

> "7. That over the years I have practiced as an Attorney-at-Law [sic] I have had an impeccable career and have not engaged in any kind of conduct that would bring the legal profession into disrepute.
>
> …
>
> 10. That in the transaction that is the subject of the compliant [sic] I acted for vendors Edward and Sharon Speke while the complainants were purchasers.
>
> 11. All monies that I received from the complainants have been paid by me to the purchasers [sic] in satisfaction of my obligations to my clients.
>
> 12. The complainants having received their titles have displayed no interest in pursuing any complaint against me and this explains why

they were not in attendance at any hearing date set by the Disciplinary Committee of the General Legal Council.

…

18. That should the judgement [sic] be enforced before the hearing of my appeal then I would face real and genuine hardship.

19. That without the judgement [sic] being stayed and the appeal pursued I would face absolute professional and financial distress, loss and damages [sic] and would face other real and genuine hardship.

20. That the Court's over-riding objective will be advanced by the making of the Orders being sought herein and that there is no prejudice to the respondent's case.

…"

[8] In response to this application the GLC filed on 2 July 2014, the affidavit of Dahlia Davis, the GLC's Secretary. In that affidavit, Miss Davis addressed the question of service. She exhibited copies of the GLC's affidavits of service of notices of hearing dates, served by registered mail on the applicant at 14 Birdsucker Drive, Kingston 8. Miss Davis stated that this was the last place of business of the applicant known to the GLC. She also exhibited a document described in paragraph 8 of the affidavit as "a copy of the GLC's contemporaneous note" of the information given to Queen's Counsel Mrs. Pamela Benka-Coker (the presiding member and Chairman of the Committee) on 4 June 2014, by Miss Allen, the Post Mistress of the General Post Office. This information was in relation to the procedure involved in posting registered items. The matters stated in this note would perhaps have been better conveyed in a sworn affidavit, though Mrs Robinson, counsel for the GLC, did explain that the urgency of this application presented some challenges in that regard. The GLC attests that the notices

were served on the applicant. A letter exhibited to Miss Davis' affidavit, (erroneously dated 19 April 2014), received by the GLC on 26 June 2014 from Miss Allen, indicated that the registered articles (the notices of hearings) were posted at the General Post Office, and notices were sent to the addressee (the applicant) from the Constant Spring Post Office. However, the letter also stated that the registered articles were not collected by the addressee and were therefore returned to the GLC. A notice to the applicant dated 3 February 2014 in respect of the date for the continuation of the part-heard matter on 22 March 2014 was returned to the GLC on 7 March 2014. The letter stated that the earlier notices registered by the GLC were also returned, but it does not say when this occurred.

[9] Mr Green, who made submissions on behalf of the applicant, argued that the applicant's appeal has real prospects of success. He indicated that the main ground of the appeal was the second ground stated in the notice of appeal, which is as follows:

> "2. The Disciplinary Committee proceeded on the basis that the Appellant was properly served and she had notice of the hearing dates before them. By so doing, they wrongly imposed the most severe sanction of striking off the Appellant in the absence of any proof of personal service or any proof of the method of service or the **deemed date of service**, or that there was any adequate efforts [sic], on the part of the Committee, to ensure that the complaint was brought to the attention of the Appellant."

[10] Counsel argued that even if there was a presumption that service was effected on the applicant by way of registered mail as set out in rule 21 of the Fourth Schedule to ***the Legal Profession Act*** ('the Act'), it is a rebuttable presumption. Reference was

made to ***Forward v West Sussex County & Others*** 6 July 1995, T.L.R 1. Further, Mr Green urged upon the court, that without a stay, the applicant would suffer severe prejudice and loss, professionally and financially.

[11] Mrs Robinson filed well-reasoned written submissions on behalf of the GLC, opposing the application for a stay. Reference was made to the well-known English decision in ***Hammond Suddard Solicitors v Agrichem International Holding Ltd*** [2001] EWCA Civ 1915. Mrs Robinson submitted that based on the grounds of appeal and the evidence currently before the Court, it cannot be said that the appeal has prospects of success and nor can it be said that if a stay is refused the applicant will be ruined. On the other hand, counsel argued, based on the uncontroverted evidence before the Committee on which it based its findings, if a stay is granted and the appeal fails, the GLC will, for the duration of the appeal, be unable to uphold the standards of professional conduct (which is one of its functions pursuant to section 3(1)(b) of the Act), in relation to the applicant. Thus, the argument continues, this will put the profession and the public at further risk.

[12] Reference was also made to the ***Legal Profession (Canons of Professional Ethics) (Amendment) Rules, 1983, Rule 3(l)***, which places the responsibility on an attorney to notify the GLC of the address at which it is proposed to practice and to inform the GLC of any change or new address within 14 days of such a change.

[13] Counsel closed her submissions by suggesting that the most just order would be for the court to refuse the stay and to make an order for the speedy hearing of the appeal.

Analysis

[14] This court has applied the reasoning in ***Hammond Suddard*** and in the decision of the English Court of Appeal in ***Combi (Singapore) Pte Limited v Ramnath Sriram and Son Limited FC*** [1997] EWCA 2164, upon numerous occasions when considering applications for a stay of execution. Reference may be made to the decisions of Phillips JA in ***Dalfeir Weir v Beverly Tree (also known as Beverly Weir)*** [2011] JMCA App 17, at paragraph [4], and more recently, that of Harris JA in ***Arc Systems Limited v Atradius Credit Insurance NV*** [2014] JMCA App 9, at paragraphs [22]-[24].

[15] In ***Combi***, Phillips LJ discusses applications for a stay of execution in relation to money judgments, as well as judgments generally. In the instant case, there is no evidence as to whether the order of the Committee has been filed with the Registrar of the Supreme Court pursuant to section 15(3) of the Act. Essentially, it is the staying of the order that is sought. Lord Justice Phillips in ***Combi*** outlined the following approach, which commends itself to me in relation to this application:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there

> is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[16] In my judgment, the appeal does have some prospect of success. Rule 21 of the Fourth Schedule of the Act states that proof of service of a notice effected by registered letter addressed to the last known place of abode or business of the person to be served, shall be proof of such service. However notwithstanding the wording of that rule, this case in my view presents issues regarding service and natural justice that require the court's examination. It is in addition not clear whether the GLC made the Committee aware that notices sent to the applicant had been returned to it (in at least the case of the hearing date of 22 March 2014, well before the hearing date). It is also in my view arguable that if the Committee was not so notified, that they ought to have been armed with such knowledge, or to have ascertained all of the relevant facts and circumstances available with regard to service in order to exercise their discretion in a reasonable and proper manner. In addition, it cannot be said that there is no prospect of success for the argument that the sanctions applied by the Committee (on the basis of the affidavit before the Committee), were harsh or excessive in all of the circumstances, or that the Committee made erroneous and/or improper findings of fact.

[17] Mrs Robinson has pointed to potential detriment to the Committee and the public if a stay is not granted. On the other hand, it seems clear that the applicant, who has stated that she was an attorney-at-law who had been practicing continuously and impeccably since 1991 until the Committee's order, stands to lose much if a stay is not granted. It is plain that there is a grave risk that she will suffer genuine professional loss, distress and harm, financially and otherwise, if a stay is not granted.

[18] In my judgment, weighing all of the relevant factors and circumstances, the course less likely to produce injustice and to cause the least risk of irremediable harm is to grant the stay as requested. Accordingly, I make the following orders:

(1) There shall be a stay of the order of the Disciplinary Committee of the GLC, made on 31 May 2014, pending the determination of the appeal.

(2) The appeal is to be given an expedited hearing.

(3) Costs of this application are to be costs in the appeal.

[19] Before leaving this matter, I wish to comment on two matters that were discussed at the hearing of this application. This is a case in which the Committee expressly stated that it was exercising its discretion to proceed with the hearing in the absence of both the applicant and the complainants pursuant to rule 8 of the Fourth Schedule to the Act. In this court's recent decision in ***Ernest Davis v The GLC*** [2014] JMCA Civ 20, it was held, amongst other matters, that an attorney-at-law who claims

not to have been properly served may exercise the right of appeal under section 16 of the Act. This court held that the attorney does not have to make an application under rule 9 of the Fourth Schedule of the Act. However, whilst this court can hear such an appeal, it seems clear to me that ordinarily, it is not ideal for appeals to be directed at dealing with issues of service. Rule 9 provides for an application for a rehearing where a hearing has taken place in the absence of a party. Rules 8 and 9 provide as follows:

> " Proceedings in absence of parties.
>
> 8. If either or both of the parties fail to appear at the hearing the Committee may, upon proof of service of the notice of hearing, proceed to hear and determine the application in his or their absence.
>
> Application for rehearing.
>
> 9. Where the Committee have proceeded in the absence of either or both of the parties any such party may, within one calendar month, from the pronouncement of the findings and order, apply to the Committee for a rehearing upon giving notice to the other party and to the secretary. The Committee, if satisfied that it is just that the case should be reheard, may grant the application upon such terms as to costs or otherwise, as they think fit. Upon such rehearing the Committee may amend, vary, add to or reverse their findings or order pronounced upon such previous hearing."

[20] Whilst, therefore, an attorney-at-law may choose to exercise the right of appeal afforded under section 16 of the Act, rule 9 seems eminently suitable for situations such as those which obtain in the present case. In my judgment, it would be reasonable to expect that an application under this rule would, without more, as a practical matter, provide relief in a speedier, more cost-effective and less formal way than an appeal. It would also result in less consumption of the scarce resource of appellate judicial time.

Rule 9 seems analogous to the Supreme Court's power under Part 13 of the Civil Procedure Rules 2002 ('the CPR') to set aside default judgments and under rules 11.18 and 39.6 of the CPR to set aside an order or judgment made in the absence of a party. The notice of appeal in the instant case was filed on 25 June 2014, which was well within a calendar month of the Committee's finding and order. An application could therefore have been made under rule 9. In addition, rule 22 of the Fourth Schedule to the Act gives the Committee the power to extend time for making any application under the Rules in the Fourth Schedule.

[21] Secondly, Mrs Robinson also pointed out that the applicant has not made an application under section 12A of the Act. That section provides as follows:

> "Power to suspend filing of orders.
>
> 12A.-(1) The Committee shall have power, upon the application of a party against or with respect to whom it has made an order, to suspend the filing thereof with the Registrar.
>
> (2) The filing of an order may be suspended under this section for a period ending not later than-
>
> (a) the period prescribed for the filing of an appeal against the order; or
>
> (b) where such an appeal is filed, the date on which the appeal is determined.
>
> (3) Where the filing of an order is suspended under the section, the order shall not take effect until it is filed with the Registrar and if the order is an order that an attorney be suspended from practice, the period of suspension shall be deemed to commence on the date of the filing of the order with the Registrar."

[22] Here again, whilst the existence of this section does not in my view deprive the applicant of the right to apply to this court for a stay of the order, or suspension of its filing with the Registrar of the Supreme Court, it does seem that this section may provide for relief that is analogous to a stay granted by the court. It may well suit attorneys-at-law and their counsel to consider the relative suitability and convenience of making applications to the Committee and exploring this other avenue of relief as opposed to, or before, making applications to this court for a stay.