

Costs – Whether a cost order should properly be made in the circumstances –The appropriate cost order to be made in the circumstances – Civil Procedure Rules, 2002, rules 56.15(4) and (5), 64.3, 64.6(1), 64.6(3), 64.6(4)(a),(b),(d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g)

A. NEMBARD J

INTRODUCTION

- [1] This matter concerns an application by the Applicant, Lisamae Gordon, for leave to apply for judicial review of the decision of the Respondent, the Disciplinary Committee of the General Legal Council (“the Disciplinary Committee”) that was made on 2 October 2021.
- [2] By way of a Notice of Application for Leave to Apply for Judicial Review, filed on 16 December 2021, Ms Gordon seeks certain orders as well as a raft of declaratory relief, namely: -
- I. A Declaration that the Respondent has no jurisdiction in law, to proceed with disciplinary proceedings against the Applicant where there is no evidence to support the complaint and accompanying affidavit of the Complainants, of alleged breaches of the Canons by the Applicant;
 - II. A Declaration that the finding of the Respondent, in its ruling delivered on 2 October 2021, that the Applicant was not the Attorney-at-Law for the Complainants, precludes the Respondent from proceeding any further with the disciplinary proceedings against the Applicant, as the Respondent would be lacking in jurisdiction to continue with the proceedings;
 - III. A Declaration that the continuation of the disciplinary proceedings brought by the Complainants against the Applicant, in the face of a finding of the Respondent, that the Applicant was not the Attorney-at-Law for the Complainants in the conveyancing proceedings that gave rise to the

disciplinary complaint, renders the said disciplinary proceedings illegal, null and void and of no effect;

- IV. An Order of Certiorari quashing the continuation of the proceedings initiated by the Complainants against the Applicant, arising from the decision of the Respondent dated 2 October 2021, in which the Respondent made a finding that the Applicant was never the Attorney-at-Law acting on behalf of the Complainants;
- V. Costs to be costs in the Application; and
- VI. Such further and other relief as this Honourable Court shall deem fit.

THE ISSUES

[3] The primary issue raised by the Application for Leave to Apply for Judicial Review for the Court's determination may be distilled as follows: -

(a) Whether the Applicant has met the threshold for the grant of leave to apply for judicial review.

[4] In seeking to determine the primary issue raised, the following sub-issues must also be resolved: -

(a) Whether the Disciplinary Committee acted ultra vires its statutory authority by arriving at its decision dated 2 October 2021;

(b) Whether there is available to Ms Gordon, a suitable alternative remedy by which the issues raised by this application may be ventilated.

BACKGROUND

- [5] The Application for Leave to Apply for Judicial Review is made against the background that, by its ruling dated 2 October 2021, the Disciplinary Committee found Ms Gordon guilty of professional misconduct. This finding was made in the context of a complaint made by the complainants, Ms Charmaine Barnett and Mr Baron Barnett, that she [Ms Gordon] was in breach of Canons 1(b) and IV(s) of the Canons of the Legal Profession.
- [6] The factual matrix, as can be gleaned from the affidavits that were filed for and on behalf of the complainants, was that the complainants entered into an agreement to purchase property, part of Orange Grove Estate, in the parish of Trelawny (“the said property”). Ms Gordon was to act as the legal representative facilitating the acquisition of the said property.
- [7] The complainants agreed to pay the sum of Fifteen Thousand United States Dollars (USD\$15,000.00), as an initial deposit towards the purchase price of the said property and an additional Three Thousand United States Dollars (USD\$3,000.00), within six (6) months of that initial deposit. The complainants assert that they paid a total of Thirty-five Thousand United States Dollars (USD\$35,000.00), towards the acquisition of the said property. They complain that they were never issued with any documentation evidencing the payment of same.
- [8] The complainants subsequently sought independent legal advice and were advised that the vendor would have been incapable of passing title to the said property to the complainants.
- [9] In her response to the complaint, Ms Gordon contended that the complainants were not her clients and had never been her clients and that she represented the vendor in respect of the sale of the said property.

- [10]** Ms Gordon further contended that, while she had drafted the Agreement for Sale, in respect of the said property, the complainants had never paid her to carry out a title search.
- [11]** Having heard the evidence of the parties, the Disciplinary Committee found that Ms Gordon's defence failed to take into account the responsibilities placed on an Attorney-at-Law who has carriage of sale of land. The Disciplinary Committee found that those responsibilities encompass the duty to ensure that title can be passed and that there are no encumbrances that would interfere with that process. Those responsibilities also place a duty on such an Attorney-at-Law to protect the money involved in the transaction. If money is to be paid over to the vendor, then such an Attorney-at-Law must have the consent of the purchaser so to do and should be in a position to refund that money, should that become necessary. The Disciplinary Committee found further, that, the fact that an Attorney-at-Law does not represent the purchasers in an Agreement for Sale does not relieve him/her of those responsibilities.
- [12]** In the circumstances, the Disciplinary Committee found that Ms Gordon failed in her duties to the purchasers, notwithstanding that she was not their Attorney-at-Law. The Disciplinary Committee found that Ms Gordon acted in a manner that was contrary to the interests of the purchasers and inevitably to their detriment. No evidence was presented to indicate that the requisite subdivision approvals had been obtained; the responsibility in relation to the payment of Transfer Tax was stated in the Agreement for Sale, as being borne by both parties, contrary to the provisions of the Transfer Tax Act and there was no evidence that this 'unusual' requirement had ever been brought to the attention of the complainants.
- [13]** In the final analysis, the Disciplinary Committee found that Ms Gordon facilitated the vendor to be unjustifiably enriched; and that a reliance on the fact that an Attorney-at-Law does not represent the purchasers in an Agreement for Sale

does not relieve him/her of the duty to act with the integrity required of him/her by the Canons of professional ethics.

- [14] As a consequence, the Disciplinary Committee found that Ms Gordon was guilty of professional misconduct.¹

THE LAW

The role of the court in matters of judicial review

- [15] Part 56 of the Civil Procedure Rules, 2002 (“the CPR”), is entitled Administrative Law and deals with applications such as this. The role of the court in judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public.

- [16] The approach of the court is by way of review and not of an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service**.²

- [17] Roskill LJ stated as follows: -

“...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third

¹ See – Exhibit “LG3” of the Affidavit of Lisamae Gordon in Support of Notice of Application for Leave to Apply for Judicial Review, which was filed on 16 December 2021, at paragraphs 17-20

² [1984] 3 All ER 935

is where it has acted contrary to what are often called 'principles of natural justice'."

- [18] Judicial review is the courts' way of ensuring that the functions of public authorities are executed in accordance with the law and that they are held accountable for any abuse of power, unlawful or ultra vires act. It is the process by which the private citizen (individual or corporate) can approach the courts seeking redress and protection against the unlawful acts of public authorities or of public officers and acts carried out that exceed their jurisdiction. Public bodies must exercise their duties fairly.
- [19] The requirement for leave is one aspect of the courts' function to act as a filter in relation to these types of claims. The starting point is rule 56.3(1) of the CPR, which provides that a person wishing to apply for judicial review must first obtain leave. Whilst the rule provides that leave must first be obtained, in order to claim judicial review, it is silent as to the threshold that must be met, in order to obtain leave. It has been accepted that, the test, as enunciated by the Privy Council in **Sharma v Brown-Antoine**,³ is the applicable test.

The threshold test

- [20] In **Sharma v Brown-Antoine**,⁴ Lords Bingham and Walker stated in their joint judgment, at paragraph 14(4), as follows: -

"(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy...But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (N) v Mental Health Review Tribunal

³ [2007] 1 WLR 780

⁴ (supra), per Lord Bingham and Lord Walker, page 787 D-H, at paragraph 14(4)

(Northern Region) [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:

‘the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.’”

[21] This test has been adopted and applied in decided cases in Jamaica such as **Digicel (Jamaica) Limited v The Office of Utilities Regulation**;⁵ **Coke v Minister of Justice et al**⁶ and **Tyndall et al v Carey**.⁷

[22] In **R v IDT (Ex parte J. Wray and Nephew Limited)**,⁸ Sykes J (as he then was) describes the threshold test as being a new and higher test than that which had previously obtained. At paragraph [58] Sykes J opined that the application for leave to apply for judicial review is no longer a perfunctory exercise that turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. Judges are required to make an assessment of whether leave should be granted in the light of the now stated approach.

The approach of the court in matters of judicial review

[23] Since the range of authorities and the circumstances of the use of their power are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of

⁵ [2012] JMSC Civ 91

⁶ Claim No. 2010 HCV 02529, unreported, judgment delivered on 9 June 2010

⁷ Claim No. 2010 HCV 00474, unreported, judgment delivered on 12 February 2010

⁸ Claim No. 2009 HCV 04798, unreported, judgment delivered on 23 October 2009

case. It is important to remember that, in every case, the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected. 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. Judicial review is concerned, not with the decision but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

SUBMISSIONS

Submissions advanced on behalf of the applicant

- [24] Learned Counsel Mr Hugh Wildman, in his oral submissions advanced on Ms Gordon's behalf, asserted that the Disciplinary Committee acted ultra vires its statutory authority in arriving at the decision which it did on 2 October 2021. As a consequence, it was submitted that, the continuation of the disciplinary proceedings initiated by the complainants, in the face of the Disciplinary Committee's finding that there was no attorney/client relationship existing between Ms Gordon and the complainants, was illegal, null and void and of no effect.
- [25] It was further submitted that the evidence contained in the affidavits of the complainants did not support the assertion that Ms Gordon acted as their Attorney-at-Law, for the purpose of the acquisition of the said property. The evidence of the complainants could not support a finding that the complainants were affected by Ms Gordon's conduct outside of an attorney/client relationship.

Submissions advanced on behalf of the respondent

- [26] For its part, the Disciplinary Committee was unable to agree with the submissions advanced by Mr Wildman.
- [27] Learned Queen’s Counsel, Mr Patrick Foster, commenced his submissions by referencing section 12(1) of the Legal Profession Act (“the LPA”). He asserted that the term “any person aggrieved”, as used in the section, is broader in scope than limiting it to a lawyer/client relationship. Mr Foster Q.C. submitted that the Disciplinary Committee clearly had jurisdiction to deal with this matter and that, its finding that Ms Gordon was not the Attorney-at-Law for the complainants does not relieve it of its jurisdiction. It was further submitted that the factual matrix is sufficient for the complainants to say that they were persons “aggrieved”, as contemplated by section 12(1) of the LPA. In an effort to ground this assertion, the Court was referred to the authority of **Arlean Beckford v The General Legal Council**.⁹
- [28] Mr Foster Q.C. also referred the Court to section 16(1) of the LPA which provides that an appeal against any order made by the Disciplinary Committee shall lie to the Court of Appeal by way of rehearing at the instance of the attorney or the person aggrieved. Mr Foster Q.C. asserted that the decision of the Disciplinary Committee is an order of the Committee and, as such, where Ms Gordon is aggrieved by its decision, the correct statutory procedure ought to be used. This, he submitted, is especially so where there is nothing in the evidence to support the contention that the Disciplinary Committee acted ultra vires its statutory authority.
- [29] It was further submitted that there is no shred of evidence from which the Court could form a preliminary view that there is an arguable ground with a realistic prospect of success. To so find, Mr Foster Q.C. argued, would be to ignore the provisions of sections 12(1) and 16(1) of the LPA as well as the proper

⁹ Civil Appeal No. 32 of 2005, judgment delivered on 31 July 2007

interpretation to be applied to the expression a “person aggrieved”, as contemplated by section 12(1) of the LPA.

[30] Finally, Mr Foster Q.C. asserted that decisions arising during the course of a hearing or trial, such as that which currently obtains before the Disciplinary Committee, should not be the subject of an appeal, except in exceptional circumstances. Otherwise, he asserted, judicial process would be frustrated.

[31] In the circumstances of this matter, Mr Foster Q.C. contended, there are no such exceptional circumstances in existence. Consequently, the proceedings before the Disciplinary Committee ought to be allowed to be brought to a conclusion and, should Ms Gordon deem it appropriate, an appeal filed at that stage.

ANALYSIS AND FINDINGS

The jurisdiction of the Disciplinary Committee

[32] It would be useful, for the purpose of this analysis, to begin with an examination of section 12(1) of the LPA. The section reads, in part, as follows: -

“12.-(1) Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by an attorney, that is to say –

(a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect);

(b) ...”

[33] The Disciplinary Committee is directed by the statutory provision to make an assessment as to whether there is an applicant, who is, as a matter of law, an

“aggrieved person” and whether there is an allegation of professional misconduct.

- [34] In seeking to determine who is an “aggrieved person”, the words of James LJ, in **Ex parte Sidebotham**,¹⁰ are instructive. He stated as follows: -

“It is said that any person aggrieved by any order of the Court is entitled to appeal. But the words ‘person aggrieved’ do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A ‘person aggrieved’ must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.”

- [35] In **Attorney General for Gambia v Pierre Sarr N’Jie**,¹¹ Lord Denning, in delivering the judgment of their Lordships, made the following observation: -

*“But the definition of James L.J. is not to be regarded as exhaustive. Lord Esher M.R. pointed that out in **Ex parte Official Receiver, In re Reed, Bowen & Co.** [1887] 19 Q.B.D. 174. The words ‘person aggrieved’ are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.”*

- [36] In **Arlean Beckford v The General Legal Council**,¹² Marsh JA (Ag.) (as he then was), in delivering the judgment of the Court of Appeal, agreed that the words “aggrieved person” have a wide scope within the LPA and that it is not restricted to attorney/client relationships. He opined that it is much wider in scope, such

¹⁰ [1880] 14 Ch. D 458 at 465

¹¹ [1961] AC 617

¹² supra

that a mortgage company may complain, if there is a breach of an undertaking given it by an attorney representing any party to a sale of land.

[37] Marsh JA found that the complainant was not a mere busybody of the kind identified by Lord Esher in **Ex parte Official Receiver, In re Reed, Bowen & Co.**¹³ and referred to, with approval, by Lord Denning in **Attorney General for Gambia v Pierre Sarr N’Jie.**¹⁴

[38] In the present instance, the Court finds that the complainants cannot be described as mere busybodies. The Court accepts the submission advanced by Mr Foster Q.C. in this regard and finds that the factual matrix is sufficient for it to find that the complainants are “persons aggrieved”, within the context of section 12(1) of the LPA.

[39] The Court also finds that the Disciplinary Committee had the jurisdiction to treat with the complaint before it and that its finding that Ms Gordon was not the Attorney-at-Law for the complainants, in respect of the acquisition of the said property, does not relieve it of its jurisdiction.

[40] In this regard, this Court is of the view that Ms Gordon has failed to establish that she has an arguable ground with a realistic prospect of success.

The existence of a suitable alternative remedy

[41] Section 16(1) of the LPA provides as follows: -

“16.-(1) An appeal against any order made by the Committee under this act shall lie to the Court of Appeal by way of rehearing at the instance of the attorney or the person aggrieved to whom the application relates, including the Registrar of the Supreme Court or any member of the Council, and every such appeal shall

¹³ [1887] 19 Q.B.D. 174

¹⁴ supra

be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court.”

- [42] The Court accepts and adopts the submissions of Mr Foster Q.C. that, where there is no evidence to suggest that the Disciplinary Committee has acted ultra vires its statutory authority, the correct statutory procedure, as set out in section 16(1) of the LPA, must be utilized.
- [43] The Court finds that there is a suitable alternative remedy available to Ms Gordon for the ventilation of any grievance that she might have, in respect of the decision/order of the Disciplinary Committee.
- [44] Regrettably, the Court finds that, in this respect, Ms Gordon has also failed to meet the threshold test for the grant of leave to apply for judicial review.

The issue of costs

- [45] Part 64 of the CPR contains general rules in relation to costs and the entitlement to costs. Where a court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.¹⁵
- [46] Rule 64.3 of the CPR provides that the court’s power to make orders about costs include the power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings.
- [47] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. The court may also consider whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a

¹⁵ See – Rule 64.6(1) of the CPR

particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.¹⁶

[48] In light of the Court's finding that the complainants in the instant case fall within the proper interpretation to be applied to the expression "a person aggrieved", as contemplated by section 12(1) of the LPA; that the Disciplinary Committee did not act ultra vires its statutory authority by arriving at the decision which it made on 2 October 2021; and that there is a suitable alternative remedy available to Ms Gordon, for the issues raised by this application to be ventilated, it cannot be said that Ms Gordon acted reasonably in pursuing this application for leave to apply for judicial review.

[49] As a consequence, the Disciplinary Committee ought properly to have its costs.

DISPOSITION

[50] It is hereby ordered as follows: -

1. The Notice of Application for Leave to Apply for Judicial Review, which was filed on 16 December 2021, is refused;
2. Costs are awarded to the Respondent against the Applicant and are to be taxed if not sooner agreed;
3. The Applicant is refused Leave to Appeal; and
4. The Respondent's Attorneys-at-Law are to prepare, file and serve these Orders.

¹⁶ See – Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR