



In The Supreme Court of Bermuda

CIVIL JURISDICTION
2011: 324

**IN THE MATTER OF A COMPLAINT OF IMPROPER CONDUCT BROUGHT BY
JENNIFER LINDSEY CALKO AGAINST CERTAIN BARRISTERS & ATTORNEYS
("THE COMPLAINT")**

AND IN THE MATTER OF THE BERMUDA BAR ACT 1974

**AND IN THE MATTER OF THE BAR PROFESSIONAL CONDUCT COMMITTEE
RULES 1997**

**AND IN THE MATTER OF THE DECISION OF THE PROFESSIONAL CONDUCT
COMMITTEE ("THE PCC") DATED 15 SEPTEMBER 2011 ("THE DECISION")**

EX TEMPORE JUDGMENT (In Court)

Date of Hearing: February 20, 2012
Date of Judgment: February 20, 2012

Mr. David Kessaram, Cox Hallett Wilkinson, for the Applicant
Mr. Saul Fromkin QC, Isis Law, for the Respondent

Factual background

1. The Applicant applied for Judicial Review by Notice dated 29th September 2011 by which application she sought an order quashing the decision of the PCC dated 15th September 2011. The Application was based on various grounds which can all conveniently be distilled into the global complaint that the decision was unlawful.
2. The background to the matter is that the Applicant on 17th August 2011 made a complaint to the Bermuda Bar Council against certain members of a firm concerning a matter rising

out of the breakdown of her marriage and the complaint can be broken down into two elements:

- (1) the first element is the allegation that the law firm was involved in assisting her husband to misappropriate a business that was solely owned by her; and
 - (2) the second element is that the same lawyers were in knowingly involved, either actually or constructively, in facilitating the operation of the company incorporated for the husband in breach of the provisions of the Companies Act which require a company to be not just owned 60 percent but also controlled by Bermudians.
3. The complaint was dealt with by way of decision dated 15th September communicated in a letter sent to the Applicant which stated as follows:

“Thank you for bringing your complaint to the attention of the Professional Conduct Committee.

The Committee is of the view that opposing attorneys have an obligation to look out for their client’s best interest and it is not always appreciated by non-lawyers that our adversarial system does give some latitude to counsel. Having said that, it is always open to the court or another attorney to make a complaint of improper conduct as they are bound to do under our Professional Code of Conduct) if they consider another attorney was in breach of that Code. Should your attorney consider that there has been improper conduct her/she can make a complaint as they are in fact obliged to do under Rule 104 of the Barristers Code of Professional Conduct 1981. In the circumstances, the Professional Conduct Committee has dismissed your complaint and the matter will be closed.”

Statutory Provisions

4. To understand the legalities of the situation one must refer to the relevant statutory provisions which were placed before the Court by Mr. Kessaram, the Applicant’s counsel. The Bermuda Bar Act 1974, section 18A, defines the general powers of the PCC as follows:

“18A The powers and functions of the Committee shall be to-

(a)conduct inquiries into and investigations of complaints of improper conduct made against a barrister, professional company or registered associate in accordance with the Rules, to determine whether a prima

facie case of improper conduct has been made out against the person complained against;

(b)take such measures prescribed by the Rules after such inquiry or investigation, or both such inquiry and investigation, if no prima facie case or improper conduct has been made out against a person complained against...”

5. The substance of the PCC’s statutory duties is to be found in the Bar Professional Conduct Committee Rules 1997 and, most significantly, in rules 3 and 4:

Preliminary inquiry into Complaints

3 *(1) Where the Bar Council refers a complaint of improper conduct to the Committee, the Committee shall-*

(a) give notice in writing to a respondent of receipt of such complaint; and

(b) sit to make such initial inquiries as appear to the Committee to be necessary to enable the Committee to perform the functions assigned to it under paragraph (4) of this rule.

(2) The Committee shall sit in such place and at such time as the Chairman of the Committee may direct.

(3) A complaint and a respondent shall be parties to any inquiry or investigation of a complaint of improper conduct.

(4) After making initial inquiries under paragraph (1) of this rule, the Committee shall conduct a preliminary inquiry to determine whether-

(a) a complaint is trivial, frivolous or lacking in merit; or

(b) a complaint has some merit; and

(c) where it is determined that a complaint has some merit, the Committee shall investigate the complaint in accordance with rule 5.

Dismissal of non-meritorious complaints after preliminary inquiry

4 *Where, after conduction a preliminary inquiry into a complaint, the Committee determines that the complaint is trivial, frivolous or lacking in merit, the Committee may dismiss the complaint summarily without further inquiry or investigation, and the*

Committee shall inform the parties in writing of any such dismissal.”

6. In my judgment, on an analysis of the statutory jurisdiction of the PCC, the standing of a complainant as either a lay member of the public generally or, alternatively, as the client of a lawyer opposing the lawyer complained against, is irrelevant to the statutory function to be performed by the PCC.
7. This view of the statute, based on its plain and ordinary meaning, is to a large extent confirmed by the fact that the document which the Bar Council produced for the purposes of informing complainants about the complaint procedure, a document which is exhibited to the Applicant’s Affidavit and is headed “*Outline of Procedure for Making Complaints of Professional Misconduct against Barristers and Attorneys*” contains no suggestion that:
 - (a) it is impermissible as a matter of law or policy for the client of an opposing lawyer to make a complaint; or that
 - (b) certain categories of complaints can only be made by a court or by lawyers.

Legality of the Decision

8. It follows that, when one analyses the decision letter of 15th September 2011, the Decision was clearly based in part- if not in whole- on an irrelevant consideration, namely the fact that the complainant was neither a lawyer nor the Court.
9. Mr. Froomkin, given the difficult (if not impossible) task of defending the legality of the Decision sought to suggest that the sole defect with it was that the letter was inelegantly drafted.
10. I found that submission impossible to accept on any sensible reading of the letter itself. But I am fortified in my view that a material consideration which informed the decision was the standing of the complainant by the PCC’s own evidence as to what took place at the meeting. A minute, albeit short, of the relevant portion of the PCC’s deliberations on this matter was exhibited at page 11 of the Exhibits to the Affidavit of Mr. Paul Lacy sworn on behalf of the Committee. And that entry states as follows:

“This complaint is made against attorneys representing the other side. Divorce proceedings were filed and the husband stole her business from right under her. If it’s fronting then it’s a problem. If the PCC were to prosecute how do we prove it? If her lawyer wants to make the complaint prosecute how do we prove it? If her lawyer wants to make a complaint he can then Bar Council can become the complainant. The matter is to be dismissed.”

11. To summarize, the essential statutory function that the PCC was required to perform in its initial review of the complaint was simply to determine whether the complaint was trivial, frivolous, or lacking in merit, or (alternatively), whether the complaint had some merit. In my judgment the Committee clearly erred in law in failing to correctly carry out that statutory function and to make a clear decision on that central issue.
12. There was some suggestion, not forcefully advanced, to the effect that the species of administrative decision in question was not amenable to judicial review. Mr. Kessaram for the Applicant, anticipating those arguments, put before the Court by way of illustration the English decision of *R v General Medical Council, ex parte Toth* (2000) 61 BMLR 149 (Lightman J). This case illustrates that where a statutory body is exercising a filtering process in deciding whether or not a disciplinary complaint should go forward for further inquiry, the dismissal of the complaint at that filtering or screening stage may be amenable to judicial review.
13. Mr. Froomkin referred to my own decision in this Court in *Michael Roberts and Stephen Hayward v The Minister of Home Affairs and Public Safety and The Chief Fire Officer* [2004] Bda. L.R. 5 which was followed by Simmons, J. in *Bank of Bermuda Ltd v The Minister of Community Affairs & Sport* [2004] Bda L.R. 36. But the *Roberts and Hayward* decision was clearly a decision concerned with the issue of *res judicata* and, in that context, I indicated that a decision of the Human Rights Commission to dismiss a complaint as lacking in merit was not a judicial decision giving rise to an issue estoppel.

Conclusion

14. For the above reasons I find that the Applicant succeeds and she is entitled to an Order of Certiorari quashing the decision and remitting the matter to the PCC to be dealt with according to law.
15. For completeness I should add that I do have some sympathy with the PCC and its intuitive response to a complaint being raised by the client of an opposing lawyer in

the midst of pending proceedings. It is easy to see that there may well be circumstances in which the pursuit of such complaints may be problematic.

16. But having regard to the existing statutory and policy framework, in my judgment the PCC erred in dismissing the complaint without reaching a conclusion that it was trivial, frivolous, or lacking in merit.

17. I will hear counsel as to costs.

Dated this 20th day of February 2012 _____
KAWALEY J