

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 20 of 2018

BETWEEN:

NORMAN MACDONALD NURSE **First Appellant**

(The duly qualified Administrator of the Estate of Marie Delcina Nurse)

THE ATTORNEY GENERAL **Second Appellant**

THE BARBADOS BAR ASSOCIATION **Third Appellant**

AND

FLORENCE NURSE **Respondent**

Before: The Hon. Kaye C. Goodridge, Justice of Appeal, The Hon. Margaret A. Reifer and The Hon. William J. Chandler, Justices of Appeal (Acting)

2019: January 9, February 28

July 9

Mr. M Tariq Khan, Ms. Shayne Williams and Ms. Alexandria Thomas for the First Appellant

Mr. Douglas Mendes SC and Mr. Jared Richards for the Second Appellant

Mr. Barry Gale QC, Ms. Leisel Weekes and Mrs. Laura Harvey-Read for the Third Appellant

Ms. Vonda Pile for the Respondent

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] These appeals against the decision of **Beckles J** given on 31 August 2018, have brought into the spotlight a long simmering issue among some members of the legal profession. That issue is whether membership in the Barbados Bar Association (BBA) is compulsory for persons engaged in the practice of law in Barbados, and if so, whether the compulsory nature of that membership infringes the fundamental right to freedom of association enshrined in **section 21** of the **Constitution**.

FACTUAL AND PROCEDURAL BACKGROUND

- [2] The facts relative to the proceedings before us are uncontested and can be stated briefly.
- [3] By fixed date claim form filed on 27 February 2014, the first appellant brought an action against the respondent for an order for possession of property at Wellington Street, St. Michael and other relief.
- [4] On 23 April 2015, when the matter came on for hearing, Mr. Tariq Khan, attorney-at-law for the first appellant, made an oral application to have Ms. Vonda Pile, attorney-at-law for the respondent, denied a right of audience on the basis that she did not possess a valid practising certificate, having not paid the subscription fee to the BBA. Mr. Khan was directed by the judge to make a written application.

[5] On 4 May 2015, Mr. Khan filed a notice of application pursuant to **section 44** of the **Legal Profession Act, Cap. 370A (Cap. 370A)** seeking the following orders:

- “i. That Ms. Vonda Pile is not entitled to a right of audience before this Honourable Court or any court;
- ii. That Ms. Pile do pay the costs of this Application by way of a Wasted Costs Order.”

The application was supported by an affidavit of even date sworn by Mr. Khan.

[6] On 1 June 2015, Ms. Pile filed an affidavit in response. Written submissions were filed by Mr. Khan on 9 November 2015 and by Ms. Pile on 18 January 2016, respectively.

[7] In her written submissions, Ms. Pile argued that: (i) the annual subscription fee to the BBA was an imposition on her guaranteed right to freedom of association under **section 21(1)** of the **Constitution**; (ii) **sections 44** and **45** of **Cap. 370A** required an attorney-at-law to pay the annual subscription fee and become a compulsory member, in direct contravention of the supreme law clause in **Chapter 1(1)** of the **Constitution**.

THE JUDGE’S DECISION

[8] After hearing the parties’ submissions, **Beckles J** delivered a written decision. At **para [22]** of that decision, the judge stated that the following issues arose for her determination:

“Issue 1: Whether **section 44** of the LPA is unconstitutional and of no effect because it violates the Defendant attorney’s right under **section 21** of the Constitution which protects her freedom of association.

Issue 2: Whether the application made by Mr. Khan, attorney-at-law for the Claimant is fatal to the proceedings since he failed to provide the reasons for him giving the certificate of truth pursuant to Rule 3.12(4).

Issue 3: Whether the Claimant’s attorney Mr. Khan is a proper person to make the instant application before the court.”

[9] The judge then proceeded to discuss the issues and cited certain authorities.

As to the first issue, **Beckles J** concluded at **para [38]** that:

“**Section 21** of the Constitution speaks to the freedom of association and as can be seen from the case law and commentary, this right to associate includes a right not to associate. Since **section 44** of the LPA compels an attorney-at-law to be part of the Association, it can be deemed as inconsistent with the Constitution. In addition since the right to associate includes a right not to associate, it can be argued quite successfully that Ms. Pile has a right not to be a member of the Bar Association if she so desires.”

[10] In relation to the second issue the judge stated at **para [43]**:

“ In the case at bar it should be noted that this is not a case where a certificate of truth was not filed but rather that the certificate of truth was not filed in compliance with the procedure set out in Rule 3.12(4). The application therefore is procedurally flawed, but it is the opinion of this court that this shortcoming is not fatal to the proceedings and can be rectified by Rule 26.1 of the CPR- the application ought not to be struck out as a result of this procedural error.”

[11] On the final issue, **Beckles J** stated at **para [45]**:

“Based on the facts, Ms. Pile failed to pay the subscription fees pursuant to **section 44** of the LPA. It can be argued that said failure to pay these fees is unprofessional and an act of bad faith. Mr. Khan is a member of the Bar Association and an attorney of proper standing and as such it is the court’s opinion that in those circumstances he is entitled to make the current application.”

[12] Thereafter, **Beckles J** disposed of the application in the following way:

“[46] In light of all the foregoing this court finds as follows:

- (1) Mr. Khan, the Claimant’s attorney-at-law is a proper person to make the instant application before the court
- (2) The application though procedurally flawed in respect of the Certificate of Truth is not fatal to these proceedings and can be rectified by **Rule 26.1** of the **CPR**
- (3) **Section 44** of the LPA violates Ms. Pile’s right under **section 21** of the Constitution which protects her freedom of association. Therefore

in so far as **section 44** of the LPA is inconsistent with the Constitution, it is void

(4) The application to deny Ms. Pile a right of audience before the court is dismissed.”

[13] On 21 September 2018, the first appellant sought and was granted leave by this Court to appeal the decision of **Beckles J.** Thereafter certain case management orders were made.

[14] On 9 January 2019, this Court, after hearing the applications of the Attorney General and the BBA, ordered that they be added as the second and third appellants respectively. We considered that this order was necessary in the interests of justice and to ensure fairness to the parties who might reasonably be affected by the outcome of these proceedings.

THE APPEALS

[15] In their notices of appeal, the appellants have asked this Court to set aside the judge’s decision as set out at **para [12]** above. The appellants have also challenged the judge’s finding at **para [26]** of her decision that there can be no legal basis for the payment of Value Added Tax on subscription fees payable to the BBA. The appellants further allege that the judge committed procedural errors in that she assumed jurisdiction to hear and determine a constitutional issue in breach of the proper procedure as contained in the **Constitution** and the **Supreme Court of Judicature (Constitutional Redress) Rules, 1975** (the **Redress Rules**).

THE ISSUES

[16] In our opinion, the appeals raise the following issues for this Court's determination:

1. Whether the judge fell into procedural error in treating the application before her as an application for constitutional redress (the **Procedural Issue**);
2. Whether membership in the BBA is compulsory for persons who practice law in Barbados (the **Compulsory Membership Issue**);
3. If membership is compulsory, whether such compulsory membership contravenes the right to freedom of association as guaranteed by **section 21** of the **Constitution** (the **Freedom of Association Issue**).

Issue 1 THE PROCEDURAL ISSUE

[17] The application brought by the first appellant concerned the alleged failure of the respondent's attorney-at-law to comply with certain sections of **Cap. 370A**. However, it was in Ms. Pile's written submissions that the matter of the constitutionality of those sections was raised.

[18] At **para [27]** of her decision, the judge stated that "the issue has now developed into one concerning the constitutionality or unconstitutionality of section 44 of the LPA." As we have already noted, the judge treated the application before her as an application under **section 24** of the

Constitution and proceeded to make a determination on the constitutionality of **section 44** of **Cap. 370A**.

DISCUSSION

[19] **Chapter III** of the **Constitution** is concerned with the protection of the fundamental rights and freedoms of the individual. Specifically, **section 11** provides:

“Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

- (a) life, liberty and security of the person;
- (b) protection for the privacy of his home and other property and from deprivation of property without compensation;
- (c) the protection of the law; and
- (d) freedom of conscience, of expression and of assembly and association,

The following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does

not prejudice the rights and freedoms of others or the public interest.”

[20] Thereafter, **sections 12 to 23** give protection to those fundamental rights and freedoms, subject to such limitations as are contained in the provisions.

[21] **Section 24** is concerned with the enforcement of the protective provisions.

This section states:

“(1) Subject to the provisions of subsection (6), if any person alleges that any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

- (a) to hear and determine any application made by any person in pursuance of subsection (1); and
- (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 12 to 23:

Provided that the High Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.”

- [22] The manner in which an application for redress may be made to the High Court under **section 24** is provided for in the **Redress Rules**. According to **rule 3**, an application to the High Court for redress may be made (a) by motion supported by affidavit; or (b) by filing a writ of summons claiming a declaration, praying for an injunction or claiming or praying for such other order as may be appropriate. **Rule 4(1)** provides that the applicant is required to give all parties affected thereby at least 3 clear days notice of the motion.
- [23] Significantly, **rule 5** states that where the Attorney-General is not a party to the proceedings, the applicant shall file an extra copy of the documents filed and the Registrar shall within 3 days thereafter forward such copy to the Attorney-General for his information.
- [24] **Rule 6 (7)** provides that the Attorney-General, and in the case of a criminal matter, the Director of Public Prosecutions where appropriate, are entitled to appear and be heard in the proceedings.
- [25] The import of these rules is that any person affected by the proceedings whether the Attorney-General, who is the principal legal adviser to the Government of Barbados having been assigned that function under **section**

72(1) of the **Constitution**, or where appropriate, the Director of Public Prosecutions who is empowered by **section 79** of the **Constitution** to institute criminal proceedings, is afforded an opportunity to be heard in any matter involving alleged contraventions of the **Constitution**.

[26] Further, the BBA, as a party directly affected by any decision on the constitutionality of **sections 44** and **45** of **Cap. 370A**, was entitled to be served with copies of the proceedings and given an opportunity to be heard.

[27] In our opinion, there was no proper application before the judge for the enforcement of a constitutional right as required by **section 24** of the **Constitution**. Even if the judge considered that Ms. Pile's submissions were to be treated as such an application, then the Attorney-General and the BBA as parties whose rights could have been affected by any determination which might be made by the court, should have been given the opportunity to be heard.

[28] The record indicates that the judge did not address this procedural irregularity, which resulted in the Attorney-General and the BBA being deprived of the opportunity to make their submissions or representations to the court prior to a decision being made by the judge.

[29] In the judgment of this Court, this failure amounted to not only to a breach of the procedure as set out in **section 24** of the **Constitution** and the **Redress Rules**, but more importantly, a breach of the rules of natural justice and procedural fairness.

[30] We turn now to consider the remaining issues.

Issue 2 THE COMPULSORY MEMBERSHIP ISSUE

[31] In her decision, the judge accepted that the combined effect of **sections 44** and **45** of **Cap. 370A** is that there is a system of compulsory membership in the BBA.

[32] In Barbados, the right to practise law, like medicine, dentistry and other professions is regulated by statute. The requirements which must be met in order to engage in the practise of law can be found in **Cap. 370A**.

The Relevant Provisions of Cap. 370A

[33] **Section 3(1)** of **Cap. 370A** mandates the Registrar of the Supreme Court to keep a register of attorneys-at-law, to be known as “the Roll”, on which shall be registered the name of every person entitled to practise law in Barbados.

[34] **Section 10** states that every person whose name is entered on the Roll in accordance with the Act shall be known as an attorney-at-law. However, such a person may not practise law unless he is the holder of a valid Practising Certificate.

[35] According to **section 11 (1)**, “a person who is registered on the Roll and who desires to practise law in any year shall, in the month of January in that year, apply to the Registrar for a certificate, to be called a Practising Certificate; and the Registrar shall, on payment of the annual registration

fee, unless that person is exempt from such payment, but subject to section 49, issue to him a Practising Certificate”.

[36] In particular, **sections 44** and **45** provide:

“44.(1) An attorney-at-law shall, on each occasion on which a Practising Certificate is issued to him, pay to the Bar Association the annual subscription which is or would be payable by him under section 45 as a member of the Association, and shall thereupon (if not already a member), notwithstanding anything in any by-law, ordinance, order, rule or regulation of the Association, become by virtue of this section and without election or appointment by the Association, a member of the Association;

(2)

(3) Every person of the Bar Association who ceases to hold a valid Practising Certificate shall thereupon cease to be a member of the Association unless he retains his membership in accordance with subsection (4).

45. (1) The amount of the annual subscription payable by members of the Bar Association shall be fixed from time to time by the Association.”

[37] From the above provisions it can be seen that if a person desires to practise law in Barbados, that person’s name must be entered on the Roll and he or she should be the holder of a practising certificate. However, this is not the end of the matter, for a practising certificate is of no effect until the

annual subscription fee required by **section 44** has been paid to the BBA. Upon payment of the fee a person becomes a member of the BBA automatically.

[38] This leads to the inevitable conclusion that membership in the BBA is compulsory for persons engaged in the practise of law in Barbados.

ISSUE 3 THE FREEDOM OF ASSOCIATION ISSUE

[39] In light of the conclusion stated above, we must now consider whether compulsory membership in the BBA contravenes the right to freedom of association protected under **section 21** of the **Constitution**.

[40] Before examining this issue, however, it important to set out certain well known principles on the constitutionality of enactments and the court's approach to the interpretation of the fundamental rights provisions in the Constitution.

The Principles on the constitutionality of enactments and the interpretation of the fundamental rights provisions

[41] There is a presumption that an enactment is constitutional. For, as was stated by Baroness Hale in **Surratt et al v The Attorney General of Trinidad and Tobago**[2007] UKPC 55 (Surrat) at **para 45**:

“The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one: see *Grant v The Queen* [2007] 1 AC1, para 15, citing *Mootoo v The Attorney General of Trinidad and Tobago* [1979] 1 WLR

1334,1338-1339. On the other hand, the Constitution itself must be given a broad and purposive construction: see *Minister of Home Affairs v Fisher* [1980] AC 319 at 328.”

[42] As to the approach to be taken by the courts in interpreting the Constitution, in **Weel v Attorney General and Another** [2011] 5 LRC 610 (**Weel**) this Court cited with approval the dictum of Lord Hoffman at **para 28** in **Boyce v R** [2004] UKPC 32. There, Lord Hoffman stated in part:

“Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions.....The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a ‘living instrument’ when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life.”

[43] It must be stressed that, even where an enactment on the face of it appears to infringe a fundamental right protected under the

Constitution, this is not the end of the matter, for there is the further obligation on the court to conduct a balancing exercise in order to determine whether or not the particular enactment is constitutional. As Baroness Hale stated at **para 58** of **Surratt**:

“It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance. But there can be little doubt that the balance which Parliament has struck in the EOA is justifiable and consistent with the Constitution. Section 7 does impinge upon freedom of expression but arguably goes no further in doing so than the existing law; if it does go further, by including gender as well as racial or religious hatred, it is merely bringing the law into conformity with all modern human rights instruments, which include sex or gender among the prohibited grounds of discrimination. Sections 17 and 18 do impinge upon freedom of contract but in ways which are now so common in the common law world that it can hardly be argued that they are not proportionate to the legitimate aim which they pursue.”

DISCUSSION

[44] With the above principles firmly in mind, we now turn our attention to the freedom of association issue.

[45] As we have stated above, the judge held that **section 44** of **Cap. 370A** which makes membership in the BBA compulsory, violated Ms. Pile's right under **section 21** of the Constitution to freedom of association, and to the extent that **section 44** was inconsistent with the **Constitution**, it is void.

[46] **Section 1** states that "the Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

[47] **Sections 21(1)** and **(2)** provide:

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and to associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

- (a) that is reasonably required in the interests of defence, public safety, public order; public morality or public health, or
- (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; or
- (c) that imposes restrictions upon public officers or members of a disciplined force.”

[48] In **Attorney General of Barbados v Smith (1984) 38 WIR 33, Williams J** as he then was, held that the right to freedom of association also encompassed the negative right not to be compelled to associate. At page 47 **Williams J** stated:

“But it would seem to me that in a society of free men and women freedom of association must guarantee the individual as well the right to choose with whom he wishes to have social, business and other relationships. A man or a woman must be free to choose his or her spouse, his or her friends, his or her business partner, his or her employer or employee. And, conversely, he or she must be entitled to reject social, business and other relationships being forced on them against their will. Freedom of association must have significance to individuals as well as to groups.”

[49] **Williams J** went on to hold that **section 65** of the **Education Act 1981** by which teachers were deemed to be appointed to the teaching service in accordance with the provisions of the **Constitution** was invalid by reason of its incompatibility with **section 21(1)** thereof.

[50] A similar conclusion was reached by the Court of Appeal of Trinidad and Tobago in **Trinidad Island Wide Cane Farmers Association (1979) 27 WIR 329** which was relied on by **Beckles J**. In that case, the Cane-Farmers Incorporation and Cess (Amendment) Act provided for compulsory membership in the Association for all cane farmers who entered into contracts with sugar manufacturers. The court held that there was not only the freedom to associate but also the freedom not to associate guaranteed by the Constitution.

[51] In response to the argument of the Attorney-General that freedom of association is not absolute Rees JA stated:

“If this contention on behalf of the Attorney-General and the Association is correct it seems to me that this can be a mortal blow to the heart of the democratic process in the country because citizens may well find themselves having compulsorily to join religious associations, commercial corporations, trade unions, trade associations and even political parties under the guise of regulating the affairs of some particular activity. Bearing in mind that constitutional instruments must not be construed in any narrow and pedantic sense, I would have thought that the only implication to be drawn from the words ‘freedom of

association' is that a person should be free to join with others and not be compelled to do so.”

- [52] In view of the above, it would appear at first blush that compulsory membership in the BBA prima facie violates the right to freedom of association in its negative formulation.
- [53] However, according to **section 11**, freedom of association is “subject to respect for the rights and freedoms of others and for the public interest.”
- [54] Further, **section 21** provides that no law shall be held to be inconsistent with or in contravention of the freedom of association to the extent that the law in question makes provision that is reasonably required in the interest of, inter alia, public order or that is reasonably required for the purpose of protecting the rights or freedoms of other persons. Therefore, the freedoms guaranteed by the Constitution are all subject to limitations.
- [55] Bearing in mind the proviso in **section 21**, the question which we must now ask ourselves is whether compulsory membership in the BBA is reasonably required in the public interest or for the purpose of protecting the rights and freedoms of others.
- [56] In answering this question, it is necessary to first examine in some detail the nature of the BBA. Is it a public body exercising public functions in the interest of the public?

[57] To begin, the BBA was established in 1940 by the **Barbados Bar Association Act, Cap. 363**. It is a body corporate which can sue and be sued in its own name and can acquire and hold property.

[58] In the Rules of the BBA, the aims and objectives of the association are stated, *inter alia*, as follows:

- (a) To support and protect the character, status and interest of the Legal Profession generally and particularly attorneys-at-law practicing in Barbados;
- (b) To promote honourable practice, and settle disputed points in practice;
- (c) To maintain the honour and independence of the Bar and the defence of the Bar in relation to the judiciary and the executive;
- (d) To improve the administration of justice and procedure and trial by jury;
- (e) To establish and maintain a system of prompt and efficient legal advice and legal aid for those persons in need;
- (f) To promote and support law reform, law revision and law reporting;
- (g) To settle questions of professional conduct, discipline and etiquette;
- (h) To consider all questions affecting the interests of the profession and to initiate and watch over, and when necessary to petition the Parliament of Barbados or

promote deputations in relation to general measures affecting the profession, and to procure changes of law or practice, and the promotion of improvements in the principles and administration of law;

- (i) To further good relations and understanding between the Bar and the public;
- (j) To encourage the study of law and for that purpose the donation on such terms and conditions as may be prescribed by regulations, of scholarships, prizes or other rewards or distinctions; and
- (k) To promote information on legal subjects by lectures, discussions, books, correspondence with public books and individuals, or otherwise.

[59] Under **Cap. 370A**, in keeping with the BBA's aim of settling questions of professional conduct, discipline and etiquette, there is a Disciplinary Committee established by **section 18(1)** of that Act which is charged with the duty of upholding standards of professional conduct. The Disciplinary Committee is empowered to make rules prescribing standards of professional etiquette and professional conduct of attorneys-at-law and has made rules known as the Legal Profession Code of Ethics, 1988 which provide a comprehensive code of ethics with which all attorneys-at-law admitted to practice must comply.

[60] The Code of Ethics regulate an attorney-at-law's conduct with his clients including regulation of the fees which an attorney-at-law may lawfully and properly charge and the comingling of funds is expressly prohibited. Significantly, the Code categorises what acts amount to "serious professional misconduct".

[61] Further, where the Disciplinary Committee, after hearing a complaint alleging professional misconduct by an attorney-at-law, determines that a case of professional misconduct has been made out against that attorney-at-law, the Committee is obligated within 21 days of its decision to forward a report signed by the Chairman to the Chief Justice setting out its findings, reasons for its decision and recommendations for sanction. Those recommendations may include:

- (1) The removal from the Roll of an attorney-at-law;
- (2) An attorney-at-law's suspension from practice on conditions;
- (3) Imposition of fines;
- (4) Imposition of reprimands; and
- (5) Payment by any party of costs in such sum as the Committee considers a reasonable contribution towards costs.

[62] It is clear then that the Disciplinary Committee plays an important role in the maintenance of discipline of members of the Legal Profession in Barbados for the benefit and protection of the public and in the public interest.

[63] By **section 48 of Cap. 370A**, the BBA is charged with the responsibility of maintaining and administering the Compensation Fund which is comprised of contributions made by attorneys-at-law on each occasion on which a practising certificate is issued, in an amount to be determined by the BBA from time to time. This Fund is used by the BBA to make grants to any person whom it is satisfied has suffered loss as a consequence of dishonesty on the part of an attorney-at-law or in consequence of the failure by an attorney-at-law to account for money due to the person in connection with his or her practice as an attorney-at-law.

[64] Further, under the BBA's Rules, a number of standing committees have been established. These are:

- (1) Costs and Fees Committee to deal with all matters submitted for the advice or decision of the Council which relate to costs and fees or to the general conduct of an attorney-at-law's business, other than questions of etiquette or professional conduct, and to take such action with regard thereto as the committee considers desirable;
- (2) Land Transfer Committee to consider all matters relating to the tenure and transfer of land and report thereon to the Council;

(3) Legal Education Committee to consider all matters relating to legal education and report thereon to the Council;

(4) Law Reform and Legislative Committee to consider all legislation other than Bills specially referred to other committees that is likely to affect the BBA or its members and report thereon to the Council;

(5) Magistrate's Court Committee to consider all matters regarding the procedure relating to Magistrate's Court and all Bills introduced into Parliament specially relating to the Magistrates' Court, and to report to the Council with regard thereto;

(6) Public Relations Committee to deal with all matters relating to the furtherance of good relations between the profession and the public and the promotion of goodwill and social intercourse between members of the BBA and members of the legal Profession of other countries;

(7) Supreme Court Committee to consider all matters relating to High Court Practice, including Bills introduced into Parliament with regard to and all rules affecting Legal Procedure and report thereon to the Council; and

(8) Legal Practice Committee to consider all matters relating to the practice of the profession, and in particular the scrutiny of persons not entitled to practice law.

[65] We have carefully examined the functions, obligations and responsibilities which have been placed on the BBA by Parliament as set out above and we have concluded that the BBA is a public body charged with important public functions to be exercised in the public interest for the following

reasons. Amongst other things, the BBA is required to promote honourable practices in the profession, to improve the administration of justice, to maintain the honour and independence of the Bar, to settle questions of professional misconduct, discipline and etiquette, to further good relations between the Bar and the public, to administer the Compensation Fund, to promote and support law reform, law revision and law reporting and to oversee clients' accounts.

- [66] In seeking to answer the question whether compulsory membership in the BBA is permissible as being reasonably necessary in the interests of public order and the protection of the rights and freedoms of others within the parameters of **section 21(2) (a) and (b) of the Constitution**, we consider it useful to examine the approach taken by the European Court of Human Rights, the United States of America and Canadian courts to the fundamental right of freedom of association.

The European Court on Human Rights

- [67] In **Le Compte, Van Leuven and De Meyere v Belgium [1981] 4 E.H.R.R. 1 (Le Compte)**, the West Flanders Provincial Council of the *Ordre des Mediciens* ordered that Dr. Le Compte's right to practise medicine be suspended for 6 weeks. This was because he had given an interview to a Belgian newspaper considered by the Council to amount to publicity incompatible with the dignity and reputation of the profession. Dr. Le Compte's argument was that compulsory membership of the **Ordre**

Des Mediciens, without which no one may practise medicine, and subjection to the jurisdiction of its disciplinary organs, were contrary to the principle of freedom of association. The court held that, having regard to its legal nature and public functions, the *Ordre* was not an association within the meaning of Article 11 of the Convention.

[68] In **Le Compte**, the court stated:

“The Court notes firstly that the Belgium *Ordre des Medecins* is a public law institution. It was funded not by individuals but by the legislature; it remains integrated within the structure of the State and judges are appointed to most of its organs by the Crown. It pursues an aim which is in the general interest, namely the protection of health, by exercising under the relevant legislation a form of control over the practice of medicine. Within the context of this latter function, the *Ordre* is required in particular to keep a register of medical practitioners. For the performance of the tasks conferred on it by the Belgium State, it is legally invested with administrative as well as rule-making and disciplinary prerogatives out of the orbit of the ordinary laws.....and, in this capacity, employs processes of a public authority.”

[69] As the court observed, even though an association may be a public body not ordinarily covered by Article 11, a violation of the right to freely associate would nevertheless occur if the setting up of the association prevented practitioners “from forming together or joining professional associations.”

[70] However, in **Le Compte**, there were several associations in Belgium formed to protect the professional interests of medical practitioners which Mr. Le Compte was free to join, or not, as he wished. In the end the court held that ‘ the existence of the Ordre and its attendant consequence that is to say, the obligation on practitioners to be entered on the register of the Ordre and to be subject to the authority of its organs clearly have neither the object nor the effect of limiting, even suppressing, the right guaranteed by Article 11.’”

[71] The principles espoused in **Le Compte** were applied by the European Human Rights Commission in relation to a requirement of compulsory membership in a bar association. In **A v Spain Application No. 13750 of 1988 (July 2nd 1990)**, members of the Saragossa Young Lawyers Group complained that the provisions which made their association subject to the supervision of the Bar Council of the Saragossa Bar Association infringed their right to freedom of association.

[72] The Saragossa Bar Association was established by decree as a public law corporation with legal personality and full legal capacity, with its main aims being to regulate practice as a lawyer, to defend lawyers’ professional interests and to further the cause of justice. Membership in the Association was made compulsory for practising lawyers and was a necessary precondition for practice as a lawyer.

[73] Applying **Le Compte**, the Commission held that the Saragossa Bar Association could not be regarded as an association within the meaning of the freedom of association provisions of the Convention and that since there was no restraint on members forming together or joining professional associations, there was no infringement of the freedom of association provisions of the Convention.

The United States

[74] In **Latrop v Donoghue 367 US 820**, the Supreme Court of Wisconsin promulgated rules and byelaws creating an integrated State Bar requiring all lawyers to be members of the State Bar and to pay annual dues of \$15.00 as a condition to practising in the State. The appellant contended that the State Bar engaged in political activities which he did not support and that, by coercing him to support it financially, the rules and byelaws violated, inter alia, his right to freedom of association.

[75] The Supreme Court held that the requirement of compulsory membership and the payment of annual dues did not infringe the right to freedom of association because the court accepted that such measures were 'part and parcel of legitimate state activity in the public interest and that accordingly, the state is entitled to make membership in a bar association performing public functions a condition of the right to practise law'.

The Canadian Position

[76] In **Lavigne v Ontario Public Service Employees Union(1991) 81 D.L.R (4th) 545**, La Forest J expressed the view that freedom of association guaranteed by section 2(d) of the Canadian Charter of Rights and Freedoms protected the right not to associate. However, he accepted that there were inherent limitations on the freedom not to associate. In this regard, La Forest stated at p 320:

“It does not necessarily follow, however, that s.2 (d) of the Charter protects us from any association we may wish to avoid. In a word, I do not think the freedom of association is necessarily a right to isolation..... it could certainly not have been intended that s.2 (d) protect us against the association with others that is a necessary and inevitable part of membership in a democratic society, the existence of which the Charter clearly assumes.... Realistically, too as I will more fully explain later, the organisation of our society compels us to be associated with others in many activities and interests that justify state regulation of these associations.....In short there are certain associations which are accepted because they are integral to the very structure of society. Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest.”

- [77] In **R v Advance Cutting and Coring Ltd (2001) 205 D.L.R (4th) 385** the Supreme Court of Canada held that legislation which compelled workers to join one of five trade unions did not infringe the freedom of association.
- [78] In our judgment, in a democratic society such as ours, the regulation of professionals is an important public function. Parliament, by enacting **Cap. 370A**, has put in place the necessary statutory framework for the regulation of the legal profession which is for the benefit of the public at large.
- [79] Apart from the requirement that an attorney-at-law must be a member of the BBA and make a financial contribution in order to obtain an effective/valid practising certificate, there is no compulsion on an attorney-at-law to participate in any activities of the BBA or to associate with other members. Also, there is no restriction on an attorney-at-law forming or joining other professional associations.
- [80] We accept that there are inherent limitations to the freedom not to associate guaranteed under the Constitution. In our judgment, it is permissible for **Cap. 370A** to make the right to practise law subject to the requirement of compulsory membership in the BBA when regard is had to the functions which the BBA is required to undertake in the public interest.
- [81] As the late Professor Margaret De Merieux opined in her text *Fundamental Rights in the Commonwealth Caribbean Constitutions (1992)* at p 282:

“.... even where the right to disassociate is admitted..... its limits will have to be articulated. As a supposed element of freedom of association, disassociation carries with it special problems, in relation for example, to membership of professional bodies- a question akin to but distinct from that of a trade union closed shop. It seems likely that a system in which members of a profession must belong to, or at least submit to the discipline of a professional association, will be seen not to contravene the right of free association even where the latter is held to include disassociation.”

[82] We have looked at the debate held on 12 December 1972 in the House of Assembly on the Legal Profession Bill. The exchange between the members indicate quite clearly that they were alert to the challenges raised by a provision requiring compulsory membership in the BBA and were confident that those provisions would not be found inconsistent with freedom of association. That notwithstanding, having regard to our analysis of those sections above and the public interest element, we therefore hold that the legislative intent in passing **sections 44 and 45 of Cap. 370A** was to make membership in the BBA compulsory for persons wishing to engage in the practise of law and are not inconsistent with freedom of association.

[83] As a result of the above, the finding of the judge that **section 44 of Cap. 370A** is unconstitutional must be set aside.

[84] There is one final point. In the court below, Ms. Pile raised the issue of VAT not being payable on subscription fees. The trial judge noted at para [26] of her decision that “the issue which Ms. Pile at the time had was

therefore not with the compulsory membership of the Bar Association and the payment of subscription fees, but was with the legality of the payment of VAT on the subscription fees”.

[85] The judge determined that subscription fees payable by members of the BBA were not subject to VAT. She stated, “I therefore uphold Defendant Counsel’s contention on this issue”. The issue of VAT was clearly identified as an issue before the trial judge. However, neither the VAT office nor the Attorney General were made parties and no notice of the proceedings was served on them as interested parties.

[86] We therefore consider the judge’s ruling on the issue of VAT to be obiter dicta.

DISPOSAL

[87] For all the foregoing reasons, the appeals are allowed. The decision of **Beckles J** given on 31 August 2018 is set aside. There is no order as to costs.

Justice of Appeal

Justice of Appeal (Acting)

Justice of Appeal (Acting)