BARBADOS

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

CLAIM NO. 106/2018

BETWEEN:

PATTERSON K. H. CHELTENHAM **APPLICANT**

AND

THE DISCIPLINARY COMMITTEE **RESPONDENT**

Before: ***The Honourable Mr. Justice William J. Chandler, High Court Judge***

Appearances:

Mr. Leslie F Haynes QC, Ms. Richel Bowen with him, Attorneys-at-Law for the Applicant.

Mr. Alair P. Shepherd QC, Mr. Philip McWatt and Ms. Alicia Archer with him, Attorneys-at-Law for the Respondent.

Mr. Steve Straughn, the interested party in person.

Dates of Hearing: 2020 July 21 and October 26
2021 November 25

Date of Decision: 2021 December 01

Administrative Justice Act Cap 109B – Legal Profession Act Cap 370A – Application for injunction against the Disciplinary Committee of the Barbados Bar Association – Application to

strike out claim against the Respondent – Whether Respondent an entity amenable to judicial review – Whether Respondent is a body exercising public functions.

Decision

Introduction

[1] Before the court is a Notice of Application filed 9 April 2018 by the Respondent erroneously described in the application as the Claimant/Applicant under **Part 26.3(1) of the Supreme Court (Civil Procedure) Rules 2008 (CPR)** for orders that:

I. The proceedings initiated under the Fixed Date Claim Form filed on 26 January 2018, be struck out;

II. The order of Chandler J made on 30 January, 2018 be struck out and/or set aside *ex debito justitae*, and

III. The costs thrown away be the Respondent/Applicant's to be agreed or assessed.

The Grounds of the Application

[2] The grounds of the application are:

1. The Respondent is an unincorporated body or association with no legal personality and cannot sue or be sued in any proceedings before a court of law;

2. The Respondent is not an entity known in law and therefore the statement of case discloses no reasonable ground for bringing the claim against the Respondent;
3. This circumstance is not a mere procedural error capable of being rectified as, pursuant to **Section 9(7)** of the **Fourth Schedule** of **the Legal Profession Act**, **Cap 370A** (**Cap 370A**) the individual members of the Disciplinary Committee are not liable for any act or default of the Committee done in good faith; and
4. There is no legal person against whom the Claimant can legally continue the proceedings.

[3] There is no affidavit filed in support of this application.

Brief factual background

[4] This is the second decision in this matter, the first was given on 9 February 2021 and related to the issue of an application by the Interested Party for me to recuse myself. The facts are amply set out in that decision. For ease of reference, I will only briefly refer to the facts relevant to this matter. The Applicant was retained by the Solicitor General of Barbados (SG) in a defamation suit brought against her and others by the Interested Party. The Interested Party alleged that he had previously retained the Applicant to act for him and that the Applicant was possessed of documents and knowledge

of his case which would render it ethically wrong for the Applicant to act for the SG. He therefore applied for the Applicant to be prevented from representing the SG.

[5] After reading the filed submissions and upon hearing counsel, I ordered that the Applicant was not ethically prevented from representing the SG.

[6] It subsequently appeared that, during the recusal proceedings, the Interested Party filed a complaint with the Respondent alleging professional misconduct on the part of the Applicant on grounds identical to or in *pari materia* with, those alleged in the substantive case.

[7] The Applicant applied for and was granted a temporary injunction restraining the Respondent from proceeding with the application before it pending the outcome of the Applicant's application.

[8] The Interested Party applied for me to recuse myself from hearing the matter at bar but for the reasons contained in my first judgment in this matter, I refused that application. The reasons therefor are not germane to the instant application and need not be repeated here.

The Issues

[9] There is no divide between the parties as to the issues in this matter. The first issue is whether or not the Disciplinary Committee is an entity against which legal proceedings may be brought under the **Administrative Justice**

Act, Cap 109(B) (AJA). If the answer is in the negative, then a further issue arises as to whether the proceedings can be continued under **Section 3** of the **AJA**.

[10] The second issue is whether the Respondent is immune from suit by virtue of the **Fourth Schedule** to **Cap 370A**.

The Respondent's Submissions

[11] Mr. Philip McWatt, counsel for the Respondent, filed outline submissions on 27 April 2021 in support of the Respondent's application. He referred to **Sections 2** and **18** of **Cap 370A** which define the Barbados Bar Association (BBA) and the Disciplinary Committee respectively and submitted that **Section 2** defines the BBA as a body corporate established by the **Barbados Bar Association Act Cap 363 (Cap 363)** whereas **Section 18** simply defines the Disciplinary Committee as meaning the Disciplinary Committee established under Part V. Counsel referred to **Section 21** of the **Interpretation Act Cap 1 (Cap 1)** which confers on corporate bodies the right, inter alia, to sue and be sued in their corporate names, in support of his submission that, in light of the fact that there are no clear words establishing the Respondent as a body corporate, its status is analogous to an unincorporated association which has no legal personality capable of being recognized in a court of law.

[12] It was his opinion that the Respondent, unlike the BBA, is not a body corporate nor is it given any special status entitling it to recognition before a court of law.

[13] Counsel also submitted that the definition of administrative acts or omissions in **Section 2** of **the AJA**, found at paragraph [42] of this decision, which includes a Committee, did not dispense with the requirement that the Respondent be an entity recognizable in law. He argued ex hypothesi that, if an applicant was aggrieved by the actions of a Committee established under the Ministry of Health, the proper respondent would be the Minister of Health and it was not open to an applicant to name the Committee as a respondent in judicial review proceedings if it lacked legal personality. He referred to **Maria Agard v Mia Mottley et al, Claim No. 1753 of 2015 (decision date, 29 December 2017) (Agard v Mottley)**, **St. Clair v Edwards et al, Claim No. 1787 of 2014 (decision date, 17 December 2014) (St. Clair v Edwards)** and ***Halsbury's Laws of England para 273, Evans v Cooper (1875) 1 QBD 45***.

[14] It was counsel's submission also that the definition of administrative acts or omissions required such acts or omissions to be made by an entity that is an authority of the Government of Barbados in keeping with the rule that the entity in question is exercising a public power that is derived from statute or

the office that the decision maker holds, however, he noted that **Rule 10** of the **Fourth Schedule** provided expressly that the office of a member of the Committee shall not be taken to be a public office. He conceded that this was not a ground of the application but noted that it was a matter which would become relevant during the proceedings namely whether judicial review is available to a person aggrieved by a decision of a private body.

[15] Mr. McWatt contended that in **St. Clair v Edwards**, the Methodist Church, of which Reverend Dr. Edwards was the superintendent, was a separate legal entity and provision made for the commencement of legal proceedings against it, whereas there were no words of incorporation relative to the Respondent giving rise to the conclusion that it was a separate legal entity as provided under **Cap 1**. He contended further that **Cap 370A** did not provide for the manner of bringing the Committee before the Court.

[16] Counsel relied upon **Section 9(7)** of the **Fourth Schedule** which provides for immunity from suit of the Committee's members to contend that there are real policy reasons why "Parliament may have intended to **immunize this body** from proceedings in a court of law." (**emphasis added**) These reasons included the fact that the members of the Committee sat voluntarily and were not paid for their services and, if they are dragged before the Court, the result may be that persons might not volunteer to serve.

[17] It was counsel's further submission that the Court of Appeal and not the Committee was the final arbiter on professional misconduct and that the Applicant was free to raise his concerns anew before the Court of Appeal.

[18] It was counsel's final submission that any order against an entity which had no legal status could not stand and ought to be set aside or discharged since the Applicant, if he wanted to maintain an action, was required to bring the matter against parties, (presumably the Committee members) in a representative action provided that he satisfied the requirements of **Part 21** of the **CPR**.

[19] He observed that the Honourable Attorney General was not made a party to the proceedings and it was unknown whether he had been served.

The Applicant's Submissions

[20] Ms. Richel Bowen, one of the Applicant's counsel, filed a Reply to the Respondent's written submissions on 26 July 2021 in which she submitted that **Section 18** of **Cap 370A** charges the Disciplinary Committee with the duty of upholding standards of professional conduct in the legal profession and determining whether or not there has been a breach of professional conduct which are administrative acts.

[21] She contrasted the Respondent's role with that of the Court of Appeal which, she submitted, will generally act on the Respondent's

recommendations unless there is some deficiency in the Report of the Committee or a failure to discharge the duties imposed by **Cap 370A**. It was therefore counsel's opinion that the role of the Committee, was a public one and provided the public law element which rendered the Respondent subject to judicial review.

[22] Counsel referred to the definitions of "administrative act or omission" in **Section 2** of the **AJA** which includes a "committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any other enactment" and the definition of "enactment" as "an Act or a statutory instrument or any provision in an Act or statutory instrument" in **Section 2** of **Cap 1** to argue that the Respondent is established by statute and exercises the duties imposed on it by **Cap 370A** which are administrative acts. In consequence, it was her submission that the Respondent is amenable to judicial review.

[23] Ms. Bowen agreed that the law provided that the office of an individual member of the committee shall not to be taken to be a public office, however she argued that the committee itself is in fact a public body whose source is founded in statute. It was counsel's submission therefore that **Rule 10** of the **Legal Profession Rules** was misconstrued by the Respondent.

[24] With respect to the submission that the Committee is not the final arbiter in disciplinary proceedings since Attorneys-at-law can raise concerns before the Court of Appeal, counsel referred to **Re Worrell and Sobers, BB 1990 CA 5 (Re Worrell and Sobers)**, to reinforce the point that the Committee is charged with hearing the evidence and deciding whether or not a case of professional misconduct has been made out and not the Court of Appeal.

[25] With reference to the submission that the Attorney General should be named as a Respondent in these proceedings, it was counsel's view that, since judicial review proceedings are governed by the **AJA** and **Part 56** of the **CPR**, the Attorney General is not required to be named as a party to the proceedings. She noted however that in compliance with **Part 56.4 (2)** of the **CPR** the Attorney General was served on 29 January 2018 with the Fixed Date Claim Form, affidavit, certificate of urgency, application and take notice.

[26] Ms. Bowen finally submitted that the applicant was seeking various forms of relief including a declaration, injunction, mandamus and certiorari and that, if this Court held that the application ought not to have been brought against the Respondent, the Court ought to exercise its discretion under **Section 3 subsection 2** of the **AJA** and permit the proceedings to continue with necessary amendments. In which case, the Applicant ought to be

permitted to pursue relief for a declaration, or a permanent injunction as claimed.

Further Submissions

[27] The Court on 20 October 2021 indicated to Counsel for the Applicant and Respondent that it considered the following additional authorities to be relevant to a determination of the issues and invited both counsel to make representations to the Court on the case law and its impact on the matter before the Court:

1. ***R v Panel on Takeovers and Mergers; Ex Parte Datafin Plc and Another [1987] Q.B. 815. (Regina v Panel on Take-Overs*)*;*
2. ***R (on the application of Holmcroft Properties Ltd) v KPMG LLP [2018] EWCA Civ 2093;* (*Holmcroft*)**
3. ***Regina v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan [1993] 1 WLR 909 (Ex Parte Aga Khan)***
4. **Re Errol Niles BB 1993 CA 28 (Re: Niles)**; and
5. **Norman Macdonald Nurse, The Attorney General and The Barbados Bar Association v Florence Nurse Civil Appeal No. 20 of 2018; BB 2019 CA 11**. (**Nurse et al v Nurse**)

[28] In her further submissions, filed 22 November 2021, counsel for the Applicant submitted that **Regina v Panel on Take-Overs** confirms that a tribunal, panel or committee need not be established by statute or have a legal personality in order to be subject to judicial review. Applying that case, it was counsel's opinion that the manner in which the Disciplinary Committee functions and the importance of the duty of upholding standards of the legal profession with which it is tasked, means that it exercises a significant public duty.

[29] Counsel for the Applicant further submitted that the Respondent is created by the **Cap 370A** and is therefore subject to judicial review pursuant to **Section 2** of the **AJA**.

[30] In his further submission filed 23 November 2021, counsel for the Respondent submitted that the main difference between the Disciplinary Committee and the Panel on Take-Overs and Mergers is that, without recourse to judicial review there would be no access to the law courts from any decision of the said Panel, whereas the Committee has power only to assist the Court of Appeal in carrying out its duty to adjudicate questions of professional misconduct, and, where applicable, prevent members of the public from being exposed to attorneys-at-law whose conduct may endanger their livelihoods, if left unchecked.

[31] Counsel also submitted that following the passage of the **AJA**, leave of the court to bring judicial review proceedings was no longer necessary and as such the ability of attorneys to stifle the Committee's business with unwarranted or unmeritorious applications for judicial review abound.

[32] It was counsel's contention that **Holmcroft** represented a reversal of the "revolutionary stance" taken by the court in ***Ex Parte Datafin***. It was his position that the court in **Datafin** was more concerned with looking at the nature of the power being exercised as opposed to the source of the power to determine an entity's susceptibility to judicial review. It was his opinion that in **Holmcroft** the traditional test i.e. the source of power had once again taken prominence in judicial review, citing ***Ex Parte Aga Khan*** and **Melnyk v The Barbados Turf Club (SCS No. 61 of 2005 decided October 25, 2007)**. He stated however, that the usefulness of the tests relating to the private/public law dichotomy is uncertain.

[33] Interestingly, Mr. McWatt submitted that there is a difference between the individual members and the Committee itself. He cited **Rule 10** of the **Fourth Schedule** of **Cap 370A** and applied the rule of statutory interpretation in **Section 36** of **Cap 1** that words in the singular shall include the plural, to express his puzzlement that a single member of the Committee does not hold a public office yet the Applicant argues that the

plurality of the membership comprising the committee must somehow hold a public office.

[34] Counsel conceded that "the Committee is exercising some form of statutory power, albeit rule 9(5) of the Fourth Schedule purports to give the Committee power to regulate its own proceedings." It was his further submission that "Given that the source of power is statutory in nature, … the true purpose behind rule 10 must be to insulate the Committee from judicial review proceedings and delaying the hearing of complaints where any Attorney-at-Law would be able to raise any issues it [sic] has directly before the Court of Appeal."

[35] With respect to **Nurse et al v Nurse**, it was Mr. McWatt's position that the named party was the BBA, an entity with judicial capacity whereas the Respondent, he maintained, has no legal personality. He described that decision as unhelpful.

[36] Counsel reiterated that its main ground in applying to strike out the proceedings is the lack of legal personality of the Defendant.

Preliminary Discussion

[37] Before embarking on the analysis of the substantive issues before the Court, I will briefly dispose of the suggestion that the **BBA** derives its corporate personality from **Section 21** of **Cap 1**. That section provides that:

"21. (1) Where an Act passed after the 16th June, 1966, contains words establishing, or providing for the establishment of, a body corporate and applying this section to that body those words shall operate–

(a) to vest in that body when established–

(i) the power to sue in its corporate name;

(ii) the power to enter into contracts in its corporate name, and to do so that, in relation to third parties, the body shall be deemed to have the same power to make contracts as an individual has;

(iii) the right to have a common seal and to alter or change that seal at pleasure;

(iv) the right to acquire and hold any real or personal property for purposes for which the corporation is constituted and to dispose of or charge such property at pleasure;

(v) the right to regulate its own procedure and business; and

(vi) the right to employ such staff as may be found necessary for the performance of its functions;

(b) to make that body liable to be sued in its corporate name;

(c) to require that judicial notice shall be taken of the common seal of that body, and that every document purporting to be a document sealed by that body and to be attested in accordance with any enactment applicable to the attestation of documents so sealed shall, unless the contrary is proved, be received in evidence and be deemed to be such a document without further proof;

(d) to vest in a majority of the members of that body the power, subject to any quorum fixed by the enactment under which it is established or by any relevant standing orders, to bind other members thereof; and

(e) to exempt from personal liability for the debts, obligations or acts of that body, such members thereof as do not contravene the provisions of the Act under which the body is established."

[38] Mr. McWatt's submission in relation to the Respondent not being a corporate entity is posited on the difference in the language of the statutory provisions which establish the Respondent and the BBA. He refers to **Section 21** of **Cap 1** which sets out the powers of a

body corporate, however, the BBA was established under **Section 2** of **Cap 363** which provides as follows:

> "2. (1) The present and all future members of the Barbados Bar Association shall be and they are hereby declared and adjudged to be one body politic and corporate by the name of the Barbados Bar Association (hereinafter referred to as the Association) and by that name may have perpetual succession.
> (2) The Association by that name–
> (a) shall and may sue and be sued in all courts and before all magistrates and others in all manner of suits, actions, complaints, matters and causes whatsoever; and
> (b) shall and may have a common seal and may alter and vary the same at their pleasure; and
> (c) shall be in law and equity capable of–
> (i) acquiring and holding all estate and property real and personal as may at any time be acquired by or come to the Association in any manner whatsoever; and
> (ii) selling and disposing of the same from time to time for the benefit of the Association; and
> (iii) for any of the purposes aforesaid borrowing at any time or from time to time as occasion may require any sum or sums of money necessary for carrying into effect any of the objects aforesaid or for any purpose which may be beneficial for furthering any of the objects of the Association; and
> (iv) executing and delivering such deeds, instruments or other documents necessary or proper for effecting all or any of the said objects."

Having regard to the law set out above, the corporate personality of the BBA is established by **Cap 363** and no resort need be made to **Cap 1**.

[39] I now turn to discuss the first issue.

The Law

[40] The applicable statutory provisions are:

Section 3(1) of the **AJA** which provides that:

> "(1) An application to the Court for relief against an administrative act or omission may be made by way of an application for judicial review in accordance with this Act and with rules of court.
> (2) Where the Court is of opinion that a person or body against whom an application for judicial review is made is not an authority of the Government of Barbados, the Court may allow the proceedings to continue, with any necessary amendment, as proceedings not governed by this Act and not seeking any remedy by way of certiorari, prohibition or mandamus.

Section 2 of the **AJA** which provides that:

> "act" includes any decision, determination, advice or recommendation made under a power or duty conferred or imposed by the Constitution or by any enactment;
> "administrative act or omission" means an act or omission of a Minister, public official, tribunal, board, **committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment; (emphasis added)**
> "Court" means the High Court;
> "enactment" has the same meaning as in the *Interpretation Act.""*

In addition to these statutory provisions, we will examine the case law which has developed in this area of the law.

Discussion and Analysis

[41] The preamble to **Cap 370A** provides that it is:

> "An Act to provide for the fusion of the branches of the legal profession, for the legal education and discipline of attorneys-at-law, and for connected purposes.*"*

[42] **Section 18 (1)** establishes the Disciplinary Committee by providing that:

> "(1) For the purposes of this Act, **there is hereby established a Committee, to be known as the Disciplinary Committee,** which shall be charged with the duty of upholding standards of professional conduct, **(emphasis added)**.

(2) ….
(3) The provisions of the Fourth Schedule shall have effect as to the constitution of the Committee and otherwise in relation thereto.
(4) The Committee may make rules–
(a) prescribing standards of professional etiquette and professional conduct of attorneys-at-law, and may by such rules direct that any specified breach of the rules shall constitute grave professional misconduct; …"

[43] **Section 20(3)** grants the Disciplinary Committee powers of the High Court. It reads:

> "(3) For the purposes of any application made to it under this Act, the Committee shall have the powers of the High Court to summon witnesses, call for the production of books and documents and examine witnesses and parties concerned on oath."

[44] Mr. McWatt's submission is that **Section 18** does not create a body corporate which is a legal entity against which an action can be maintained. **Section 18**, however, does not purport to create a body corporate in the sense in which such a body has been defined by Mr. McWatt, it creates a Committee. **Section 2** of **Cap 370A** defines "Disciplinary Committee" or "Committee" as meaning the Disciplinary Committee **established** under Part V. The words in parenthesis in paragraph [42] demonstrate that the Respondent Committee is a creature of statute whose duty of upholding standards of professional conduct is also statutorily established in **Section 18** of **Cap 370A**. It is given the power to regulate its own procedure and, for the purposes of issuing subpoenae, it has the powers of a High Court. Having been given a statutory personality, it may be sued as an entity in its

own right. Herein lies the distinction between the Respondent and the unincorporated bodies which Mr. McWatt referred to in his submissions which we now examine.

[45] It appears to this Court that Mr. McWatt's submission that the Respondent is an unincorporated body is based upon the traditional view that such bodies are created by agreement between their members and thus they have no personality separate from their members. This submission ignores the fact that companies and other entities may be created otherwise than by contract or by way of the **Companies Act Cap 308** of the Laws of Barbados. Before proceeding further with the substantive discussion, we simply note the contradiction in Mr. McWatt's further submissions where, at paragrapg 12, he concedes that **the source of the Defendant's power "is statutory in nature"**. (emphasis added)

[46] In the United Kingdom, the Jockey Club was created by Royal Charter and enjoys a separate legal personality of its own, thus in ***Ex parte Aga Khan***, ***Lord Bingham of Cornhill*** noted that the Jockey Club was incorporated by Royal Charter and exercised responsibility for the organisation and control of horse racing and training activities in Great Britain. The club's powers and duties did not derive from primary or secondary legislation and its dominance was principally maintained through the issue of licences and

permits by which the club's stewards entered into contracts with racecourse managers, owners, trainers and jockeys, who were required to submit to a comprehensive regulatory code, the Rules of Racing, published by the stewards for the conduct of the sport.

[47] It was held, however, that although the Jockey Club exercised dominant control over racing activities in Great Britain its powers and duties were in no sense governmental but derived from the contractual relationship between the club and those agreeing to be bound by the Rules of Racing; that such powers gave rise to private rights enforceable by private action in which effective relief by way of declaration, injunction and damages was available; and that, accordingly, the club's decision was not amenable to judicial review. Of importance is the fact that the Aga Khan was able to maintain an action against the Jockey Club as an entity created by Royal Charter.

[48] Similarly in ***Ex Parte Datafin Plc*.** the headnote of which succinctly sums up the ratio decidendi, it was held that the supervisory jurisdiction of the High Court was adaptable and could be extended to any body which performed or operated as an integral part of a system which performed public law duties, which was supported by public law sanctions and which was under an obligation to act judicially, but whose source of power was

not simply the consent of those over whom it exercised that power; that although the panel purported to be part of a system of self-regulation and to derive its power solely from the consent of those whom its decisions affected, it was in fact operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties, and was under a duty in exercising what amounted to public powers to act judicially; that, therefore, the court had jurisdiction to review the panel's decision to dismiss the applicants' complaint; but that since, on the facts, there were no grounds for interfering with the panel's decision, the court would decline to intervene.

[49] ***Lord Donaldson MR*** examined extensively the issue of the amenability of certain bodies to judicial review, his opinions are instructive and worthy of repetition. Having made the observation that the Panel on Take-overs and Mergers is a truly remarkable body which oversees and regulates a very important part of the United Kingdom financial market, he noted at pages 824-825 that:

> "…The panel is an unincorporated association without legal personality and, so far as can be seen, has only about twelve members. But those members are appointed by and represent the Accepting Houses Committee…" [and other

named bodies] It has no statutory, prerogative or common law powers and it is not in contractual relationship with the financial market or with those who deal in that market."

[50] The Master of the Rolls went on to outline the "immense power" exercised by the Panel and at page 826 said:

> "The panel is a self-regulating body in the latter sense. Lacking any authority de jure, it exercises immense power de facto by devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions. These sanctions are no less effective because they are applied indirectly and lack a legally enforceable base."

[51] ***Lloyd LJ***, in a concurring judgment, observed at page 845 that:

> "The panel wields enormous power. It has a giant's strength. The fact that it is self-regulating, which means, presumably, that it is not subject to regulation by others, and in particular the Department of Trade and Industry, makes it not less but more appropriate that it should be subject to judicial review by the courts."

[52] ***Lloyd LJ*** noted that the principal and only issue was whether the Panel was above the law and, in relation to determining whether a body is subject to judicial review, at page 847 said:

> "I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive**. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review**. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see *Reg. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee), Ex parte Neate* [1953] 1 Q.B. 704.
>
> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. **If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr. Lever submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to "public law" in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other**. Thus in *Reg. v.*

Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 Q.B. 864 Lord Parker C.J., after tracing the development of certiorari from its earliest days, said, at p. 882:

> "The only constant limits throughout were that [the tribunal] was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned."

[53] He continued at page 849:

> "Having regard to the way in which the panel came to be established, the fact that the Governor of the Bank of England appoints both the chairman and the deputy chairman, and the other matters to which Sir John Donaldson M.R. has referred, I am persuaded that the panel was established "under authority of the Government," to use the language of Diplock L.J. in *Lain's case*. If in addition to looking at the source of the power we are entitled to look at the nature of the power, as I believe we are, then the case is all the stronger."

[54] In ***Holmcroft,*** the Administrative Court of the United Kingdom **(*Elias LJ, Mitting J*)** distinguished between bodies established by contract and those established by statute and at paragraph [24] said:

> "[24] It is now firmly established that the mere fact that the source of power is contract does not of itself necessarily result in the conclusion

that public law principles are inapplicable. If a body is exercising public functions, even though the mechanism for carrying out those functions is contract, it may be subject to judicial review."

[55] The learned justices continued at paragraphs [25]-[26]:

"[25] In Datafin, the Court of Appeal held that the Panel on Take-Overs and Mergers was subject to judicial review because it was established under authority of the Government. The powers that it exercised were in effect mandatory and coercive. As Lloyd LJ put it (p.846) the panel regulates not only itself, but all others who have no alternative but to come to the market in a case to which the code applies.

[26] The question of amenability therefore requires a careful analysis of the function in issue…the law has now been developed to the point where, unless the source of power clearly provides the answer, **the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law**." (**emphasis added**).

[56] We now examine the applicability of these legal principles to the factual matrix of this case and, in particular, the submission that the Respondent is a body which exercises public duties. The **AJA** provides that an application for judicial review may be brought in relation to an administrative act or

omission as defined in **Section 2**. The definition of administrative acts or omissions is wide and identifies those persons or bodies against whom the action may be brought. The words in parenthesis in paragraph [40] above make it clear that, in relation to a Committee, it must be one that is exercising or purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment. It is clear that **Cap 370A** is an enactment within **Section 2** of **Cap 1**.

[57] Whether or not the Committee is a body exercising public law duties is a question of fact to be decided by the Court. The resolution of this question depends upon the interpretation of **Cap 370A** and analyzing the role and function of the Respondent in the regulation of the legal profession against the background of the public interest.

[58] In order to determine whether the Respondent is amenable to the provisions of the **AJA**, we must look to see whether it is a body that exercises or purports to exercise or failed to exercise any power or duty conferred or imposed by the Constitution or by any enactment. It has not been urged before me and it is evident that no duty or power is conferred on the Respondent by the Constitution. The question now becomes whether a duty or power is conferred on it by **Cap 370A**.

[59] To assist in answering this question, we now turn to examine our case law. In **Nurse et al v Nurse**, **Goodridge JA** stated at paragraph [78] of the judgment:

> "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."

This dictum illustrates the point that I previously made that **Cap 370A** provides a statutory regime, of which the Disciplinary Committee is a central plank, for regulating the legal profession in the public interest.

[60] In **Re Worrell and Sobers**, Williams CJ acknowledged the statutory status of the Committee when he noted that "The Committee, not this court, is the body charged by statute with the function of hearing the evidence and deciding whether or not a case of professional misconduct has been made out."

[61] Having set out the statutory foundations of the Disciplinary Committee, I turn now to analyse the role and function of the Respondent to see whether or not it exercises the functions of a public body. By virtue of **Section 18** of **Cap 370A** Parliament "established a Committee, to be known as the Disciplinary Committee, which shall be charged with the duty of upholding

standards of professional conduct." These words in their natural and ordinary meaning make it clear that Parliament was creating a body called the Disciplinary Committee for the purposes of upholding standards of professional conduct within the legal profession.

[62] An analysis of **Cap 370A**, reveals that Parliament did not leave the establishment of the machinery of disciplining members of the legal profession to the profession itself but established a statutory framework for so doing endowing the Committee with the subpoena powers of a High Court by virtue of **Section 20(3)**. In similar vein, the immunity from suit of the members of the Committee contained in **Section 9(7)** of the **Fourth Schedule** to **Cap 370A** is further evidence in support of the view that Parliament intended to create a statutory body for the above purposes by establishing the Disciplinary Committee.

[63] It is also of tremendous importance that Parliament made membership of the BBA compulsory so that all Attorneys-at-Law are subject to this disciplinary regime and cannot contract out. See: **Nurse et al v Nurse**. This reinforces my view that the Disciplinary Committee was intended to be and is a body exercising public functions albeit over an essentially private avocation or profession.

[64] **Cap 370A** mandates that a Report must be submitted to the Chief Justice and the time within which this must be done. The powers of the Court of Appeal on receipt and consideration of the Report are also set out in **Cap 370A**. Parliament even decided on the composition of the Committee and established a quorum for the purposes of the Committee's proceedings. In my view **Cap 370A** provides little discretion for the BBA or the legal profession within the disciplinary framework which is established under its provisions save and except deciding on the members of the Committee and regulating its own procedure.

[65] It is unnecessary to go through the whole gamut of decisions in the United Kingdom. Suffice to say that I am in agreement with the views expressed by ***Donaldson MR*** and ***Lloyd LJ*** on this issue. It stands to reason therefore that I disagree with counsel for the Respondent's submission that the law has reverted to looking at the source of the power rather than the nature of the power since each case is determined on its own circumstances.

[66] I think it is important to mention **Sections 10** and **11** of the **Fourth Schedule** relied upon by Mr. McWatt, before concluding my analysis of this issue. These sections are now reproduced seriatim:

> "10. The office of a member shall not be taken to be a public office."

> "11. All expenses incurred by the Committee in carrying out its functions under Part V of the Act shall be defrayed out of moneys voted for the purpose by Parliament."

[67] Mr. McWatt's submitted that the usefulness of the tests relating to the private/public law dichotomy is uncertain. He argued that there is a difference between the individual members and the Committee itself. I agree only with the latter. I do not, however, agree that it is a legitimate application of **section 36** of **Cap 1** to imply that the Applicant is arguing that the plurality of the membership comprising the committee hold public office. **Section 36** of **Cap 1** refers to the plurality of words in a statute, it does not purport to alter the law in relation to those entities which exist in law such as panels and committees. To accept counsel's submission would mean that the Respondent would be a loose collection of individuals rather than the statutory entity that it is.

[68] **Section 10** must be read in the context that **Cap 370A** regulates the legal profession which consists principally of lawyers in private practice. Members of the Committee are drawn for the most part from Attorneys-at-Law in private practice who are not public officers but provide a public service by serving on the Committee. **Section 10** in my opinion reinforces that point but does not render the Committee a private body.

[69] It is my opinion also that **Section 11** supports the view that Parliament created a body called the Disciplinary Committee for the purposes of exercising the aforementioned public purpose described by **Goodridge JA** and for this purpose the expenses of the Committee are defrayed out of public funds.

Conclusion

[70] While not conceding that the Respondent enjoyed the status of an entity capable of being sued in law, Mr. McWatt, in his submissions set out at paragraph [16] of this decision, referred to the Respondent as "a body", the nature of which I have examined in this decision. I am of the view that the Disciplinary Committee is a body established by statute and not by contract. The import of its establishment is its purpose and its impact upon the public which have been succinctly stated by **Goodridge JA** above and with which I am in complete agreement. The Committee is also funded by Parliament and not by the legal profession itself. This leads me to conclude that the Disciplinary Committee is a committee exercising public functions.

[71] In the circumstances, I reject the submissions of the Respondent and hold that the Disciplinary Committee is a statutorily created entity or body which is amenable to judicial review under the **AJA**.

[72] I now turn to the submission that the Court of Appeal and not the Committee is the final arbiter on professional misconduct and that the Applicant is free to raise his concerns anew before that Court. This submission brings into focus the dichotomy between the role of the Respondent and the Court of Appeal.

[73] The powers of the Committee are investigatory and recommendatory. It investigates the complaint against an Attorney-at-Law and, if the complaint is found proved, it files its Report (together with notes of proceedings) with the Chief Justice under **Section 21** of **Cap 370A** and recommends those sanctions it considers warranted. The Committee cannot impose any sanctions. The imposition of sanctions is solely within the province of **the Court of Appeal** which makes the final decision. This was succinctly put by **Simmons CJ** in **Re Errol E. Niles (No 2) BB 2003 CA 16** when he stated at paragraph [40] that:

> "Contrary to the usual procedure where "he who hears, decides", the statute deliberately splits the functions as between the Committee and the Court of Appeal. The former investigates the complaint and makes a preliminary determination whereas the Court of Appeal makes the final decision and imposes a sanction where appropriate."

[74] Counsel for the Respondent, in his further submissions, stated that "it is difficult to understand the necessity of invoking judicial review proceedings

at a stage where [the Applicant] is still able to make his case before not only the committee, but the Court of Appeal". Ms. Bowen's counter submission suggests that this is the appropriate stage for the Applicant to challenge the application brought against him, I agree. The Applicant's substantive application alleges abuse of process, namely that the hearing of the matter would amount to an injustice to the Applicant. The challenge is to jurisdiction in the sense that the Applicant's case is that the complaint has already been decided by the High Court. This is the appropriate stage to have this point decided. If the Applicant waits until the matter is referred to the Court of Appeal, he risks the argument that he has submitted to jurisdiction and a possible argument of issue estoppel.

[75] In **Re Errol E. Niles (No 2) Simmons CJ** observed at paragraph [41] that:

> "The decisions of the Committee do not finally determine rights and obligations even though it is undoubted that its recommendations may adversely affect an attorney-at-law. But the proceedings before the Committee are only a stage in the process involving a determination of rights and obligations. It is at the Court of Appeal stage that those rights and obligations are finally determined. It is our opinion that the whole of the procedure – **(that before the Committee** and **in the Court of Appeal**) – provides a full opportunity for the attorney-at-law to be heard in the widest connotation of the principle of natural justice embodied in the Latin

maxim audi alteram partem. Indeed it is our opinion that the scheme of the legislation preserves the right of an attorney-at-law to a fair hearing in so far as it provides for:–

(a) real and effective access to the Court of Appeal;

(b) adequate notice of the date and time of hearing;

(c) an opportunity for the parties to present the respective cases; and

(d) a right to a reasoned decision.

The entire procedure, bearing all the characteristics of a judicial trial, secures fairness to an attorney-at-law. All that natural justice requires is that the procedure before a tribunal shall be fair in all the circumstances." (**emphasis added**)

[76] In **Re Worrell and Sobers,** an Attorney-at-Law was found guilty of misconduct on two complaints to the Disciplinary Committee which recommended that he be fined and suspended from the practice of law on the respective complaints. Having failed to attend before the Committee despite having been given due notice of the proceedings, he applied to the Court of Appeal and filed two affidavits containing an apology to the aggrieved clients and an explanation of his failure to attend the Committee's meetings and an account of his dealings with the clients. **Williams CJ**, in noting that it appeared to the Court that the Attorney-at-Law now wished to give his side of the transactions and to be heard, opined that the Attorney-at-Law ought to have directed his apologies and

representations to the Committee which was the body charged by statute with the function of hearing the evidence and deciding whether or not a case of professional misconduct had been made out. **Williams CJ** said that:

> "The Committee, not this court, heard evidence from Mr. Sobers and Miss Worrell and it is the Committee that should hear evidence from the other side and reach a decision."

The Court noted that it would have been for counsel to approach the Committee and seek a reopening of the case in order to put his side of the story.

[77] In the circumstances, I am of the view and hold that the Applicant need not wait until the matter reaches the **Court of Appeal** to make his application. Such an application ought appropriately to be made now since it is the Applicant's right so to do.

The second issue

[78] I now turn to the Respondent's submission in relation to the policy reasons why the Respondent is not amenable to legal action, that pursuant to **Section 9(7)** of the **Fourth Schedule** the individual members of the Disciplinary Committee are not liable for any act or default of the Committee done in good faith.

The Law

[79] The applicable law is found in **Section 9(7)** of the **Fourth Schedule** to **Cap 370A** which provides that:

> "No member of the Committee shall be personally liable for any **act or default of the Committee** done or omitted to be done in good faith in the performance of its functions under this Act." (**emphasis added**)

[80] Section 9(7) is the basis upon which Mr. McWatt posits his submissions of the immunity from suit of the Respondent. A literal interpretation of this section does not bear out counsel's submissions. This section speaks to the immunity from suit of the individual members of the Committee in respect of any act or default "of the Committee" done in good faith. The immunity is not given to the Committee itself.

[81] It therefore stands to reason also that one could not sue the Committee in a representative capacity via its members if they enjoy statutory immunity from suit.

[82] In my opinion, this personal immunity of the Committee's members from suit would provide an incentive as distinct from a disincentive to members of the profession to serve contrary to Mr. McWatt's submission.

[83] I therefore, do not accept Mr. McWatt's submissions on these points.

[84] Having dealt with the provisions of **Cap 370A** establishing the Committee, setting out, inter alia, its role and purpose, it composition, immunity of its members from suit and its funding in extenso, I now briefly return to Mr. McWatt's submission that the Respondent is an unincorporated body with no legal status rendering it capable of being sued. The above discussion clearly shows that the Respondent is a body created for a specific purpose, which differs from other contractually or statutorily created bodies and whose powers are also specifically bestowed upon it by the statute which created it without the need for recourse to **Section 21** of **Cap 1** as with other bodies contrary to Mr. McWatt's submissions. It is therefore unnecessary to discuss the decisions in **St. Clair v Edwards** or **Agard v Mottley** cited by counsel.

Disposal

[85] In the circumstances, it is therefore ordered that:

1. The Respondent's application is dismissed, and it is further ordered by consent:
2. That there shall be no Order as to costs.

William J. Chandler
High Court Judge