**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE EDWARDS JA**
**THE HON MR JUSTICE BROWN JA (AG)**

**MISCELLANEOUS APPEAL NO COA2020MS00003**

**APPLICATION NO COA2020APP00168**

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| **BETWEEN** | **DWIGHT REECE** | **APPELLANT** |
| **AND** | **GENERAL LEGAL COUNCIL (Ex parte Loleta Henry)** | **RESPONDENT** |

**Ravil Golding instructed by Lyn-Cook, Golding and Co for the appellant**

**Mrs Sandra Minott-Phillips QC and Litrow Hickson instructed by Myers Fletcher and Gordon for the respondent**

**19 May and 30 July 2021**

**F WILLIAMS JA**

[1] I have read, in draft, the judgment of my brother E Brown JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

**EDWARDS JA**

[2] I have also read, in draft, the judgment of my brother E Brown JA (Ag). I agree with his conclusion and reasoning.

**E BROWN JA (AG)**

## Introduction

[3] This is an appeal against the decision of the Disciplinary Committee ('the Committee') of the General Legal Council ('GLC') in which it found the appellant, an attorney-at-law, guilty of professional misconduct on 25 September 2019. In a subsequent sanctions hearing, on 12 and 18 August 2020, the Committee imposed the following sanctions on the appellant:

> "1. The Attorney, Dwight Reece shall pay restitution to the Complainant of Six Hundred and Fifty Thousand Dollars ($650,000.00).
>
> 2. The Attorney Dwight Reece shall pay costs to the Complainant of Fifty Thousand Dollars ($50,000.00).
>
> 3. The Attorney Dwight Reece shall pay costs to the General Legal Council of Fifty Thousand Dollars ($50,000.00).
>
> 4. The Attorney Dwight Reece is hereby immediately suspended from practice in the Courts of Jamaica for a period of four (4) months.
>
> 5. The payment of the sums in paragraphs (1), (2) and (3) herein shall be made on or before 30th September, 2020."

[4] The appellant filed his notice and grounds of appeal on 20 August 2020. Subsequent to the filing of his notice and grounds of appeal, on 16 September 2020, the appellant was granted a stay of execution of the Committee's order of immediate suspension from practice, by a single judge of this court. As a corollary to the notice and grounds of appeal, the appellant also filed two subsidiary applications. The first of these notices sought leave to adduce fresh evidence and the second, to argue a supplementary ground of appeal. Both applications also came on for hearing before us. The facts giving rise to the decisions of the Committee, and the subsequent challenges, provide the relevant background.

**Background**

[5] On 15 October 2010, Jodiann Henry, who was 16 years old at the time, was a passenger in a Jamaica Urban Transport Corporation ('JUTC') bus, along with several others. They were on their way to a church retreat in the parish of Saint Ann. The JUTC bus became involved in a motor vehicle accident when it plunged over a precipice along the Faiths Pen Main Road in the parish of Saint Ann. Several passengers received injuries, including Jodiann. She died as a result of the injuries she sustained in that accident.

[6] In or about November 2010, Mrs Loleta Henry (Jodiann's mother) was introduced to the appellant. Discussions between them led him to agree to represent her to make a claim for damages on behalf of her daughter's estate. They entered into a contingency fee arrangement.

[7] Mrs Henry made several efforts to track the progress of this claim. After the lapse of almost eight years of unsuccessful calls and visits to the office of the appellant, Mrs Henry filed a formal complaint at the GLC on 8 June 2018 (by which date the statute of Limitations of Action had run). Her affidavit in support of her complaint sworn to on 12 June 2018 listed three grounds of complaint against the appellant:

> "a. He has not provided me with all information as to the progress of my business with due expedition, although I have reasonably required him to do so.
>
> b. He has not dealt with my business with all due expedition.
>
> c. He has acted with inexcusable or deplorable negligence in the performance of his duties."

[8] In her affidavit, Mrs Henry spoke of two visits to the appellant's office. The first visit was in September 2013, after several calls which bore no fruit. Her second visit was on 25 July 2017, which came to a similar end in that she failed to get any information on the progress of her claim. On this occasion, she was given an appointment to meet with the appellant on 3 August 2017 at 1:00 pm. However, on that day Mrs Henry received a call from the appellant's secretary advising her not to attend as scheduled. The reason

given for the cancellation was that the appellant was in attendance at court in Saint Elizabeth. In that call, the secretary also promised to reschedule an appointment. That promise went unfulfilled. Accordingly, there were more calls, both to the appellant's business and personal telephone numbers which were to no avail. Nine weeks before making the complaint to the GLC she succeeded in speaking with the appellant. Mrs Henry alleged that, in that telephone call, the appellant assured her he was awaiting action from the Administrator-General's Department. He promised to get back to her.

[9] Not having heard from the appellant, after the passage of some time, Mrs Henry took it upon herself to visit the offices of the Administrator-General's Department on 6 June 2018. The information she received was that there was nothing on file for her there. The complaint to the GLC was lodged two days later.

[10] In advance of those civil proceedings contemplated by Mrs Henry, was the criminal aspect arising from Jodiann's death. It was her evidence before the Committee that the appellant accompanied her to one of those hearings. That aspect culminated in the acquittal of the driver of the JUTC bus of criminal charges. Hearing of this result, Mrs Henry again tried to get in touch with the appellant. From the evidence before the Committee, it appears Mrs Henry's frustration was only increased by the knowledge that other victims from the accident had received a settlement. This, especially, against the background of her daughter having been the only fatality.

[11] The disciplinary proceedings commenced sometime after the completion of criminal proceedings against the driver of the JUTC bus. The complaint first came before the Committee's three-member panel on 23 March 2019. Mrs Henry and her daughter Andrea Chinloy, Mrs Henry's witness, were present. The appellant was absent. That hearing seems to have been a case management session. No evidence was taken. Instead, orders were made for the appellant to file and serve his affidavit in response, as well as his list of documents, on or before 3 May 2019. An order for costs of $10,000.00 was also imposed on the appellant, to be paid on or before 12 April 2019. The complaint was adjourned to 29 May 2019, at noon.

[12] On 29 May 2019 when the complaint came on for hearing, the appellant was again absent. The Committee noted that the appellant was properly served with notice of the hearing on 1 April 2019. Both Mrs Henry and Ms Chinloy were present. Their evidence-in-chief was taken and the hearing part-heard and adjourned to 29 June 2019. The Committee ordered that the notes of evidence of Mrs Henry and Ms Chinloy were to be sent to the appellant, together with the notice of the adjourned hearing.

[13] At the adjourned hearing on 29 June 2019, the appellant was again absent, while Mrs Henry and Ms Chinloy were present. The Committee took note of an email from the appellant's secretary with a medical certificate attached (presumably concerning the appellant). Accordingly, the hearing was adjourned to Wednesday 25 September 2019 at 10:00 am.

[14] On 25 September 2019, Mrs Henry and Ms Chinloy dutifully attended the GLC for the continuation of the hearing. They attended in spite of experiencing transportation difficulties which delayed their arrival. The appellant's non-attendance continued. The Committee decided the matter was "closed" for a decision.

[15] The Committee next reconvened on 4 March 2020. On that date all the parties, including the appellant, were present. The Committee delivered its decision and written reasons. The Committee found the appellant guilty of professional misconduct. Specifically, the Committee found that the three grounds of complaint were proved.

[16] After directing itself on the burden and standard of proof, the Committee declared that it accepted the evidence of the complainant and her witness as credible. Noting the absence of any challenge to the evidence, the Committee accepted the complainant's evidence in its entirety. The Committee then made the following findings:

> "a. In or about the month of November 2010, after the burial of her daughter [Jodiann], the Complainant retained the services of the Attorney to file a suit against the Jamaica Urban Transit Company (J.U.T.C.) and the driver of the

bus to recover damages arising from the death of [Jodiann].

b. The Complainant entered into a contingency fee arrangement with the Attorney.

c. The Complainant met with the Attorney and provided him with all the necessary information and documents to commence proceedings.

d. In 2014 or 2015 the Attorney presented the Complainant and her husband with documents which they signed. These documents were submitted to the Administrator General.

e. Notwithstanding many telephone calls to the Attorney, and visits to his office, there was no progress.

f. To date, the Attorney has not provided to the Complainant any information as to the status of the case, particularly, as to whether suit was filed."

[17] The Committee found that although the complainant acted promptly in obtaining all the necessary documents and retaining an attorney, there was no apparent movement towards her goal of getting compensation for the loss of her daughter, notwithstanding the lapse of nine years. The Committee observed that the complainant's anguish was further compounded by the appellant's failure to provide her with any or any credible reports of the progress of the matter.

[18] The Committee went on to find the appellant guilty of professional misconduct (canons IV(r) and (s) of the Legal Profession (Canons of Professional Ethics) Rules). Specifically, the Committee found:

"a. The Attorney has not provided the Complainant with all information as to the progress of her business with due expedition, although she has reasonably requested him to do so.

b. The Attorney has not dealt with the Complainant's business with all due expedition.

c. The Attorney has acted with inexcusable or deplorable negligence in the performance of his duties."

[19] In keeping with its practice, the Committee postponed the hearing to allow the appellant to make a plea in mitigation of the sanction.

[20] By notice of postponement, dated 31 July 2020, the appellant was summoned to the sanctions hearing to make submissions in mitigation on 12 August 2020. In his skeleton submissions, the appellant concentrated on the appropriate sum that would compensate Mrs Henry for the lost opportunity to pursue her claim. After itemizing the liquidated sums he was prepared to pay, inclusive of interest and costs, the appellant concluded, "[t]hat the above be done in mitigation of sanction consequent on the finding of the Panel [sic]". The Committee noted that the appellant declined to expand on his skeleton submissions and his apology to Mrs Henry. The hearing was then adjourned to 18 August 2020 when the Committee imposed the sanctions against the appellant.

[21] Having set out the background, I will now turn my attention first to the applications filed by the appellant, which will be considered in the order in which they were filed. Following that, the substantive appeal against sanction will be considered.

**Notice of application to adduce fresh evidence**

[22] By notice of application, filed on 15 September 2020, the appellant sought the court's leave to adduce fresh evidence at the hearing of the appeal, in relation to the work he had done in the matter. The application was supported by the following grounds:

"a. That the [appellant] was not able to respond to the complaint made against him by the Complainant to the General Legal Council as his case file could not be located prior to or during the hearing of the matter before the Disciplinary Committee of the General Legal Council. As a consequence of the

> foregoing the [appellant] was not able to file an affidavit in response setting out his side and or [sic] refuting the allegations contained in the Complainant's allegations.
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> b. That the [appellant] could not have meaningfully participated in the said hearing as the documents and other materials he would be relying on were in the said misfiled cased [sic] file.
>
> c. That if the material that the misfiled case file contained was presented to the Disciplinary Committee it would probably have had an important influence on the result of the case."

[23] In his affidavit, in support of the application, the appellant asserted that he had done a number of things under and by virtue of being the retained legal representative. In summary, he wrote to the JUTC's attorney-at-law; filed a claim against the JUTC; watched proceedings on behalf of Jodiann's estate in both the coroner's court and preliminary enquiry in the Resident Magistrates Court (now Parish Court) in the parish of Saint Ann; and made an application for letters of administration. The oath of administratrix was exhibited. The appellant alleged that all this information was contained in the misplaced case file.

[24] The circumstances under which the file came to be misplaced may be subdivided into two groups, each of which took place in December 2016. Firstly, the resignation of the appellant's secretary/office manager. Prior to her separation from the job, her functions included proper filing of case files, ensuring the service of documents and the preparation of affidavits of service. Secondly, the removal of office, which caused significant internal dislocation.

[25] These circumstances were left to be mitigated, in so far as this matter is concerned, by the serendipitous return of the secretary/office manager to the island.

Based on information the appellant received from her, a further search was carried out, resulting in the location of the file.

Submissions on behalf of the appellant

[26] In his written submissions, the appellant contended that if the missing material had been submitted to the GLC it would probably have had an important influence on the result of the case. Counsel referred us to **Ladd v Marshall** [1954] 3 All ER 745, which sets out the applicable principles. The principles were applied in **Rose Hall Development Limited v Minkah Mudadah Hananot** [2010] JMCA App 26 ('**Rose Hall Development Limited'**). It was counsel's concluding submission that all the criteria set out in **Ladd v Marshall** have been satisfied.

[27] In his oral submissions, on behalf of the appellant, Mr Ravil Golding tried to demonstrate that, contrary to his position before the Committee, the appellant had not been dilatory in his handling of the matter. On the contrary, the appellant had gone beyond the call of duty by attending court in the criminal proceedings and filing a claim on 14 October 2016, the day before the expiration of the limitation period. That claim form was not served.

[28] As it concerned the late filing of the claim, Mr Golding submitted that the filing of a claim under either the Fatal Accidents Act ('FAA') and/or the Law Reform (Miscellaneous Provisions) Act ('LRMPA') had to abide the appellant first obtaining the death certificate. In this instance, obtaining the death certificate was delayed because there was a coroner's inquest; and the death certificate could not be issued until the coroner had first issued her certificate. Hence, the death certificate was not issued until 2014.

[29] Following those submissions, the court asked counsel Mr Golding to explain what occurred during the period after the death certificate was granted in 2014. He commenced his response by saying the appellant applied for letters of administration upon receipt of the death certificate to proceed under the LRMPA, but he made one concession. He conceded that the claim under the FAA could have been filed without

awaiting the letters of administration. Mr Golding added, however, that damages under the FAA would have been low since Jodiann was a student at the time of her death.

[30] Turning to the lack of service, Mr Golding submitted that it was the responsibility of the secretary/office manager to ensure that service of the claim form was effected. Consequently, it was urged, that the appellant laboured under the mistaken impression that the document had been served. Pressed on what would have been advanced to the GLC as a result of having the documents in hand, Mr Golding conceded that ultimately it was the appellant's responsibility to ensure service. So, why then would the documents have made a difference? The submitted answer was, with nothing before it, the GLC may have been of the impression that nothing had been done.

[31] On the question of whether the documents could have been obtained with reasonable diligence, Mr Golding submitted that the appellant carried out a search at his office which would have met the bar in the case of **Ladd v Marshall**. The information would have had an important influence on the case, even if it was not decisive. Further, the fact that the appellant did not seek to obtain copies should not prevent him from adducing fresh evidence.

Submissions on behalf of the GLC

[32] Mr Litrow Hickson, on behalf of the GLC, submitted that the application to adduce fresh evidence did not meet the test in **Ladd v Marshall**. He made three points in support of that contention. Firstly, there is no evidence that the appellant exercised reasonable diligence in seeking to obtain the documents as all the documents were accessible when the appellant was served with the complaint, since they are public documents. Moreover, the appellant's affidavit does not disclose that he made any effort to contact his former secretary/office manager. Consequently, the application does not satisfy the first ground.

[33] Secondly, even if the evidence is allowed, it would not influence the outcome. Under the existing provisions of the Civil Procedure Rules ('CPR'), the claim form would have been valid for 12 months. Therefore, the appellant had nine months after the

departure of his secretary/office manager to effect service. Based on the grounds advanced by Mrs Henry in her complaint, the availability of the documents would not have affected the decision as there were steps that the appellant could have taken. For example, he could have applied for an administrator *ad litem* to be appointed in the deceased estate.

[34] Thirdly, Mr Hickson adverted to the appellant's record of attendance before the Committee. In essence, the appellant chose not to attend the hearings of the Committee until the day it pronounced its decision. Having led no evidence there, the word "fresh" or "further" evidence cannot be construed to mean additional evidence in this case. What the appellant is seeking to do, it was submitted, is to be allowed to adduce evidence on his behalf in this court, having elected not to do so at the Committee hearing. In the words of Mr Hickson, the appellant is "asking this court for a 'do-over'".

Analysis and discussion

[35] The relevant law to guide the court on an application to adduce fresh evidence has been settled for some time. To be accepted as fresh evidence, the 'new' evidence must satisfy three criteria: unobtainability even with reasonable diligence, qualitatively capable to have an important, if not decisive, impact on the result of the case and be presumptively credible. These were the principles laid down in **Ladd v Marshall**.

[36] **Ladd v Marshall** was accepted and applied by this court in **Rose Hall Development Limited**. At paragraph [16], Dukharan JA quoted Lord Denning in **Ladd v Marshall**, at page 748:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

[37] In accepting that **Ladd v Marshall** laid down the applicable principles, Panton P in **Rose Hall Development Limited** also relied on learning from Halsbury's Laws of England Fourth Edition Reissue Vol 17(1), at paragraph 441. Firstly, the three criteria are not rules but guidelines and facilitators to the overriding objective of dealing with cases justly. Secondly, the first criterion enjoys pre-eminence. That is, if the evidence could have been obtained with the requisite reasonable diligence, permission should be denied. The principles are therefore applied cumulatively and not disjunctively.

[38] It is, therefore, appropriate to commence with the first of the three criteria, that is, could the evidence which the appellant now seeks to adduce have been obtained with reasonable diligence for use at the hearing of the complaint? The evidence the appellant seeks to adduce was contained in a file that was misplaced in his office. His affidavit evidence is that he and his staff made an exhaustive, but unsuccessful, search at his office for the file after receiving notice of the complaint. The question is, is that indicative of the **Ladd v Marshall** reasonable diligence standard?

[39] The answer to this question becomes obvious when the efforts of the appellant are measured against what the reasonably diligent attorney-at-law would have done in the circumstances of this case. The reasonably diligent attorney-at-law would have known that the pertinent documents are all public documents. Consequently, the reasonable attorney-at-law would have sought to obtain copies of the documents at the Coroner's Court and the registry of the Supreme Court. Efforts undergirded by reasonable diligence would also have tried to obtain copies of documents emanating from the office of the Administrator-General's Department. Secondly, in the exercise of reasonable diligence, a prudent counsel would have searched the closed 'criminal' file in his office. It appears to be a matter of common sense that, through inadvertence, the open 'civil' file could have become intermingled with the closed 'criminal' file and put in storage. Thirdly, there is no evidence that the appellant was out of touch with his former secretary/manager and could not have contacted her to enquire about the location of the file.

[40] These efforts, here characterized as those of the reasonably diligent attorney-at-law, were questions put to Mr Golding by the court during his oral submissions. Mr Golding's frank concession was that for whatever reason no great effort was made to obtain copies from the respective institutions. Not only did the appellant make no effort to obtain copies, but there was also a want of reasonable diligence in searching for the file in his office on two occasions. The first is that identified above, which was to have searched the closed criminal file. Secondly, as Mr Hickson correctly submitted, the appellant's affidavit does not disclose any prior effort to contact his former secretary/office manager until serendipity smiled upon him.

[41] Against this background, it is clear that when the appellant's efforts to obtain the information are placed on the scale with what the reasonably diligent attorney-at-law would have done, he is found wanting. Having failed the first of a three-tier composite test, the inquiry needs to proceed no further. That was the position of Panton P in **Rose Hall Development Limited** at paragraph [10]. However, in deference to the industry of Mr Golding, I will go on to consider the second criterion.

[42] As was said above, at para. [31], the second criterion requires the appellant to show that the evidence he wishes now to adduce would probably have had an important, even if not decisive, influence on the case. The contention was that had the file been located at an opportune time, the Committee would have seen that the appellant had filed a claim in the name of the complainant as administratrix in Jodiann's estate. That claim was filed one day before the expiration of the limitation period. That situation was compounded by the non-service of the claim form. Mr Golding submitted that this information would have fulfilled the second criteria in **Ladd v Marshall**.

[43] Mr Golding was hard-pressed to demonstrate the likely impact the claim form and particulars of claim would have had on the Committee. In my view, it is highly unlikely that the new information would have had an important influence on the Committee. Firstly, on the question of the appellant's tardiness, it would have left the factual situation with the claim unaffected. That is to say, the documents would not have provided any

explanation for the eleventh-hour filing of the claim. Neither would they have shone any light on the reason the claim form was not served. Mr Golding could not explain the failure to serve the claim form, knowing that it was a stale claim that had been filed.

[44] Secondly, the documents relating to the filing of the claim provided no answer to ground one of the complaint made against the appellant. For ease of reference, Mrs Henry charged that the appellant failed to provide her with all information concerning the progress of her business, although she had reasonably required him to do so. Her evidence before the Committee told the story of a litigant who acted with alacrity and reasonable promptitude. Her zeal in tracking the progress of the claim was frustrated at every turn by the appellant's inaccessibility. Nothing in the documents addresses his failure to provide her with information on the progress of the claim. The application fails to meet this bar as well.

[45] Having stumbled at the first hurdle, as well as the second hurdle, failure at the third is almost inevitable. Mr Golding made no submissions on this ingredient. Mr Hickson submitted, among other things, that the appellant's failure to participate in the hearing before the Committee, cannot be truly said to be seeking to adduce fresh or further evidence. A fair understanding of Mr Hickson's submission appears to be, having snubbed the Committee by his absence and disobedience to file affidavits, the very application to adduce fresh evidence is insincere as the appellant led no evidence before the Committee. Howsoever that may be, the credibility of the proposed fresh evidence is now moot. That is to say, since the appellant is required to satisfy all three limbs of **Ladd v Marshall**, after failing to pass the other two hurdles an assessment of the material for its apparent credibility would be an academic exercise.

**Application to argue supplementary ground of appeal**

Submissions on behalf of the appellant

[46] In his second application, the appellant sought the court's leave to argue the following supplementary ground of appeal, filed 10 September 2020:

> "The panel of the Disciplinary Committee of the General Legal Council fell into error when it found that the Appellant's conduct in the conduct of the matter was in breach of **canons [IV] (r) and (s) of the Legal Profession Act (Canons of Professional Ethics) Rules 1978** and so he was guilty of professional misconduct." (Emphasis as in the original)

[47] Mr Golding submitted that when the appellant filed his notice and grounds of appeal, he indicated that on the receipt of the notes of evidence he intended to file supplementary grounds. The notes of evidence were never made available, notwithstanding the appellant's letter to the GLC on 18 August 2020. When the notes of evidence came to the hand of the appellant, it was through the courtesy of the GLC's counsel. Consequently, it was urged, the supplementary ground could not have been filed before the time it was.

Submissions on behalf of the GLC

[48] Mrs Sandra Minott-Phillips QC opposed this application. She submitted that the appeal is governed by the Disciplinary Committee (Appeal Rules), 1972 ('DCAR'). The Court of Appeal Rules ('CAR') only become applicable where there are gaps in the DCAR. Queen's Counsel contended that there are no gaps in the applicable rules in this appeal, which are rules 4(1), (2) and (3). While Mrs Minott-Phillips acknowledged that the court has a wide discretion to allow an additional ground of appeal, she urged the court not to exercise it in the appellant's favour.

[49] Broadly, Mrs Minott-Phillips submitted that the proposed supplementary ground flies in the face of the way the matter was conducted before the Committee. The appellant did not only absent himself from the proceedings prior to the sanctions hearing, but he also disobeyed the Committee's order to file documents. It was Queen's Counsel's further submission that in the proceeding before the single judge for a stay of execution, the appellant declared he was not appealing the findings of the Committee.

Discussion and analysis

[50] It is perhaps appropriate to set out rule 4 of the DCAR:

> "4. (1) Every notice of appeal shall specify the grounds of appeal and the precise form of the order which the appellant proposes to ask the Court to make …
>
> (2) Except with the leave of the Court the appellant shall not be entitled on the hearing of an appeal to rely upon any grounds not specified in the notice of appeal.
>
> (3) The Court may give leave to amend the notice and grounds of appeal upon such terms as may be just."

[51] In accordance with rule 4(1) of DCAR, the appellant listed three grounds of appeal in his notice of appeal, filed 20 August 2020. The grounds are reproduced below:

> "a. That the order that the Appellant is hereby immediately suspended from practice in the Courts of Jamaica for a period of four (4) months is manifestly excessive and harsh in that orders were already made for the Complainant to be compensated in the sums that the Complainant may not have been awarded if she had filed a claim and was successfully [sic] in the Supreme Court of Judicatures [sic] of Jamaica; the complainant has not suffered any financial loss.
>
> b. The Complaint was not one of dishonesty and or moral turpitude and the Appellant has not benefitted financially.
>
> c. That the imposition of the fines was sufficient punishment so that suspension from practice amounts to double punishment."

[52] These grounds are palpably in conformity with the appellant's posture of quiescence and acquiescence before the Committee. That is, he neither filed documents

ordered by the Committee nor appeared to cross-examine the complainant. This disinclination to act in this phase of the proceedings demonstrates a resigned acceptance of whatever verdict the Committee would pronounce. The appellant's acquiescence in the finding of professional misconduct was made manifest in his appearance only on the date the Committee handed down its decision. That acceptance was further underlined in his written submissions in mitigation of sanction.

[53] Against this background, the submission of learned Queen's Counsel that the proposed supplementary ground flies in the face of the appellant's conduct before the Committee has much force. By the supplementary ground, the appellant seeks to re-open the question of culpability. By that route, he wishes to challenge the findings of facts that form the substratum of the composite finding of professional misconduct.

[54] The legal basis of such a challenge is now considered settled. An appellate court ought not to disturb findings of fact that have evidentiary support (see **Musson (Jamaica) Ltd v Claude Clarke** [2016] JMCA Civ 44). The findings that the Committee made were based on evidence it found credible and accepted in its entirety. Not having challenged any of that evidence, a failure the Committee acknowledged, the appellant would have no basis to dispute those findings on appeal. Therefore, it would amount to an exercise in futility to permit the appellant to argue the supplementary ground.

## The appeal

[55] Turning to the substantive appeal, the nub of the appellant's complaint is that the sanction of an immediate suspension for four months is excessive.

Submissions on behalf of the appellant

[56] In sum, the argument that the sanction of four months suspension is excessive rests on the following premises. Firstly, the complainant has not suffered any loss. On the contrary, the appellant placed the complainant in the position she would have been in; without having to pay legal fees. Secondly, the complaint against the appellant did not involve dishonesty. Thirdly, the appellant did some work in furthering the claim. The

position of the appellant is therefore to be favourably contrasted with an attorney-at-law who collected a retainer yet did no work. Counsel relied on the case of **Fredrick Chambers v Howard Lettman** Complaint No 254/2005.

[57] In light of this position, Mr Golding submitted, the appellant should not be further punished by being 'struck from the roll' for the period ordered by the Committee. To this end, the court was referred to **Re A Solicitor** [1972] 2 All ER 811. In essence, the court was urged to say, in the circumstances of this case, the suspension should not be enforced. The court should substitute either a strong reprimand or a modest fine, a punishment he implies is condign.

Submissions on behalf of the GLC

[58] The main thrust of Mrs Minott-Phillips' submissions was as follows. The power of the GLC to impose sanction derives from section 12(4) of the Legal Profession Act ('LPA'). By virtue of that section, the GLC is competent to make one or more of the orders listed there, in any given case, as may seem just. The only restriction on the penalties to be imposed is the conjoining of suspension with striking off from the roll. She contended that the GLC was therefore correct and within its remit to make the orders it did.

[59] Accordingly, Mrs Minott-Phillips disagreed with the opposing submission that the suspension is tantamount to double punishment and posited that each case turns on its own facts. So that, not because restitution is ordered in one instance means that in every other case suspension should not also be ordered. To demonstrate the point, she referred the court to the following decision of the Committee: **Fredrick Chambers v Howard Lettman**, **Rudolph Campbell v Howard Lettman** Complaint No. 62/2010; and **Hyacinth Davis v Arthur Kitchin** Complaint No 113/2008. It was submitted that all these cases demonstrated that it is entirely a matter for the Committee whether, and for what period, the sanction of suspension is warranted.

[60] Mrs Minott-Phillips further submitted that this court has always shown great deference to the Committee's decisions on sanctions. The test, she said, of whether this court will interfere was explained in **Chandra Soares v The General Legal Council** [2013] JMCA Civ 8, at para. [32]. There Dukharan JA said, in sum, that the court's discretion to set aside the sanction of the professional body should only be engaged by a very strong case. That is premised on an acceptance that the professional body is better placed than the court to weigh the gravity of the professional misconduct.

Discussion and analysis

[61] Based on its findings, the Committee made the orders (a) to (d) listed at para. [3] above. This appeal concerns only order (d) namely, the immediate suspension of the appellant from practice in the courts of Jamaica for a period of four months. Two issues are raised for resolution. The first is, whether it is double punishment to impose a period of suspension together with the order for restitution. The second issue for resolution is whether the imposition of the sanction of suspension is manifestly excessive in all the circumstances.

[62] Both issues touch and concern the powers of the Committee to impose a sanction, which is derived from section 12(4) of the LPA. The section provides that after the hearing of any application (requiring the attorney to answer allegations of professional misconduct), the Committee may, as it thinks just, make one or more of the seven orders listed there. The subsection is quoted below:

> "On the hearing of any such application the Committee may, as it thinks just, make one or more of the following orders as to -
>
> (a) striking off the Roll the name of the attorney to whom the application relates;
>
> (b) suspending the attorney from practice on such conditions as it may determine;
>
> (c) the imposition on the attorney of such fine as the Committee thinks proper;

(d) subjecting the attorney to a reprimand;

(e) the attendance by the attorney at prescribed courses of training in order to meet the requirements for continuing legal professional development;

(f) the payment by any party of costs of such sum as the Committee considers a reasonable contribution towards costs; and

(g) the payment by the attorney of such sum by way of restitution as it may consider reasonable,

so, however, that orders under paragraphs (a) and (b) shall not be made together."

[63] Mr Golding contended that the imposition of a period of suspension was a further, or double punishment of the appellant. However, it is clear that section 12(4) of the LPA empowers the Committee to "make one or more" of the orders listed at (a) to (g), "as it thinks just". It was therefore within the legislative remit of the Committee to conjoin (b) and (c) in imposing a sanction. Doing so was no more than an exercise of the discretion given to it under the section. This argument is therefore without merit.

[64] The preceding unsound argument, to which I will return below, was not Mr Golding's strongest argument. Mr Golding's position appears to be this. The sufficiency of the sanctions warranted by the circumstances of the case is amply expressed in the imposition of the monetary penalties, payable to the complainant and the GLC. It was therefore a wrong exercise of the Committee's discretion to have gone beyond this.

[65] This takes me to the basis upon which this court will interfere with the sanctions the Committee imposes, consequent on a finding of professional misconduct. An appeal against any order made by the Committee to this court is by way of a rehearing (see section 16 of the LPA). Accordingly, upon the hearing of the appeal, this court has three options. First, this court may dismiss the appeal and confirm the Committee's order. Second, this court may allow the appeal and either set aside or vary the order or, direct that the application be reheard by the Committee. Third, this court is competent to make

costs orders here and before the Committee. The powers of this court are only circumscribed by a legislative prohibition against imposing a greater penalty upon the attorney than was imposed at the first hearing (see section 17 of the LPA). Notwithstanding the breadth of a rehearing, this court, adopting and applying the posture and principles of the English appellate court, has approached these appeals with restraint.

[66] The basic proposition is this: an appellate court should hesitate before it sets aside the sanction of the Committee out of deference to the Committee's vantage point in weighing the gravity of the breach (see **Michael Lorne v The General Legal Council (Ex parte Olive C Blake)** [2021] JMCA Civ 17, per F Williams JA at para. [27] and **Bolton v Law Society,** at page 490). Although a distinction is now to be made between appellate deference and a refusal to differ, it still requires a very strong case to interfere with the Committee's sanction on account of its advantageous position to assay professional misconduct.

[67] Mrs Minott-Phillips is therefore correct in her submission that this court has always shown great deference to the Committee's decisions on sanctions. This court is not entitled to interfere with the sanction of the Committee unless it can be shown that it was plainly wrong or irrational or that there are extenuating circumstances (see **Barrington Earl Frankson v The General Legal Council (ex parte Basil Whitter at the instance of Monica Whitter)** [2012] JMCA Civ 52, at para. [55]) (**'B Frankson v GLC'**). The most recent statement of the principle was articulated by F Williams JA in **Michael Lorne v The GLC**. At para. [30] the learned judge of appeal said:

> "… the intervention of the appellate court in matters of sentencing, imposed by the disciplinary tribunal ought to be limited to cases where errors of law exist or where the sentence is demonstrated to be clearly inappropriate".

[68] This court is therefore compelled to examine the factors the Committee had to consider in determining the sanction it imposed. Firstly, the Committee considered the

appellant's plea in mitigation of sanction, which was limited to a proposal to pay restitution to the complainant. Secondly, the Committee regarded the breach of canon IV(s), inexcusable or deplorable negligence, as very serious. Thirdly, the Committee cited the compound effect the nine years over which the failure to adequately communicate with the complainant and move the claim forward, had on the bereaved complainant.

[69] Mr Golding was not understood to be taking issue with these considerations. He appears to be saying, in the first instance, that the Committee did not give any or sufficient weight to the fact that the complaint did not involve dishonesty. Respectfully, his reliance on ***Re A Solicitor*** is misplaced. In that case, a solicitor was brought before the disciplinary committee of the law society for failure to keep his accounting books properly written up and professional misconduct in not keeping books of accounts in proper form. After several wasted opportunities extended to the solicitor by the disciplinary committee to remedy the situation, he was suspended from practice for six months. The solicitor's appeal to the divisional court was dismissed.

[70] On appeal from that decision to the English Court of Appeal, the suspension was lifted. However, germane to the setting aside of the period of suspension was fresh evidence which was not before the divisional court. In making the order of suspension, the disciplinary committee opined that the period should allow the solicitor to submit an accountant's report to cover the period of concern. By the time of the hearing before the English Court of Appeal, that court had in hand the certificate of the chartered accountant, which covered the accounting period that was of concern to the disciplinary committee.

[71] It was against that background that Lord Denning, at page 816, concluded that the position which the disciplinary committee desired had been achieved. That is, the solicitor's books were put in order for the future. Consequently, the suspension was not enforced; a costs order was substituted.

[72] It is a specious argument to point to the lifting of the suspension without the recognition of the following two points. First, Lord Denning, with whom the rest of the

court agreed, at pages 815 to 816, explicitly grounded his decision in the perceived objective of the disciplinary committee in imposing the suspension. Secondly, the exercise of the Court of Appeal's discretion was within the confines of its general power to act in the new environment. That is, there had been a change of circumstances since the disciplinary committee made its decision which would have justified the disciplinary committee itself varying its order; were it not *functus* by then.

[73] Indeed, Lord Denning, at page 816, was of the view that with the desired position achieved, "[i]f they [the disciplinary committee] had the power themselves to modify or amend their order … they might well have done so". So, although it was noted that no dishonesty was alleged against the solicitor, that was not the basis of lifting the sanction of suspension. Indeed, the sanction did not attract any adverse comments from their Lordships. On the contrary, Lord Denning, at page 816, noted that "[t]he negligence of the solicitor was reprehensible". For Karminski LJ, at page 816, the conclusion to which the disciplinary committee came, on the material before them brooked no criticism. Rather, how it treated with the solicitor was to be lauded. Therefore, **Re A Solicitor** is not an authority for Mr Golding's proposition that a sanction of suspension will not be upheld, for being excessive, where it was imposed in circumstances not involving dishonesty.

[74] Mr Golding is nevertheless correct that the circumstances of this case (canons IV (r) and (s)) do not involve dishonesty. In **Earl Witter v Roy Forbes** (1989) 26 JLR 129, where this court considered breaches of these two canons, Carey JA, at page 131, expressly declared the court was not dealing with "professional misconduct involving an element of deceit or moral turpitude". A review of the cases does not disclose that in all instances of running afoul of these, or similar canons, a suspension is an inevitable sanction. However, where a period of suspension was imposed, it was only disturbed on appeal in the face of changed or extenuating circumstances.

[75] In **Bolton v Law Society** [1994] 2 All ER 486, a two-year suspension was quashed. In that case, the solicitor improperly disbursed funds received from a building

society, pursuant to the sale of a property, before the completion of the sale. No allegation of dishonesty was levelled against the solicitor. However, a close reading of the judgment of the English Court of Appeal reveals more than its decision telegraphs.

[76] A summary of the salient points in **Bolton v Law Society** will make this clear. Mr Bolton appealed to the Divisional Court against the Law Society's decision. While the matter was on appeal several stays of execution were granted. The Divisional Court quashed the suspension. The Law Society appealed that decision. The English Court of Appeal, per Sir Thomas Bingham MR at page 493, was of the view that the Divisional Court had no good reason to interfere with the order of the tribunal and acted contrary to established principles. Sir Thomas Bingham was minded to restore the tribunal's order, but for the passage of time. Two and a half years had elapsed since the date of the tribunal's order and, by virtue of the stays granted, had never taken effect. The court felt it would have been oppressive to reinstitute the tribunal's order after that passage of time.

[77] The principle to note from both **Re A Solicitor** and **Bolton v Law Society** is that a sanction of suspension is not by its nature disproportionate when imposed as a result of breaches of the canons which do not involve deceit or moral turpitude. In **B Frankson v GLC**, this court found that the most serious breach of which the appellant was found guilty was his failure to account to the complainant (canon IV (r)). Accordingly, the order striking off that attorney was set aside and a sanction of six years suspension substituted.

[78] In Mr Golding's effort to demonstrate that the suspension imposed in this case is disproportionate, he cited the case of **Fredrick Chambers v Howard Lettman**. In that case, the attorney was both suspended and made to pay a fine (to be paid to the complainant). Mr Golding contended that, unlike, in this case, the attorney Howard Lettman did no work under the retainer. This submission takes no cognizance of the Committee's finding that the appellant presented documents to the complainant and her husband for their execution. The purported purpose of those documents was submission to the Administrator-General. The thrust of Mr Golding's submission, however, was the

appellant's filing of a claim in the Supreme Court, albeit unserved and eventually statute-barred.

[79] However, when this case was under the Committee's consideration, evidence of the appellant having filed a claim in the Supreme Court was not before it. Indeed, neither was it properly before this court, the appellant having failed in his bid to adduce fresh evidence. In any event, in neither case was the business objective of the complainant achieved, after the passage of almost a decade. So that, what the Committee had before it in this case, as in **Chambers v Lettman**, was culpable non-performance coupled with an abysmal failure to apprise the complainant of the progress of the matter.

[80] The case of **Chambers v Lettman**, therefore, is not as distinguishable on its facts from this case as it might at first appear. But even if it was, Mrs Minott-Phillips is quite right in her submission that each case has to be considered on its particular facts. So that, what the appellant has to demonstrate is that the sanctions imposed in this case were wrong or so aberrant that any disciplinary committee, regardful of its duty to act judicially could not have imposed them.

[81] In this regard, none of the appellant's complaints has been found to have merit. I will encapsulate them. Firstly, as I endeavoured to show above, it was entirely within the Committee's statutory remit to impose more than one sanction in this case. In fact, Mr Golding's suggestion that either a reprimand or a modest fine be substituted in place of suspension, admits, without frankly accepting, the power of the Committee to impose more than one sanction. That is so since he excluded from his submission the pecuniary penalty already inflicted and discharged by the appellant. This point is bolstered by the fact that this court cannot subject the appellant to sanctions which the Committee was not competent to impose.

[82] Secondly, the argument that in imposing a period of suspension, the Committee went beyond expected bounds of proportionality by imposing a penalty which appellate courts have set aside, for want of dishonesty, collapsed. Therefore, taken with the

unmeritorious argument of double punishment, the Committee made no error in law in exercising its discretion in the imposition of the sanction.

[83] Thirdly, on the facts of this case, it cannot seriously be argued that a sanction of suspension was unwarranted. As Mrs Minott-Phillips rightly submitted, the appellant's inaction resulted in the expiration of the limitation periods in respect of two claims which were maintainable on behalf of Mrs Henry. That inaction he compounded by a gross failure, even viewed through the most benign lenses, to provide Mrs Henry with information on the progress of her claim.

[84] In sum, the appellant's failure to deal with the complainant's business in a business-like manner compounded by his culpable non-performance fell below the acceptable standard of the profession. As Carey JA observed in **Witter v Forbes**, at page 131, the canons require the attorney to "act in the best interest of his client and represent him honestly, competently and zealously". Any practising member of the profession ought to know that a fall from that high standard will attract serious punishment.

[85] In this vein, as Lord Bingham said in **Bolton v Law Society**, it is not without importance that there is a full understanding of the reasons guiding the Committee in making orders which might, on their face, appear to be harsh. Two purposes undergird the orders of the Committee in most cases. The first is the individual deterrence of the erring attorney. The second is the reputational protection of the profession. In his own words, at page 492:

> "… In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the

> solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth…"

[86] The sanction of suspension, in this case, must be taken to be geared towards these two purposes. The need for individual deterrence may be readily seen from the appellant's approach to the complaint before the Committee. Not to take too strong a view, it was at the very least flippant. Firstly, the appellant neither appeared before the Committee at the liability stage nor obeyed any of the Committee's orders to file documents. This was an observation the Committee made before imposing a sanction. Secondly, the appellant stood on his offer of restitution to the complainant. Meaning, although he had the opportunity to do so, he did not place before the Committee any material for its consideration in deciding an appropriate sanction. So that, viewed against the background of the justifiable seriousness with which the Committee regarded the professional misconduct, there was nothing to mitigate the sanction outside of the offer of restitution. What was called for was some explanation for the breakdown and perhaps some indication of the systems adopted to insure against a recurrence. That was the time to advance arguments tending to show that suspension was unwarranted.

[87] It has not escaped my attention that the underlining concern to the challenge of the sanction of suspension, is the reputational stigma. That stigma bears within it the kernel of loss of clientele. That loss of clientele could well be ruinous to a fledgling attorney-at-law, which seems to have been a major concern of the divisional court in **Bolton v Law Society**. However, it is a well-known fact that the appellant is a senior member of the Bar, with a reputation that in all probability could survive any fallout from the adverse effects of a suspension. Certainly, the possible adverse effects of a suspension upon the law practice of the appellant were fit for the Committee's consideration. The opportunity availed the appellant to do so was squandered.

**Conclusion**

[88] Against the background of the above discussion and analysis, the appellant has failed to show any reason why this court should interfere with the sanction of suspension ordered by the Committee. In other words, it has not been shown that the exercise of the Committee's decision was wrong, irrational or that there are extenuating circumstances warranting interference by this court. Accordingly, I would dismiss the appeal. In dismissing the appeal, I would, however, vary the effective commencement date for the suspension to take effect. There is no evidence to say whether the appellant is a sole practitioner or partner in a firm. Whichever it is, it appears to be reasonable to allow space to make arrangements for the servicing of existing files during the period of suspension. Therefore, I propose that the suspension take effect on 1 September 2021 for a period of four calendar months.

**F WILLIAMS JA**

**ORDER**

1. The appeal is dismissed and the order of the Committee suspending the appellant from practice in the courts of Jamaica for a period of four months is affirmed.

2. The period of suspension from practice in the courts of Jamaica shall commence on 1 September 2021.

3. The order for stay of execution granted on 16 September 2020 is discharged.

4. Costs of the applications and the appeal to the General Legal Council, to be agreed or taxed.