JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

MISCELLANEOUS APPEAL NO COA2021MS0002

MOTION NO COA2023MT00009

BETWEEN	**FAY CHANG RHULE**	**APPLICANT**
AND	**ANGELLA SMITH**	**1ST RESPONDENT**
AND	**GENERAL LEGAL COUNCIL**	**2ND RESPONDENT**

Mrs Caroline Hay KC and Mrs Tereece Campbell-Wong instructed by Caroline P Hay for the applicant

Lemar Neale instructed by Nea|Lex for the 1st respondent

2nd respondent not appearing

4 March and 14 June 2024

Appeal – Privy Council - Motion for conditional leave to appeal to His Majesty in Council - Whether the proposed appeal involves a question of great general or public importance or a question that should otherwise be submitted to His Majesty in Council - Constitution of Jamaica, section 110(2)(a)

F WILLIAMS JA

[1] I have read in draft the judgment of Shelly-Williams JA (Ag) and agree with her reasoning and conclusion. There is nothing that I wish to add.

SIMMONS JA

[2] I too have read the draft judgment of Shelly-Williams JA (Ag). I agree with her reasoning and conclusion.

SHELLY-WILLIAMS JA (AG)

[3] By way of an amended notice of motion filed on 16 January 2024, Fay Chang Rhule, the applicant, had sought conditional leave to appeal to His Majesty in Council ('the Privy Council') from a decision of this court given on 26 May 2023 and embodied in the written judgment cited as **Angella Smith v The General Legal Council and Fay Chang Rhule** [2023] JMCA Misc 2. The amended notice of motion was supported by the affidavit of Fay Chang Rhule, filed on 28 June 2023, as well as a supplemental affidavit filed on 29 February 2024.

[4] The applicant invoked section 110(1)(a) of the Constitution of Jamaica ('the Constitution'), which allows leave to appeal as of right where the matter in dispute on the appeal to the Privy Council is of the value of $1,000.00 or upwards; or the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of $1,000.00 or upwards and is a final decision in any civil proceedings.

[5] Alternatively, the motion was brought pursuant to section 110(2)(a) because "the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council ...".

[6] The applicant's motion for conditional leave to appeal to the Privy Council was first considered by a single judge of this court who, on 25 July 2023, granted conditional leave to appeal to the Privy Council pursuant to section 110(1)(a) of the Constitution. Arising from this, an application was made by the 1st respondent to discharge the decision of the single judge on the ground that the proposed appeal did not satisfy the requirements under section 110(1)(a). It was argued that there was no final decision in a civil proceeding and, further, that the proposed appeal did not involve directly or indirectly a claim to or question respecting property.

[7] On 1 December 2023, this court discharged the orders and remitted the alternate application under section 110(2) of the Constitution for the court's consideration. Section 110(2) is the only provision applicable to this proposed appeal.

[8] The motion is strongly opposed by the 1st respondent, who contended, through her counsel, Mr Neale, that the proposed appeal entails no question that is of great general or public importance, or which should otherwise be submitted to the Privy Council.

[9] As it concerns the 2nd respondent, King's Counsel, Mrs Hay, indicated that there was no service of process on the 2nd respondent, by its own election, and as such it does not appear in the matter.

[10] There is also a collateral application for a stay of execution of the impugned decision pending the outcome of this application which was not heard by the panel.

The relevant background

[11] A comprehensive background was set out in the judgment referred to at para. [1], as such, I will only adopt the salient facts rehearsed therein.

[12] The 1st respondent, Angella Smith ('Ms Smith') and her husband, Denton McKenzie (Mr McKenzie) were the registered proprietors of a property. In 2011, Carolyn Alexander ('Ms Alexander'), with whom Mr McKenzie was in an intimate relationship, retained the applicant, an attorney-at-law, regarding the sale of the property. Ms Alexander presented to the applicant a power of attorney, dated 6 March 2011 and purportedly signed by Mr McKenzie, authorizing her to act as the vendor for the purpose of the sale of the property. After doing her investigations at the National Land Agency, the applicant discovered that Ms Smith was also a co-owner of the property, as a joint tenant. She made enquiries of this with Ms Alexander and was later presented with another power of attorney, dated 21 November 2011, purported to have been made by Ms Smith in favour of Ms Alexander. Ms Alexander also explained that both Ms Smith and Mr McKenzie, the owners of the

property, were incarcerated in Canada. The applicant, accordingly, conducted the sale of the property and paid the proceeds of the sale over to Ms Alexander.

[13] Thereafter, Ms Smith lodged a complaint to the General Legal Council ('GLC') contending that she had not signed the power of attorney or consented to the sale of the property and that the applicant, by acting pursuant to the power of attorney, had breached Canon 1(b) of the Legal Profession (Canons of Professional Ethics) Rules ('the Canons').

[14] She averred, in her affidavit in support of the complaint before the Disciplinary Committee of the GLC ('the Committee'), that she never gave Ms Alexander a power of attorney and that the signature and handwriting purporting to be hers, were not hers. Mr McKenzie, by his affidavit, also denied signing a power of attorney in favour of Ms Alexander.

[15] The applicant, in her affidavit, asserted that both powers of attorney were signed and sealed by a duly commissioned notary public, and as such, she completed the sale of the property and disbursed the proceeds of the sale to her client, Ms Alexander, in accordance with the instructions she received.

[16] The Committee, after considering the issues, concluded that there was not, on the face of the document or the circumstances that arose, sufficient risk factors that would cause the applicant to have a duty to enquire further into the authenticity of the two powers of attorney. Accordingly, the Committee found that the applicant was not guilty of inexcusable or deplorable negligence in acting on the two powers of attorney and her action could not be considered behaviour which did not maintain the honour and dignity of the profession or behaviour that would discredit the profession of which she is a member.

[17] The 1st respondent appealed the decision of the Committee. Upon determination of the appeal, this court set aside the decision of the Committee, substituted its own

views regarding the guilt of the applicant and remitted the matter to the Committee for a sanction hearing to be held. The orders made were as follows:

> "1. The appeal is allowed.
>
> 2. The decision of the Disciplinary Committee of the General Legal Council made on 13 January 2021, that the second respondent is not guilty of a breach of Canon 1(b), is set aside.
>
> 3. The second respondent Fay Chang Rhule is in breach of Canon 1(b) and is guilty of professional misconduct.
>
> 4. The matter is remitted to the Committee for a sanction hearing to be held.
>
> 5. Costs to the appellant to be taxed if not agreed."

[18] The applicant has advanced six questions which purportedly raise issues of great general or public importance, or which ought otherwise to be submitted to the Privy Council. The questions are set out in the following terms:

> "(a) Where in the performance of her professional duties an Attorney-at-Law engages in conduct that is not:
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> (i) Negligent
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> (ii) In breach of fiduciary duty;
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> (iii) Incompetent;
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> (iv) Fraudulent or otherwise deceitful or dishonest;
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> (v) Inexcusable, deplorable or neglectful
>
> Either towards her client or any third party, whether the conduct of that Attorney can be said to be in breach of Canon 1(b) of the Legal ([sic] Profession [(]Canons of Professional Ethics) Rules which Canon enjoins the Attorney to maintain the honour and dignity of the profession and to avoid discreditable conduct.

(b) whether there is any duty on an Attorney-at-Law in Jamaica to look behind a foreign power of attorney which is [sic]:

(i) [is] regular on its face being signed by the donor and witnessed by a duly commissioned notary public;

(ii) satisfies the requirements of the 16th Schedule of the Registration of Titles Act [J];

(iii) satisfies the due execution requirements of the Probate of Deeds Act [J];

(iv) contains no requirement on its face to look behind it.

(c) Does the appearance of the existence of facts deemed to be 'red flags' in a transaction relate to standard of care towards those to whom there is an existing duty of care and if no, despite the absence of any duty of care can an Attorney-at-Law be said to be in breach of Canon 1(b) towards a third party alleging the Attorney's failure to see and act on 'red flags' in the transaction.

(d) On the question of the 'rehearing' of an appeal, whether the approach taken by the Court of Appeal of Jamaica in ***Angella Smith v General Legal Council and Fay Chang Rhule [2023] JMCA Misc 2,*** which led the Court of Appeal of Jamaica to a 'different conclusion on the facts' in the absence of an error of principle or on the evidence by the specialist tribunal fundamentally departs from the approach and decisions of the Court of Appeal of Jamaica in ***Harold Brady v General Legal Council [2021] JMCA App 27*** and ***Ernest Davis v General Legal Council [2015] JMCA Civ 33*** which decisions urge against the Court of Appeal coming to its own conclusions on the facts absent error of fact or law in the specialist tribunal.

(e) Where the Court of Appeal of Jamaica allows an appeal against a decision of the Disciplinary Committee of the General Legal Council, whether the Court has the

power to [sic] pursuant to section 17 of the Legal Profession Act of Jamaica to substantiate a verdict of 'not guilty' for 'guilty' of professional misconduct or is the Court permitted to direct that the application be reheard by the Disciplinary Committee, should it choose to do so in order for there to be a finding of either guilty or not guilty of professional negligence.

(f) Where the standard of proof in disciplinary proceedings is proof beyond a reasonable doubt, can that standard be demonstrably met where the Court of Appeal's interpretation of the evidence reveals different 'possibilities', 'other possibilities' and/or 'plausible' circumstances arising from the Attorney's conduct and which are capable of exonerating the Attorney?"

Discussion

[19] The motion for leave to appeal to the Privy Council is made pursuant to section 110(2) of the Constitution, which states that:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament."

[20] There have been several decisions that have discussed the requirements of section 110(2)(a) of the Constitution. In **National Commercial Bank Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27, Morrison P defined, at para. [33], what is meant by "great general or public importance" as such:

> "[33] ...in order to be considered one of great general or public importance, the question involved must, firstly, be one

> that is subject to serious debate. But it is not enough for it to give rise to a difficult question of law: it must be an important question of law. Further, the question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspect of the practice, procedure or administration of the law and public interest..."

[21] Similarly, in the case of **Dr Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams** (1992) 29 JLR 79 Rowe P, at page 81, referenced the explanation of the principle by MacGregor J in **Vick Chemical Company v Cecil DeCordova and others** (1948) 5 JLR 106 at page 109. MacGregor J explained the principle in this way:

> "The principles which should guide the Court have been set out in a number of cases the latest of which is Khan Chinna v. Markanda Kothan and Another [1921] W.N. 353. Lord Buckmaster delivering the judgment of the Board said:
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> > 'It was not enough that a difficult question of law arose, it must be an important question of law. Further the question must be one not merely affecting the rights of the particular litigants, but one the decision of which would guide and bind others in their commercial and domestic relations.'."

[22] McDonald Bishop JA, in the case of **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16, also reviewed cases related to granting of leave as per section 110(2) of the Constitution and summarised the principles distilled therefrom at para. [27] as follows:

> "i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
>
> ii. There must first be the identification of the question involved. The question identified must arise from the

decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.

iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.

iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.

v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.

viii. Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise."

[23] It was contended by Mrs Hay, on behalf of the applicant, that the questions posed are of great general and far-reaching importance by reason of their nature and impact on attorneys-at-law and other professionals in ascertaining their duties under powers of attorney to third parties, who are not their clients, or any third-party authorization. She argued that it is of great public importance to examine the scope of the obligation, if any, to look behind a power of attorney, that is regular on its face, for validation. In fact, she

submitted that the determination of the questions posed touches and concerns questions of law important to the commercial sector wherein these third-party authorization documents are utilized. Mrs Hay urged us, in considering an appeal under section 110(2)(a), to accept the approach taken by this court in **Patrick Allen v Theresa Allen** [2019] JMCA App 5, which also applied the principles above. She submitted that the requirements are met in the instant case as the questions posed are not merely difficult questions of law but important ones, that go beyond the rights of the particular litigants and are apt to guide and bind others generally.

[24] On the other hand, Mr Neale, on behalf of the 1st respondent, submitted that the questions identified are not worthy of debate before the Privy Council as they are not of great general or public importance or otherwise and do not satisfy the requirements laid out in **Patrick Allen**. He indicated that the questions raised at (a), (b), (c) and (f) related to the view taken by the court of the facts, the answers to which are not determinative of the appeal. The questions raised at (d) and (e) are questions of law governing the role of the appellate court, which have long been settled by the Privy Council. He submitted that the questions do not involve any serious issues of law or important questions of law, but, at most, have given rise to difficult questions of law, which does not satisfy the requirements for an appeal to the Privy Council, by reason of their great general or public importance or otherwise.

[25] The questions will now be analysed in turn against the foregoing.

Question (a)- Where in the performance of her professional duties an Attorney-at-Law engages in conduct that is not:

(i) Negligent
(ii) In breach of fiduciary duty;
(iii) Incompetent;
(iv) Fraudulent or otherwise deceitful or dishonest;
(v) Inexcusable, deplorable or neglectful

Either towards her client or any third party, whether the conduct of that Attorney can be said to be in breach of Canon 1(b) of the Legal ([sic] Profession [(]Canons of Professional Ethics) Rules which Canon enjoins the Attorney to maintain the honour and dignity of the profession and to avoid discreditable conduct.

Submissions by applicant

[26] In written and oral submissions Mrs Hay contended that the scope of Canon 1(b) treats with acts that are dishonourable to oneself as a person and dishonourable to the profession, based on the learning in **Re Cooke** (1889) 5 TLR 407. She submitted that there must be some act or omission that is dishonourable to the profession to allow an attorney to come within the scope of Canon 1(b). She argued that the idea of an attorney's conduct being impugned based on the facts as found in this case does not fit within the scope of Canon 1(b) and as such raises the question "whether an act or omission which does not qualify as deplorable, dishonest, immoral, discriminatory or in breach of any legal duty could in fact qualify as conduct in breach of Canon 1(b). She submitted that by taking such an approach the court appears to have elevated the requirements of Canon 1(b) to principles of law.

Submissions by 1st respondent

[27] Mr Neale asserted that the question as framed is too restrictive to be regarded as being of general or public importance. He argued that the question called for more context as it was vague and failed to appreciate that there are other types of conduct outside of those listed above that may fall under Canon 1(b). He submitted that Canon 1(b) is very wide and contemplated the conduct of an attorney "in relation to the [c]ourt, the regulatory body governing the profession, the law practice, the client, colleagues and certain other persons". Counsel relied on the cases of **Gresford Jones v The General Legal Council (ex parte Owen Ferron)** (unreported), Court of Appeal, Jamaica, Miscellaneous Appeal No 22/2002, Cross Appeal No 27/2002, judgment delivered 18 March 2005), and **Re Cooke** for guidance on the conduct that fell within Canon 1(b).

[28] It was also his submission that Mrs Hay, in her arguments, restricted the duty to the area of tort law and in so doing seem to have conflated the duty under Canon 1(b) with that under the law of tort. He asserted that this duty under Canon 1(b) was different from that under tort and also contract. This duty, he submitted, was to the client, the

court and fellow attorneys and concerned the attorney's role in upholding the dignity and integrity of the legal profession.

[29] He further submitted that Canon 1(b) is not circumscribed by an attorney/client relationship. Any person may complain under section 12 of the Legal Profession Act ('LPA') and be considered as an interested party. He referred to the case of **Arlean Beckford v The General Legal Council** (unreported), Court of Appeal, Jamaica, Civil Appeal No 32/2005, judgment delivered 31 July 2007 in respect of this.

Analysis

[30] Delivering the decision of the court, Laing (JA) (Ag), in addressing whether the applicant had breached Canon 1(b) considered several decisions including the case of **Shiokawa v Pacific Coast Savings Credit Union and Woods Adair** 2005 BCJ No 294 ('**Shiokawa**') and **Ginelle Finance v Diakakis** [2007] NSWSC 60. He then went on to opine at paras. [69] and [70] of the judgment that:

> "[69] …. In the case before us, the scope of the duty of an attorney-at-law which is being considered is being assessed in the context of the complaint made against the second respondent, by the appellant, who is not her client. As a consequence, what is at issue is not the duty of the second respondent to her client, but rather, her duty (in acting on the instructions of a donee of a power of attorney in a real estate transaction), under Canon 1(b), to: '…at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which [s]he is a member'.
>
> [70] As Mrs Hay appreciated, what is in issue is the scope of the duty to act in accordance with the reasonable standards of the profession. In my view, although Canon 1(b) does not expressly impose an obligation on attorneys to "act in accordance with the reasonable standards of the profession", that is the reasonable construction to be placed on the Canon. The existence or imposition of such a duty is manifestly sensible, in that, it prevents an attorney from relying on an

> absence of a fiduciary or other duty to third parties affected by his conduct, to behave in a manner which by bringing harm to third parties, may tend to discredit the profession."

[31] There was no reference to or any indication in the judgment where, as Mrs Hay submitted, the court appeared to have elevated Canon 1(b) to a principle of law. The decision addresses the scope of the duty of an attorney at law as per Canon 1(b). This issue does not arise on the decision, and as such, no leave will be granted.

Question (b)- whether there is any duty on an Attorney-at-Law in Jamaica to look behind a foreign power of attorney which is [sic]:

(i) [is] regular on its face being signed by the donor and witnessed by a duly commissioned notary public;

(ii) satisfies the requirements of the 16th Schedule of the Registration of Titles Act [J];

(iii) satisfies the due execution requirements of the Probate of Deeds Act [J];

(iv) contains no requirement on its face to look behind it.

Question (c)- Does the appearance of the existence of facts deemed to be 'red flags' in a transaction relate to standard of care towards those to whom there is an existing duty of care and if no, despite the absence of any duty of care can an Attorney-at-Law be said to be in breach of Canon 1(b) towards a third party alleging the Attorney's failure to see and act on 'red flags' in the transaction.

Submissions by applicant

[32] These two questions are being considered together as they concerned the issue of red flags raised in relation to powers of attorney and the approach this court adopted regarding them. It was submitted that if there is no general principle that a power of attorney must always be validated, then without more, there is no need to look behind it. King's Counsel, however, accepted that this court has found that where there are 'red flags', there is a duty of care towards a third party to take steps to validate the document.

[33] Mrs Hay indicated that the court considered whether there were risk factors or red flags that imposed an obligation on the applicant to make further checks. However, it is her submission that the analysis emanating from this raised two questions:

a) Whether the court should, first, determine whether there are risk factors; and

b) then impose a duty on an attorney-at-law.

She submitted that this approach conflicted with common law principles, which have established that a duty of care must first be examined and, thereafter, if a duty exists, consider whether the standard of care, in light of the risk factors, was met by the conduct of the attorney (see **Esser v Luoma** 2004 BCCA 359; **Shiokawa**; **Adams v Mancuso** [1986] O J No 46 (QL) (HCJ)).

[34] Considering this, King's Counsel contended that the law in Jamaica on the professional duties of attorneys-at-law ought to be clarified for there to be a better understanding of the scope of normative professional obligations and how they intersect with duties in law. She indicated that to do this the court would need to consider the relationship between Canon 1(b) and that of a fiduciary duty or a duty in contract or tort and determine whether they are the same or natural substitutes for each other. If they are not so considered, it is then necessary to consider if it is the law in Jamaica that Canon 1(b) be seen as having the same force, character and quality as legal rights and duties to clients and third parties.

[35] Nevertheless, Mrs Hay submitted that, in the substantive appeal, the court expressly found that there was no breach of duty, whether at common law or otherwise. There was also no fraud or incompetence found on the part of the applicant. Mrs Hay asked the court to consider as such, whether the applicant could be said to be in breach of Canon 1(b) when no act of hers can be identified as faulty and, where there is doubt as to the legal duty to the person aggrieved.

[36] She submitted that these are all questions worthy of further consideration by the Privy Council.

<u>Submissions by 1st respondent</u>

[37] Mr Neale conceded that an attorney is under no fiduciary duty to a third party or donor of a power of attorney to validate or authenticate a power of attorney unless, on the face of it, there are certain risk factors that would cause such steps to be required.

He accepted that the position of the law on this is not in dispute and was even acknowledged by this court in the substantive appeal. He opined, however, that the challenge sought to be raised through the question seemed to be directed at the view taken by this court of the facts that were in evidence before the Committee.

[38] It was also the submission of Mr Neale that the issue for the court's consideration was not the attorney's duty of care to a third party or client, but rather, the duty under Canon 1(b), in acting on the instructions of a donee of a power of attorney, in a real estate transaction, to "at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which [s]he is a member".

[39] Counsel indicated that the court, in considering this issue, assessed the evidence before the Committee and found that the circumstances gave rise to sufficient risk factors that should have caused the applicant to be on guard against fraud or to be put on enquiry.

[40] In relation to question (c), Mr Neale submitted that it was irrelevant whether or not the existence of red flags affected the standard of care, as an attorney-at-law can be found to have acted dishonourably and in breach of Canon 1(b) as in the circumstances of the present case. He also contended that though a fiduciary duty may not be owed to the 1st respondent, this did not absolve the applicant from being in breach of Canon 1(b). The 1st respondent was qualified as a complainant under section 12(1) of the LPA and, as such, was entitled to complain to the Committee as someone aggrieved by the conduct of the applicant. Mr Neale also relied on the wide definition of 'complainant' approved by the Privy Council in **Causwell v The General Legal Council (ex parte Elizabeth Hartley)** [2019] UKPC 9, "permitting anyone aggrieved by relevant misconduct to bring a complaint".

Analysis

[41] The second question suggests that there is ambiguity in the law as to the way an attorney-at-law ought to treat with powers of attorney issued from foreign countries. Laing JA (Ag) seems to have been of the view that there is no such ambiguity and indicated as such at para. [78] of the judgment. He stated:

> "I accept that the checks described by the [applicant] are those which would be sufficient in the ordinary course."

[42] Therefore, the issue that arose in this case was whether, despite the routine checks that were undertaken, there were red flags raised, that placed a duty on the attorney-at-law to make further enquires. The answer to that, the court found was yes. Laing JA (Ag) referenced cases in the judgment that alluded to the duty of an attorney-at-law and their course of action once these red flags are raised.

[43] An enquiry relating to this question concerning the duty of an attorney-at-law when presented with a foreign power of attorney is one which the legal profession would benefit from and so go beyond the parties in this case. The direction of the Privy Council would be beneficial to this jurisdiction bearing in mind the absence of any binding precedent and as such leave should be granted in relation to this question.

[44] The third question raised concerned whether an attorney-at-law can be said to be in breach of Canon 1(b) as it relates to third parties. This is, in the context of this case, where the red flags raised did not relate to the actual client.

[45] The LPA addresses the issue as to whether a third party can commence a complaint against an attorney-at law for professional misconduct. Section 12(1)(a) of the said statute states that:

> "(1) Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the

> Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by an attorney, that is to say-
>
> > (a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect);"

[46] Canon VIII(d) identifies the canons in respect of which a breach shall constitute professional misconduct, which includes Canon 1(b). Canon 1(b) states that: -

> "An Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member."

[47] Therefore, section 12(1)(a) of the LPA allows a third party to bring a complaint alleging misconduct on the part of an attorney-at-law.

[48] This issue had also been canvassed before the Privy Council in the case of **Causwell v The General Legal Council**. The case concerned the filing of a complaint by an agent who did not have the authority to do so at the time. Lord Briggs, in delivering the decision on behalf of the Board, opined at para. 9 of the decision that

> "As is common ground, this section gives statutory *locus standi* to bring a disciplinary complaint to the Committee to three categories of person namely: (1) any person alleging himself aggrieved by an act of professional misconduct committed by an attorney (2) the Registrar of the Supreme Court and (3) any member of the GLC. It is also common ground (although implicit rather than expressly stated in the LPA) that a person in category (1) may initiate and pursue such a complaint either in person or through an agent." (Italics as in the original)

[49] This area of law relating to question (c) had already been settled by the Privy Council, and as such, there is no serious issue of law raised that requires clarification. Leave, therefore, ought not to be granted on this ground.

Question (d)- On the question of the 'rehearing' of an appeal, whether the approach taken by the Court of Appeal of Jamaica in *Angella Smith v General Legal Council and Fay Chang Rhule [2023] JMCA Misc 2,* which led the Court of Appeal of Jamaica to a 'different conclusion on the facts' in the absence of an error of principle or on the evidence by the specialist tribunal fundamentally departs from the approach and decisions of the Court of Appeal of Jamaica in *Harold Brady v General Legal Council [2021] JMCA App 27* and *Ernest Davis v General Legal Council [2015] JMCA Civ 33* which decisions urge against the Court of Appeal coming to its own conclusions on the facts absent error of fact or law in the specialist tribunal.

Submissions by applicant

[50] In advancing her submissions on question (d), Mrs Hay contended that it was not open to this court, it not being one of original jurisdiction, to reverse or substitute the decision of a specialised tribunal on the basis that it would have dealt with the matter differently. She argued that there must be an error of fact or law. She indicated that on a review of the judgment, there is no error of fact or law adverted to by the court. She stated that, instead, the court took a different view of the facts adduced, which led it to conclude that there were sufficient red flags and the specialised tribunal (the Committee) was wrong in not detecting this.

[51] King's Counsel submitted that, in adopting the approach of forming its own view of the facts, the court departed from prior authorities such as **Ernest Davis** and **Harold Brady**, which promote giving deference to the decision of a specialised tribunal. She further submitted that the court's approach in this case represents a change of direction being taken by the court in how the appellate body approaches facts found by specialised tribunals such as the Committee.

[52] It was also the contention of King's Counsel that conducting an appeal by way of "rehearing" does not mean exercising original jurisdiction to hear cases from the Committee *de novo*. Mrs Hay relied on **Harold Brady** for this contention and noted that, in that case, the court accepted that if Parliament had intended that the appeal should be a hearing *de novo*, there would have been no need for the court to be granted the power to remit the matter for re-hearing by the Committee.

[53] Mrs Hay concluded by submitting that if a review court could differ from a specialised tribunal and enter a verdict of guilty of professional misconduct on paper, with the known disadvantages of not participating in a trial, the ramifications would be concerning. Therefore, she opined that there is great general importance in seeking a final statement on the issue.

Submissions by 1st respondent

[54] Mr Neale disagreed that there were no errors of fact or law. He highlighted that the basis for this court to interfere in the decision of a lower court/tribunal is where the lower court/tribunal had misread the evidence, acted on wrong principles, took irrelevant matters into account, failed to take relevant matters into account or if the decision is palpably or plainly wrong.

[55] Counsel pointed out that the court had determined in its judgment at para. [106] that, "…the Committee was plainly wrong in concluding that the circumstances did not raise red flags that were sufficient to require the [applicant] to do further checks to verify the authenticity of the powers of attorney". He opined that the court, having found that there was some error on the part of Committee, was enabled to interfere with the decision in that respect.

[56] Further, counsel submitted that in embarking on the "rehearing" exercise, the court did not conduct a hearing *de novo* but a hearing on the record. He indicated that the court looked at the evidence before the Committee and accepted that there was a duty on the applicant to look behind the power of attorney when there were risk factors. The court concluded, after an assessment, that there were sufficient risk factors, contrary to what the Committee had found.

[57] Against this backdrop, counsel submitted that the court did not err in substituting the verdict of not guilty with guilty and reverting the matter of sentence to the GLC. Accordingly, the question does not raise any question of great general or public importance.

Analysis

[58] There have been several cases from the Privy Council that have opined on the issue as to the jurisdiction of the court in rehearing cases from specialist tribunals. In the case of **Ghosh v General Medical Council** [2001] 1 WLR 1915 ('**Ghosh**'), Lord Millet, delivering the decision on behalf of the Board, sought to dispel the notion that the powers to disturb the decisions of disciplinary tribunals were limited. He stated at paras. 33 and 34 of the judgment that:

> "**33** Practitioners have a statutory right of appeal to the Board under section 40 of the Medical Act 1983, which does not limit or qualify the right of the appeal or the jurisdiction of the Board in any respect. The Board's jurisdiction is appellate, not supervisory. The appeal is by way of a rehearing in which the Board is fully entitled to substitute its own decision for that of the committee. The fact that the appeal is on paper and that witnesses are not recalled makes it incumbent upon the appellant to demonstrate that some error has occurred in the proceeding[s] before the committee or in its decision, but this is true of most appellate processes.
>
> **34** It is true that the Board's powers of intervention may be circumscribed by the circumstances in which they are invoked, particularly in the case of appeals against sentence. But their Lordships wish to emphasise that their powers are not as limited as may be suggested by some of the observations which have been made in the past... For these reasons the Board will accord an appropriate measure of respect to the judgment of the committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the committee's judgment more than is warranted by the circumstances. The council conceded, and their Lordships accept, that it is open to them to consider all the matters raised by Dr Ghosh in her appeal; to decide whether the sanction of erasure was appropriate and necessary in the public interest or was excessive and disproportionate; and in the latter event either to substitute some other penalty or to remit the case to the committee for reconsideration." (Emphasis as in the original)

[59] Later, in **Preiss v General Dental Council** [2001] 1 WLR 1926 ('**Preiss**'), Lord Cooke of Thorndon, in delivering the opinion of the Board, said, in part, at para. 27:

> "**27** Since the coming into operation of the Human Rights Act 1998, with its adjuration in section 3 to read and give effect to legislation, so far as it is possible to do so, in a way compatible with the Convention rights, any tendency to read down rights of appeal in disciplinary cases is to be resisted. In *Ghosh v General Medical Council* [2001] 1 WLR 1915, 1923 F – H the Board has recently emphasised that the powers are not as limited as may be suggested by some of the observations which have been made in the past. An instance, on which some reliance was placed for the General Dental Council in the argument of the present appeal, is the observation in *Libman v General Medical Council* [1972] AC 217, 221, suggesting that findings of a professional disciplinary committee should not be disturbed unless sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence was misread. That observation has been applied from time to time in the past, but in their Lordships' view it can no longer be taken as definitive. This does not mean that respect will not be accorded to the opinion of a professional tribunal on technical matters. But, as indicated in *Ghosh*, the appropriate degree of deference will depend on the circumstances..." (Emphasis as in the original)

[60] In the case of **General Medical Council and others v Michalak (Solicitors Regulation Authority and others intervening)** [2017] 1 WLR 4193, Lord Kerr in delivering the judgment on behalf of the Board stated at para. 20 of the judgment that:

> "**20** In its conventional connotation, an 'appeal' (if it is not qualified by any words of restriction) is a procedure which entails a review of an original decision in all its aspects. Thus, an appeal body or court may examine the basis on which the original decision was made, assess the merits of the conclusions of the body or court from which the appeal was taken and, if it disagrees with those conclusions, substitute its own. Judicial review, by contrast, is, par excellence, a proceeding in which the legality of or the procedure by which a decision was reached is challenged."

[61] Having reviewed the decisions of the Privy Council, it is clear the interpretation taken of the word "rehearing". The approach taken by this court in this case, is in keeping with the decisions from the Privy Council and as such no leave ought to be granted in relation to question (d).

Question (e)- Where the Court of Appeal of Jamaica allows an appeal against a decision of the Disciplinary Committee of the General Legal Council, whether the Court has the power to pursuant to section 17 of the Legal Profession Act of Jamaica to substitute a verdict of 'not guilty' for 'guilty' of professional misconduct or is the Court permitted to direct that the application be reheard by the Disciplinary Committee, should it choose to do so in order for there to be a finding of either guilty or not guilty of professional negligence.

Submissions by the applicant

[62] The gravamen of the complaint arising out of question (e) was that this court did not have the jurisdiction to substitute a verdict of guilty. King's Counsel argued that section 17 of the LPA did not give the court a statutory power to substitute the verdict, only a power to vary an order, which was entirely different. King's Counsel distinguished the authority of **Ghosh** and the line of authorities which referred to it. In those cases, there was a specific statutory power that allowed the court to substitute a verdict, unlike in the instant case where there is no such language in the LPA. She submitted, as such, that **Ghosh** and the other medical board cases could not assist as they dealt with a different statutory framework. She also raised for the court's determination whether the use of the word "vary" in section 17 of the LPA contemplates a total reversal of the decision on its merit on paper.

Submissions of the 1st respondent

[63] In relation to question (e), Mr Neale submitted that there are numerous authorities emanating from the Privy Council, which demonstrate the power of the court to substitute its own decision for that of the Committee. He relied on the decisions of **Julius Libman v General Medical Council** [1972] 2 WLR 272; **Ghosh**; **Preiss** and **Gupta v General Medical Council** [2002] 1 WLR 1691. He argued, as such, that the question is well settled by the Board and cannot be referred to it in accordance with the principles

concerning applications under section 110(2)(a), as was expanded, in **Shawn Campbell and others v R** [2020] JMCA App 41, and later affirmed in **The General Legal Council v Michael Lorne** [2022] JMCA App 12.

Analysis

[64] Question (e) raised the issue of appeal by way of rehearing as per section 16 of the LPA and whether the court has jurisdiction to change the verdict from not guilty to guilty.

[65] Section 16(1) of the LPA provides that an appeal against any order made by the Committee under that Act shall lie to the Court of Appeal by way of rehearing. The options available to the Court of Appeal on the rehearing of the matter are listed in section 17 of the LPA. It states:

> "17.---(1) The Court of Appeal may dismiss the appeal and confirm the order or may allow the appeal and set aside the order or may vary the order or may allow the appeal and direct that the application be reheard by the Committee and may also make such order as to costs before the Committee and as to costs of the appeal, as the Court may think proper:
>
> Provided that in the rehearing of an application following an appeal by the attorney no greater punishment shall be inflicted upon the attorney concerned than was inflicted by the order made at the first hearing.
>
> (2) Where the Court of Appeal confirms the order (whether with or without variation) it shall take effect from the date specified in the order made by the Court of Appeal confirming it."

[66] Mrs Hay had submitted that the above-mentioned cases, such as **Ghosh,** dealt with appeals from the Medical Tribunal in England. Counsel's position was that the power to substitute the decisions in those cases was based on section 40 of the Medical Act 1983 of England which deals with appeals from Medical Tribunals.

[67] Section 40(7) of the Medical Act states the options available to a court after rehearing the decisions of the tribunal. Section 40 states:

> "On an appeal under this section from [a Medical Practitioners Tribunal], the court may—
>
> (a) dismiss the appeal;
>
> (b) allow the appeal and quash the direction or variation appealed against;
>
> (c) substitute for the direction or variation appealed against any other direction or variation which could have been given or made by [a Medical Practitioners Tribunal]; or
>
> (d) remit the case to [the MPTS for them to arrange for] [a Medical Practitioners Tribunal] to dispose of the case in accordance with the directions of the court and may make such order as to costs (or, in Scotland, expenses) as it thinks fit." (Emphasis added)

[68] Although section 40 of the Medical Act 1983 of England, does include the word 'substitute', the absence of that specific word from section 17 of the LPA does not limit the power of the Court of Appeal, whilst rehearing a case from the GLC. This position was reinforced in the recent decision of **General Legal Council v Michael Lorne** [2024] UKPC 12. This was an appeal concerning the variation by this court of the sanction imposed on Mr Lorne to strike him off the Roll of Attorneys-at-Law entitled to practise in Jamaica. Lord Hodge and Lady Simler, in delivering the decision on behalf of the Board, stated at para. 11 of the decision that:

> "These sections make clear that an appeal from the Committee lies to the Court of Appeal and is a rehearing rather than a review. In other words, the Court of Appeal has full appellate rather than simply a supervisory jurisdiction. That means that rather than being limited to reviewing the legality of the decision, the Court of Appeal can conduct a rehearing and can substitute its own decision for that of the decision-maker in an appropriate case, provided always that caution is exercised before overturning a disciplinary decision

> in the absence of an error of law or principle. It may allow the appeal, set aside the decision and/or vary the sanction imposed."

[69] The approach taken by this court in this case, is in keeping with decisions from the Privy Council and as such no leave ought to be granted in relation to question (e).

Question (f)- Where the standard of proof in disciplinary proceedings is proof beyond a reasonable doubt, can that standard be demonstrably met where the Court of Appeal's interpretation of the evidence reveals different 'possibilities', 'other possibilities' and/or 'plausible' circumstances arising from the Attorney's conduct and which are capable of exonerating the Attorney?

Submissions by applicant

[70] On her last question, Mrs Hay submitted that the court, by recognizing that there are other possibilities that could exonerate the applicant, had used language that seemed to suggest that the requisite standard of proof beyond a reasonable doubt was not met.

Submissions by 1st respondent

[71] In addressing this question, Mr Neale asserted that the court did not find that any 'possibilities', 'other possibilities' or 'plausible' circumstances from the applicant's conduct existed that could exonerate her. He submitted that the court did find that the applicant had provided a plausible explanation as it relates to the similar addresses on the powers of attorney. He submitted, however, that the court assessed the evidence and looked at the cumulative effect of the risk factors and found that the applicant failed to be on guard and that her conduct, in acting on the power of attorney without making any checks as to its authenticity, led to the inescapable conclusion that she was in breach of Canon 1(b).

Analysis

[72] The final question posed is whether the court had utilised the correct standard of proof in this case. Laing JA (Ag), at para. [55] of his judgment, indicated the standard of proof that was to be utilised in cases from the GLC as:

> "Accepting the conclusion arrived at by the Board after it analysed a number of cases after **Bhandari v Advocates Committee**, it is clear to me that the criminal standard of proof beyond a reasonable doubt is the appropriate standard of proof to be applied in disciplinary proceedings against an attorney." (Emphasis as in the original)

[73] The evidence was then considered by the court utilising the stated standard of proof. There is no merit in this ground and, therefore, leave ought not to be granted.

Conclusion

[74] Having considered all the questions proffered by the applicant in this leave application, leave will be granted in relation to question (b).

F WILLIAMS JA

ORDER

1. Leave to appeal to His Majesty in Council from the decision of this court made on 26 May 2023 is granted, pursuant to section 110(2)(a) of the Constitution, in respect of the following question:

   Question (b)- whether there is any duty on an Attorney-at-Law in Jamaica to look behind a foreign power of attorney which is:

   i. regular on its face being signed by the donor and witnessed by a duly commissioned notary public;
   ii. satisfies the requirements of the 16th Schedule of the Registration of Titles Act [J];
   iii. satisfies the due execution requirements of the Probate of Deeds Act [J];
   iv. contains no requirement on its face to look behind it.

2. Leave to appeal is granted on the following conditions:

a. The applicant shall within 30 days of the date of this Order enter into good and sufficient security in the sum of $1,000.00 for the due prosecution of the appeal and payment of all such costs as may become payable by the applicant in the event of her application for final leave to appeal not being granted, or of the appeal being dismissed for want of prosecution, or of the Judicial Committee ordering the applicant to pay costs of the appeal; and

b. The applicant shall within 90 days of the date of this Order take the necessary steps to procure the preparation of the record and the dispatch thereof to England.

3. Leave to appeal is refused in respect of all other questions.

4. The costs of and incidental to this motion shall await the determination of the appeal to His Majesty in Council.