[2014] JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 3/2013

BEFORE: **THE HON MR JUSTICE PANTON P**
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**OWEN K CLUNIE**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

André Earle, Ms Kristin Lewis and Mrs Nickeisha Young Shand instructed by Earle and Wilson for the appellant

Mrs Sandra Minott-Phillips QC and Miss René Gayle instructed by Myers Fletcher and Gordon for the respondent

5, 6, June; 31 July and 22 September 2014

PANTON P

[1] On 31 July 2014, we ordered as follows:

> "1. Appeal allowed in part.
>
> 2. The decision of the respondent made on 28 September 2013 is quashed in respect of the orders in paragraph 9 thereof.
>
> 3. The matter is remitted to the panel to hear submissions in mitigation and to determine the sanction thereafter.
>
> 4. The appellant is to have half his costs to be agreed or taxed."

The court promised that written reasons would be provided shortly.

[2] The appellant is an attorney-at-law who, in the opinion of the Disciplinary Committee of the General Legal Council, breached canons 1(b) and V11 (b) of the Legal Profession (Canons of Professional Ethics) Rules. As a result, the committee struck him off the roll of attorneys-at-law and ordered him to pay by way of restitution the sum of $700,000.00 with interest @ 6% per annum from 31 July 2012, and costs of $20,000.00 to the complainant.

[3] My learned sister, Phillips JA, has set out in her judgment all the facts of the case, the grounds of appeal and the submissions that were made by Mr André Earle for the appellant and Mrs Sandra Minott-Phillips, QC, for the respondent. In the circumstances, I do not see the need to repeat them, except so far as necessary for an understanding of my reasons for agreeing that the appeal should be allowed in the terms stated in paragraph [1].

[4] A complaint was filed on 31 October 2012, by one Fabian Allen alleging that he had paid the sum of $600,000.00 to the appellant in respect of a real estate transaction, and that the appellant had failed to pay over the sum to the vendor or to refund same to the complainant. The appellant promised on two occasions to repay the money but had failed to do so. The appellant was summoned to attend before the disciplinary committee on 21 September 2013 to answer to the allegations. It seems clear that the appellant did not receive the complaint that was filed against him

although it had been sent by registered post. Consequently, he was not aware of the hearing date. The evidence indicates that the complaint and notification of hearing were returned unclaimed to the post office from which they had been dispatched.

[5] On 21 September 2013, the disciplinary committee, being satisfied that the documents had been dispatched to the appellant in the manner required by the rules, proceeded to hear the complaint in his absence. The record of the proceedings indicates that at the end of the hearing the matter was "part heard and adjourned to 28th September 2013 at 11:00 a.m." The appellant was subsequently e-mailed the adjourned hearing date along with the notes of evidence and exhibits. He and his attorney-at-law, Mr Lynden Wellesley, duly attended on 28 September 2013. On that occasion, Mr Wellesley informed the disciplinary committee that there was "no dispute as to the facts", and sought an adjournment for four weeks "to make good". The record of the proceedings indicates that Mr Wellesley and the panel were of the same understanding as regards the sum of money that was involved.

[6] The committee refused the application for an adjournment and proceeded to impose the sanction mentioned in paragraph [2], without having heard from the appellant.

[7] In my view, given the posture adopted by Mr Wellesley in the presence of the appellant on 28 September 2013, the question of the service of the complaint and notification of the first hearing date becomes irrelevant. Their attendance on 28

September 2013 and the request for time to pay are clear indications of a waiver of service, and an admission of having failed to account to the complainant for money held on his behalf by the appellant. To say that "there is no dispute as to the facts" is as complete an admission as there can possibly be. In the circumstances, it is my view that the grounds of appeal in respect of service, and proof of the complaint are without merit.

[8] As regards the imposition of the sanction, it seems clear that the committee erred in not hearing from the appellant in mitigation. The sanction for the breaches committed is not mandatory. Consequently, the appellant ought to have been afforded the opportunity to address the committee as regards penalty. The reasoning in ***Dominique Moss v The Queen*** [2013] UKPC 32 is apt. In delivering the judgment of the Board, Lord Hughes said:

> "It is elementary that, at least where the sentence is not fixed by law, a criminal court has a duty to give a defendant the opportunity to be heard, through counsel or otherwise, before sentence upon him is passed."

I do not think that it would be appropriate for this court to perform the committee's duty in this regard; hence, the matter has to be remitted to the committee for the appellant to be heard on the sanction to be imposed, and for the committee to act thereafter. I agreed therefore that to this extent, the appeal ought to be allowed.

DUKHARAN JA

[9] I have read in draft the reasons for judgment of the learned President and my learned sister Phillips JA. I agree with their reasoning and have nothing further to add.

PHILLIPS JA

[10] This is an appeal from the decision of the disciplinary committee of the General Legal Council ('the Committee') given on 2 October 2013, whereby it ordered that:

> "1. Pursuant to s 12(4) (a) of the Legal Profession Act, the name of Owen Kirkwood Clunie is struck off the Roll of Attorneys-at-Law entitled to practice in the Island of Jamaica.
>
> 2. Pursuant to s 12(4) (f) of the Legal Profession Act by way of restitution, Owen Kirkwood Clunie is to pay to the Complainant the sum of $700,000.00 with interest thereon at the rate of 6% per annum from the 31st July 2012.
>
> 3. Costs in the sum of $20,000.00 are to be paid to the Complainant by Owen Kirkwood Clunie."

[11] The matter was heard 5, 6 June 2013, and our decision was given on 31 July 2014, wherein we ordered as follows:

> "1. Appeal allowed in part.
>
> 2. The decision of the respondent made on 28 September 2013 is quashed in respect of the orders in paragraph 9 thereof.
>
> 3. The matter is remitted to the panel to hear submissions in mitigation and to determine the sanction thereafter.
>
> 4. The appellant is to have half his costs to be agreed or taxed.

The court promised that written reasons would follow shortly.

These are my reasons for our decision.

[12] The amended notice of appeal filed on 29 October 2013 contained 11 grounds of appeal, three of which, namely grounds nine, 10 and 11, were abandoned at the hearing of the appeal. The appellant is therefore relying on grounds 1-8 as set out below:

> "1. The respondent failed to serve notice of the hearing on the Appellant pursuant to Rule 5 Schedule 4, of the Legal Profession Act;
>
> 2. The Respondent failed to serve on the Appellant, pursuant to rule 5, Schedule 4 of the Legal Profession Act, a copy of the Application of the Complainant within twenty-one days;
>
> 3. The Respondent failed to allow the Appellant pursuant to Rule 6 Schedule 4 of the Legal Profession Act, the opportunity to furnish to the secretary a list of all documents on which he proposed to rely at least fourteen days before the hearing;
>
> 4. The Respondent breached the rules of natural justice by not allowing the Appellant to be heard;
>
> 5. The Respondent breached the rules of natural justice by not providing the Appellant the opportunity to cross-examine his accuser;
>
> 6. The respondent failed to give the Appellant an opportunity or any sufficient or proper opportunity to be heard in relation to the appropriate sanction pursuant to Section 12(4) of the Legal Profession Act to be imposed in the event that the complaint was established;
>
> 7. The Respondent's striking the Appellant's name from the Roll of Attorneys-at-Law was manifestly excessive and harsh;

8. The respondent displayed actual or apparent bias, or otherwise breached the rules of natural justice in having arrived at its decision prior to the hearing held on the 28th September 2013 as evidenced by its pre-pared typewritten Decision dated 28th September, 2013."

[13] In my view the following issues can be distilled from these grounds of appeal:

(i) Were the proceedings properly served in compliance with the disciplinary rules? And if not, what is the effect of non compliance? (grounds 1, 2 and 3)

(ii) Was there, on the evidence, any waiver of any alleged irregularities?

(iii) Was there any breach of the principles of natural justice with regard to the finding of professional misconduct and or the sentence to be imposed? Was the sentence imposed manifestly excessive and harsh? (grounds 4, 5, 6 and 7)

(iv) Was there any evidence of bias? (ground 8)

(v) What ought this court to do in the light of its conclusions in respect of any or all of the above?

The proceedings before the Committee

[14] The first hearing took place on 21 September 2013. Neither the appellant nor his attorney was present. As a consequence, the affidavit of service of Angella Moses sworn to on 17 September 2013 was taken as read into the record. She deposed to the fact that on Friday, 2 August 2013, she had posted a notice dated 31 July 2013 in the matter of Fabian Allen v Owen Kirkwood Clunie, complaint no 187/2012, under the provisions of the Legal Profession Act, to the appellant, an attorney-at-law at 11 Oxford

Road, Kingston 5. The notice was exhibited to the affidavit. It referred to the said complaint, the names of the parties; that the matter was under the Legal Profession Act, and the address of the appellant was again clearly stated as 11 Oxford Road, Kingston 5.

[15] As this document was very important to both sides I will set out the four paragraphs, in the notice of hearing which comprise the contents of the same for ease of reference:

> "Application has been made by Fabian Allen of [sic] to the Committee constituted under the Legal Profession Act, 1971 that you may be required to answer the allegations contained in the Affidavit of the Complainant a copy whereof has already been sent to you.
>
> The 21st day of September, 2013 is the day fixed for the hearing of the application by the Committee. The Committee will sit at the Supreme Court Building, King Street, Kingston at 10.00 a.m in the forenoon. If you fail to appear the Committee may in accordance with the rules made under the Legal Profession Act 1971 proceed in your absence.
>
> You are required by the rules under the Legal Profession Act to furnish to the applicant and to the Secretary of the Committee at the General Legal Council [sic] office at 78 Harbour Street, Kingston at least 14 days before the day fixed for hearing a LIST OF ALL DOCUMENTS ON WHICH YOU PROPOSE TO RELY.
>
> Either party may inspect the documents included in the list furnished by the other and a copy of any document mentioned in the list of either party must, on the application of the party requiring it, be furnished to that party by the other within three days after receipt of the application.

YOU ARE REQUESTED TO ACKNOWLEDGE RECEIPT OF THIS NOTICE WITHOUT DELAY."

The notice was dated 31 July 2013, and signed by Ms Althea Richards, the secretary of the Committee. The "certificate of posting of a registered article" with regard to the said notice was also attached to the affidavit of service of Angella Moses.

[16] Mr Fabian Allen gave sworn testimony at the hearing on 21 September 2013. He deposed that he was a businessman who resided with his three children and their mother in rented premises. He had received notice to quit the premises and had noticed a property in the newspaper that he thought he could afford to purchase, as other places for rent were too expensive and, paying mortgage would, he thought, be preferable. The premises was located at 183b Windward Road at a price of $3,500,000.00. He spoke to the owner who indicated that he should obtain a lawyer. The appellant, he said, had been recommended to him by a friend.

[17] Mr Allen said that he attended on the offices of the appellant, and told him about the intended purchase, and he was given instructions by the appellant in respect of what he was to do. He was later called by the appellant, went to his office with his children's mother and his daughter, with a cheque from the bank made out to the appellant in the sum of $600,000.00 which had been drawn from his account. He tendered in evidence the receipt that he had been given by the appellant evidencing the payment (marked as exhibit 1). It was his evidence that he never received a copy of any agreement for sale. It is unclear from the evidence whether it was ever signed by

anyone. He was told though, that the "deal had come through" but he was "kept waiting and waiting", while the appellant was away in Miami "doing a case". He said that the waiting became unbearable and impossible, so much so that he could not sleep. He began having pains and had to seek medical attention. He obtained advice from another lawyer to go to the Bar Association, and he called the appellant and told him that he was going to make a complaint against him, as he could not get any response in respect of the funds that he had given him, and he had been incurring expenses in the sum of $100,000.00. The appellant agreed to give him a "payment agreement" dated 4 July 2012, which he also tendered in evidence as exhibit 2. Mr Allen said that despite calling the appellant repeatedly he had not been paid and he therefore threatened the appellant again. He was given a "second payment paper" dated 19 September 2012, which he also tendered in evidence (as exhibit 3).

[18] Mr Allen further testified that during all this, his mother had died and he had asked the appellant to return his monies so that he could "bury her". He said that the appellant apologized, and stated that he was awaiting some money from the Government which he had not yet received. Mr Allen was clear that he had not given the appellant any permission to use his funds, in fact, the monies were to have been paid over to the vendor or the vendor's attorney-at-law. He said that as a result of that not having been done, he had lost the purchase of the property on Windward Road, he had had to move out of the rented premises where he had been living, to live with his mother and, he was thereby separated from his children as he had to pay for rented

accommodation for them to reside with their mother. He had not at the time of giving evidence, received the return of his monies from the appellant.

[19] The exhibits were as indicated. Exhibit 1 was a receipt signed by the appellant. It was dated 17 February 2012, and stated that the $600,000.00 was received "as deposit and part payment Legal fees re purchase of 183b Windward Road". Exhibit 2 was intituled "Payment Agreement" and was signed by the appellant and read thus:

> "I OWEN CLUNIE hereby agree to pay FABIAN ALLEN the principal amount of six hundred thousand dollars ($600,000.00) together with an addition [sic] amount of one hundred thousand dollars ($100,000.00) to cover incurred expenses and interest.
>
> Every effort will be made to make this payment on or before July 31, 2012.
>
> [Signed O Clunie]
>
> July 04, 2012"

A stamp was affixed stating Owen K Clunie, Attorney-at-law.

Exhibit 3 was in similar vein as exhibit 2, save and except the last paragraph read:

> "Every effort will be made to make this payment on or before the 30th day of September 2012."

It was signed by the appellant and had the said stamp impressed thereon.

[20] The hearing of the matter, namely 21 September 2013 was adjourned part heard at the end of the evidence given by Mr Allen, at 11:00 am, to 28 September 2013. The report of the Committee, which was signed by all members of the panel, duly noted that there had been no answer from the appellant; that the affidavit of service had been referred to in the hearing, confirming service of the notice of hearing by post on 2

August 2013, that the matter had been adjourned to 28 September 2013 "for judgment", and that the appellant was to be provided with the notes of evidence.

[21] As the appellant was absent from the hearing and pursuant to the directive of the Committee, on 24 September 2013 at 4:55 pm the respondent sent to the appellant by way of electronic mail the following documents:

1. notice of hearing;
2. letter dated 24 September 2013;
3. notes of evidence; and
4. exhibits 1-3.

The notice of hearing indicated that the matter was set for continuation on 28 September 2013 at the Supreme Court at 11:00 am and, that if the appellant failed to appear the Committee may proceed in his absence. The letter of 24 September 2013, informed the appellant that the complaint had come up for hearing on 21 September 2013, and he had been absent; that Mr Fabian Allen had attended; that the matter was part heard and, had been adjourned to 28 September 2013. It enclosed the notes of evidence and the exhibits tendered at the hearing.

[22] On the 28 September 2013, at the second sitting of the Committee in this matter, the appellant and his attorney were present. The transcript of the proceedings is as follows:

> "**DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL**
>
> **NOTES OF PROCEEDINGS**

FABIAN ALLEN VS OWEN KIRKWOOD CLUNIE

RE: COMPLAINT NO: 187/2012

Report of hearing held in the no. 3 court room, Supreme Court building, King Street, Kingston on Saturday 28th September, 2013.

Before:	Mr Allan Wood, Q.C. Chairman Mrs. Ursula Khan Miss Lilieth Deacon		
Present:	Mr Fabian Allen	-	Complainant
	Mr Owen Clunie	-	Respondent
	Mr. Lynden Wellesley	-	Respondent's Attorney

Commencement: 11:10 a.m.

In attendance: Mrs. Janet Francis Wright
Miss Fay Williams

Wellesley: I have just been brought into the matter. My instructions are incomplete but there is no dispute as to the facts. My client is asking for four weeks to make good. May I just enquire what is the sum?

Panel: $700,000

Wellesley: I was told $600,000 plus $100,000. I am asking for four weeks to pay

Panel: Please give us a moment to consider what has been said

BREAK

ON RESUMPTION

Panel: We considered very carefully what has been said and we find no basis to consider the adjournment.

Wellesley: I don't have any documents…

Panel: We are going to deliver the judgment.

Panel delivers decision

Attorney struck off and ordered to pay restitution of $700,000"

[23] The report of the Committee in respect of the hearing of 28 September 2013, noted the attendance of the parties and that Mr Allen had nothing more to say. It noted that the attorney's instructions were incomplete; that there was no dispute as to the facts; that a certain sum was owing namely $600,000.00, plus an additional sum of $100,000.00; that four weeks were being sought; and that the application for an adjournment had been declined. The judgment as set out in paragraph [3] herein was duly noted in the report and signed by the members of the panel who heard the complaint.

The decision

[24] The reasons for the decision was dated 28 September 2013 and was duly handed down to the appellant and his attorney on the same day. The Committee referred to the complaint filed by Mr Allen which claimed that the appellant had not accounted to him for all the monies in his hands held to his, the complainant account or credit and that he had failed by his conduct to act in a manner which maintained the honour and dignity of the profession. The Committee outlined the evidence which had been given, noted (by a handwritten addition) that on 28 September the appellant had attended and through his counsel had indicated that the facts were not in dispute and had

requested an adjournment to pay the money, which had been declined. The Committee made the following findings of facts:

> "(i) The Respondent was retained to act for the Complainant in the purchase of premises 183b Windward Road, Kingston.
>
> (ii) The Complainant paid the Respondent the sum of $600,000.00 to be paid to the vendor's attorney to cover the deposit and part of the legal fees for the purchase of the premises.
>
> (iii) The Respondent failed to pay the aforesaid sum over to the vendor's attorney with the consequence that the Complainant lost the premises, which was sold to some one else.
>
> (iv) The Respondent misappropriated the Complainant's money which ought to have been paid over to the vendor's attorney.
>
> (v) Having misappropriated the Complainant's money, the Respondent defaulted on his repeated promises to refund same with an additional sum of $100,000.00 to reimburse the Complainant's expenses.
>
> (vi) In breach of Canon VII (b) of the Legal Profession (Canons of Professional Ethics) Rules the Respondent has failed to account to his client for monies in hand for the account or credit of his client and has misappropriated same.
>
> (vii) The Respondent has acted dishonestly and has therefore failed to maintain the honour and dignity of the profession and his behavior has discredited the profession of which he is a member in breach of Canon 1 (b) of the aforesaid Rules."

[25] The committee referred to the oft cited dictum of Sir Thomas Bingham MR in **Bolton v Law Society** [1994] 1 WLR 512, which it said has been followed in this court, in respect of the guidelines to be adopted when dealing with attorneys who have violated their client's trust and confidence and acted dishonestly by misappropriating client's money. In delivering the order as set out in paragraph [3] hereof, the committee said that:

> "It is disheartening that any attorney would so abuse the trust and confidence reposed in him by a client. It follows that this Panel must act in the interest of the public to ensure that this conduct can never be repeated, that the public is protected from the Respondent and that the collective reputation of the Profession is maintained."

[26] On 7 October 2013 notice to the public appeared in the Daily Observer advising that the appellant had been found guilty of professional misconduct and had been struck from the roll of attorneys entitled to practice in the several courts of the Island of Jamaica. It was stated that the Committee was of the view that the misconduct was grave and so in addition to an order of restitution, in the protection of the public, the striking off order was necessary.

The appeal

[27] The appellant filed two affidavits in this court, which would have been in support of an application for fresh evidence to be tendered on appeal. However, Queen's Counsel for the respondent, while indicating that she was of the view that the application did not pass the threshold laid down in **Ladd v Marshall** [1954] 3 All ER

745, the respondent would not be opposing the evidence being viewed by the court and utilized by the appellant on appeal.

[28] In the first affidavit sworn to on 3 October 2013, the appellant deposed that on 24 September 2013 he had received the e-mail referred to in paragraph [13] herein with the attachments. He stated emphatically that prior to receiving that e-mail, he had never received any document, nor had he been given any notice, nor had he any knowledge of the complaint No 187/2012. He indicated that on receipt of the documents he had instructed his attorney, and they had both appeared before the Committee on 28 September 2013, when his attorney had advised the panel, he said, that, "apart from the documents received on the 24 September 2013, I had had no prior knowledge of the proceedings and he accordingly requested time for us to properly respond to the said complaint and requested an adjournment thereof." He said that the Committee took a brief period to consider the adjournment and then proceeded to deliver a prepared typewritten decision dated 28 September 2013.

[29] The appellant further deposed that he had been practising at the address "11 Oxford Road, Kingston 5" since 2011, and there are two separate buildings on the property with the same address, but the buildings are accessed differently, one from Norwood Avenue and the other (his) from Oxford Road. He stated that he had attended the offices of the respondent and requested copies of the documents pertaining to the complaint. He noticed the affidavit of service of Angella Moses with attachments. He thereafter, he said, attended the General Post Office and spoke to a Mrs Lorna Barrett, the deputy postmaster. He discovered that the letter bearing registration no 123305

which had been registered to him on 2 August 2013 from the respondent had been returned unclaimed to the General Post Office on King Street in the parish of Kingston and collected by the bearer of the respondent on 1 October 2013. A letter, he said, had been duly dispatched to the General Post Office from his attorneys requesting information with regard to the "movement of the letter" that had been sent to the appellant from the respondent, which was exhibited to the affidavit. The letter responding to this request which was exhibited to the second affidavit of the appellant sworn to on 16 January 2014 showed the movement of the letter from the respondent, and indicating particularly that the General Post Office had received the said item from the main register section on 19 September 2013, which item was later delivered to the respondent's bearer on 1 October 2013.

[30] The appellant deposed further in his affidavit filed on 3 October 2013 he paid the sum of $762,000.00 by way of manager's cheque [no. 1073501 drawn on National Commercial Bank Jamaica Ltd], in the name of Fabian Allen to the respondent and, he exhibited the letter to the respondent enclosing the said cheque and a copy of the said manager's cheque. The sum, the letter said, represented full refund of $600,000.00 deposit plus $100,000.00 for expenses and $62,000.00 for interest and costs.

[31] The appellant testified that based on the sequence of events it was clear to him that the Committee had prepared its typewritten decision prior to 28 September 2013. He further testified that he had a real prospect of succeeding on appeal.

[32] It may be useful to point out that the Committee is appointed by the General Legal Council which is a body established under section 3 of the Legal Profession Act (the Act) concerned with the organisation of legal education and with upholding standards of professional conduct. Pursuant to section 12 of the Act, the Committee is mandated to hear applications from persons requiring attorneys to answer allegations in respect of professional misconduct and or criminal offences. Section 12(4) of the Act states that on the hearing of such applications the committee can make one or more of the following orders as it thinks fit, namely: striking the attorney off the roll; ordering the suspension of the attorney from practice; ordering a fine; giving a reprimand; and ordering restitution and the payment of costs.

[33] The Council is empowered by section 12(7) (a) and (b) of the Act to prescribe standards of professional etiquette and professional conduct, and rules directing that any breach of the standards set may be specified as constituting professional misconduct.

[34] For ease of reference in the appeal, and for the resolution of the issues identified, I shall set out hereunder the relevant rules relating to the Legal Profession Canons of Professional Ethics) Rules, namely I(b) which reads:

> "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."

And VII (b) (ii) which reads:

> "An Attorney shall

—(ii) account to his clients for all monies in the hands of the Attorney for the account or credit of the client, whenever reasonably required to do so

and he shall for these purposes keep the said accounts in conformity with the regulations which may from time to time be prescribed by the General Legal Council."

Also, the relevant rules in the fourth schedule to the Act relating to the procedures used by the disciplinary committee, namely rules 5, 6, 8 and 21 which reads:

"FOURTH SCHEDULE

The Legal Profession (Disciplinary Proceedings) Rules

5. In any case in which, in the opinion of the Committee, a prima facie case is shown the Committee shall fix a day for hearing, and the secretary shall serve notice thereof on the applicant and on the attorney, and shall also serve on the attorney a copy of the application and affidavit. The notice shall not be less than a twenty-one days' notice.

6. The notice shall be in Form 3 or Form 4 of the Schedule to these Rules, as the case may be, and shall require the applicant and attorney respectively to furnish to the secretary and to each other a list of all documents on which they respectively propose to rely. Such lists shall, unless otherwise ordered by the Committee, be furnished by the applicant and by the attorney respectively at least fourteen days before the day of hearing.

8. If either or both of the parties fail to appear at the hearing the Committee may, upon proof of service of the notice of hearing, proceed to hear and determine the application in his or their absence.

21. Service of any notice or documents required by these Rules may be effected by registered letter addressed to the last known place of abode or business of the person to be served, and proof that such letter was so addressed and posted shall be proof of service. Any notice or document

> required to be given or signed by the secretary may be given or signed by him or by any person duly authorized by the Committee in that behalf."

Submissions

Issues (i) and (ii) (grounds 1, 2 and 3)

Were the proceedings properly served in compliance with the disciplinary rules? And if not, what is the effect of the non compliance? Was there, on the evidence, any waiver of any alleged irregularities?

For the appellant

[35] Counsel for the appellant maintained that as the appellant had not been served with the notice of the hearing in respect of 21 September 2013, the respondent's decision ought to be deemed a nullity and quashed. Counsel referred to the appellant's affidavit indicating that the appellant had first learnt of the matter on 24 September by electronic mail, and questioned why that means of communication had not also been used with regard to the first sitting of the Committee as the documents sent by post had all been returned to the General Post Office before the said hearing of the Committee. The appellant complained that having not been served with the notice of hearing he had also been denied the opportunity of furnishing the committee with a list of documents on which he intended to rely to defend himself against the action being brought against him.

[36] Counsel submitted on what he considered to be the true and proper construction of rules 5, 6, 8 and 21 of the disciplinary rules. He stated that rule 21 could only mean that the appellant *must* be served with the notice or other documents required to be served. The respondent *must* prove, he said, that the documents were received at the

address given by the appellant and, if he can show that he was not served, as there is no deeming provision, that fact would override any other statement made in rule 21. Counsel referred to **George Anthony Hylton v Georgia Pinnock (as Executrix of the Estate of Dorothy McIntosh, deceased)** [2011] JMCA Civ 8 for this proposition. He also relied on **Linton Watson v Gilon Sewell** et al [2013] JMCA Civ 10 to submit that non-service of the required documents was fatal to the proceedings. With regard to rule 5, counsel submitted that it was a mandatory requirement that the application and affidavit be served on the appellant as those were the documents which informed the appellant of the allegations being made against him and the particular breaches of the Canons of Professional Ethics relevant to the matter. Counsel submitted that the appellant had a right to know what those breaches were in order to assess whether they were deemed breaches of professional conduct and the consequences that could follow as a result thereof, pursuant to section 12(4) of the Legal Profession Act. Counsel further submitted that rules 5, 6 and 8 should be read together to mean that the notice of hearing *must* be served *with* the application and the affidavit, and the hearing cannot proceed in the absence of the appellant without proof of service of all three documents, which he submitted was not done in this case. He particularly stressed the lack of evidence of *proof of service* by the respondent in this case, of the application and affidavit in support thereof. Counsel submitted that the notice of hearing that the respondent claimed was served on the appellant was exhibited in the appeal, but the application and the affidavit were not. Rule 6, counsel submitted, referred to the notice of hearing being in form 3 or form 4 of the schedule to the rules,

the latter referring to notice to the attorney at law. That form of notice, counsel argued, states clearly that a copy of the affidavit "accompanies" the notice. Having not received the notice with accompanying documents, the appellant, counsel submitted, had no knowledge of the hearing date, the allegations against him, and he lost the opportunity of submitting the documents on which he could rely in defence of the complaint against him. On this issue (these grounds) alone, counsel argued, the appeal should be allowed.

For the respondent

[37] Queen's Counsel for the respondent submitted that the appellant could not succeed in respect of the issue of service. Counsel relied on the proper interpretation to be given to rules 5 and 21, namely, in respect of rule 5, that once the Committee has fixed a date for hearing, the secretary shall serve with not less than 21 days notice, the notice of hearing on the complainant and the attorney. Rule 21, counsel insisted, requires that service may be effected by registered letter addressed to the last known place of abode or business of the person to be served. She relied on the words of the rule that: "proof that such letter was so addressed and posted shall be proof of service" to submit that, "proof of posting *is* proof of service". She argued that no further requirement of proof of receipt or actual communication was necessary, as counsel for the appellant had contended. Counsel relied on the case of **Regina v Secretary of State for the Home Department** [1987] 1 WLR 1586 to submit that "posted" in rule 21 means, "dispatched". Counsel submitted that the certificate of posting exhibited to the affidavit of Angella Moses was a complete answer to the issue of service, as the

notice of hearing was posted by registered mail to the offices of the appellant, which stands as proof of service, and he was therefore accordingly served. As a consequence, counsel argued, any additional material from the appellant alleging to the contrary was immaterial to the appeal. In oral arguments, Queen's Counsel also submitted that in any event, the appellant was in receipt of certain documents on 24 September 2013, he attended the hearing on 28 September, with his counsel, and through his counsel indicated to the Committee that "there is no dispute as to the facts" which must, she submitted, include the fact that he had been properly served all the documents required under the rules.

Discussion and analysis

[38] It is trite law that in construing a document, statutory instrument or in this case a rule, one must give the words being examined their natural and ordinary meaning. As a consequence one cannot ascribe meanings given by the court to a particular provision in another statute or rule to that statute or rule under review when the provisions are worded differently. One must therefore exercise caution when endeavouring to draw an analogy in construing unrelated provisions. In **George Anthony Hylton v Pinnock et al**, the issue concerned the service of notices in respect of caveats under the Registration of Titles Act (ROTA). Section 140 does not state how the method of service of the said notices is to be effected, although it is clear that notice must be given to the caveator. Section 139 is instructive as to how this notice is to be given. It states that no caveat shall be received unless an address for service is appointed in Kingston as the place at which notice and proceedings relating to such caveat may be served; and that

if an additional office outside of Kingston is utilised then a registered letter is to be sent through the post to such address on the same day as the notice is served on the address in Kingston. Every notice and proceedings in relation to the caveat served at the address appointed, shall be deemed to be duly served.

[39] I stated in that judgment approving the dictum of Smith JA in **Mitchell v Mair & Ors** SCCA NO 125/2007 delivered 16 May 2008 that section 52 of the Interpretation Act was inapplicable as there was no need to invoke the deeming provisions of that Act if the relevant provisions of the ROTA state the manner in which service is to be effected, which is also so in the instant case. I also stated that the deeming provisions of the Civil Procedure Rules (CPR) do not assist as there was nothing in the ROTA to allow for those provisions to be invoked when dealing with questions of service, which is also the situation with regard to the disciplinary rules. We therefore held in **George Anthony Hylton v Pinnock et al**, based on the authorities and on a proper construction of the clear words of ROTA, that the notice was duly served once delivered to and received at the address given in the caveat. I indicated that it was not necessary to prove that the notice had come to the caveator's attention. That interpretation, however, per se, cannot assist in the instant case given the specific words in the disciplinary rules.

[40] In **Regina v Secretary of State for the Home Department**, relied on by the respondent, the relevant provisions were also different. Pursuant to regulations 3(1), (3) and 6 of the Immigration Appeals (Notices) Regulations 1972, as soon as a decision which was appealable had been made, written notice of it was to be given in

accordance with the regulations. However, it was not necessary for such notice to be given if the official authority had no knowledge of the whereabouts or place of abode of the person to whom the notice was to be given. But any notice required to be given may be sent by registered letter or by recorded delivery service to the last known or usual place of abode. Regulation 2(3) made the provisions of the UK Interpretation Act, similar to section 52 of ours, applicable. Although section 7 of the UK Interpretation Act recognized that the "contrary could be shown" that is, that the appellant had never been served, ultimately, the court held that although the appellants in that case had no notice of the deportation orders, and as regulation 4 required that the notice must state when the appeal is to be brought, which must be 14 days from when the notice was "sent", it would have been impossible for the authority to know whether the time for appealing had passed, if it was referable to receipt of the notice, as against when it had been sent. Additionally, if receipt of the notice was what was required, the rule, the court held, would have said so.

[41] As a consequence, on the basis of the strict interpretation of the notice regulations "sent" was construed to mean "dispatched." I do not think that, without more, that interpretation can be adopted entirely with regard to the disciplinary rules. The court particularly took issue with the principles enunciated in **Reg v London County Quarter Sessions Appeals Committee, Ex parte Rossi** [1956] 1 All ER 670, where a powerful court (Denning, Morris and Parker LJJ) laid down other principles applicable to service which resonate well with me and are deserving of specific mention.

[42] The **Rossi** case related to the service of registered letters to the respondent from the clerk of the peace for the County of London. A registered letter was sent to the respondent in respect of the hearing of an appeal which had been adjourned sine die, and for which the respondent did not appear as the notices were returned unclaimed, and although that fact was known to the panel, the hearing proceeded in his absence, and orders were made adjudging him the putative father who should make certain maintenance payments. The respondent applied by way of certiorari for the orders to be quashed on the basis that although the registered letters had been sent to his address no notice of the hearing had been given to him as the letters of notice had been returned undelivered. In this case, regulation 3 required that notice be given by the clerk in due course which must state the date, time and place of the hearing of the appeal. The notice to any person "may be sent by post in a registered letter addressed to him at his last or usual place of abode".

[43] In construing this regulation, and in response to the argument that it was sufficient to comply with the regulation once the registered letter was <u>sent</u> to the respondent, even though it was not received by him and known not to be received, Lord Denning having stated that he did not think that position was correct further opined:

> " …. it is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them. The common law has always been very careful to see that the defendant is fully apprised of the proceedings before it makes any order against him…."

Lord Denning therefore found that once it had appeared that the registered letter had been returned undelivered, Quarter Sessions ought not to have proceeded with the case because there was no proper service. The order obtained would therefore have been obtained irregularly and should be set aside, and certiorari should bring up the proceedings to be quashed. Lord Denning did say however that had the order been regularly obtained (for instance if the respondent had been properly served but been absent because he had been ill, or the notices had not been returned, and so were presumed to have been delivered in the ordinary course of post) certiorari would not be applicable. The respondent he said, could apply for the matter to be set aside on such terms as the court thought fit, as the order having been given in his absence, he could apply for the appeal to be reheard.

[44] Morris LJ in construing regulation 3 also stated:

> "There is an obligation to "give" notice. The purpose of giving notice to a party of the hearing of a case is so that the party may have the opportunity to appear in order to assert or to defend his rights. It seems to me, therefore, that it is of the very essence of such notice that it should be communicated to or should reach the party interested. It is fundamental in our system of administration of justice that a party should have the right and opportunity to be heard or to be represented. This is well recognised…"

[45] In the instant case, rule 21 of the disciplinary rules also requires that service of any notice is to be done by registered letter to the last known place of abode or business of the person to be served and states quite clearly that proof of posting is

proof of service. In this case, it appears that this was done in respect of the notice itself. But as in the **Rossi** case, the purpose of sending the notice is so that the respondent can attend and be heard in defence of his rights. The matter concerns allegations of professional misconduct and the orders open to the committee are severe and far reaching, affecting persons' livelihood. The matters are so serious that the burden of proof in the hearings is beyond reasonable doubt. In those circumstances, one must assume that the purpose of the service is that the respondent should get notice of the hearing. There was evidence through the certificate of posting that the registered letter was posted to the last known place of abode of the respondent, which ordinarily as indicated, would be service pursuant to rule 21, but there was also evidence that the documents were returned unclaimed (although not known before the hearing). Additionally, rule 5 requires that the respondent be given 21 days notice of the hearing once a prima facie case has been made out against him, which suggests that he should be made aware of the hearing to take place dealing with the allegations against him and be able to attend to defend himself accordingly.

[46] There is no evidence whatsoever that the application and the affidavit in this matter had been served on the appellant pursuant to the manner set out in rule 21, or at all. He was entitled to be served with both documents (rule 5). Rule 6 refers to the notice being in form 4 which is the notice to the attorney at law, which states that the affidavit is attached to the said notice. The application and the affidavit, which are referred to in rule 3 are to be prepared as set out in forms 1 and 2 to the schedule, and contain the allegations being claimed against the attorney, and the specific canons of

ethical conduct that have been breached, in this case, canons I (b) and 7 b (ii). A statement in the notice, as is the case here, which refers to a copy of the affidavit already having been served, is not in my view, acceptable, particularly when there is a challenge to that fact, in proceedings in which there has been a finding of striking the attorney from the roll of attorneys entitled to practice. In my view this would not be proper service in respect of the proceedings and whatever transpired could be set aside.

[47] However, that is not the end of the matter in this particular case as there was a second sitting of the Committee. There was still no evidence that, for that hearing the application or the affidavit had been served on the appellant. The appellant was sent by way of e-mail the documents referred to in paragraph [13] herein, four days before the hearing. That method of service was not in keeping with the provisions of rule 21, so receipt of the documents would therefore have to have been proved (see **Chiswell v Griffon Land and Estates Ltd** [1975] 1 WLR 1181). This was done, as the appellant acknowledged receipt of them. At the second hearing, the appellant's representative indicated that his instructions were incomplete and that he didn't have any documents. In my view, the statement recorded in the notes of proceedings, that "there is no dispute as to the facts" is not an admission of service, and on its own would not cure the failure to serve the documents as required under rule 5 and in the manner as set out in rule 21. As the application and the affidavit were not sent to the appellant on 24 September, the "facts" to which there was no dispute need not relate to those documents.

[48] However, the "facts" in respect of which there would have been no dispute would certainly relate to the allegations made by the complainant which were reproduced in the notes of the proceedings which were accompanied by exhibits 1-3, documents signed by the appellant, all of which were sent to him on 24 September 2013. The real question therefore was whether what had transpired at the second sitting was a waiver of the irregularities in the proceedings which had occurred thus far. The request for time to pay would have confirmed the acceptance by the appellant of monies previously given to him which were due to be repaid to the complainant which had not been repaid timeously, in that, in the first instance, the monies had not been repaid when promised, nor had they been paid at the time of the hearing, which would have amounted to an admission in respect of the allegations of the complainant.

[49] I must say that the statements made to the Committee were most unusual given the information given to this court later, but be that as it may, there was no statement made to the Committee that the documents had not been served or had not been received by the appellant. It would seem therefore that any irregularities had been waived by the attendance of the appellant with his representative and by the stance they adopted at the hearing. On that basis, therefore, I would hesitate to say that the proceedings were irregular and should be set aside. In fact, I am constrained to mention that the allegations against the appellant are serious and that there are documents to support them. However, bearing in mind the conclusion to which I have arrived on issue (iii), which in my mind, is determinative of one aspect of the appeal,

the fact that the sums have been repaid would perhaps be a fact for the consideration of the Committee at a later stage.

Issue (iii) (grounds 4, 5, 6 and 7)

Was there any breach of the principles of natural justice with regard to the finding of professional misconduct and or the sentence to be imposed? Was the sentence imposed manifestly excessive and harsh?

For the appellant

[50] Counsel submitted that the appellant having not been served and therefore unaware of the hearing and having been absent therefrom, he had been denied a "fair opportunity to be heard". That had been so even though he had received notice of the second sitting of the Committee on 28 September as he had only received three days notice of that hearing date, and he was entitled to 21 days notice. Counsel submitted that the hearing on 28 September was not scheduled for the Committee to continue hearing the matter, but for the committee to give its judgment. With the Committee in that mindset, counsel argued, the appellant's fundamental right to be heard had been severely breached, procedural fairness had been compromised, and the proceedings ought to be declared a nullity. Counsel argued that on any perusal of the notes of the proceedings of 28 September, it was clear that the appellant's counsel had not been given any opportunity to make any submissions on behalf of the appellant in his defence, or as mitigating circumstances in respect of the sentence, and had this been done, a different sanction may have been imposed on him. Counsel submitted that any tribunal engaged in disciplinary proceedings must act judicially and not in breach of the principles of natural justice. Also, it was the duty of any court or tribunal before passing

sentence on a defendant, to allow him to have an opportunity to be heard. Additionally, there had also been no opportunity to cross-examine the complainant. Counsel relied heavily on the dictum of Lord Reid in the seminal case **Ridge v Baldwin** and **Ors** [1963] 2 All ER 66, Downer JA in **Owen Vhandel v The Board of Management Guys Hill High School** SCCA No 72/2000 delivered 7 June 2001, Lord Hughes in the Privy Council case from the Court of Appeal of the Commonwealth of the Bahamas in **Dominque Moss v The Queen** [2013] UKPC 32 and Lord Widgery CJ in **R v Billericay Justices, Ex parte Rumsey** [1978] Crim LR 305, in support of these submissions. Counsel reiterated that in the circumstances the action taken by the Cmmittee was "grossly untenable" and the decision made ought to be deemed a nullity and quashed due to the breach of the principles of natural justice.

[51] Counsel, having referred to several other decisions of the Committee, including **Teasha Levy-Manfred v Ramon Gordon**, Complaint No 118/2012 delivered 28 September 2013, **Harold Brady v The General Legal Council** [2012] JMCA Civ 45, **Chandra Soares v The General Legal Council** [2013] JMCA Civ 8, and decisions from other jurisdictions such as Barbados in **Re Clarke** [2008] 73 WIR 43 and the United Kingdom in **McCoan v General Medical Council** [1964] 3 All ER 143, submitted that the sentence imposed on the appellant was manifestly excessive and harsh. He drew an analogy of the facts in the case at bar with the **Teasha Levy-Manfred** case where in that case, the attorney had failed to deliver funds to the complainant for a period of two years and eight months, yet the Committee had permitted the attorney to repay the funds within four weeks and once that had been

achieved, the attorney would suffer no further sanction and his reputation would remain intact, which decision had been given by the Committee on the same day as the decision in the instant case. Counsel submitted that in the circumstances of this case the appropriate course that the Committee ought to have taken was to have adjourned the matter on 28 September, imposed costs on the appellant, and permitted him time to put forward evidence of his good character and other mitigating factors in his favour. Counsel submitted that the statement, "the facts were not in dispute" made by the appellant's counsel when he had only been recently instructed, and had "no papers", was not sufficient to deny the appellant the right to be heard before any sanction was imposed on him. Counsel therefore submitted that in those circumstances, to strike the appellant from the roll of attorneys-at law, was manifestly excessive and harsh, and the decision ought to be deemed a nullity and quashed.

For the respondent

[52] Queen's Counsel submitted that the appellant was present at the second sitting of the Committee and so it was not true to say that he had not been given an opportunity to be heard. The rules of the Committee (rule 8) she stated, recognize that the Committee can proceed in the absence of the attorney. The court must therefore take into consideration the status of the proceedings at the first sitting. Counsel submitted that once the Committee was satisfied that the appellant had been served, it was appropriate and quite within its remit, to proceed with the hearing nearly one hour-and-a-half after its scheduled commencement. Counsel relied on a decision of this court namely **Ace Betting Co Ltd v Horse Racing Promotions Ltd** and **Summit Betting**

Co Ltd v Horse Racing Promotions Ltd (1990) 27 JLR 541, which held that a judgment entered in default due to the failure of a party to attend was regularly obtained, and could not be set aside ex debito justitiae, even where the writ had been served by registered post and unknown to the parties at the date of entering the judgment, had been returned unclaimed.

[53] Counsel submitted that the rules do not require proof of actual receipt of the notice of hearing, or for any inquiry to take place to ascertain why the appellant was not in attendance. In any event, counsel argued, the appellant had notice of the second hearing, which was the adjourned hearing for judgment, as the report of the Committee stated, and which was in keeping with rule 12 of the rules. The appellant, counsel submitted, could also have availed himself of rule 9, which allowed for a rehearing of the matter which he failed to do. Instead, he had attended the adjourned hearing and indicated that he did not dispute the facts, but requested an adjournment of four weeks to repay the complainant. This was declined by the panel. As a consequence based on this issue, and these grounds, it was contended that the appeal must fail.

[54] Counsel submitted further that in keeping with the principles laid down in the Privy Council case of **Kanda v Government of the Federation of Malaya** [1962] AC 322 what was required, was that the appellant ought to know the evidence given and the statements made which could have affected him, and then he must be given an opportunity to correct or contradict them. It was the respondent's contention that the appellant had obtained the notes of the proceedings relating to 21 September 2013 on

24 September 2013, and therefore when he attended before the Committee on 28 September that was his opportunity to respond to the allegations which he then knew had been made against him. His response was that there was no dispute as to the facts. So, says learned Queen's Counsel, he not only had an opportunity to be heard, but in fact had been heard. Counsel submitted further, that the appellant had raised several judicial review issues in the appeal which were not relevant as the matter was not one of judicial review. Additionally, counsel stated that the appellant did get an opportunity to cross-examine the complainant, but had not done so. The Committee, she stated, was under no duty to offer him an opportunity to cross examine witnesses if he did not ask for it. So in those circumstances there would not have been any breach of the principles of natural justice (see **University of Ceylon v Fernando** [1960] 1 WLR 223).

[55] Counsel argued strenuously that the sentence imposed on the appellant cannot be said to be either harsh or manifestly excessive. She relied on the decision of **Bolton v Law Society** [1994] 1 WLR 512 which has been referred to with approval repeatedly in this court, to state that as the Committee found that the appellant had misappropriated the complainant's money and had thereby acted dishonestly, and failed to maintain the honour and dignity of the profession, the appellant should have expected to be struck off the roll of attorneys-at-law as provided for in section 12(4) of Legal Profession Act, which allows the Committee to make such orders *as it thinks just*. Counsel reminded the court that the authorities have expressed "a strong disinclination to usurping that discretion on appeal". Counsel drew the distinction

between the facts of some of the cases referred to by counsel for the appellant, namely **Ramon Gordon** and **Chandra Soares** and submitted that in the former, there was no finding of dishonesty and the attorney was treated differently, and in the latter, although the sums owed had been repaid with costs and interest before the commencement of the hearing of the complaint, the attorney was nonetheless struck from the roll. In the instant case, counsel said that the appellant had repaid the money after the hearings, and after having caused the complainant serious harm and discomfort. It was a matter she submitted, entirely within the discretion of the Committee, based on the relevant applicable law, and the facts before it at the particular time. What was of some significance was that in response to a query from the court as to whether there was a duty imposed on the Committee to hear the appellant before a sentence was imposed on him, Queen's Counsel responded that there was nothing on the record which disclosed that the appellant had been invited to make submissions before being sentenced by the Committee. However, she submitted, the court ought to look at the facts of the case supporting the dishonest conduct, in order to ascertain whether the sentence imposed in the circumstances could be considered harsh, which she submitted, in the instant case it could not.

Discussion and analysis

[56] Essentially these issues deal with the appellant's claim that the hearings were conducted in breach of the principles of natural justice in that he was not given an opportunity to be heard. With regard to these allegations I will focus on just one matter which I think is insurmountable, and that is the failure of the Committee to give the

appellant an opportunity to make representation on his own behalf before a sentence was imposed on him, which, in my view, the Committee had a duty to do. In **Ridge v Baldwin** it was clearly established that the principles of natural justice include a right to be given notice and to be heard and in the circumstances where these principles were not observed, the decision of the Committee would be considered null and void. It is clear from a perusal of the notes of the proceedings of the second sitting of the Committee that, as was the situation in **R v Billericay Justices, Ex parte Rumsey**, so it was with the appellant, that by immediately pronouncing sentence after convicting him, the Committee had "deprived him of the opportunity of putting matters in mitigation before them". In the **Billericay** case it had resulted in the sentence being quashed.

[57] This principle has been stated with clarity, by the Privy Council leaving the issue beyond question, although dealing with a case of murder. In **Dominque Moss v The Queen**, a case from the Court of Appeal of the Commonwealth of the Bahamas Lord Hughes in delivering the speech of the Board, said this at paragraph 5:

> "5. The Crown's concession on the point of principle is clearly realistic. It is elementary that, at least where the sentence is not fixed by law, a criminal court has a duty to give a defendant the opportunity to be heard, through counsel or otherwise, before sentence upon him is passed. That is so however little there may appear to be available to be said on his behalf. As Megarry J memorably put it in *John v Rees* [1970] Ch 345, 402:
>
> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of

> inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."
>
> An omission to hear a defendant before passing sentence is a serious breach of procedural fairness. That simple proposition does not need the citation of authority."

[58] In the Law and Practice of Disciplinary and Regulatory Proceedings 2nd edition, the learned author Brian Harris QC made the following statement at page 308:

> "Just as in the criminal courts where the previous convictions of a convicted person are heard before sentence is passed, so it is customary and proper for a disciplinary tribunal to be informed of and to have regard to previous adverse disciplinary findings recorded against a defendant found guilty of misconduct. Conversely, the defendant, if of blameless reputation, is entitled to pray this fact in aid when it comes to the matter of sentence."

[59] In my view, having not been afforded that chance, on that ground alone, the decision of the Committee with regard to the sentence imposed, would have to be quashed, and the matter remitted so that factors relevant to sentence could be properly aired. It is perhaps because of the approach that was taken by the Committee why the appellant submits that had he been given the opportunity to put forward mitigating circumstances on his behalf, he may have been treated differently, and given the far reduced sanction which had been meted out to **Ramon Gordon**, where the circumstances could prima facie appear more grievous. Yet, that reduced sanction was imposed on the same day, as opposed to what occurred in respect of the appellant, which was that, he, not having had the opportunity to address the Committee before

the sentence was imposed on him, was struck from the roll. That sanction, he submitted, was harsh and oppressive. In my opinion, this was a serious breach of procedural fairness and the decision in respect of sanction would have to be quashed.

Issue (iv) (ground 8)

Was there any evidence of bias?

For the appellant

[60] Counsel for the appellant submitted that the respondent had displayed:

> "actual or apparent bias on 28 September when it proceeded to hand down a type-written judgment, which by all accounts could only have been based upon the evidence provided by the complainant, Mr Fabian Allen, in the "Part Heard" hearing on September 21, 2013 of which the Appellant was not a party due to the fact that he was not served with the notice that proceedings were being brought against him."

Counsel was bold to submit that in keeping with the principles of natural justice, and as stated by Lord Denning in Kanda,

> "… [w]hoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other … the risk of [prejudicial] is enough"

The hearing having been conducted in the absence of the appellant, then any pre prepared decision must be evidence of apparent if not actual bias. Counsel relied on the decision of the House of Lords in **Porter v Magill** [2002] 2 AC 357 for the true test of bias and submitted that it was "… whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". Counsel maintained, relying also on the ratio decidendi from the Barbadian

Court of Appeal case **Re: Ezra Alleyne** BB 1994 CA 9 in which the court held that based on statements made by certain members of the disciplinary committee in the course of the hearing, it was not unreasonable to conclude that their minds "were already made up" and as a consequence treated the hearing as a nullity, leaving the decision as to whether any further action should be taken to the committee.

[61] Based on that approach and on the facts of the instant case, counsel submitted that the fair minded observer would conclude that the decision was biased and that the appropriate action to be taken by the court was an order for a re-hearing, by a different panel as the appellant had never been heard, and specifically sentence had been passed on him based solely on the representations of the complainant without any opportunity for him to persuade the panel that he had never acted dishonestly in his dealings with the complainant, but had fallen below the required standards of integrity, probity and trustworthiness, but that his actions did not warrant the harsh order of striking off the roll.

<u>For the respondent</u>

[62] Learned Queen's counsel submitted that the allegation of bias on the part of the Committee is a strong one, which the appellant has the burden of proving and which it was submitted, the appellant was unlikely to succeed in doing. Counsel indicated that the Committee had not based its decision solely on what had taken place on 21 September 2013, but what had transpired on 28 September also. Counsel stated that the typewritten additions on the decision had been explained by the chairman, Mr Alan

Wood QC in an affidavit, and, in any event, the fact that the panel had formed a provisional view at the end of the hearing on 21 September as the matter had been adjourned for judgment does not disqualify the Committee on the grounds of bias. Counsel said the nature of the proceedings only changed when the appellant attended the hearing of 28 September, and then he was given an opportunity to be heard and "his response was a full admission of guilt". The decision was therefore adjusted to record that fact but the conclusions of the Committee had not changed given the appellant's admissions, and that would appear quite reasonable in the circumstances. It was therefore suggested by counsel that there was no evidence of bias, either apparent or actual, on the part of the respondent.

Discussion and analysis

[63] I agree with both counsel that the relevant test of apparent bias is to be gleaned from the decision of the House of Lords in **Porter v Magill**. In my view, I need say very little on this issue, bearing in mind the position I have taken on issues (i) – (iii) above. However, I feel constrained to comment that a fair minded observer having considered all the facts could not have concluded that the Committee displayed any bias whatsoever. On the evidence, the matter commenced without the members of the Committee knowing that service of all the documents on the appellant had not been properly effected or at all. The affidavit of Miss Moses had been taken as read. Proof of posting and therefore proof of service of the notice of hearing having been produced, the Committee proceeded with the hearing in the absence of the appellant as it was entitled to do pursuant to rule 8. However, as indicated, no note was taken as it ought

to have been, that the affidavit was not attached to the notice of hearing and that there was no certificate of posting in relation to the application and the affidavit as required by the rules.

[64] At the end of the hearing of the first sitting the matter was adjourned for judgment, and notice was given of the new date pursuant to rule 12, which judgment would have to be given in open court again pursuant to rule 14. The pre-prepared typewritten document (the decision of the Committee) therefore could only have represented the views of the Committee based on the evidence adduced before the Committee at that stage of the proceedings. Had the appellant attended on 28 September and indicated to the panel that he had not been served with the notice of hearing nor the application and the affidavit, the matter would certainly have unfolded differently. However, he did not do so. What he did was to indicate that he did not dispute the facts given, at the earlier sitting, by the complainant and also asked for time to pay the funds claimed by the complainant to be owed. The handwritten adjustment therefore made by the chairman reflected what the Committee viewed as having occurred thereafter at the second sitting of the Committee. There was, in my view, no evidence upon which the informed observer could have concluded that there was bias on the part of the Committee.

[65] In my opinion therefore, the decision of the Committee in relation to the sanction should be quashed, as there was a breach of the principles of natural justice, in that the appellant was not given an opportunity to be heard before the sanction was imposed on him. In the light of all of the above (issue v), I ordered that the matter be remitted to

the Committee so that the appellant could be given the opportunity to address the panel on the sanction which ought to be imposed on him in all the circumstances of this case. I therefore allowed the appeal as it relates to sanction only, with one-half of the costs to the appellant to be agreed or taxed.