JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA (AG)

MISCELLANEOUS APPEAL NOS COA2019MS00001-3

BETWEEN	**GORSTEW LIMITED**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Mrs Caroline Hay QC, Richard Small, Andre Moulton, Miss Kimberly McDowell and Ms Tereece Campbell instructed by Patterson Mair Hamilton for the appellant

Michael Hylton QC, Mrs Sandra Minott Phillips QC, Miss Melissa McLeod instructed by Hylton Powell Hylton for the respondent

André Earle and Miss Coleasia Edmondson instructed by Earle & Wilson for the interested party Mr Garth McBean QC (COA2019MS00001)

Abraham Dabdoub instructed by Dabdoub & Dabdoub for the interested party Mr Raymond Clough (COA2019MS00002)

Dr Lloyd Barnett and Miss Gillian Burgess instructed by Miss Gillian Burgess for the interested party Mr Roald Henriques QC (COA2019MS00003)

22, 23, 24, 25 June 2020 and 9 June 2023

Attorney-at-Law - Disciplinary Proceedings – Professional Misconduct – Duty of confidentiality – Legal Professional Privilege – Breach of Canon IV(t) – Application of proviso (ii) in Canon IV(t) - What constitutes an accusation of wrongful conduct - Whether the proviso can be invoked where an accusation of wrongful conduct is made by a third party – Legal Profession Act,sections 11, 12, and 14 - Legal Profession (Canons of Professional Ethics) Rules (Amendment) Rules, 2014 - proviso (ii) (b) of Canon IV (t)

Attorney-at-Law - Disciplinary Proceedings – Professional Misconduct – Conflict of interest - Whether a notice of a preliminary objection on a point of law is required – Whether a complaint can be dismissed on the first

appearance before the Disciplinary Committee – Issue Estoppel – Right to a fair hearing by an independent and impartial tribunal – Bias - The Disciplinary Proceedings Rules, rules 4, 5, and 7.

Attorney-at-Law - Disciplinary Proceedings – Whether the death of an attorney-at-law invalidates the complaint against him before the Disciplinary Committee – Jurisdiction of disciplinary proceedings.

F WILLIAMS JA

[1] I have had the opportunity of reading the draft judgment of my learned sister V Harris JA (Ag). I agree with her reasoning and conclusion and have nothing to add. We take this opportunity to sincerely apologise to the parties for the delay in the delivery of this judgment.

P WILLIAMS JA

[2] I, too, have read in draft the judgment of my sister V Harris JA (Ag). I agree with her reasoning and conclusion and have nothing useful to add.

V HARRIS JA (AG)

Introduction

[3] The appellant, Gorstew Limited ('Gorstew'), has placed before this court three appeals from the decisions of two different panels of the Disciplinary Committee of the General Legal Council ('the GLC' or 'the Committee' where appropriate), which have been consolidated. The GLC is a statutory body established pursuant to section 3 of the Legal Profession Act ('the LPA'). The GLC's primary responsibilities are the organisation of legal education and upholding standards of professional conduct for attorneys-at-law ('attorneys') in Jamaica. The GLC is empowered by section 11 of the LPA to appoint a Disciplinary Committee comprised of persons specified in that section to hear and determine allegations of misconduct committed by attorneys. Gorstew is a limited liability company incorporated locally.

[4] Gorstew instituted disciplinary proceedings against the interested parties, Mr Garth McBean QC (now King's Counsel), Mr Raymond Clough and Mr Roald Henriques QC

(together 'the Attorneys') for, among other things, a breach of the Legal Profession (Canons of Professional Ethics) (Amendment) Rules, 2014 ('the Canons') by which all attorneys practising in Jamaica are bound. In the course of hearing those complaints on divers dates, the Committee first dismissed the complaint against Mr McBean then later dismissed the complaints against Messrs Henriques and Clough.

[5] Aggrieved by the Committee's decisions, Gorstew filed its notices and grounds of appeal with this court, which we heard over several days. Learned counsel, Dr Barnett, raised a preliminary objection concerning the validity of these appeals. He contended, and counsel for the GLC and Mr Clough agreed, that the appeals are defective since they sought orders against the interested parties but failed to include them as respondents. Having considered their respective positions, we ruled that since the appeals concern the procedures and decisions of the GLC, we would nonetheless proceed with hearing the submissions in the substantive appeals from counsel for the parties and the interested parties.

[6] Upon concluding their submissions, we reserved our decision, which is now set out below. At this point, we take the opportunity to express our profound gratitude to counsel for the parties for their industry and helpful submissions.

Background

[7] The history of the litigation in this matter has its genesis in the criminal case of **R v Patrick Lynch, Jeffrey Pyne and Catherine Barber** ('the defendants'), which was heard in the Corporate Area Resident Magistrate's Court (now the Kingston and Saint Andrew Parish Court, Criminal Division). Gorstew, as one of the complainants, obtained a fiat from the Director of Public Prosecutions ('DPP') for Mr McBean, Mr Henriques and later, Mr Hugh Wildman, who were supported by counsel, Mr Clough and Mr Miguel Williams ('the prosecution team'), to prosecute the defendants on an indictment containing 16 counts for conspiracy to defraud as well as breaches of the Forgery Act and Larceny Act.

[8] The defendants were arraigned and tried on divers dates between April 2013 to June 2014 by Her Honour Mrs Lorna Shelly-Williams (as she then was) ('the learned judge of the Parish Court'). On 3 June 2014, the learned judge of the Parish Court upheld submissions of no case to answer made on the defendants' behalf at the end of the prosecution's case. As a result, the defendants were acquitted of all charges and discharged.

The application for permission to seek judicial review

[9] Following the conclusion of the criminal case, Mr Dmitri Singh, the general counsel for Gorstew, endeavoured to challenge the ruling of the learned judge of the Parish Court. On 22 August 2014, a meeting was held at Gorstew's headquarters with Mr Singh, Mr Henriques and Mr Wildman in attendance. Six days later, on 28 August 2014, an application for leave to seek judicial review along with an affidavit in support deposed by Mr Singh were filed in the Supreme Court ('the judicial review application'). On a date in September 2014, another meeting was held at Gorstew's headquarters. In attendance were Mr Gordon "Butch" Stewart, Mr Singh, Mr Henriques, Mr McBean, Mr Wildman, and Mr Douglas Leys QC. It is undisputed that at that meeting, Messrs Henriques and McBean expressed reservations about the judicial review application. It was agreed that the legal team pursuing the judicial review application would consist of Mr Leys and Mr Wildman.

[10] On 10 December 2014, Lawrence-Beswick J ('the learned judge') refused the judicial review application, and on 21 April 2015, she delivered her written judgment. She found that, among other things, the proposed judicial review would be an exercise in futility since it would allow the prosecution to appeal an acquittal, which was not permissible under our law then. At this juncture, it is useful to note that the refusal of the judicial review application subsequently spawned a collection of decisions from the Full Court, Court of Appeal, and the Privy Council.

[11] On 29 April 2015, an article was published in the Jamaica Gleaner newspaper ('the Gleaner') with the headline "Court reaffirms constitutional bar against not-guilty appeals - Says Gorstew made back-door attempt" ('the Gleaner article'). The learned judge's

decision was summarised in the Gleaner article, emphasising her criticisms of the improper joinder of the defendants in the judicial review application, the non-participation of the DPP, and the constitutional bar on the prosecution's ability to appeal criminal acquittals.

The complaints before the GLC

[12] In response to the Gleaner article, the Attorneys wrote a letter to the Gleaner, which was published on 2 June 2015 ('the letter'), which is set out in full below:

> "**We didn't back Gorstew appeal**
>
> Published: Tuesday | June 2, 2015
>
> **THE EDITOR, Sir:**
>
> We refer to an article in The Gleaner of Wednesday, April 29, 2015 captioned 'Court reaffirms constitutional bar against not-guilty appeals' and subcaptioned 'Says Gorstew made a back-door attempt'.
>
> The first paragraph of the article conveys to the readers that the prosecutors in the case of *R vs Patrick Lynch, Jeffrey Pyne, and Catherine Barber* had brought this judicial review action, the subject matter of the article.
>
> As members of the prosecution team, we wish to clarify the matter by stating that we did not approve of or participate in the judicial [review] action.
>
> **R.N.A. HENRIQUES**
>
> GARTH McBEAN
>
> RAYMOND CLOUGH" (Emphasis as in the original)

[13] The letter was the catalyst for the complaints before the GLC. The Attorneys were promptly notified of Gorstew's displeasure at the publication of the letter, and they communicated briefly through a series of letters. On 30 June 2015, Gorstew submitted a letter of complaint to the GLC regarding the Attorneys. In that letter, Mr Singh declared

that the Attorneys published the letter in the Gleaner (including the online edition) without their consent and breached their duty of confidence to Gorstew in the following terms:

> "We are of the opinion that the attorneys breached their duty of confidence to [Gorstew] by the publication of the letter to the Editor and, in particular, by stating to the public that they "did not approve of" the "judicial action" a position which they could only have taken in the course of advising [Gorstew]. We have not at any time prior to this, accused the attorneys or any of them of wrongful or other conduct which could have compelled them to issue the letter to the Editor and cause same to be published. The said attorneys did not consult [Gorstew] prior to the publication and Gorstew at no time [at] all waived any of its rights to have the advice published in the manner aforesaid."

[14] On 5 August 2015, the GLC forwarded the letter of complaint to each of the Attorneys and invited them to respond. The Attorneys responded to the GLC with individual letters (the contents of which will be set out below), which the GLC sent to Gorstew. Still dissatisfied with the Attorneys' response, Gorstew filed with the GLC three separate forms of application with supporting affidavits sworn to by Mr Singh against the Attorneys ('the complaints') on 16 February 2016.

[15] On the first occasion the complaints came up for hearing before the Committee (16 September 2017), it was decided that the complaint against Mr McBean (no 95/2016) would be heard first. The Committee ultimately dismissed that complaint on 12 January 2019 and provided written reasons for its decision. The complaints against Mr Clough (no 96/2016) and Mr Henriques (no 97/2016) were dismissed without a hearing by a differently constituted panel of the Committee on 16 February 2019.

[16] It is in that context that the present appeals were filed in this court. The appeals will be separately considered, commencing with that against the decision in the complaint against Mr McBean.

COA2019MS00001- Complaint no 95/2016 against Mr McBean

[17] Mr McBean responded by letter dated 17 September 2015 to Gorstew's letter of complaint. He asserted, among other things, that Gorstew was not his client or former client, and the letter did not reveal any confidential information. If the Committee found that he had breached his duty of confidence, he sought to rely on the proviso (previously (ii)(b) of Canon IV(t) and by amendment on 2 July 2014, now subparagraph (ii) of the proviso in Canon IV(t)) since he only intended to clarify the misconception that he participated in the judicial review application. Gorstew, not having been persuaded, filed the form of application and affidavit in support on 16 February 2016.

The complaint

[18] It is noted that at the hearing of the complaint against Mr McBean, the Committee at first found that the supporting affidavit did not satisfy the requirements of rule 3 of the Legal Profession (Disciplinary Proceedings) (Amendment) Rules, 2014 ('the Disciplinary Proceedings Rules'), since it was not properly sworn. After discussion with counsel for the Attorneys, the Committee accepted the affidavit. It proceeded on the basis that Mr Singh was present at the hearing, and the parties had treated it as an affidavit and responded to it accordingly. We will likewise treat the affidavit filed in support of the formal complaint as being properly filed.

[19] Mr Singh averred that Gorstew is the founder of ATL Group Pension Fund and was the complainant in the criminal case. Accordingly, Gorstew engaged the services of the Attorneys to prosecute. After the disposal of the case before the Parish Court, he, along with Mr Wildman and Mr Henriques, participated in a telephone conference during which they discussed, among other things, the feasibility of pursuing judicial review to challenge the learned judge of the Parish Court's decision. It was agreed that Mr Wildman would prepare the first draft of the application for judicial review and the supporting affidavit.

[20] On 22 August 2014, he met with Mr Wildman and Mr Henriques, and they reviewed the first draft of the application for judicial review. According to Mr Singh, Mr Henriques

proposed several amendments to that draft. After the meeting, Mr Singh's personal assistant emailed Mr Henriques and Mr Wildman the amended draft affidavit in support of the application. Later that day, he emailed a further amended draft affidavit to Mr Henriques, his junior, Mr Miguel Williams and Mr Wildman. After the application and affidavit were finalised and filed "in late August 2014", another meeting was held to discuss, among other things, who would argue the application. Messrs Henriques and McBean were present. Mr Singh averred that there was a discussion about potential challenges with respect to the constitutional provision of *autrefois acquit* (a plea that the defendant has already been tried and acquitted of the same offence). At this meeting, Messrs Henriques and McBean expressed reservations about the proceedings.

[21] The Gleaner article was published after the learned judge delivered her written decision in the judicial review application. Gorstew, Mr Singh stated, was "appalled" by the contents of the letter that "[a]s members of the prosecution team, we wish to clarify the matter by stating that we did not approve of or participate in the judicial action". Mr Singh averred that none of the Attorneys informed Gorstew or any other member of "the group" of their intention to write the letter dissociating themselves from the judicial review application. Gorstew was "particularly offended" because the trial before the Parish Court was widely publicised, and the Attorneys were known as active participants in the prosecution on fiat from the DPP.

[22] He further averred that the Attorneys were informed by way of a letter dated 3 June 2015 that Gorstew had not waived their duty of confidentiality and requested a written explanation. The Attorneys responded in a joint letter dated 16 June 2015, stating, among other things, that the Gleaner article constituted a serious indictment on the competence and integrity of the prosecutors involved in the criminal proceedings, but it had not identified the attorneys who participated in the judicial review application.

[23] Mr Singh, having refuted the Attorneys' position on the matter, stated that "it is against the ethical standard of the legal profession for Attorneys-at-Law to put their interests above that of their clients". The Attorneys, he asserted, had disclosed

confidential information to the public regarding their disagreement with the decision to challenge the learned judge of the Parish Court by way of judicial review. Since the Attorneys knew that Gorstew was not responsible for the publication of the Gleaner article, any dissatisfaction with it should have been raised with the Gleaner, Mr Singh insisted.

[24] Accordingly, by co-signing the letter, the Attorneys "committed acts of professional misconduct which require adjudication by [the Committee]" for:

> a. breach of Canon IV(t) of the Legal Profession (Canons of Professional Ethics) Rules (they knowingly revealed confidential information without Gorstew's consent);
>
> b. breach of Canon IV(t) of the Legal Profession (Canons of Professional Ethics) Rules (they used Gorstew's confidence to their own advantage and Gorstew's disadvantage); and
>
> c. conduct unbecoming of the ethical standards and traditions of the legal profession.

The affidavit of Mr McBean

[25] In response to the complaint, Mr McBean filed two affidavits dated 15 April 2016 and 8 September 2017. He reiterated that he had not been retained by Gorstew and exhibited his engagement letter, which was addressed to ATL Sandals Group, as well as a copy of a letter from Sandals Resort International, dated 10 March 2011, signed by Mr Singh and agreeing to the terms of the engagement. That retainer ended on 4 June 2014, when the no case submissions in the criminal case were upheld. Furthermore, he was never engaged for the judicial review application.

[26] He insisted that he was not a party to any of the telephone conversations or email trails and was not present at the meeting on 22 August 2014. Additionally, he was not

privy to the drafts of the judicial review application, which he saw for the first time when they were exhibited to Mr Singh's affidavit in support of Gorstew's complaint to the GLC.

[27] Mr McBean admitted that he attended the meeting at the headquarters in September 2014, but it was not his understanding that his attendance was to finalise the legal team for the judicial review application. No legal advice was sought from or given by him up to that date. He averred that if that were so, he would have requested or otherwise been provided with copies of the relevant documents for the judicial review application, which at that point had already been filed. At that meeting, he agreed with Mr Henriques that there was no legal basis for the judicial review application. He expressed this opinion after it was made clear that neither he nor Mr Henriques was part of the legal team representing Gorstew in that application.

[28] The Gleaner article, Mr McBean said, published several of the learned judge's criticisms, but it failed to state who the attorneys in the judicial review application were. The wording of the Gleaner article suggested that all the attorneys involved in the prosecution were also involved in the judicial review application. He asserted, among other things, that members of the public would believe that the Attorneys were being accused of wrongful conduct and breaches of the Canons (III, V, and VI), and that would reflect adversely on their professional competence and integrity. In an effort to protect themselves from those accusations, they sought to make it clear in the letter that they did not participate in those proceedings. Mr McBean admitted that they did not inform Gorstew or any other member of the group of their intention to publish the letter.

[29] By saying, "[W]e did not approve of or participate in the judicial action", Mr McBean stated that he did not disclose any confidential information. Furthermore, the context was that when he first heard from other sources about Gorstew's intention to file the judicial review application, he did not believe there was a legal basis to do so. Accordingly, he could not knowingly reveal or use any confidential information to his advantage or Gorstew's disadvantage. In the alternative, Mr McBean argued that he was entitled to the protection of the proviso to defend himself against the accusations of wrongful conduct.

The decision of the Committee

[30] A panel of the Committee, which comprised Mr Trevor Ho-Lyn, sitting as the chairman, along with Mrs Debra McDonald and Mr Peter Champagnie QC ('the first panel'), heard the complaint on several dates between 16 September 2017 and 18 October 2018 and delivered their decision on 12 January 2019.

[31] The first panel was primarily concerned with the interpretation and application of Canon IV(t) and its proviso. They took the view that (para. 10 of their decision):

> "The logical conclusion to be drawn from the words quoted by the article as being said by the Judge, was that at the very least, the application for judicial review bordered on an abuse of process, It [sic] could never have succeeded and its foundation was erroneous. Such language by necessary implication could be construed as suggesting that this action amounted to wrongful conduct on the part of the persons who filed the action."

[32] Reliance was placed on the cases of **Johnson v Gore Wood & Co** [2001] 2 WLR 72 and **Hunter v Chief Constable of the West Midlands Police & Others** [1982] AC 529, and the first panel found as follows:

> "11. …
>
> Although Her Ladyship the Honourable Justice Lawrence-Beswick did not specifically label the procedure used before her as an abuse of process, the language used in the delivery of her decision is in keeping with the language used in cases, where the issue before those courts was the existence of an abuse of process. **Accordingly in this case it could reasonably be concluded that the Attorneys who filed the action were abusing the process of the court. Their action for judicial review in the present circumstances could reasonably be considered as wrongful conduct and not as submitted by the Complainant that there was no allegation of misconduct whatsoever against the attorneys in the judicial review matter. In fact the headline of "back door attempt" implicitly infers wrongful conduct.**
>
> 12. The article did not specify who the actual Attorneys were that had filed the action for Judicial Review instead it said *"The case was largely prosecuted by private attorneys, hired by Gorstew, on the*

basis of a fiat, issued by the DPP". There is no doubt that the case while before the Parish Court (then called the Magistrate's Court) had received widespread publicity and the persons named as participants on behalf of Gorstew included the Attorney. Although the Complainant submitted that the publication of the written judgment had indicated the attorneys involved in the filing of the judicial review, the panel notes that the article does not draw any distinction between the attorneys who represented Gorstew at the trial and those that represented them at the application. **The Panel is therefore driven to the inevitable conclusion that the article was ambiguous and therefore the Attorney was justified in believing that independent fair minded observers could come to the conclusion that he was a party to the filing of the application action.** In this regard the Panel also notes that in fact the witness for the Attorney who is a retired Supreme Court Judge, who had also acted in the Court of Appeal, came to that very conclusion.

13. The Panel then looked at what in fact the Attorney did when faced with this particular dilemma, which was to issue a letter to the editor of the same newspaper which had carried the original article. Here the words used in the letter are of significance. It states inter alia as follows*: -The first paragraph of the article conveys to the readers that the prosecutors in the case of R vs Patrick Lynch. Jeffrey Pyne and Catherine Barber had brought this judicial review action, the subject matter of the article. As members of the prosecution team, we wish to clarify the matter by stating that we did not approve of or participate in the judicial action."*

14. The wording of the letter attempts to clarify the Attorney's role in the judicial review action based upon what in his opinion was being conveyed to the public by the article and does not elaborate further. The Panel is therefore satisfied that the Attorney was defending himself from a possible misconception by the public of his role, in what, a Judge of the Supreme Court had thought to be a waste of judicial time, a misrepresentation of facts and contrary to law. Of course the Panel takes into account that the Attorney is also a member of the Inner Bar who has found himself worthy of being an example of the highest traditions of the Bar and whose reputation is required to be significantly beyond reproach. Accordingly the protection of his reputation is of paramount importance to him.

CONCLUSION

In summary therefore the Panel concluded that :-

(A). The Article could be construed as implying wrongful conduct on the part of the attorneys who pursued the application for judicial review.

(B). The failure of the article to specify the attorneys filing the application created the probability that members of the public could conclude that it was the same attorneys who prosecuted the criminal case.

(C.) The response of the Attorney who reasonably believed that his reputation was at stake was appropriate in all the circumstances.

(D). The Attorney was therefore justified in defending himself from the assertion of wrongful conduct.

(E.) The fact that wrongful conduct was not specified, neither was the Attorney specified by name, fails to take into account that often it is the absence of specifics that leads to persons coming to erroneous conclusions, and in this case not only was it a real probability but it had actually led a retired Judge to do so.

15. Based on these conclusions therefore, the Panel found that as a matter of law, the Attorney was entitled to the protection of proviso (ii)(b) of IV(t) of the Canons, therefore any analysis of factual disputes relating to the retainer or breach of confidence or betrayal of the ethical standards of the profession are unnecessary, as such a finding is a complete defence to the disclosure of a confidence. Implicit in this finding is therefore the rejection of the submissions of the Complainant that the proviso does not apply.

16. The panel therefore finds that the Attorney is not guilty of professional misconduct and the Complaint is therefore dismissed." (Emphasis added)

The appeal

[33] On 1 February 2019, Gorstew filed their notice and four grounds of appeal. Those grounds are:

"(1) The Disciplinary Committee erred as a matter of law in concluding that an issue for determination by it was whether the article which appeared in the Gleaner could be construed as being wrongful conduct on the part of the Attorneys who filed the Judicial Review suit when the issue for determination by virtue of the plain and unambiguous words of proviso (ii) (b) of Canon IV (t) of the

Legal Profession (Canons of Professional Ethics) Rules ('the Canons') was whether Mr. McBean was defending himself against an accusation of wrongful conduct.

(2) In conducting its analysis of the complaint that was before it, the Disciplinary Committee took into account various considerations that were irrelevant to the matters it was required to determine including Mr. McBean's membership of the Inner Bar as well as whether:

a. it could reasonably be concluded that the Attorneys who filed the judicial review application were abusing the process of the court;

b. independent, fair minded observers could come to the conclusion that Mr. McBean was a party to the filing of the judicial review application;

c. Mr. McBean was seeking to defend himself from possible misconception of his role in the judicial review application

(3) Based on the evidence presented, the Disciplinary Committee erred as matter of fact and law in concluding that Mr. McBean was entitled to the protection of proviso (ii)(b) of Canon IV (t) of the Canons.

(4) The Disciplinary Committee's finding that Mr. McBean's response to the article published in the Gleaner (co-signing the letter dated June 2, 2015) was appropriate and justified in all the circumstances was wholly misconceived bearing in mind that the names of the Appellant's legal representatives for the judicial review application were a matter of public record prior to the publication of the article in the Gleaner."

[34] On 30 March 2020, in a prior hearing before this court, Gorstew sought and was granted permission to amend the notice and grounds of appeal. The amended notice and grounds of appeal, filed on 31 March 2020, outlined the following two additional grounds of appeal:

"…

(5) The Disciplinary Committee erred in its interpretation and application of Canon IV (t).

(6) The Disciplinary Committee, [sic] failed to carefully identify and analyse the circumstances which give [sic] rise to the use of the client's confidential information and the client's rights [sic] to release or withhold consent of the release of its confidential information."

Discussion

[35] It has been the position of Gorstew that by co-signing the letter, which stated that they "did not approve of or participate in the judicial action", Mr McBean breached Canon IV(t) of the Canons, as he knowingly revealed confidential information without Gorstew's consent, used a confidence of Gorstew to his own advantage and the disadvantage of Gorstew, and was guilty of conduct unbecoming of the ethical standards and traditions of the legal profession.

[36] Canon IV(t) of the Canons provides:

"CANON IV

AN ATTORNEY SHALL ACT IN THE BEST INTERESTS OF HIS CLIENT AND REPRESENT HIM HONESTLY, COMPETENTLY AND ZEALOUSLY WITHIN THE BOUNDS OF THE LAW. HE SHALL PRESERVE THE CONFIDENCE OF HIS CLIENT AND AVOID CONFLICTS OF INTEREST.

(a) …

*(t) An Attorney shall not knowingly-

(i) reveal a confidence or secret of his client, or

(ii) use a confidence or secret of his client-

(1) to the client's disadvantage; or

(2) to his own advantage; or

(3) to the advantage of any other person

unless in any case it is done with the consent of the client after full disclosure.

Provided that an Attorney may reveal confidence or secrets in the following circumstances: -

(i) where it is necessary to establish or collect his fee;

(ii) **to defend himself or his employees or associates against an accusation of wrongful conduct;**

(iii) in accordance with the provisions of the Proceeds of Crime Act and any regulations made under that Act;

(iv) in accordance with the provisions of the Terrorism Prevention Act and any regulations made under that Act; or

(v) where the attorney is required by law to disclose knowledge of all material facts relating to a serious offence that has been committed." (Emphasis added)

[37] The above Canon urges attorneys to fulfil their duty to protect the confidences and secrets of their clients. As already established, the first panel dismissed Gorstew's complaint that Mr McBean failed to do so on the basis that Mr McBean was entitled to the protection of the exception contained at subparagraph (ii) of the proviso to Canon IV(t) ('the proviso'), which allows an attorney to reveal a confidence or secret in order to defend himself (or his employees or associates) against an accusation of wrongful conduct.

[38] Counsel in this matter had different approaches to addressing the grounds of appeal, and so the main points of their submissions will be recapitulated as they have been presented.

Submissions on behalf of Gorstew

Grounds 1 and 3

[39] Learned counsel for Gorstew, Mr Richard Small, argued these grounds together as they sought to impugn the Committee's determination that the Gleaner article could be construed as an accusation of wrongful conduct on the part of the attorneys involved in the judicial review application and that Mr McBean was entitled to the protection of the proviso in defending himself against that accusation.

[40] It was submitted that, in considering and applying the proviso, the first panel implicitly found that Mr McBean revealed a confidence or secret by writing and causing the letter to be published. That finding, it was posited, also means that the first panel accepted that Gorstew was a client of Mr McBean and that there was a confidence or secret covered by Canon IV(t).

[41] Mr Small further contended that the first panel should have made an explicit finding about the accusation that Mr McBean claimed to be defending himself against. It was argued that that primary fact was not established by the first panel's decision or the Gleaner article, which would have been the source of the "accusation". Reference was made to the specific wording of the decision that "the Article could be construed as implying wrongful conduct", and counsel submitted that the "wrongful conduct" could not be based on the mere fact that Mr McBean was involved in the criminal case. To establish that the accusation of wrongful conduct was against Mr McBean, the argument continued, it was necessary to show from what primary fact it could be inferred that he was a party to the bringing of the application. In conclusion, counsel contended that Mr McBean was not entitled to the protection of the proviso since there was no accusation of wrongful conduct against him necessitating his defence.

Ground 2

[42] According to Mr Small, the crux of this complaint was that the first panel considered matters "which were of no probative value, which had no evidentiary basis and which were applied to artificial facts". Issue was taken with the first panel's consideration of Mr McBean's membership in the Inner Bar. It was submitted that whether or not an attorney sits at the Inner Bar is irrelevant to the consideration of the complaint brought against him or her and particularly to the question of whether Mr McBean had a basis for revealing the confidential advice that he had given to Gorstew. It was submitted that each matter must be approached objectively without considering the attorney's status. Counsel contended that by considering Mr McBean's membership at the Inner Bar, the first panel

conveyed that he is beyond reproach and would be favoured in proceedings by virtue of his status.

[43] Counsel Mr Small went further to propose the following as relevant concerns for the first panel's determination of the matter:

> a. whether there was evidence of a confidence;
>
> b. whether the confidence was revealed;
>
> c. whether the confidence was revealed with the consent of the client after full disclosure;
>
> d. whether there was an accusation of wrongful conduct;
>
> e. from whom the accusation came;
>
> f. what circumstances permitted the release of the client's confidences or secrets;
>
> g. whether Mr McBean observed those circumstances;
>
> h. whether Mr McBean was subject to a finding that he breached Canon IV(t); and
>
> i. whether Mr McBean had satisfied the requirements to receive the protection of the proviso.

[44] He submitted that the first panel was required to make specific findings in relation to these issues, but they neglected to do so and, consequently, failed to administer their judicial functions.

[45] It was further contended that the first panel's analysis and findings regarding the Gleaner article and the learned judge's ruling were "incredible and wholly irrelevant" to Mr McBean's conduct. Finally, under this ground, it was advanced that the first panel also

erred and was plainly wrong when it considered the possibility of the public's misconception as a valid basis for interpreting the proviso in Mr McBean's favour.

Ground 4

[46] Mr Small prefaced his submissions under this ground by making the point that the judgments of the Supreme Court and Court of Appeal are matters of public record and are accessible through a simple online search. Moreover, the learned judge's decision stated the attorneys who appeared for Gorstew in the judicial review application, so anyone who may have had the impression that Mr McBean was involved could have ascertained the facts as to representation. He further submitted that there was no evidence that Mr McBean had taken any part in the judicial review application, nor were there any primary facts from which such a finding could be inferred.

[47] The first panel's acceptance that there might be a chance that the public would think that Mr McBean was involved because of his prior representation is "fundamentally flawed and has no factual support or evidentiary value", Mr Small submitted. That notion could be quickly dispelled by anyone who presumed Mr McBean's involvement, just as Mr Lloyd Hibbert QC, retired judge of the Supreme Court ('Hibbert J'), did by calling Mr McBean. Furthermore, counsel argued, it was clear from Mr McBean's evidence that he was aware that prior representation of a client did not mean he represented them in subsequent proceedings.

[48] In challenging the appropriateness of the letter, Mr Small submitted that the criticisms in the learned judge's decision were aimed at Gorstew. Even if a view could be taken that the criticisms were directed at the attorneys involved in the judicial review application, Mr McBean, not being one of them, would not be included. Accordingly, it was contended that Mr McBean's justification that he released Gorstew's confidence to protect himself from the assumption that he was involved in the judicial review application was "entirely unsound and without merit".

Ground 5

[49] Gorstew's grievance with the first panel's application of the proviso related primarily to the finding that there was an accusation of wrongful conduct against Mr McBean. It was their position that they did not accuse Mr McBean of any wrongful conduct, and in fact, the purported "implied accusation" was from the Gleaner article, an "unrelated, unaffected third party". Counsel Mr Small referred to section 12 of the LPA and contended that the proviso applies to circumstances where a client or person aggrieved makes the accusation of wrongful conduct. The purpose of that proviso, counsel submitted, is to address instances where a client makes an accusation of wrongful conduct against an attorney and then relies on privilege to preclude the attorney from revealing information to defend himself. Reliance was placed on the American case of **Mitchell v Bromberger** (1865) 1 Nev 604. It was further submitted that the first panel acknowledged that the "wrongful conduct" was not specified and that the proviso requires positive assertion. Accordingly, counsel argued, they widened the scope by including omissions and conclusions in applying the proviso.

[50] Gorstew contended that the information disclosed in the letter was protected by legal professional privilege because Mr McBean's legal advice was sought and given, at the meeting he attended, about contemplated litigation directly connected to his original retainer in the criminal case. That privilege, Mr Small submitted, is not displaced merely by claiming that there was an accusation of wrongful conduct. He relied on several authorities, including **R v Derby Magistrates' Court ex parte B and anor** [1995] 4 All ER 526 ('**R v Derby Magistrates' Court**'), **Balabel v Air India** [1988] Ch 317, and **Dubai Aluminium Company Limited v Al Alawi** [1999] 1 All ER 703 ('**Dubai Aluminium**').

[51] In determining whether that conduct could fall within the exception and lift privilege, the nature of the conduct must be considered, it was submitted. Mr Small insisted that there were no assertions of fraud, illegality, or other iniquitous behaviour.

As such, there was not a sufficient basis for releasing the confidential, privileged information.

Ground 6

[52] In arriving at its decision, Mr Small argued that the first panel failed to identify and analyse the circumstances under which Gorstew's confidential information could be used, as well as their right to give or withhold consent for its use. It was his position that Gorstew sought Mr McBean's advice at the meeting, and by his own testimony, he agreed with Mr Henriques' advice that there would be challenges concerning the principle of *autrefois acquit*. Accordingly, it was argued that the advice, which was given in a legal context in relation to litigious proceedings, was protected communication.

[53] It was submitted that information communicated orally between an attorney and potential client with a view to the attorney being retained is privileged from disclosure, even if he does not accept the retainer. That duty to not reveal privileged information is a continuing one. Counsel Mr Small relied on the cases of **Prince Jefri Bolkiah v KPMG (a firm)** [1999] 2 AC 222 ('**Bolkiah v KPMG**'), **Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)** [2004] UKHL 48 ('**Three Rivers (No 6)**'), and **Minter v Priest** [1930] AC 558 in support of those submissions.

[54] With that in mind, Mr Small contended that if the attorney is accused by someone other than the client, he should make full disclosure to the client and seek permission to release the confidences. Since the privilege was not waived, it was not up to the attorney to disclose privileged information. Counsel submitted further that if Mr McBean had sought consent and it was denied, he had other means of addressing his concerns, such as writing to the Gleaner to indicate the impression the Gleaner article gave and asking them to clarify the representation in the judicial review application.

[55] It was posited that by stating that he did not approve of the judicial action, Mr McBean went beyond what was needed to clarify the potential misconception. Counsel

Mr Small went on to identify the confidential and privileged information that, in their view, Mr McBean knowingly revealed, namely:

> a. the advice given by Mr McBean was contrary to the course Gorstew embarked upon;
>
> b. Gorstew rejected Mr McBean's advice; and
>
> c. the learned judge agreed with Mr McBean's advice.

[56] For those reasons, Mr McBean, having admitted that he did not seek Gorstew's consent, breached their trust and privilege and ultimately violated Canon IV(t).

Submissions on behalf of the GLC

[57] Learned Queen's Counsel for the GLC, Mr Michael Hylton, condensed the grounds of appeal into a single ground, namely:

> "The Disciplinary Committee erred in its finding that [Mr McBean] was entitled to the protection of the proviso because it took into account the wrong issues and/or took into account the wrong considerations."

[58] The GLC's position was that the retainer between Mr McBean and Gorstew was not general; it was for the specific purpose of prosecuting the criminal case, and once the case ended, so did the retainer. Learned Queen's Counsel also proposed that since Mr McBean was not retained for the judicial review application, even if he received "information" at the time the letter was published, Gorstew was not his client, that information would not be protected and could not be seen as revealing confidential information of a former client.

[59] It was contended that Gorstew failed to specify the "secret" that was revealed, and vague information would unlikely be considered confidential. Referring to Halsbury's Laws of England, 2011, Volume 19, Chapter 1 para. 8, Mr Hylton further contended that for information to be protected as confidential, it must relate to a definite body of material

or source of information. Reliance was placed on the case of **Mancini v Mancini** [1999] NSWC 800, in which the Supreme Court of New South Wales determined that such an omission was fatal to the claim. The information contained in the letter, namely Mr McBean's non-participation, was a fact that was a matter of public record, it was contended. It did not, therefore, "meet the standard of being of limited public availability or something uniquely within the knowledge of Mr McBean as an attorney". The cases of **Greenough v Gaskell** [1824-34] All ER Rep 767 and **R v Derby Magistrates' Court** were cited in support of these submissions.

[60] Reference was also made to the case of **Bolkiah v KPMG** for the submission that the protection of confidential information extends only to information received during the subsistence of the retainer. Mr Hylton submitted that in stark contrast to that case, in which the "nature and specific character" of the information provided was known and clear, in the present case, Gorstew did not identify any specific information that was confidential or would have been in the possession of Mr McBean acting as its attorney in the judicial review application. Gorstew, it was asserted, bore the burden to prove beyond a reasonable doubt that Mr McBean breached his duty under Canon IV(t) by providing evidence that there was some advice given by him, and he revealed it.

[61] The GLC contended that Gorstew sought to conflate the distinct concepts of legal advice privilege and confidentiality. Furthermore, it was asserted that there was no complaint that Mr McBean had breached privilege, and those submissions should be disregarded. Queen's Counsel Mr Hylton insisted there was no evidence on Gorstew's case that they sought Mr McBean's approval or advice regarding the judicial review application.

[62] Our attention was directed to the evidence that Gorstew only consulted Mr McBean after the judicial review application had already been filed. At that time, Mr Hylton stated, he would not have given any advice that could be regarded as being revealed in the letter. Mr McBean's attendance at the meeting was for the sole purpose of ascertaining whether he would join the team for the hearing of the judicial review application, counsel

asserted. It was the GLC's position that the view expressed by Mr McBean at the meeting was not advice to Gorstew but rather an explanation for why he would not join the team, as stated by him under cross-examination. It was submitted that this version of events is more credible since Gorstew did not attempt to obtain legal advice from Mr McBean before filing the application and did not provide him with any copies of the documents filed for his comments on the viability of the claim. This, Queen's Counsel said, is to be viewed in the context that, when pursuing the criminal case, Gorstew actively engaged Mr McBean from the stage of investigations.

[63] In relation to the publication of the letter, it was submitted that Mr McBean did not reveal any confidence or secret of Gorstew, nor did he use any confidence or secret to his advantage or to Gorstew's disadvantage. Mr Hylton argued that the letter merely clarified that the Attorneys were not involved in the judicial review application. It was also submitted that the statement that the Attorneys did not approve of the judicial review application did not in any way suggest that they conveyed that disapproval to Gorstew. Queen's Counsel indicated that it could also be interpreted to mean that they were not asked for advice and, as such, did not have an opportunity to give their approval, rather than it being a revelation of his advice, as suggested by Gorstew.

[64] With respect to the decision that Mr McBean was entitled to the protection of the proviso, Mr Hylton submitted that the first panel was correct in not just considering the Gleaner article itself but the context in which it was written. Queen's Counsel argued that most readers could reasonably conclude that Mr McBean represented Gorstew in the judicial review application and was being accused of wrongful conduct in the Gleaner article. As such, it was submitted that the first panel interpreted the Gleaner article correctly according to whether a reasonable and fair-minded person would perceive that the Gleaner article contained an accusation of wrongful conduct.

[65] Additionally, it was argued that the word "accusation" in the proviso should not be construed narrowly to mean an accusation by a client. Learned Queen's Counsel contended that this would not have been the drafters' intention and would require

"reading into the Canon, words that are not there". Instead, counsel proposed that the ordinary meaning of the word included an implicit accusation by a third party. The cases of **Bedford Borough Council v M & Ors** [2017] IEHC 583 and **Clark v David et al** (unreported), Supreme Court, Jamaica, Claim No HCV 108 of 1963, judgment delivered 3 July 1964 were relied on as examples of implied accusations.

[66] The word "wrongful conduct" in the proviso, Mr Hylton submitted, should also not be given a restrictive meaning. It should apply to conduct that may breach the Canons or is contrary to an attorney's paramount duty to the court. It was further contended that "wrongful conduct" was not restricted to fraudulent or criminal acts (see **Dubai Aluminium**), and if this were intended, the Canons would specifically refer to illegal or fraudulent conduct as they had expressly done at (q) (ii) and (iii) in Canon IV.

[67] It was put forward by the GLC that Gorstew had misconstrued the first panel's observation of Mr McBean's status as a member of the Inner Bar. Queen's Counsel Mr Hylton argued that what was meant was that the expectations of his conduct were higher so that the weight of an accusation of wrongful conduct was greater, and the first panel was not suggesting that he should be "lightly treated". Moreover, such a consideration must be relevant to whether he was justified in defending himself in the face of such an accusation of wrongful conduct and whether what he did in defence was proportionate.

[68] Mr Hylton pointed out that in the amendment of the proviso, the words "where it is necessary" were removed from subsection (ii), whereas they remain for the exception at (i), which reads, "where it is necessary to establish or collect his fee". He further argued that an attorney does not need to show that it was objectively necessary in his defence to reveal a confidence, only that he reasonably believed he should do so. In conclusion, the GLC's position is that taking into account all of the circumstances of this case, it was reasonable for the first panel to find that Mr McBean had been accused of wrongful conduct, which entitled him to defend himself.

Submissions on behalf of the interested party

[69] Mr André Earle, counsel for Mr McBean, agreed with the GLC's submissions and added that, before the meeting, Mr McBean was never consulted, nor did Gorstew request legal advice concerning the judicial review application from him. Furthermore, Mr McBean was not provided with any of the pleadings or other documents related to the judicial review application prior to its filing. He argued that there was no retainer and fiduciary duty between Mr McBean and Gorstew, and since no attorney-client relationship existed, no duty of confidentiality was owed to Gorstew by Mr McBean. Reliance was placed on **James v Ricknell** (1887) 20 QBD 164 to make the point that the original retainer between Mr McBean and Gorstew covered the criminal proceedings only up until judgment was delivered. He further contended, relying on **Parry-Jones v Law Society and Others** [1969] 1 Ch 1, that, in any event, Mr McBean's duty of confidence was overridden by his duty to obey the general law.

[70] The purpose of Mr McBean's presence at the meeting was to explain to Mr Stewart why he was not a part of the legal team pursuing the judicial review application. That evidence, counsel argued, was unchallenged in cross-examination.

[71] It was also Mr Earle's contention that the letter did not disclose any confidential information. He argued that information in the public domain or considered public knowledge could not be described as confidential or protected by the law. Gorstew, he submitted, did not identify what secret or confidential information was disclosed. Nevertheless, counsel argued, the words "we did not approve" could either mean that having heard about it from other sources, Mr McBean did not approve of the action, or it could mean that not having seen the draft pleadings or documents, Mr McBean did not have the opportunity to approve it.

[72] Mr Earle submitted that, even if this court were to find that the information was confidential, it was revealed to clarify that Mr McBean was not involved in wrongful conduct, which is in keeping with the exception in Canon IV(t). It was his position that Mr McBean's intention in signing and publishing the letter was to protect his professional

competence, reputation and integrity. Mr Earle denied Gorstew's contention that there was no need for the letter since the mere delivery of the written judgment amounted to the legal representatives in the judicial review application being known as a matter of public record. Instead, he asserted that the vast majority of the members of the public, including Hibbert J, were not aware of it. Additionally, because Mr McBean was a well-known member of the prosecution team, it was reasonable for persons to conclude that he also acted in the judicial review application, especially since the Gleaner article did not specifically name counsel in the application.

[73] Moreover, counsel submitted, the letter was published after the learned judge's decision was handed down but before the renewed application for leave was heard by the Full Court. Gorstew, the argument continued, failed to show how the information in the letter was detrimental to its continued applications.

Law and analysis

[74] The complaint before the first panel was that by co-signing the letter, Mr McBean committed acts of professional misconduct by knowingly revealing confidential information without Gorstew's consent and using their confidence to his own advantage and to the disadvantage of Gorstew, in breach of Canon IV(t).

[75] In considering that complaint, the first panel's analysis focused on whether Mr McBean was entitled to the protection of the proviso. Having answered that question in the affirmative, they did not find it necessary to contemplate the factual disputes regarding the retainer, breach of confidence, or betrayal of ethical standards since the proviso was a complete defence to the violation of Canon IV(t).

[76] In my judgment, for the absolute resolution of the issues and proper guidance for attorneys, certain findings of fact must be made when considering whether there was a breach of Canon IV(t) and the application of the proviso. Since the appeal of the Committee's decision is by way of rehearing (see rule 3 of the Disciplinary Committee (Appeal Rules), 1972), the following three issues have been identified to be resolved:

1. Did Mr McBean have a duty of confidentiality to Gorstew?

2. Did Mr McBean breach his duty of confidentiality to Gorstew?

3. Was Mr McBean entitled to the protection of the proviso contained in Canon IV(t)?

1. Did Mr McBean have a duty of confidentiality to Gorstew?

[77] The unqualified duty of confidentiality is fiduciary in nature. Its purpose is to ensure that all information related to an attorney's representation of his client, whether oral or written, is not disclosed. That duty is codified in Canon IV(t). Implicit in the wording of Canon IV(t), an attorney-client relationship must first exist. By virtue of that relationship, an attorney would come into possession of a client's confidence or secret to be in a position to knowingly reveal or use that confidence or secret. Canon IV(t) seeks to maintain the attorney's duty of confidentiality to their client, which is the backbone of the attorney-client relationship. Even if the duty is not expressly acknowledged, it is implied in the retainer. If an individual seeks advice from an attorney, but there is no formal retainer, the attorney still has a duty to treat their conversations as private.

[78] Counsel for both parties relied on the House of Lords case of **Bolkiah v KPMG** because of its utility in understanding the unqualified duty of an attorney to preserve confidentiality. However, I would like to draw attention to Lord Millett's dictum in that case on the scope of that duty (page 235):

> "…The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. **The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence**." (Emphasis added)

[79] Mr McBean first challenged the existence of the attorney-client relationship between himself and Gorstew in his letter dated 17 September 2015, in response to Gorstew's letter of complaint to the GLC. He contended that he was not retained by Gorstew, as alleged by Mr Singh. This matter became a point of contention (although not considered or decided by the first panel). Mr Singh addressed it in his examination in chief before the first panel as follows:

> "[Question]: Do you have any comments to offer in respect of Mr. McBean's assertion that he was not retained by Gorstew?
>
> [Mr Singh's answer]: ATL is not a legal entity. It is a common reference to the group in Jamaica which comprises 40 to 50 different companies in Jamaica. When you consider the automotive division, the hotels, the villas, the appliance stores, the villas and hotels, cars division and the appliance stores, Gorstew would form part of that group. I would also say that Mr. McBean issued 12 invoices, none of which was issued to Sandals International. Five were issued to Sandals ATL Group and 7 to Gorstew Ltd. and all 12 invoices were paid by Gorstew. I would further say that Gorstew was one of the complainant's [sic] in the criminal case and Mr. McBean would have been the attorney who drafted the indictment, one of the attorneys."

[80] During the cross-examination of Mr McBean, counsel for Gorstew referred to the original and amended indictments. Mr McBean agreed with his suggestion that the complainants in the criminal matter were ATL Group Pension Fund Trustee Nominee Limited and Gorstew. When asked if he knew Gorstew was a part of the Sandals ATL Group, he responded that he could not recall but knew it was an affiliated and related company. He later admitted that he knew that there was an allegation against the defendants that Gorstew was being defrauded.

[81] In his affidavit (filed with the GLC) dated 15 April 2016, Mr McBean averred that he was retained by "ATL Sandals Group", not Gorstew. He exhibited the written engagement letter dated 18 February 2011, which was addressed to "Sandals/ATL Group" and signed by Mr Singh as the legal officer. Several invoices were also exhibited, most of which were billed to Gorstew, along with receipts of payments made by Gorstew. It is, therefore, undeniable that at the material time, Mr McBean must have known that

Gorstew, being a part of "Sandals/ATL Group" and a complainant in the criminal case, was also his client.

[82] It is observed from the engagement letter that the only reference to the criminal proceedings is contained in the caption, "Re: Investigation- Appliance Traders Group Pension Scheme". Otherwise, Mr McBean agreed to be responsible for the "representation" in that matter. It is not specified what that representation entails. We also could not discern from the contents of the engagement letter that the retainer had ended when the criminal proceedings were determined, as contended by Mr McBean.

[83] However, the parties' unequivocal evidence that Mr McBean was not consulted on the way forward or involved in the telephone conversations, email trails, or meeting on 22 August 2014 is most compelling in settling this issue. This is especially so since the judicial review application was already filed when he attended the later meeting (in September 2014) with Gorstew. For those reasons, I accept Mr McBean's assertion that his retainer ended upon the conclusion of the criminal case. Notwithstanding, since the judicial review application may be considered a continuation of the criminal proceedings, it may well be that any communication between Mr McBean and Gorstew in that regard could appropriately fall under his continuing duty of confidentiality (if any such communication took place in the required circumstances, which will be discussed below).

2. Did Mr McBean breach his duty of confidentiality to Gorstew?

[84] In order to determine whether Mr McBean breached any alleged duty of confidentiality to Gorstew, it is necessary first to consider whether the information disclosed in the letter constitutes a "confidence" or "secret" in respect of Canon IV(t). Unfortunately, those terms are not defined in the Canons; however, the American Bar Association's Model Code of Professional Responsibility (replaced by the Model Rules of Professional Conduct in 1983), which counsel for Gorstew referred to, is useful in this regard. DR 4-101 of the Model Code (which has been substantially amended in rule 1.6 of the Model Rules) is similar to Canon IV(t) as it pertains to the "Preservation of

Confidences and Secrets of a Client", and so its definitions of "confidence" and "secret" can provide some guidance; it states:

> **"(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.**
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct. …" (Emphasis supplied)

[85] Counsel for Gorstew contended that Mr McBean breached their confidentiality and revealed communications covered by legal professional privilege. On the contrary, the GLC submitted that the duty of confidentiality and legal professional privilege are two distinct concepts, and the latter did not apply in the circumstances.

[86] The ethical obligation of attorneys to maintain the confidentiality of their clients' information is a settled principle. In contrast, the scope of the protection of confidential communications by legal professional privilege has caused much controversy. All information pertaining to the client's representation falls under the umbrella of confidentiality. Legal professional privilege, however, is a common-law rule that relates to the admissibility of evidence. Accordingly, all information that is privileged is also confidential, but not all confidential information is regarded as privileged. Both principles prevent the disclosure of confidential information shared between an attorney and his client to encourage full and frank communications between them (**R v Derby Magistrates' Court**). In this context, it is imperative to consider whether the relevant communications are protected by privilege or confidentiality or are simply unprotected.

[87] Similar to the duty of confidentiality, legal professional privilege extends beyond the termination of the attorney-client relationship. The authorities have divided legal professional privilege into two categories, legal advice privilege and litigation privilege. The requirements for litigation privilege were stated by Lord Carswell in **Three Rivers (No 6)** at para. 102 as follows:

> "…[C]ommunications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial." (See also **Re L (A Minor)** [1997] AC 16).

[88] Legal advice privilege applies to confidential communication between a client and a lawyer for the purpose of giving and obtaining legal advice (**Balabel v Air India**; **Three Rivers (No 6)**). As Baroness Hale of Richmond explained in **Three Rivers (No 6)**, "[l]egal advice privilege restricts the power of a court to compel the production of what would otherwise be relevant evidence". She went on to say that the "privilege belongs to the client, but it attaches both to what the client tells his lawyer and to what

the lawyer advises his client to do". Also, the following opinion given by Lord Justice Taylor in **Balabel v Air India** is quite instructive:

> "In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as 'please advise me what I should do'. But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."

[89] This principle corresponds with Gorstew's submission that the information communicated at the meeting, namely, Mr McBean's agreement that there would be challenges to the judicial review application because of the doctrine of *autrefois acquit*, constituted legal advice. Mr McBean and the GLC denied this. They argued that that communication simply explained why Mr McBean was not participating in the judicial review application.

[90] Murphy on Evidence, 11th edition, page 498, on which Gorstew relied, referred to several cases, including **Balabel v Air India**. The learned author opined as follows:

> "The test is whether the communication was made for the purposes of the giving and receiving of legal advice, and for this purpose, it matters not that the communication may be broadly worded, or that it does not in so many words refer to the giving or receiving of advice, as long as it is reasonably inferable that it was made pursuant to the professional relationship of lawyer and client. Moreover, the communication may be one made in the course of continuing instructions, and is not confined to the situation where a lawyer is retained [in regard] to a specific matter. But if it clearly appears that

> a communication is not directly related to the giving of legal advice, then that communication should not be regarded as privileged."

[91] In the case of **Minter v Priest**, the House of Lords assessed the purpose of the communication between two men who had interviewed a solicitor. The men sought to procure a loan of £450 as a deposit to purchase a house from the plaintiff. Their Lordships found that the slanderous words uttered when the solicitor was no longer contemplating acting for the men were not privileged from disclosure. Lord Atkin elucidated:

> "It is apparent that if the communication passes for the purpose of getting legal advice it must be deemed confidential. The protection of course attaches to the communications made by the solicitor as well as by the client. If, therefore, the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is, I think, correctly defined. One exception to this protection is established. If communications which otherwise would be protected pass for the purpose of enabling either party to commit a crime or a fraud the protection will be withheld. It is further desirable to point out, not by way of exception but as a result of the rule, that communications between solicitor and client which do not pass for the purpose of giving or receiving professional advice are not protected. It follows that client and solicitor may meet for the purpose of legal advice and exchange protected communications, and may yet in the course of the same interview make statements to each other not for the purpose of giving or receiving professional advice but for some other purpose."

[92] The undisputed facts are that when the criminal case concluded, Gorstew began discussing the way forward with some of the attorneys from the prosecution team. Mr McBean was not one of those attorneys. In fact, Gorstew, at no point before the September meeting, sought legal advice from Mr McBean concerning the judicial review application. When he attended the meeting in September 2014, the documents for the judicial review application had already been filed, and he was not provided with a copy of the pleadings. At the meeting, upon being asked, he agreed with Mr Henriques that "there would be challenges in relation to constitutional provision in relation to the *autrefois acquit*… [sic]".

[93] The parties disagree on who invited Mr McBean to the meeting and for what purpose. When pressed during cross-examination about Mr McBean's presence at the meeting, Mr Singh maintained that he had invited Mr McBean but admitted that his affidavit did not say that. However, it was his *viva voce* evidence that "[he] telephoned Mr McBean and invited him to a meeting at 35 Half-Way-Tree Road to discuss the team to deal with the Judicial Report [sic]". He also asserted that Gorstew sought legal advice from Mr McBean at the meeting. It was Mr Singh's evidence that Mr McBean was very clear when he stated in the meeting that "[y]ou cannot get past autrefois [acquit]" and categorically said that he would not be a part of the legal team pursuing the application.

[94] Mr McBean, during his examination in chief, gave a different account:

> "It was Mr. Henrique [sic] who asked me to attend the meeting based on what Mr. Gordon Stewart said. Mr. Gordon Butch Stewart indicated that he was concerned and surprised that we, the full team, were not in the Judicial Review team. Mr. Miguel William [sic] who is Mr. Henriques' junior of the same firm at the time also accompanied Mr. Henriques to the meeting. And Mr. Miguel William [sic] was also at the same firm of Livingston Alexander & Levy where Mr. Henriques was senior partner. I was never invited to go to the meeting to give any legal advice, certainly not by Mr. Singh and I would also say [sic] make it clear that I had never seen up to that point when I was invited by Mr. Henriques, any documents relating to the Application for Judicial Review and certainly would have been asking for copies of same if I was asked to give advice."

[95] Further, in cross examination, Mr McBean stated that he went to the meeting out of respect for Mr Stewart to confirm that he was not part of the legal team pursuing the judicial review application and, if necessary, to give his reasons. Accordingly, before us are two different accounts of the purpose of the communication at the meeting between Mr McBean and Gorstew.

[96] The case of **R (Jet2.com Limited) v The Civil Aviation Authority** [2020] EWCA Civ 35 is instrumental in this respect. The brief facts are that judicial review proceedings were brought by Jet2 (an airline company) against the Civil Aviation Authority of the United Kingdom, challenging their decision to issue a press release and

subsequently publish correspondence between them in the Daily Mail which criticised Jet2's refusal to participate in an alternative dispute resolution scheme for the resolution of consumer complaints. Prior to the publication of the correspondence, Jet2 wrote to the Civil Aviation Authority to complain about the press release and issued its own, to which the Civil Aviation Authority responded with a letter. According to Jet2, the Civil Aviation Authority lacked the authority to publish their communications and did so for an improper purpose. In its claim for judicial review, Jet2 applied for disclosure of the drafts of the Civil Aviation Authority's letter and all records of any discussions regarding those drafts for the reason that it was necessary to understand the Civil Aviation Authority's reasons and purpose behind the publication of the letter.

[97] In the judicial review proceedings, Morris J ruled, among other things, that claims for legal advice privilege are subject to the "dominant purpose test", and so the drafts of the letters should be disclosed unless they were specifically drafted for the dominant purpose of obtaining legal advice. On appeal, the Court of Appeal considered whether, in circumstances where the communication between an attorney and client had more than one purpose, it was sufficient for the privilege to attach for one purpose (whether it be for litigation or for obtaining or seeking legal advice), or conversely, whether that one purpose had to be the "appreciable, dominant or even sole purpose".

[98] Their Lordships conducted a thorough examination of the authorities that had historically discussed the application of the dominant purpose test (such as **Waugh v British Railways Board** [1980] AC 521, **Grant v Downs** (1976) CLR 674, and **AWB Limited v Cole** [2006] FCA 571) and found that the test had been applied in several cases and was accepted without any adverse comments by the Court of Appeal and House of Lords in **Three Rivers (No 6)**. Accordingly, they held that Morris J (at first instance) was correct in proceeding on the basis that "… for [legal advice privilege] to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice".

[99] In deciding if the communication between Mr McBean and Gorstew at the meeting was protected by legal professional privilege, it is, therefore, important to consider whether the dominant purpose of the meeting and the communication was to obtain or give legal advice or for the purpose of conducting litigation. I find that this is a marginal case where the answer is not easy. An examination of the circumstances that led to the communication illustrates that the relevant legal context existed. However, there appears to me to be ample evidence to support the finding that the communication at the meeting was not for the dominant purpose of obtaining or giving legal advice or for the purpose of litigation. I say so for the reasons set out below.

[100] In circumstances where Mr McBean was the lead counsel for Gorstew (and was the first attorney of the team of attorneys engaged) in the criminal case, it is quite telling, in my judgment, that Gorstew would have excluded him from their deliberations about, preparation for, and penultimate filing of the judicial review application, only to belatedly invite him to a meeting to give legal advice without even providing him with the relevant material to give such advice. Mr McBean either agreed with a statement of the law (on his case) or stated the law himself (on Gorstew's case) about the well-known constitutional provision that prevents the prosecution from appealing an acquittal (at the time of the application). In light of the evidence before the first panel, I am compelled to the view that the dominant purpose of Mr McBean's communication with Gorstew was to explain why he was not participating in the judicial review application. Consequently, the communication would not be protected by legal professional privilege.

[101] Therefore, the next question to be determined is whether the letter constituted a breach of the continuing duty of confidentiality owed to Gorstew by Mr McBean. Mr Singh addressed Gorstew's complaint that the letter revealed Gorstew's confidential information in cross examination; he stated:

> "[Question]: And you agree with me that the implication as to their desire to [sic] writing that letter was to clarify the matter by stating that they did not approve of or participate?

> [Mr Singh's answer]: Yes, they gave out confidential information, I agree with that.
>
> …
>
> [Question]: What in that letter shows that he rendered legal advice?
>
> [Mr Singh's answer]: That he did not approve of, so he must have told us. He rendered legal advice why he wouldn't approve of it and so he did not participate."

[102] Three aspects of the letter were identified as constituting a breach:

> A. The headline "We didn't back Gorstew appeal"
>
> B. The words "we did not … participate in the judicial action"
>
> C. The words "we did not approve of…the judicial action"

[103] As it relates to the headline, it was first asserted in a letter dated 1 July 2015 addressed to Mr Singh on behalf of the Attorneys (and also in his affidavit dated 15 April 2016) that the letter they sent to the Gleaner for publication did not include a caption or by-line. They maintained that they were not responsible for the headline since it was created by the Gleaner's editors . Gorstew has not provided any proof the Attorneys provided the headline. Although Mr Singh wrote to the Gleaner requesting a copy of the original letter, the Gleaner's response, if any, was not presented to us.

[104] Gorstew's complaint in respect of the words "we did not …participate in the judicial action" is unmeritorious. When the letter was published, the names of counsel in the judicial review application were included in the written judgment. Accordingly, those words constituted a fact that was in the public domain. That fact cannot be regarded as confidential information.

[105] The words "we did not approve of…the judicial action" certainly conveyed the Attorneys' opinion on the judicial review application. However, it was vague since it did not disclose whether their advice was sought and/or given to that effect. The information

that Gorstew is claiming as a "secret" is the Attorneys' statement of disapproval of the judicial review application. Gorstew had the burden of proving that Mr McBean was in possession of confidential information, and in all the circumstances, that burden has not been discharged. Mr McBean and Gorstew did not enter into a new retainer for his representation in the judicial review application. However, as stated earlier, he had a continuing duty of confidence to Gorstew. That continuing duty would only be in relation to information imparted during the subsistence of the retainer (see **Bolkiah v KPMG** discussed at para. [78] above). Therefore, Mr McBean's disapproval of the judicial review application would not qualify as falling within his continuing duty of confidence. Although there is a close nexus between the criminal case and the judicial review application, the statements made in the letter, without more, could not be regarded as a breach of the duty of confidence. For all of the above reasons, the letter did not constitute a breach of Mr McBean's continuing duty of confidentiality to Gorstew.

3. Was Mr McBean entitled to the protection of the proviso contained in Canon IV(t)?

[106] Although the discussion above (paras. [77] – [105]) is effectively dispositive of the appeal against Mr McBean, the question of whether he was entitled to the protection of the proviso will nonetheless be addressed.This court's position has always been that the Committee is best suited to determine what constitutes professional misconduct (**Oswest Senior-Smith v General Legal Council and anor** [2018] JMCA Civ 26). As such, it is essential to consider whether Mr McBean was entitled to the protection of the proviso.

[107] The objective of the proviso is to allow attorneys to exonerate themselves from accusations of wrongful conduct that would have the effect of sullying their reputations or even laying the foundation for civil, criminal, or disciplinary proceedings against them. It has been appropriately designated as the "self-defence exception" in several authorities, including a decision from this court (**Harold Brady v General Legal Council** [2021] JMCA App 27). As already stated, it recognises an attorney's right to reveal confidences or secrets to defend himself, his employees, or his associates against an accusation of wrongful conduct. The prerequisite for the application of the proviso is

a finding that there was indeed an accusation of wrongful conduct, and it is on this basis that the parties have fundamentally disagreed.

[108] The Canons have not specified what constitutes an "accusation of wrongful conduct". The parties have, however, put forward their own understanding of the term, though not grounded in any relevant authority. "Wrongful conduct" is defined by the Black's Law Dictionary, 7th edition (1999) as "an act taken in violation of a legal duty; an act that unjustly infringes on another's rights". Throughout the Canons, the only reference to "wrongful conduct" is in relation to the proviso. I also take the point made by the GLC that the Canons have intentionally referred to fraud or illegality only in Canon V(n) and (q). There is also no requirement in the proviso for the accusation of wrongful conduct to be actionable. Nevertheless, it is not lost on me that the principle protected by Canon IV is so sacrosanct that for an attorney to unilaterally waive privilege or breach confidentiality, the accusation would have to be more than frivolous. In my opinion, what is to be regarded as an "accusation of wrongful conduct" includes conduct that violates the legal duties encapsulated in the Canons.

[109] The introductory paragraph of the Gleaner article reads:

> "A Supreme Court judge has reaffirmed the constitutional bar against **Jamaican prosecutors** appealing not-guilty verdicts in criminal cases in its formal rejection of the bid by Gordon 'Butch' Stewart's company, Gorstew, to get a judicial review of the acquittal of three former executives it accused of fraud. …" (Emphasis added)

[110] From the outset, reference was made to the constitutional bar being reaffirmed by the learned judge against the "Jamaican prosecutors", which, it has been accepted, included Mr McBean. The Gleaner article highlighted that the learned judge questioned the logic of Gorstew seeking judicial review without the DPP's support, which she said would likely lead to a waste of the court's time since, without her approval or consent, the DPP was empowered to discontinue proceedings. It was also reported that the learned judge found that it was "an exercise in futility" since a constitutional bar (at the material time) prevented the prosecution from appealing criminal acquittals. For that reason, a

judicial review of the decision of the learned judge of the Parish Court would amount to allowing the prosecution to appeal an acquittal, which was not permissible. The learned judge also took issue with the accused being joined as respondents in the judicial review application since "they could make no order in their own trial".

[111] The learned judge considered certain statements ascribed to the learned judge of the Parish Court (which formed the basis for the judicial review application) and upheld a preliminary point that the learned judge of the Parish Court was misquoted, and her words were taken out of context. I agree with counsel for the GLC that such a finding could have serious implications for counsel, not only in respect of possible disciplinary action but also their reputation. For instance, it could be regarded as a breach of Canon V(c), which states that an attorney shall not wilfully make false accusations against a judicial officer and shall support such officers against unjust criticisms.

[112] The above findings of the learned judge immediately raised concerns regarding the competence of counsel who filed the judicial review application. It matters not that those findings were directed at Gorstew. It is their attorneys in the judicial review application who would be brought into disrepute. The first panel had concluded that, by necessary implication, the learned judge's findings amounted to an accusation of wrongful conduct by the persons who filed the judicial review application. It is the uncertainty surrounding who those persons were that created this predicament.

[113] The Gleaner article stated that "[t]he case was largely prosecuted by private attorneys, hired by Gorstew, on the basis of a fiat, issued by the DPP" then, in the subsequent paragraph, it went on to state that Gorstew sought judicial review of the verdict in that matter. No distinction was made between the attorneys involved in the criminal case and those involved in the judicial review application. I agree that this omission was misleading since the Gleaner article indicated no such distinction but rather implied that the attorneys who represented Gorstew in both matters were the same. Although Gorstew has argued that such a presumption could be easily dispelled, I am mindful of the evidence of Hibbert J in his affidavit dated 11 September 2017, in which

he stated that, upon reading the Gleaner article, he believed that Mr McBean was part of the team of attorneys representing Gorstew in the judicial review application. Hibbert J averred that he regarded Mr McBean's involvement to be surprising because:

> "a. that would be an attempt by the Prosecution to try and 'appeal' a 'not guilty' verdict from the Court on a No-case submission contrary to the provisions of the Constitution and the Judicature (Appellate Jurisdiction) Act;
>
> b. Mr. McBean, as a former prosecutor from the office of the DPP, ought to have known that that application was doomed to failure;
>
> c. the application appeared to be an abuse of the process of the courts as being entirely without merit, frivolous and vexatious;
>
> d. the application was not the sort of matter with which an Attorney of Mr. McBean's seniority, experience and calibre should be involved."

[114] That perception remained until Hibbert J spoke with Mr McBean. Surely, if a retired judge of the Supreme Court came to that conclusion upon reading the Gleaner article, it is not farfetched to surmise that other reasonable and fair-minded observers would arrive at the same conclusion. What I find incredible is the expectation Gorstew has placed on those fair-minded observers to locate the judgment to verify the representation, as ideal as this seems. Such a reasonable assumption on account of that critical omission was further exacerbated by the widespread publicity of the criminal proceedings in which Mr McBean was known to be involved. For those reasons, the first panel's finding that there was an accusation of wrongful conduct against Mr McBean cannot be faulted.

[115] The next consideration contingent on that finding is whether the invocation of the proviso requires the accusation of wrongful conduct to be made by the client or a former client to whom the confidences or secrets belong or whether the proviso could be invoked where a third party accuses an attorney of wrongful conduct (as in this case). Neither party presented any authority on this point. Despite intensive research, no cases from this court or other Commonwealth jurisdictions that were of any assistance could be located. However, it seems to me that the plain and ordinary language of the proviso is

broad enough to apply to anyone who makes an accusation of wrongful conduct. Support for this stance is found in the American authority of **Meyerhoffer v Empire Fire & Marine Insurance Company** 497 F2d 1190 (2d Cir 1974) ('**Meyerhoffer**'), which explored the invocation of their DR 4-101(C)(4) exception (which was referred to at para. [84] for its similarity to our Canon IV(t)) in defence of an accusation of wrongful conduct against an attorney by a third party. In that case, it was held that an attorney may reveal "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct".

[116] In **Meyerhoffer**, an attorney was named as a defendant in a claim for securities fraud. He was accused by Meyerhoffer and other purchasers of the shares of Empire Fire & Marine Insurance Company ('Empire') of knowing about a finder's fee arrangement between his firm and their client, Empire, that was not disclosed in the offer documents. The attorney in his defence disclosed an affidavit, which he had previously submitted to the Securities and Exchange Commission, notifying them of the omission and stating that he sought to have his firm rectify the nondisclosure. Having considered, among other things, the seriousness of the charges and the potential damage to his professional reputation, the court recognised his right pursuant to DR 4-101(C)(4) to disclose otherwise protected confidences to protect his own interests. The court found that when an attorney is charged with misconduct or illegal behaviour by a third party or a party other than the current or former client, the attorney may invoke the exception to disclose otherwise privileged and confidential information, even if that disclosure is to the detriment of the current or former client.

[117] The reasoning in **Meyerhoffer** is persuasive, I find. This has led me to the view that the application of the proviso does not depend on the identity of the accuser. As such, I disagree with Gorstew's narrow interpretation.

[118] Similarly, it is observed that there is no express requirement in Canon IV(t) for the attorney to seek the consent of the client or former client in order to invoke the exceptions in the proviso. In fact, my understanding of Canon IV(t) is that a client's (or former

client's) confidences or secrets can only be disclosed in two circumstances: either with their consent or if that disclosure falls within any of the exceptions stated in the proviso. It is also noted that **Meyerhoffer** did not contemplate whether there was a need for the client (or former client) to give consent for the exception to be advanced in circumstances where the allegation of wrongful conduct was made by a third party.

[119] I am mindful that there may very well be legitimate concerns regarding the potential abuse of this exception, especially due to its broad application. However, if an attorney is seeking to disclose a client's (or former client's) confidence or secrets to defend himself (or his employees or associates) against an accusation of wrongful conduct made by that client (or former client) or as in this case, a third party, then it would be impractical to require him to obtain consent since in such circumstances it is unlikely that his interests will align with those of his client (or former client). In this matter, it would have been highly impractical to require the Attorneys, particularly Messrs McBean and Henriques, to obtain Gorstew's consent to disclose the purported confidence, given their diametrically opposed positions and interests concerning the judicial review application.

[120] Gorstew's suggestion that Mr McBean had other means of rectifying the misapprehension has been considered. The proviso does not delineate the scope of appropriate responses or permissible disclosures. The first panel, however, found that the letter was appropriate since Mr McBean simply clarified that he did not participate in the judicial review application and did not elaborate further. Additionally, counsel for the GLC rightly pointed out that, prior to the 2014 amendment, there was a requirement for all the exceptions to be used where necessary. Since the amendment, subparagraph (i) of the proviso states "where it is necessary to establish or collect his fee", but there is no such stipulation for subparagraph (ii). In keeping with the spirit of Canon IV(t), I have concluded that the only restraint on such disclosures must be limited to what is reasonably necessary to establish the attorneys' defence (or that of his employees or associates).

[121] The first panel was satisfied that Mr McBean was merely defending himself, and as a member of the Inner Bar, there was a need for him to protect his reputation. I agree with counsel for the GLC that their consideration of Mr McBean's status as a member of the Inner Bar was solely to acknowledge the reason for his desire to dispel the perception that he was involved in the judicial review application and any wrongful conduct as well as to avoid a sullied reputation.

[122] This court is reluctant to disturb the decision of a disciplinary body as to what constitutes professional misconduct (**Re A Solicitor** [1974] 3 All ER 853) and will only interfere where it is shown that the decision was plainly wrong (**Oswest Senior-Smith v General Legal Council and anor**), that is, if there was an error of law, a failure to take account of relevant evidence, or a failure to provide proper reasons (**Solicitors Regulation Authority v Anderson Solicitors & Ors** [2013] EWHC 4021 (Admin)). For all of the reasons stated above, in my judgment, there is no basis upon which it could be found that the Committee's conclusion that Mr McBean was entitled to the protection of the proviso in Canon IV(t) was plainly wrong.

[123] In the result, I would dismiss this appeal (COA2019MS00001) against the decision of the Committee in complaint no 95/2016 against Mr McBean, with costs to the GLC and interested party to be agreed or taxed.

COA2019MS00003- Complaint no 97/2016 against Mr Henriques

[124] In response to Gorstew's letter of complaint (dated 30 June 2015), which the GLC delivered to Mr Henriques on 5 August 2015, Mr Henriques refuted the allegations by way of letter dated 16 September 2015. He asserted, among other things, that Gorstew failed to substantiate its claims, and as such, no *prima facie* case of professional misconduct had been established. Also, by virtue of the proviso in Canon IV(t), the Attorneys were entitled to defend themselves against accusations concerning their professional competence, integrity, and reputation, owing to the serious condemnation made by the learned judge.

[125] Mr Henriques' response failed to appease Gorstew, and on 16 February 2016, they filed their form of application and supporting affidavit with the GLC. The contents of that affidavit are identical to the affidavit filed in support of the complaint against Mr McBean (set out at paras. [18] – [24] above). An amended affidavit dated 18 September 2017, which sought to address an anomaly with the original affidavit, was also filed.

The affidavit of Mr Henriques

[126] Having been notified of the formal complaint against him, Mr Henriques filed an affidavit dated 12 April 2016. A summary of his affidavit evidence will be outlined below since no *viva voce* evidence was taken in this matter.

[127] Mr Henriques averred that Gorstew did not engage him. Instead, he was retained by Appliance Traders Limited to prosecute the criminal case on a fiat issued by the DPP. His engagement ended on 4 June 2014 (this should have been 3 June 2014) when the defendants were acquitted of the charges against them. On 18 July 2014, while on vacation in Canada, he was informed by counsel, Mr Miguel Williams, that Gorstew requested the transcripts (presumably from the trial) as they intended to file an action for judicial review. It was his recollection that he only spoke with Mr Singh socially while in Canada. He did not remember speaking with Mr Singh and Mr Wildman (as alleged in their affidavit) on a three-person call. Further to that denial, Mr Henriques also said that he did not discuss nor was he consulted on the feasibility of pursuing judicial review of the decision of the learned judge of the Parish Court.

[128] Regarding the allegation that he reviewed a draft of the application and affidavit when he met with Mr Singh and Mr Wildman on or about 22 August 2014, Mr Henriques insisted that he had never seen or reviewed any drafts of those documents. The purpose of that meeting, he averred, was "to discuss the provision of an opinion on the validity of [the learned judge of the Parish Court's] decision", to which he expressed the view that if required, such an opinion should be obtained from an independent person, not the attorneys who prosecuted the case. He also stated that he did not see the emails or

attachments dated 22 August 2014 until he received the affidavit deposed by Mr Singh in support of the complaint (on 23 February 2016), to which those emails were exhibited.

[129] Mr Henriques stated that he attended the meeting with Mr Stewart as a courtesy to clarify and reiterate his position that he would not be participating in the application for judicial review.

[130] In line with his evidence, Mr Henriques denied knowingly revealing his client's confidential information. He stated that Gorstew's complaint did not specify what confidential information was allegedly disclosed by him, and he was unable to identify any such information given to him. Furthermore, Mr Henriques maintained that he did not participate or appear in the judicial review application. The Gleaner article, he professed, "quoted salient aspects of the judgment that strongly criticised the counsel in the matter". Consequently, he became concerned that it would be misunderstood by readers that he was one of the attorneys "about whom the judicial imputation of wrongful conduct was made" since he was known as a prosecutor in the criminal proceedings. Mr Henriques considered it his right to defend himself against the accusation of wrongful conduct, but, in any event, he did not think that the letter had revealed any confidence of Gorstew.

The decision of the Committee

[131] The complaint against Mr Henriques was heard on 16 February 2019, together with the complaint against Mr Clough (no 96/2016), by a panel of the Committee, which was composed of Mr Peter Champagnie, sitting as the chairman, along with Miss Katherine Francis and Miss Annaliesa Lindsay ('the second panel').

[132] Mr Henriques was represented by Mrs Sandra Minott Phillips QC and Ms Gillian Burgess, who submitted, among other things, that this complaint could not be distinguished from the complaint against Mr McBean, which was already decided by the first panel. The issue of law was ventilated, she said, and so the second panel was tethered to the same course taken in the complaint against Mr McBean. Counsel also

submitted that the Committee's jurisdiction does not change depending on whether it is a mention date or hearing date.

[133] Counsel Mr Spencer, on behalf of Gorstew, argued that once a *prima facie* case had been made out, the matter should proceed to a trial, and the complaint had been set for mention and not trial on 16 February 2019. The difference, he argued, was that if the matter proceeded to a hearing, the second panel would hear the evidence and the submissions of both sides. His position was that the first panel's decision in the complaint against Mr McBean did not constrain the second panel.

[134] After they considered the relevant parties' submissions, the second panel gave the following decision in respect of the complaints against Messrs Henriques and Clough:

> "The Panel have [sic] given careful consideration to the application made by the attorneys in regards to respondent complaint 96/2016 [Mr Clough] and also 97/2016 [Mr Henriques], and we have given careful consideration to the response by counsel for complainants in both complaints and it is the unanimous view of the Panel that having regard to the recent judgment in complaint 95/2016 [Mr McBean] which simply put, turns on the point of law that, made it abundantly clear that there was the statutory defense [sic] that avail the respondent in that complaint. The issue in terms of the application therefore is clear. We take note of the fact also that on the subject of the issues itself, it is identical and save and except for the names of the respondents, the facts and the allegations are identically the same. We are of the view that the continuation of these matters in all the circumstances would not be fair to the respondent of 96/2016 [Mr Clough] and 97/2016 [Mr Henriques]. The continuation of these matters either by way of a mention date or trial date is unjust and oppressive and we could not countenance that. In the circumstances the application made by the respondent's counsel Sandra Minott Phillips QC. and senior counsel Abe Dabdoub, we find favour of the submission accordingly and dismiss the matters 96/2016 [Mr Clough] and 97/2016 [Mr Henriques]. The only purpose of these matters occupying time is in relation to the issue of costs. The applications are granted. The complaints No. 96/2016 [Mr Clough] and 97/2016 [Mr Henriques] are dismissed."

[135] The second panel made the following orders:

> "(1) The Complaint (The General Legal Council Complaint No. 97/2016 Gorstew Limited v Roald N.A. Henriques Q.C.) is dismissed.
>
> (2) The issue of costs is reserved until March 1, 2019.
>
> (3) The Respondent is to file affidavit(s) on the issue of costs on or before February 21, 2019.
>
> (4) The Appellant is to file affidavit(s) on the issue of costs on or before February 27, 2019."

[136] The parties were invited to submit on costs, further to which the second panel ordered on 1 June 2019:

> "(1) Costs awarded to the Respondent in the sum of $500,000.00."

[137] Gorstew has asked this court to allow the appeal, set aside those orders, remit the hearing of complaint no 97 of 2016 against Mr Henriques to the GLC, and award costs in their favour.

The appeal

[138] In the amended notice of appeal filed on 3 January 2020, Gorstew outlined five grounds of appeal:

> "(1) In breach of Rule 7(2) of the Legal Profession (Disciplinary Proceeding) [sic] Rules, the Disciplinary Committee proceeded to dismiss the complaint in the absence of any notice being given to the Appellant. ['No notice in breach of rule 7']
>
> (2) The Disciplinary Committee erroneously concluded that it had the jurisdiction under the Legal Profession Act and Legal Profession (Disciplinary Proceedings Rules) [sic] to dismiss a complaint at a mention date. ['Dismissal at the mention date']
>
> (3) The Disciplinary Committee having previously ruled that there was a prima facie case made out against Mr Henriques [QC] erred when it decided it had power to dismiss the complaint without the hearing as required by section 14 of the Legal Profession Act and Rule 5 of the Legal Professional (Disciplinary Proceedings Rules) [sic]. ['Dismissal at the mention date']

> (4) The Disciplinary Committee had no legal basis to conclude that Complaint 97/2016 should be dismissed because it had dismissed a related complaint on January 12, 2019 (Complaint 95/2016). ['Basis of the dismissal']
>
> (5) The Disciplinary Committee conducted the proceedings in Complaint 97/2016 in a manner that was procedurally unfair and in breach of the principles of natural justice. The Complainant was deprived of a fair hearing by an independent and impartial tribunal. ['Deprivation of a fair hearing']" (Underline as in the original)

Preliminary objection

[139] By way of a preliminary objection with written submissions in support, Gorstew raised a point of contention concerning the fact that Mrs Minott Phillips, who represented Mr Henriques in the complaint before the GLC, now represents the GLC in this appeal. It was submitted that the Committee was established by virtue of section 11 of the LPA, and the interested party, Mr Henriques is a person aggrieved under section 12 of the LPA. It is improper, counsel for Gorstew argued, for the same attorney to act for both the respondent (the GLC) who committed the wrong and the interested party (Mr Henriques) who benefitted from the wrong as they represent different interests. There must be more than the appearance of independence on the part of the GLC since it is the only "body" permitted to receive complaints against attorneys for professional misconduct, counsel concluded. On the other hand, it was the GLC's submission that there was no conflict of interest since Mr Henriques and the GLC both agreed with the Committee's decisions. Even if there were a conflict, counsel continued, Gorstew could not raise it.

[140] We considered the parties' submissions and dismissed the preliminary objection. As promised, our brief reasons for that decision will now be provided.

[141] The rationale behind this objection was that there existed a conflict of interest because Mrs Minott Phillips, who had represented Mr Henriques in the proceedings before the Committee, now represented the GLC in this appeal. The tenets of the attorney's duty to avoid a conflict of interest emerge from the principle that an attorney must not represent a client whose interests are adverse to his own or those of a former client. To

do so would have implications for, among other things, the duty of confidentiality to one client and the duty of disclosure to the other. Canon IV(k) and (l) provide:

> "(k) Subject to the provisions of Canon IV (l), an Attorney shall not accept or continue his retainer or employment on behalf of two or more clients if their interests are likely to conflict or if the independent professional judgment of the Attorney is likely to be impaired.
>
> (l) Notwithstanding the provisions of Canon IV (k), an Attorney may represent multiple clients if he can adequately represent the interests of each and if each consent to such representation after full disclosure of the possible effects of such multiple representation."

[142] In light of those provisions of the Canons, it is Mr Henriques who would have the right to object to Mrs Minott Phillips' representation of the GLC. There was no evidence before us whether such consent was sought or given; however, Mr Henriques' consent can be presumed from his silence on this issue. As to whether Mrs Minott Phillips could adequately represent the interests of Mr Henriques and the GLC, we did not find that in this appeal, the interests of her client and former client are adverse or even fundamentally different. Consequently, we had no justification for upholding this objection.

Discussion

Ground 1- No notice in breach of rule 7

[143] This appeal against the Committee's dismissal of the complaint against Mr Henriques began with the premise that the second panel, in contravention of its own Disciplinary Proceedings Rules, allowed an objection from counsel for Mr Henriques, for which the required notice was not given.

Submissions on behalf of Gorstew

[144] Learned counsel Mrs Caroline Hay QC submitted on behalf of Gorstew that rules 7(2) and (3) of the Disciplinary Proceedings Rules established a mandatory procedure for an objecting party to give notice of a preliminary objection, which should include the nature and grounds. Queen's Counsel argued that by failing to enforce those rules, the

second panel deprived Gorstew of its right to receive prior notice of a substantive objection. The effect of this was the summary conclusion of the matter without Gorstew being able to call evidence in support of its complaint. This, Queen's Counsel posited, represents the common law position that "a party potentially adversely affected by an administrative (or judicial) decision has the right to prior notice of the issue to be addressed or the decision to be taken". The preliminary objection identified by counsel, in this case, was that since the complaint against Mr McBean was heard and determined, "no other outcome [was] possible…the only result [was] to dismiss the complaint [against Mr Henriques]". Queen's Counsel Mrs Hay contended that it was a substantive challenge to the hearing and was raised without notice to Gorstew. She relied on the cases of **Cooper v Wandsworth Board of Works** [1861-73] All ER Rep Ext 1554 and **Frederick Osborne Symes v The Attorney General of the Commonwealth of Dominica** [1995] ECSCJ No 60.

[145] Mrs Hay contended that the "requirement to give notice prior to interference with substantive rights is a fundamental principle of natural justice". The GLC, she argued, performs judicial functions, and every judicial act is subject to the procedures required by natural justice. The authorities cited in support of that submission were Wade, Administrative Law, 6th edition page 504 and Halsbury's Laws of England 2018 Volume 61A para. 31. Reliance was also placed on the cases of **Aston Reddie v Firearm Licensing Authority et al** (unreported), Supreme Court, Jamaica, Claim No HCV 1681 of 2010, judgment delivered 24 November 2011, and **Reginald Brown and Alberta Tugman v Balford Douglas and others** [2015] JMCA Civ 18. Counsel concluded that the upholding of the preliminary objection and eventual dismissal of the complaint were the result of an ambush, manifestly unfair, and ought not to be permitted.

Submissions on behalf of the GLC

[146] Learned Queen's Counsel for the GLC, Mrs Minott Phillips, contended that rule 7(2) of the Disciplinary Proceedings Rules does not apply. The GLC's position was that the dismissal of Gorstew's complaint against Mr Henriques did not emanate from a preliminary

objection. On the contrary, the bar to the complaint against him arose from a point of law taken in the complaint against Mr McBean. Furthermore, the complainant in both matters was Gorstew, so there was no scope to reasonably contend that they were unaware that the proviso to Canon IV(t) operated as a complete defence for Mr McBean and would also apply to Messrs Henriques and Clough. It was, therefore, subject to issue estoppel and not a preliminary objection.

Submissions on behalf of the interested party Mr Henriques

[147] Learned counsel for Mr Henriques, Dr Lloyd Barnett, indicated that he adopted the GLC's submissions relative to this ground.

Law and analysis

[148] This ground rests on the statutory construction of rule 7 of the Disciplinary Proceedings Rules, which provides as follows:

> "7. – (1) Each party-
>
> (a) may inspect the documents included in the list furnished by the other party, and a copy of any document mentioned in the list, shall, on the written request of the inspecting party, be furnished to the inspecting party by the other party within fourteen days after the receipt of the request; and
>
> (b) shall furnish to the secretary copies of all the documents on which that party wishes to rely.
>
> (2) Where a party intends to make a preliminary objection, notice of the objection shall be given to the secretary, and to the other party, not less than seven days before the date fixed for the hearing.
>
> (3) A notice under paragraph (2) shall include a brief statement of the nature of the objection and the grounds thereof."

[149] Counsel for Gorstew has isolated rules 7(2) and (3) from rule 7(1) of the Disciplinary Proceedings Rules in order to give them a wider scope of application to

preliminary objections in general. However, upon perusing rule 7 in its entirety, such a course, to my mind, is contrary to the rules of statutory interpretation, particularly the "*ejusdem generis"* and "*noscitur a sociis"* principles. In the judgment of **Winston Leiba et al v Beverly Valetta Warren** [2020] JMCA Civ 19, Morrison P discussed those rules of construction and made specific reference to the authority of Bennion on Statutory Interpretation, 6th edition, section 379, page 1105. He had this to say:

> "[63] The *ejusdem generis* principle is well known. This is how Bennion explains it:
>
> > 'The Latin words *ejusdem generis* (of the same kind or nature) have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words.'
>
> …
>
> [73] … For, it is another commonplace of statutory interpretation that, to quote Bennion again, 'a word or phrase is not to be construed as if it stood alone but in the light of its surroundings'. This principle is captured in yet another Latin maxim, *noscitur a sociis*, by virtue of which words or phrases in a statute 'must always be construed in the light of the surrounding text'."

[150] For the precise application of rule 7, the *ejusdem generis* principle dictates that subsections (2) and (3) are to be read conjunctively with subsection (1). Those subsections are restricted to the same genus, "Inspection, reliances, and objections", in respect of disclosure and inspection of documents. Therefore, I am firmly of the view that rules 7(2) and (3) of the Disciplinary Proceedings Rules have been misinterpreted by Gorstew and do not apply in the circumstances.

[151] Regarding the argument that common law also mandates the general requirement for notice of a preliminary objection, it is discerned from the authorities that such a requirement is context-specific. The preliminary objection ordinarily raises a point of law

for the tribunal's consideration before they can proceed to hear the substantive matter. If the tribunal agrees with the point made, it could very well result in the matter ending summarily, as was done in this case.

[152] Gorstew relied on the case of **Cooper v Wandsworth Board of Works** for the principle that "no man ought to be deprived of his property without an opportunity of being heard". That case concerned the demolition of a house without due notice being given to the owner. The court held that in circumstances where the demolition was because the defendant had not received due notice of the construction, the plaintiff, by virtue of the common law, deserved the opportunity first to be heard. Not only are the facts of that case dissimilar from the present case, but the authority is not supportive of a purported general requirement for notice to be given of a preliminary objection.

[153] Similarly, the other authorities relied on by Gorstew are unhelpful outside of reiterating the well-known and accepted principle that a litigant has a right to be heard. In the context of this case, however, it is doubtful that Gorstew has been deprived of that right. The basis of the preliminary objection was that Gorstew was estopped from re-litigating a point of law that was decided in the complaint against Mr McBean. The hallmark of such a finding is that the litigant, having had an opportunity to be heard on a particular issue(s) that was fully ventilated and decided by the tribunal, should not get a second bite at the cherry. Gorstew's desire to be heard once again in a different complaint regarding the same issue which arose from a specific set of facts (see paras. [186] and [205] below) would, therefore, be an abuse of process. For these reasons, this ground must fail.

Grounds 2 and 3 - Dismissal at the mention date

[154] Concerning this issue, the criticism directed at the second panel was grounded in procedure. More specifically, the question of whether the second panel was empowered to dismiss the complaint on 16 February 2019, described as the "mention date", without a hearing.

Submissions on behalf of Gorstew

[155] Queen's Counsel Mrs Hay cited rules 4 through 10 of the Disciplinary Proceedings Rules to support the contention that the Committee has no power to dismiss a complaint, whether for substantive or procedural reasons, without a hearing after a *prima facie* case had been established. Instead, the GLC must consider the evidence, whether *viva voce* or on affidavit, in whole or part.

[156] It was submitted that on account of the preliminary objection taken, the second panel should have set a hearing date so that Gorstew could have had a fair chance to explain why the objection should be dismissed. The mention date of 16 February 2019 was to facilitate the setting of a hearing date. Mrs Hay contended that dismissing the complaint at that time contravened section 12 of the LPA, which affords a person alleging himself aggrieved by an act of professional misconduct, the right to have his complaint heard and the attorney answer the allegations against him.

[157] A mention date, Mrs Hay submitted, is for the administrative treatment of the matter, not the substantive treatment of an issue, especially not one for which due notice ought to be given. The second panel was, therefore, obliged to proceed with a hearing. Furthermore, counsel contended that a mention date before the Committee was identical to a mention date before the Supreme Court. A judge of the Supreme Court has the inherent power to dispose of a matter at the mention date, whereas the Disciplinary Committee of the GLC, being a creature of statute, has no equivalent power to dispose of a complaint on a mention date. It was submitted that the GLC only has this discretion when a *prima facie* case was not made out against the attorney. It was Gorstew's position, firstly, that the GLC "fragrantly breached the procedure it is obliged to follow" by failing to set a hearing date and dismissing the complaint, and secondly, that the GLC acted "ultra vires, with substantial procedural impropriety and grave unfairness to Gorstew".

Submissions on behalf of the GLC

[158] Mrs Minott Phillips, in reference to section 13(2) of the LPA, contended that the dismissal of the complaint occurred at an *inter partes* hearing of Gorstew's application, which was brought pursuant to section 12 of the LPA. At that hearing, counsel submitted, the second panel made a determination and order, and so the deeming provision (section 13(2) of the LPA) applied to convert the mention date to a hearing date. Moreover, like any other tribunal, the GLC has the power to control the proceedings before it and determine how it will deal with issues. Accordingly, the argument that the complaint was dismissed without a hearing is factually inaccurate since those proceedings were deemed to be a hearing pursuant to the LPA.

[159] Mrs Minott Phillips referred to rule 5 of the Disciplinary Proceedings Rules, which stipulates that the applicant and the attorney shall have at least 21 days' notice of the date fixed for the hearing. She submitted that the parties, in this case, received more than the required notice period since the original date fixed for the hearing was 8 April 2017. Queen's Counsel further contended that all subsequent hearing and mention dates, including 16 February 2019, were agreed upon between the parties and the GLC, for which notices were dispatched in due time.

[160] It was posited that the GLC's decision in the complaint against Mr McBean was delivered after an *inter partes* hearing more than a year after its determination in 2017 that there was a *prima facie* case for the Attorneys to answer. Consequently, its later decision disposed of that initial declaration of the existence of a *prima facie* case. The GLC contended that a hearing does not necessarily involve calling witnesses and taking evidence and could even be entirely on paper (as acknowledged in Gorstew's submissions in this appeal). Queen's Counsel Mrs Minott Phillips submitted that, on 16 February 2019, the parties, through their counsel, were given the opportunity to make submissions regarding the implications of the point of law taken in the complaint against Mr McBean on the complaint against Mr Henriques. In conclusion, it was advanced that "fairness does

not require the Disciplinary Committee to hear evidence when the matter should be dismissed on a point of law".

Submissions on behalf of the interested party Mr Henriques

[161] Counsel Dr Barnett submitted that the nomenclature "mention date" does not appear in the Disciplinary Proceedings Rules but rather is conveniently adopted from language used in court proceedings. It was contended that mention dates are essentially dates for managing cases so that a case can be dismissed in appropriate circumstances. Counsel posited that the relevant question is whether the issue that arose for the second panel's consideration on that date was a purely legal issue or if it were important to adduce evidence that would be subjected to cross examination before the complaint could be determined. Furthermore, all the relevant parties had copies of the decision in the complaint against Mr McBean and had the opportunity to submit on its applicability to Mr Henriques' complaint. Accordingly, the complaint against Mr Henriques was rightly dismissed on the same basis as the complaint against Mr McBean. Counsel also adopted the GLC's submissions in relation to these grounds.

Law and analysis

[162] The Disciplinary Proceedings Rules set out the procedure to be followed when disciplinary action is to be taken against an attorney. Rule 4 (as amended) states, among other things, that before a hearing date is fixed, the Committee will serve a copy of the application and supporting affidavit on the attorney against whom the complaint is made, along with all relevant documents and information. The attorney should respond within 42 days of service in the form of an affidavit. Upon the expiration of the 42 days, the Committee will consider the application and response, and if a *prima facie* case is established, the Committee will fix a date for the hearing (see rule 5). A notice of the date for the hearing will be served on the attorney and the complainant.

[163] Counsel for Gorstew has placed much emphasis on the preliminary finding of a *prima facie* case for a hearing date to be set. What is meant by "a *prima facie* case" in

this context was discussed in the judgment of **McCalla v Disciplinary Committee of the General Legal Council** [1994] 49 WIR 213 ('**McCalla v GLC**'). At page 248, Wright JA opined:

> "In my judgment, the provision in rule 4 for the dismissal of the complaint where no prima facie case is shown simply indicates the meaning in the rule which is **a case serious enough to require a response from the attorney**. It would be ridiculous to summon an attorney to answer charges which are frivolous or misconceived. In such cases the prima facie case required by the rule would not have been shown." (Emphasis added)

[164] However, caution is to be exercised in applying that definition to the present case, considering that **McCalla v GLC** was decided before rule 4 of the Disciplinary Proceedings Rules was amended. Prior to its amendment, there was no requirement for the attorney to respond or even be notified of the complaint before a determination that a *prima facie* case had been made out. Wright JA further opined that, by that rule, if *prima facie* meant proof beyond a reasonable doubt, then the charge against the attorney would be held to be proved even before he had been notified of the complaint. He stated further that "[i]t would, indeed, be startling to hold that before there has been any response from the attorney, the Disciplinary Committee could, on the untested information supplied by the [complainant], find that a *prima facie* case, as the term is generally understood, has been made out".

[165] It is, therefore, not surprising that rule 4 was subsequently amended to allow the attorney to submit his or her response by way of affidavit within 42 days of receiving a copy of the application and supporting affidavit before the Committee decides whether a *prima facie* case is shown. Considering Wright JA's reasoning and the amendment to rule 4, it is understood that the term "*prima facie*" now means more than there is "a case serious enough to require a response from the attorney" (that is, the attorney is required to face disciplinary proceedings by way of a hearing). Notwithstanding, I am not convinced that the finding of a *prima facie* case would be a bar to the Committee dismissing the matter on a point of law that directly affects their jurisdiction.

[166] It is unclear to me why the hearing on 16 February 2019 has been dubbed the "mention date". We have not been provided with any copy of the notices of the hearing dates in the complaints. However, the transcript of the proceedings in the complaint against Mr McBean reveals that all three complaints were to be heard together on 16 September 2017. All three Attorneys and their counsel were present on that date. On that day, due to issues cited by counsel for Messrs Henriques and Clough, the first panel conducted what could best be described as a case management exercise (typically done on a mention date), which resulted in a decision to proceed first with the hearing against Mr McBean. Mr McBean's hearing then commenced with Mr Singh giving evidence in chief. This clearly indicated that 16 September 2017 was treated as a hearing and not a mention date by the panel. Nevertheless, it is acknowledged that the notes of proceedings (dated 16 September 2017) do not show whether the complaints against Messrs Henriques and Clough were adjourned for mention or hearing.

[167] Also, there is no indication in the notes of proceedings dated 16 February 2019, that that date, when Messrs Henriques and Clough appeared before the second panel, was to be treated as a mention date. The first sentence in the notes of proceedings reads, "Report on hearing held on 16th February, 2019 in Room No. 3 at General Legal Council 78 Harbour Street, Kingston". Admittedly, throughout that transcript, there were several references to the "mention date", although none directly identified the proceedings as such, except when the second panel enquired of counsel if the matter "should be put for further mention date". When the preliminary objection was raised by Mrs Minott Phillips (counsel for Mr Henriques at the hearing of the complaint), Mr Jerome Spencer (counsel for Gorstew at the hearing of the complaint) responded. A discussion ensued, during which Mr Spencer posited that once a *prima facie* case is made out, the matter should proceed to a full hearing and not a mention date. He also resisted the preliminary objection on the basis that the decision of the first panel was being appealed and proposed that the "natural course" was for the matter to be adjourned for trial. Mr Spencer also argued that if the preliminary objection arose on a hearing date, the second panel would hear the submissions of both sides. In stating their position towards the end

of the proceedings, the second panel declared that "the continuation of these matters either by way of a mention date or trial date is unjust and oppressive and we could not countenance that".

[168] That being said, even if it were to be accepted that there is some unwritten custom where the Committee treats the date of the first hearing as a mention date or that 16 September 2019 was, in fact, a mention date, this would not, as previously indicated, prevent the Committee from hearing and giving a decision on a preliminary legal issue. The concept of a "mention date" is traditionally a facet of criminal proceedings. It is a prominent feature of the Parish Courts and the Supreme Court's criminal division, allowing the courts to manage the cases. There has, however, been much debate in this matter and previous matters regarding the nature of such proceedings.

[169] While it is well known and accepted that the Committee's standard of proof is the criminal standard, which is "beyond a reasonable doubt" (**Campbell v Hamlet** [2005] UKPC 19), it would also be fair to observe that the procedure set out in the Disciplinary Proceedings Rules (rules 3 through 10) shares similar procedures with the civil jurisdiction of the Supreme Court. For instance, the requirement to file an application with an affidavit in support, along with relevant documents, to initiate a complaint and the attorney to respond by way of affidavit. Some of the sanctions open to the Committee (under section 12(4) of the LPA) are also similar to civil sanctions, such as costs orders and the requirement for the attorney to attend prescribed training courses. Counsel for Gorstew, in their submissions relating to Mr Clough's appeal, went even further to argue that the Committee is quasi-civil.

[170] In my judgment, how the Committee carries out its functions, in the light of the procedural requirements of the Disciplinary Proceedings Rules, is reminiscent of aspects of the Civil Procedure Rules 2002 ('CPR') of the Supreme Court. By way of comparison, it would seem to me that even if the first date set for the hearing of the complaint is ordinarily used to manage the case, it would be commensurate with the first hearing of fixed date claims and/or case management conferences. The first hearing of a fixed date

claim is covered by rule 27.2 of the CPR; of relevance to this assessment are subsections (7) and (8), which provide:

> "(7) At the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.
>
> (8) The court may, however, treat the first hearing as the trial of the claim if it is not defended or the court considers that the claim can be dealt with summarily."

[171] As it pertains to the general powers of case management, rule 26.1(2)(j) of the CPR provides that the court has the power to "dismiss or give judgment on a claim after a decision on a preliminary issue".

[172] It is evident from the above that the Committee is neither purely civil nor criminal in nature. As Dr Barnett stated, it is best described as *sui generis*, which means "of its own kind". Consequently, I see no reason why the second panel would be restrained from dismissing a complaint on a preliminary issue taken on a "mention date".

[173] To me, irrespective of the title given to the proceedings on the date in question, it cannot reasonably be said that, at that time, the matter was not dealt with justly. The parties and their attorneys were before a fully constituted panel. The decision in the complaint against Mr McBean was handed down over a month before the proceedings for Messrs Henriques and Clough. Upon appearing before the second panel, counsel for Gorstew would have been aware of that decision. When counsel for Mr Henriques made the preliminary objection for the dismissal of the complaint, counsel for Gorstew was afforded the opportunity to respond, and he did so. What then would be the practical benefit of adjourning the discussion on whether Gorstew was estopped from re-litigating the point of law decided in the complaint against Mr McBean on the basis that it was a preliminary objection being raised on a "mention date"? In fact, the second panel pondered this very question when they enquired of Mr Spencer:

> "…if we were to adjourn to next week having set a trial date instead of a mention date and then the Panel took the decision to dismiss

> the complaint and hear the submissions on the matter of costs your position would be?"

[174] It is my opinion that Gorstew had a full and fair opportunity to argue their case before the second panel in relation to the objection raised to the continuation of the hearing of the complaints on the basis of issue estoppel. This ground is, therefore, devoid of merit.

Ground 4 - Basis of the dismissal

[175] In arguing this ground, Gorstew sought to challenge the second panel's decision to dismiss the complaint against Mr Henriques following the dismissal of the related complaint against Mr McBean. The discussion on this matter concerned the law on issue estoppel and the finding that Mr Henriques was also entitled to the protection of the proviso.

Submissions on behalf of Gorstew

[176] Queen's Counsel Mrs Hay contended that the second panel's justification for dismissing the complaint against Mr Henriques was that the facts were identical to the complaint against Mr McBean and Mr Clough. That finding, it was submitted, was plainly wrong. Accordingly, the argument continued, the issues of *res judicata* and issue estoppel do not arise since the parties and the allegations in the separate complaints against Messrs McBean and Henriques are not the same. Therefore, whether Mr Henriques could avail himself of the proviso is entirely dependent on the facts of the case and could not merely be determined based on the finding of the first panel, after a hearing, that the proviso relieved Mr McBean in a related complaint.

[177] It was Gorstew's case that whereas Mr McBean expressed his reservations and declined to participate after the judicial review application had been filed, Mr Henriques, on the other hand, actively participated in the decision to file the judicial review application. Mrs Hay submitted that Mr Henriques assisted with drafting the pleadings and prepared Gorstew for the judicial review application. In addition, he did not express

his reservations about the proceedings until after the judicial review application was filed. It was contended that had the second panel proceeded to the hearing in accordance with the rules, those matters would have been ventilated before them, and they would have been obliged to make findings of fact in that regard. Queen's Counsel posited that if Mr Henriques "advised the course of action, it would be inconceivable that [he] could later complain about [the] resultant criticism". It was Gorstew's position that the second panel's determination of Mr Henriques' role would have affected whether he was entitled to call upon the proviso.

[178] It was further submitted that the duty to maintain confidences is very high and should not be lightly disturbed. That duty appeals to high ethical standards and sound public policy and is unqualified (**Bolkiah v KPMG**). In such circumstances, counsel argued, the client, Gorstew, who has not complained against the attorney, Mr Henriques, or accused him of any misconduct, "ought not to lose the enshrined protection of his confidences". Once an attorney-client relationship exists, the burden on the client to prove that the attorney possessed the confidential information is low (**JMMB v Winston Finzi (No 3)** [2015] JMCCD 15). Furthermore, counsel argued that the duty to maintain confidences subsists even if the retainer is terminated (**Balabel v Air India**).

[179] It was argued that the unqualified duty to maintain confidence belongs to the client, and only the client can trigger the release of information, whether by consent or an accusation against the attorney. That principle can only be broken in limited circumstances, which in this case is the accusation of wrongful conduct. Queen's Counsel Mrs Hay contended that for the proviso to apply, the accusation must be made by the client or a person aggrieved (within the meaning of section 12 of the LPA). It was submitted that if the public perceives an attorney as acting wrongfully, but the client makes no complaint, it would be an improper use of the proviso to defend oneself with the client's confidential information. Otherwise, such an application, Queen's Counsel asserted, would "lead to absurdity and danger".

[180] It was Gorstew's position that the mere signing of the letter was an unacceptable breach of confidence and possibly even a breach of privilege. The letter was written after the judicial review application was refused but before the hearing of the renewed application by the Full court, so the legal advice given in the course of litigation would have been subject to litigation privilege.

[181] For these reasons, Gorstew concluded that the second panel "gravely erred" in its decision not to fix a date for the hearing of the complaint against Mr Henriques by a differently constituted panel, which resulted in a miscarriage of justice and a breach of the right to a fair hearing.

Submissions on behalf of the GLC

[182] Mrs Minott Phillips submitted that where the facts giving rise to the issues are identical and arise out of the same incident, the law is to be applied in the same way to each set of identical facts, which was what happened in this case. Queen's Counsel highlighted that the affidavits filed by Gorstew in support of its position in each complaint were alike. Consequently, the determination of the point of law in the complaint against Mr McBean immediately created an issue estoppel. For that reason, it was further submitted, the proviso is applicable as a complete defence not just to that complaint but equally to the other two complaints because the facts relevant to the applicability of the proviso were identical in all three complaints.

Submissions on behalf of the interested party

[183] Dr Barnett submitted that the second panel was correct to first consider whether the proviso applied, in which case assessing the other issues raised was unnecessary. The decision in the complaint against Mr McBean was a matter of law regarding the letter signed by the Attorneys. Counsel referred to the Supreme Court decisions of **Sydnia Matheson v Lelieth Watts** [2018] JMSC Civ 144 and **Fletcher and Company Limited v Billy Craig Investment Limited and Scotia Investment Limited** [2012] JMSC Civil 128, and submitted that issue estoppel could still apply since in all three complaints,

it was the same complainant seeking to argue the same point of law, that the proviso did not apply. Gorstew was estopped from asserting that the proviso did not operate as a complete defence to the remaining complaints as a matter of law since that issue had been decided in Mr McBean's favour. The submissions made on behalf of the GLC in relation to this ground were also adopted.

Law and analysis

[184] The question to be resolved under this ground is whether the second panel erred in finding that they were constrained by the decision in the complaint against Mr McBean, with the result that Mr Henriques was entitled to the protection of the proviso. At the cornerstone of that decision was the conclusion that both complaints arose from identical facts and allegations, which Gorstew has ardently challenged. Gorstew contended that Mr Henriques' involvement in the judicial review application was much more than Mr McBean's. For example, after the determination of the criminal proceedings, it was stated that Gorstew consulted Mr Henriques on the way forward. There were allegations of conversations and meetings in which Mr Henriques was said to be an active participant. There was also the claim that he assisted in drafting the documents for the judicial review application. Mr Henriques has, of course, contested those assertions. Mr Henriques has put forward that he did not advise Gorstew in respect of the judicial review application and did not have sight of the draft documents. However, both parties agree that Mr Henriques expressed his reservations at the meeting held (with Mr McBean and others in September 2014) after the judicial review application was filed and ultimately declined to participate in the judicial review application.

[185] On account of those diverse facts, it was further submitted by Gorstew that the second panel ought to have proceeded with the hearing so that the discrepancies could be aired and resolved. That discourse, Gorstew opined, would have allowed for the issues of law to be considered in view of the facts specific to Mr Henriques.

[186] In my judgment, however, the facts on which the proviso was applied in both complaints steer clear of the facts regarding the Attorneys' involvement in the judicial

review application. The divergent facts on that issue relate to whether the Attorneys had a duty of confidence to Gorstew and whether that duty was breached; matters that were not decided by the Committee in either hearing. In any event, as previously indicated, there is merit in Gorstew's argument that the entitlement of the Attorneys to the protection of the proviso would have, by implication, been preceded by the Committee's acceptance that, based on the facts presented by Gorstew, they could have likely been in breach. Notwithstanding, upon an examination of the words of the proviso, it is pellucid that given their ordinary meaning, there is no requirement for an impartial determination of whether the wrongful conduct an attorney is accused of is true in order for the proviso to be invoked, contrary to Gorstew's argument (see **Harold Brady v General Legal Council**). I wish to reiterate that the proviso clearly states that once there is an accusation of wrongful conduct, an attorney can reveal in his defence, his client's (or former client's) confidence or secret without consent (as stated at para. [107] above). Accordingly, the points of variance (on Gorstew's case) with Messrs McBean and Henriques' participation in the judicial review application are immaterial to the resolution of this ground.

[187] The essential facts, therefore, are those that establish whether there was an accusation of wrongful conduct. As confirmed in the discussion of the complaint against Mr McBean, the Gleaner article constituted an accusation of wrongful conduct (albeit by a third party) for which the defence contained in subparagraph (ii) of the proviso could be invoked (paras. [115] – [122] above). After reviewing the evidence, including the affidavits supporting the complaints against Messrs McBean and Henriques, I am satisfied that the facts which support the determination that they were entitled to the protection of the proviso were identical.

[188] The related matter to be considered is whether Gorstew was estopped from re-litigating that mixed point of fact and law in the complaint against Mr Henriques. Before the second panel, counsel for Mr Henriques raised a preliminary objection that the complaint was barred by issue estoppel. Issue estoppel arises when a tribunal of

competent jurisdiction delivers the final decision on an issue raised in subsequent proceedings with the same parties or their privies (see Halsbury's Law of England, 2020, Volume 12A, para. 1589).

[189] Notwithstanding that definition, issue estoppel can also be canvassed where not all the parties are the same. In **North West Water Limited v Binnie & Partners** [1990] 3 All ER 547, Drake J considered the House of Lords decision in **Reichel v Magrath** (1889) 14 App Cas 665 and expressed the view that while it was acknowledged that "issue estoppel" was not a recognised term at the time of that decision, the principle was established that to allow an appellant to re-litigate an issue that is identical to one already decided between him and a different party would be an abuse of process. Drake J also considered the two schools of thought as to the limits of issue estoppel and expressed that he preferred the broader approach. He opined (page 561c):

> "… I find it unreal to hold that the issues raised in two actions arising from identical facts are different solely because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word 'solely'. I think that great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. Before doing so the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in the new action."

[190] In my view, the second panel cannot be faulted for its decision. In the two complaints, there is no real or practical difference between the issues of the application of the proviso and the circumstances that led to it. Accordingly, Gorstew was estopped from reviving the discussion in the complaint against Mr Henriques since those issues had already been decided, albeit with a different party. In the light of the preceding discussion, this ground must fail.

Ground 5- Deprivation of a fair hearing

[191] The final ground of appeal challenged how the second panel conducted the proceedings as being procedurally unfair and in breach of the principles of natural justice. The main bone of contention was that Gorstew was deprived of a fair hearing by an independent and impartial tribunal.

Submissions on behalf of Gorstew

[192] Queen's Counsel Mrs Hay maintained that the GLC failed or refused to set the matter for a fair hearing before an impartial panel and that no notice had been given of the intended preliminary challenge to the hearing. By virtue of the GLC's prior ruling that the matter should proceed to a hearing, it was "irrational and unfair to deprive Gorstew of the opportunity to be heard". Reliance was placed on the cases of **R v Secretary of State for the Home Secretary, ex parte Doody** [1994] 1 AC 531, **Symbiote Investments Limited v Minister of Science and Technology and Office of Utilities Regulation** [2019] JMCA App 8, **R (On the application of Citizens UK) v Secretary of State** [2019] 1 All ER 416.

[193] It was asserted that there was a real possibility of bias because the chairman of the second panel also sat on the first panel that heard the complaint against Mr McBean. Mrs Hay referred to the test for bias as stated in the cases of **Wilmot Perkins v Noel B Irving** (1997) 34 JLR 396, **Porter v Magill** [2001] UKHL 67 and **Roald Henriques v Hon Shirley Tyndall et al** [2012] JMCA Civ 18, and submitted that "no fair-minded informed observer would perceive impartiality in that member". The reasoning in the complaint against Mr McBean was fact-sensitive, or at least it needed to be. The chairman, however, had a settled view in determining the case on the preliminary objection "without apparent objectivity or impartiality", Queen's Counsel argued. It was further contended that the chairman did not appreciate the difference in the factual allegations, and he imported unsound reasoning, which led the second panel to abruptly terminate the hearing. If the chairman had not sat on the second panel, that error might not have occurred, and an objective panel might have waited to hear the facts. For those

reasons, Gorstew submitted that the decision to dismiss the complaint against Mr Henriques was an affront to justice, and it ought to be remitted to the GLC before a differently constituted panel for a hearing.

Submissions on behalf of the GLC

[194] The GLC, in response, pointed out that Gorstew did not express any objection to the chairman of the second panel hearing the complaint on the basis that he was also a member of the first panel that heard the complaint against Mr McBean. The case of **Frankson v The General Legal Council**, in which this court found that members of the panel who had decided whether a *prima facie* case existed could also hear the actual complaint, was cited. Mrs Minott Phillips made the submission that a member hearing a similar complaint is not a bar to hearing another complaint. As to the purported bias, Queen's Counsel argued that the chairman had no personal interest in the outcome of the proceedings, so he could not have been a judge in his own cause merely because he sat on the first panel that heard the complaint against Mr McBean.

[195] Mrs Minott Phillips posited that the outcome of this complaint was inevitable as a result of the issue estoppel created by the decision in the complaint against Mr McBean. Gorstew benefitted from a full hearing in the latter complaint, and as a result, counsel was aware of the point of law. It was contended that if the second panel were not made aware of the legal issue mandating the dismissal of the complaint, it would have been a waste of time and resources. The determined issue of law was applied to the facts alleged by Gorstew, and the second panel found that Mr Henriques was entitled to the protection of the proviso as a complete defence. Accordingly, none of the factual differences are relevant because the complaints and the facts that gave rise to the decision were identical, and the second panel proceeded on the assumption that the facts alleged were true, though no decision was made in this respect.

Submissions on behalf of the interested party

[196] Counsel Dr Barnett for Mr Henriques adopted the submissions made on behalf of the GLC. Further, he contended that Gorstew was represented at the hearing and made submissions that were considered by the second panel.

Law and analysis

[197] The right to a fair hearing is a fundamental principle of natural justice. Gorstew has asserted that it has been deprived of that right for two reasons. First, the chairman of the second panel, having also sat on the first panel, was not impartial in his consideration of the complaint, and second, the second panel decided not to proceed with the hearing but instead to dismiss the complaint by virtue of the dismissal of the complaint against Mr McBean.

[198] Undeniably, the independence and impartiality of a decision-making body will be threatened by a member of that body having a bias against or in favour of any of the parties to the matter. An allegation of bias, whether actual or apparent, must not be frivolously or spuriously made (**Roald Henriques v Hon Shirley Tyndall et al**). The relevant test has been repeatedly addressed in numerous cases, most of which have cited the House of Lords' formulation in **Porter v Magill**, that is, "whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". Lord Bingham described the fair-minded and informed observer in the case of **R v Abdroikof** [2007] UKHL 37, approved by the Privy Council in **Tibbetts v the Attorney General of the Cayman Islands** [2010] UKPC 8, as being neither unduly complacent or naïve nor unduly cynical or suspicious, who must adopt a balanced approach and is to be taken as a reasonable member of the public.

[199] The purported bias being ascribed to the chairman of the second panel is not personal in nature. On account of the decision in the complaint against Mr McBean, it is said that he was unable to be impartial in this complaint, thereby contaminating the independence of the second panel in its determination of the matter. No rule, statutory

or otherwise, precludes a member of one panel from sitting as a member on another panel in a related matter. Still, the circumstances surrounding each matter would be crucial in ascertaining whether a fair-minded and informed observer would find that there was a real possibility of bias.

[200] The complaint was dismissed on the basis that Gorstew was estopped from re-litigating the finding of law already decided on identical facts in the previous complaint against Mr McBean. Those issues of law and facts were thoroughly ventilated during the hearing of the complaint against Mr McBean and would only be repeated in a further hearing of this complaint, as indicated by the identical affidavits filed in support of both. As stated earlier, the facts that differed were not relevant to the second panel's determination. It is also evident that the constitution of the panel was immaterial. Had it been a differently comprised panel with three members who did not sit in on the complaint against Mr McBean, they would have still been bound by the point of law taken in that matter.

[201] Additionally, I adopt the words of Edwards JA in **Don O Foote v General Legal Council** [2021] JMCA Misc 2 (at para. [69]) that in the present case, "[T]here was no evidence that the chairman had any interest [direct or indirect] in the outcome of the case. It could not be said that he was acting as a judge in his own cause, nor could it be fairly said that his conduct could raise any suspicion of bias". Therefore, I am compelled to conclude that no fair-minded and informed observer, having full knowledge of the facts, would find that there was a real possibility that the chairman was biased. It follows from this conclusion that the impartiality of the second panel has not been undermined.

[202] In any event, this is not the appropriate forum to raise that concern for the first time. In **Locabail (UK) Limited v Bayfield Properties Limited** [2000] QB 451, it was held that it was not open to the appellant to await the resolution of her matter and then pursue an allegation of bias upon being unsuccessful. Similarly, despite Gorstew's knowledge that the chairman of the second panel also sat on the first panel that heard the complaint against Mr McBean, no objection was raised that there was a real possibility

that the chairman was tainted by bias to enable the second panel to consider this issue. If Gorstew were genuinely concerned about the chairman being a member of the second panel, it ought to have objected and applied for his recusal, given that not only did it know that the chairman was a member of the first panel, but its counsel would have appreciated the implications of the preliminary legal point that counsel for Mr Henriques advanced. It is now palpably unacceptable for Gorstew to raise this issue for the first time in the face of an adverse decision against it (see also **Jamaican Redevelopment Foundation, Inc v Clive Banton and Sadie Banton** [2019] JMCA Civ 12). This ground also fails.

The issue of costs

[203] Gorstew indicated in their amended notice and grounds of appeal that they are also appealing against the award of costs to Mr Henriques for $500,000.00. However, counsel for Gorstew has not advanced any submissions on this issue. We note that the Committee is empowered by section 12(4)(f) to order "the payment by any party of costs of such sum as the Committee considers a reasonable contribution towards costs". The second panel allowed the parties to file affidavits on costs. However, Mr Henriques was the only party to file an affidavit (dated 19 February 2019). It is plain that the second panel exercised their discretion to order costs in favour of Mr Henriques on that uncontested affidavit. In the absence of submissions to the contrary, there is no basis for finding that the exercise of that discretion was improper.

[204] Accordingly, I would propose that appeal COA2019MS00003 against the Committee's decision in complaint no 97/2016 against Mr Henriques be dismissed and that the GLC and interested party be awarded costs to be agreed or taxed.

COA2019MS00002 - Complaint no 96/2016 against Mr Clough

[205] This complaint and the corresponding appeal were the second to be filed, but it was more pragmatic, I found, to address it last so that the judgment would be more coherent. As already established, the complaint against Mr Clough was also heard and

dismissed on 16 February 2019. The finding of issue estoppel was also the basis for that dismissal, in circumstances where the facts which led to the allegation that the Attorneys breached Canon IV(t) and those which supported the application of the proviso were identical. It should also be noted that the affidavit filed by Gorstew in support of this complaint was identical to the affidavits filed in support of the complaints against Messrs McBean and Henriques (paras. [18] – [24] of this judgment). At the hearing before the second panel, counsel Mr Dabdoub for Mr Clough joined Mrs Minott Phillips in submitting that the second panel was estopped from re-litigating the relevant point of law by virtue of the first panel's decision.

The decision of the Committee

[206] The second panel made the following orders in favour of Mr Clough on 16 February 2019:

> "(1) The Complaint (The General Legal Council Complaint No. 96/2016 Gorstew Limited v Raymond Clough) is dismissed.
>
> (2) The issue of costs is reserved until March 1, 2019.
>
> (3) The Respondent is to file affidavit(s) on the issue of costs on or before February 21, 2019.
>
> (4) The Appellant is to file affidavit(s) on the issue of costs on or before February 27, 2019."

[207] Mr Clough did not file any such affidavit, and neither he nor his attorney were present on 1 June 2019, for the adjourned hearing on costs. In any event, the second panel awarded costs to Mr Clough in the amount of $250,000.00.

The appeal

[208] The amended notice and grounds of appeal filed on 3 January 2020 outlined five grounds of appeal:

> "(1) In breach of Rule 7(2) of the Legal Profession (Disciplinary Proceeding) [sic] Rules, the Disciplinary Committee proceeded to

dismiss the complaint in the absence of any notice being given to the Appellant.

(2) The Disciplinary Committee erroneously concluded that it had the jurisdiction under the Legal Profession Act and Legal Profession (Disciplinary Proceedings) Rules to dismiss a complaint at a mention date.

(3) The Disciplinary Committee having previously ruled that there was a *prima facie* case made out against Mr Clough erred when it decided it had power to dismiss the complaint without the hearing required by the Legal Profession Act and Legal Professional (Disciplinary Proceeding) [sic] Rules.

(4) The Disciplinary Committee had no legal basis to conclude that Complaint 96/2016 should be dismissed because it had dismissed a related complaint on January 12, 2019 (Complaint 95/2016).

(5) The Disciplinary Committee conducted the proceedings in Complaint 96/2016 in a manner that was procedurally unfair and in breach of the principles of natural justice. The Complainant was deprived of a fair hearing by an independent and impartial tribunal." (Underlining as in the original)

[209] If successful in this appeal, Gorstew has sought orders for the decision handed down on 16 February 2019 to be set aside, the hearing of the complaint against Mr Clough to be remitted to the Committee and for costs in the appeal.

Discussion

[210] Mr Clough was retained in September 2011 by ATL Group Pension Fund Limited to assist the prosecutors in the criminal proceedings, and his participation as a member of the team was well known. It is agreed that Mr Clough was not involved in the judicial review application and did not attend the meeting that was held in September 2014 (or any meeting held after the criminal case ended) and was not privy to any discussion that took place at that meeting (or any other meeting). By virtue of his involvement in the criminal case and the ambiguity in the Gleaner article surrounding which counsel represented Gorstew in the judicial review application, he felt the need to co-sign the letter. Gorstew, having taken issue with his co-signing of the letter, also filed their

complaint with a supporting affidavit against him. The contents of the affidavit in support are the same as those filed against Messrs McBean and Henriques.

[211] In his affidavit dated 13 April 2016, in response to Gorstew's complaint, Mr Clough averred that:

> (a) aside from the fact that he was not involved in the judicial review application, the content of the letter did not reveal any confidential information;
>
> (b) he did not use any confidence of Gorstew to his own advantage and/or to the disadvantage of Gorstew;
>
> (c) he was not guilty of conduct unbecoming of the ethical standards and traditions of the legal profession; and
>
> (d) Canon IV(t) allowed him to lawfully defend himself against an accusation of wrongful conduct.

[212] In light of the orders sought, due consideration has been given to the fact that Mr Clough passed away in September 2019 (after the initial filing of this appeal on 21 February 2019). Queen's Counsel for the GLC, Mr Hylton, raised this preliminary issue and contended that, even if the appeal were allowed, the GLC would have no basis to hear the complaint against him due to his death. We enquired of Queen's Counsel Mrs Hay whether Mr Clough's death would have any implications for the appeal. Queen's Counsel responded that the court's determination of whether Mr Clough's co-signing of the letter in circumstances where he was not consulted and did not attend the meeting in relation to the judicial review application constituted a breach of Canon IV(t) was important. She submitted that resolution of that issue would be of great value to the profession. It was Gorstew's position, however, that the death of an attorney does not invalidate proceedings unless there is a statutory provision to that effect.

[213] In written submissions, counsel for Gorstew posited that the GLC's disciplinary proceedings are not "quasi-criminal" (**McCalla v GLC**, **Bolton v Law Society** [1994] 1 WLR 512, **Solicitors Regulation Authority v Dar** [2019] EWHC 2831 (Admin), **GLC (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16, **Re a Solicitor** [1945] KB 368 were cited in support). Accordingly, the criminal law procedure that applies to terminate criminal proceedings when an accused person dies does not apply to disciplinary proceedings. On the other hand, it was the position of the GLC that disciplinary proceedings are quasi-criminal in nature, and so cannot be continued after the death of the attorney since any liability or penalty would be personal to the accused (the attorney in disciplinary proceedings) (**Turk v R** [2017] EWCA Crim 391).

[214] Common law dictates that, in criminal appeals, the death of an accused will ordinarily abate the proceedings and extinguish all previous decisions made against him. In civil matters, depending on the remedy sought, the claim against the defendant can survive death if pursued by his estate. In **McCalla v GLC**, Wright JA cited **Re A Solicitor** in observing that although the standard of proof is the criminal standard, there are no criminal sanctions provided by a breach of the Canons constituting "misconduct in a professional respect".

[215] It is recognised that disciplinary proceedings do not fall squarely within either arena, and as such, they must be determined in accordance with the LPA and relevant case law. It would seem that in the absence of any pronouncement in case law or express provision in the LPA or the Disciplinary Proceedings Rules that provides for the dismissal of such complaints upon the death of the attorney, they are not automatically abated. However, it is noted that the Committee, upon finding that an attorney is guilty of professional misconduct, is empowered by section 12(4) of the LPA to impose sanctions of striking off, suspension, imposition of a fine, and reprimand, which are all personal in nature.

[216] Gorstew is seeking orders for, among other things, the second panel's decision to be set aside and the complaint against Mr Clough to be remitted to the GLC's Disciplinary

Committee for hearing. In circumstances where Mr Clough would not be able to give oral evidence in his defence or respond to and challenge the evidence of Gorstew, it is incomprehensible to me how a hearing before the GLC could properly proceed. Nevertheless, this appeal is against the decision of the GLC, relative to which Mr Clough would only be an interested party. With that in mind, on account of Mr Clough's death, this appeal is purely academic since it would be ludicrous and improper for the hearing of the complaint against Mr Clough to be remitted to the Committee and for the orders being sought against him to be made posthumously. I say so because it is beyond debate that disciplinary proceedings, given their character, are *in personam* and not *in rem.*

[217] The complaints against Messrs Henriques and Clough were heard together. The second panel dismissed the complaints for the reasons outlined at paras. [131] – [134]. The grounds cited in both appeals are the same. Save and except for the varying degree of their involvement with Gorstew, the law and its application would be substantially similar. Taking this into account, only the possible implications of that disparity will be examined.

[218] It was Gorstew's position that, although Mr Clough did not settle any documentation, advise them, or attend the meeting in relation to the judicial review application, by co-signing the letter, he adopted and published the advice given by Messrs McBean and Henriques. Effectively, he was "gratuitously and publicly giving his own advice to his former client in a matter that was directly related to his former retainer", counsel argued. It was further submitted that that advice became the confidence of Gorstew. Mrs Hay, in conclusion, asserted that Mr Clough was not entitled to rely on the proviso.

[219] Queen's Counsel for the GLC, Mrs Minott Phillips, relied on their submissions in the appeal for Mr McBean and contended that the proviso would equally apply to Mr Clough. Queen's Counsel also submitted that it was clear and accepted by Gorstew that they did not seek Mr Clough's approval or involvement to institute the judicial review application.

As a result, he could not have revealed any advice with the words "did not approve of" since he did not advise Gorstew.

[220] Mr Dabdoub submitted on behalf of Mr Clough that his retainer ended on 4 June 2014, and communication between him and Gorstew ceased. He contended that the Gleaner article gave the false impression that the judicial review application was made by the same team of private attorneys hired by Gorstew in the criminal.

[221] For the reasons stated in the discussion of Mr McBean's appeal, I also accept that Mr Clough was retained by Gorstew in the criminal case and had a continuing duty to maintain their confidences. However, the communication that Gorstew has asserted was purportedly revealed in the letter did not exist during that retainer. In the light of the undisputed fact that Gorstew did not seek legal advice from or communicate confidential information to Mr Clough, I am of the view that he did not possess Gorstew's confidences or secrets with respect to the judicial review application.

[222] Gorstew's submissions do not persuade me that the statement that the Attorneys did not approve of the judicial review application could belatedly be considered legal advice in circumstances where Mr Clough had not communicated with Gorstew on that matter. Consequently, Mr Clough could not have breached Canon IV(t) by co-signing the letter, and neither did he "gratuitously and publicly [give] his own advice to his former client in a matter that was directly related to his former retainer" as attractively proposed by counsel for Gorstew. The other issues concerning the proper procedure and the application of the proviso have already been addressed, and the resolution of those issues is equally applicable to this appeal. Consequently, the grounds relied on by Gorstew in Mr Clough's appeal are unmeritorious, and they fail.

[223] I also propose that this appeal (COA2019MS00002) against the decision of the Committee in complaint no 96/2016 against Mr Clough be dismissed with costs to the GLC and the attorneys-at-law for the interested party to be agreed or taxed.

F WILLIAMS JA

ORDER

1. The appeal in COA2019MS00001 against the decision of the Disciplinary Committee of the General Legal Council in complaint no 95/2016 against Mr Garth McBean QC is dismissed.

2. The decision and order of the Disciplinary Committee of the General Legal Council made on 12 January 2019 are affirmed.

3. The appeals in COA2019MS00002 and COA2019MS00003 against the decisions of the Disciplinary Committee of the General Legal Council in complaints nos 96/2016 and 97/2016 against Mr Raymond Clough and Mr Roald Henriques QC, respectively, are dismissed.

4. The decisions and orders of the Disciplinary Committee of the General Legal Council made on 16 February 2019 are affirmed.

5. Costs to the respondent and the interested parties, Mr Garth McBean QC, Mr Roald Henriques QC and the attorneys-at-law for Mr Raymond Clough, to be taxed if not agreed.