J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 16 of 1970

BEFORE: The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

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BETWEEN	ROLAND JACKSON	DEFENDANT/APPELLANT
AND	GROVER GRACEY	PLAINTIFF/RESPONDENT

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R.N.A. Henriques for Defendant/Appellant
Ian Ramsay and Hugh Small for Plaintiff/Respondent.

7th June, 31st July, 1972

25th September, 1972

FOX, J.A.:

This is an appeal from a judgment of Rowe J. in an action claiming damages arising out of a collision between 2 cars driven in the opposite direction by the plaintiff and the defendant on the main road leading from Reading to Montego Bay on 9th November, 1967. The learned judge found for the plaintiff and awarded, special damages $843.09; general damages $6,500. The appeal was confined to a complaint as to the amount awarded for general damages. Counsel for the defendant submitted that as a sum of money intended to represent appropriate compensation for the injuries received by the plaintiff, it was a wholly erroneous estimate.

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After the accident, the plaintiff was taken to the University College Hospital. On 13th November, 1967, he was examined by Professor Golding, the professor of orthopaedics at the hospital, and found to be suffering from,

(1) pain in the region of the right thigh and left lower chest,

(2) a fracture of the sixth rib on the left,

(3) a simple fracture of the upper end of the shaft of the femur, and

(4) a fracture of the right patella (knee cap).

Because of the chest injury, the Plaintiff was not fit for surgery until 29th November, 1967. On that day the fracture of the patella was closed. The other fractures were also reduced. A metal nail was used to hold the fracture of the femur and the leg was put in traction. The plaintiff remained in hospital up to 19th December, 1967 when he was discharged. At this stage the plaintiff was mobile with the help of crutches. He was seen again by Professor Golding on 5th and 9th January, 1967 and on 2nd February, 1968. On this last date, the fracture of the femur was found to be healing soundly, but the knee joint was very stiff, and was capable of flexion to a mere 30 degrees in comparison with the normal 140 degrees. On 29th May, 1968, the plaintiff again underwent surgery. The nail was removed from the femur. Prior to this date, parts of the knee cap had been removed. On 29th May, the remainder of the knee cap was completely removed. On 4th July, 1968, ~~the~~ Professor Golding found that although the knee joint was able to move freely,

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the flexion of the knee remained at 30 degrees.

Assessment of the medical evidence describing the effects and the consequences of the injuries sustained by the plaintiff in the collision, is complicated by evidence relating to an accident which he suffered in March, 1969, at a time when he was still an out-patient at the hospital. The plaintiff was seated in a swivel chair. The chair moved backwards. The plaintiff came to his feet suddenly. His right leg gave way and he fell. Upon examination, by Professor Golding on 31st March, 1969, it was discovered that he had sustained a second fracture of the neck of the femur of the same right leg. Professor Golding operated and inserted a nail. The plaintiff made a good recovery from surgery. The fracture healed soundly. The learned judge did not deliver a written judgment. In a note of his "findings", he recorded that he disallowed any claim for damages resulting from the second accident, but that if the defendant was liable for that injury, he would have awarded a sum of $1500. The problem posed by the medical evidence is one of identifying the extent to which the plaintiff was disabled in the right lower limb by the injuries sustained in the collision, and without taking account of the injury resulting from his fall in March, 1969.

In chief, Professor Golding said that up to June, 1968, disability of the right leg was total. On 28th March, 1970, there was a permanent disability of 25% of that limb resulting from both injuries combined. The absence of the knee cap contributed at least 50% to this disability. In September, 1968, that is, prior to the second injury, Professor Golding had

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formed the opinion that the permanent disability resulting from the first injury was 10%. He would not describe this disability as minimal, but he admitted that in September, 1968, the plaintiff would have been able to drive his car. He would also have been able to walk unaided by a stick or a crutch with only slight discomfort. In view of the assessment on 28th March, 1970 that the disability was 25%, and that of this percentage, the absence of the knee cap contributed at least one half, it seems to me reasonably clear from the ~~pointed~~ formed evidence that in April, 1970 when he gave his evidence, Professor Golding had revised the assessment which he had made in September, 1968, of 10% permanent disability resulting from the first injury, and that in his latest considered opinion this percentage was considerably higher. When he was re-examined, Professor Golding explained that the first injury was the more serious. This supports a conclusion that the first injury contributed more towards the permanent disability of the limb than the second injury.

At the second operation in April, 1969, Professor Golding found that the bone was softer than he anticipated it would have been when he wrote his first report in September, 1968. The soft condition of the bone was unusual. It could account for the way in which the leg suddenly gave way in March, 1969. It must have been caused by the presence of the nail which had been inserted at the first operation. Since use of the nail was normal treatment for the particular kind of fracture which the plaintiff had sustained in the accident, there is room for the view that

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the link between the first and the second injury had been sufficiently established to enable both injuries to be taken into account in assessing damages. However, this view was not maintained before us. The point argued was that the evidence of the softening of the bone, and the opinion of Professor Golding that the plaintiff could suffer a further accident as a result of disability of the leg of 25%, gave rise to an inference that the softening of the bone was permanent and not temporary. In my view such an important conclusion should not have been left a matter of inference. Professor Golding's opinion should have been canvassed, and the fact decided by direct evidence of his opinion in this respect.

Nevertheless, with all due deference to the contrary opinion of Smith, J.A., as I have said, on the evidence before the Judge, I take the view that it was open to him to find that of the 25% total final disability of the leg, by far the larger percentage, was due to injury sustained in the collision. The consequences of this first injury to the leg were also fairly well established. The absence of the knee cap disabled the plaintiff from stooping, from running and from jumping. This imposed a considerable handicap in the discharge of his duties as supervisor of the Bustamante Industrial Trade Union in St. James and Trelawny. The right leg had also been made shorter than the left by one inch, and as a result the plaintiff walked with a limp. In his evidence the plaintiff said that the reliance which he was able to place on his right leg was uncertain. The plaintiff suffered severe and prolonged pain as a result of the injuries to his leg, and up to the time when he gave evidence

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was suffering discomfort in the knee joint. Professor Golding said that there was a likelihood that arthritis would develop in the knee. Up to the end of December, 1968, the plaintiff said that he was unable to move about without the aid of crutches. After that date he used a stick. He was probably so inconvenienced up to the time of his second accident. In the light of these considerations, I was unable to say that the award of $6,500 for general damages fell above the brackets within which appropriate awards for similar injuries are contained. The award had not been shown to be wrong, and for this reason I agreed that the appeal should be dismissed.

SMITH, J.A.:

There is nothing in the record to indicate how the learned judge arrived at the figure of $6,500.00 awarded for general damages. He did not record the matters which he took into account. In deciding whether his award was a wholly erroneous estimate of the damage suffered by the plaintiff, I did not think that the condition of the softening of the bone of the plaintiff's right leg could safely be taken into account. This could be done only if it was established that this condition is permanent and I agree with Fox, J.A. that such an important conclusion should not be left to inference when it could have been established beyond doubt by a simple question to Professor Golding. Because he disallowed the claim in respect of the second accident, the trial judge almost certainly did not take the softening of the bone into account in his award of general damages. If the evidence in respect of the softening of the bone is excluded, there seem to be no evidential basis on which the percentage of the final disability in respect of the first accident can safely be increased above 10%. This is so in spite of the fact that, apart from evidence of a fractional increase in the shortening of the leg, there was no evidence given in respect of the injuries resulting from the second accident which could account for an increase of 15% in the final disability. Professor Golding said that the second accident had left the plaintiff more permanently disabled but he did not say why. He had ample opportunity to say that in March, 1970 he revised his original opinion of 10% disability in respect of the first accident.

Instead, he seemed to have maintained that without the second accident the disability did not exceed 10%. For these reasons I hesitate to base my opinion on any increase over 10%, although I agree with Fox, J.A. that there is some evidence from which it may be inferred that the final disability in respect of the first accident is in excess of 10%.

Nevertheless, it was my opinion that we could not justifiably interfere with the award for general damages. For purposes of comparison, Mr. Henriques referred us to a number of local cases, mostly awards made by the Master on assessment of damages. If these cases can be said to be of any assistance to us, it is clear that the injuries and disability suffered by the plaintiff in this case are more serious than in each of the cases to which we were referred.

The plaintiff, who was 47 years old at the time of the trial in 1970, was totally disabled in the injured leg for almost eight months. There was 30% disability for a further three months. He was on crutches until December, 1968. As a consequence of his injuries, the plaintiff said that his movements are very restricted. He has to take care in walking that he does not stumble. He cannot run. Climbing of stairs is very laborious. He walks with a limp due to shortening of the leg. He can now bend his right knee only to a limited extent. Professor Golding supported the plaintiff that the injuries to the leg from the collision would have caused weakness in the leg and that there is a risk of further accident because of the resulting disability. The professor said that because of the absence of the knee cap the plaintiff will not be able to stoop as an ordinary person of his age, he will not be

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able to run and his general physical activities will be affected. Arthritis of the knee is likely.

It was submitted for the defendant that the award for general damages could only have been for pain and suffering, discomfort and inconvenience as there was no evidence of loss of amenities and the plaintiff's disability was not shown to have had any causal effect on his enjoyment of life. While there was no direct evidence that any of his pleasures were affected as a consequence of his injuries, I think the trial judge was entitled to infer that there must be some adverse effect on the enjoyment of life of a man of 47 years of age who cannot run, cannot stoop normally and who has to take extra care in walking. In any event, these and other circumstances described in the evidence and set out above would certainly have a hampering effect on the plaintiff in the carrying on of the normal social and personal routine of life. He was entitled to be compensated for this.

When this is added to such compensation as the plaintiff was entitled for pain and suffering and the discomfort and inconvenience caused by being almost totally disabled in one leg, and having to use crutches, for a full year, it could not, in my opinion, be said that in the damages awarded the trial judge made a wholly erroneous estimate of the damage suffered by the plaintiff. The amount may certainly be said to be on the high side, but this is not sufficient. In Davis v. Powell Duffryn Associated Collieries Limited [1942] A.C. 601 at 617, Lord Wright said that the scale must go down heavily against the figure attacked before the Court of Appeal is justified in

interferring. I do not think that the amount awarded was so out of proportion to the proved damage suffered by the plaintiff.

GRAHAM-PERKINS, J.A.:-

For the reasons advanced in the judgment of Smith, J. A., I agreed that this appeal should be dismissed.

Chas H Graham P. J.

J A M A I C A

IN THE COURT OF APPEAL

CIVIL APPEAL No. 24/69

BEFORE: The Hon. Mr. Justice Fox, Presiding
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Robinson, J.A. (Ag.)

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BETWEEN - J. A. ARIS - DEFENDANT/APPELLANT

AND - EDITH CHIN - PLAINTIFF/RESPONDENT

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Plaintiff/Respondent not represented.
Ramon Alberga Q.C., and Scharschmidt for Appellant.
Dr. Watkins Q.C., Solicitor General and Mrs. Hines as Amicus Curiae.
Hugh Small as Amicus Curiae on behalf of the General Legal Council.

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Heard 24th, 25th, 26th July, 1972
& 29th September, 1972

FOX, J.A.:

In this appeal by a solicitor from an adverse decision of the Committee constituted under the Solicitor's Law, Cap. 363, two main questions arose for an answer, namely;

(1) is the appeal competent?

And (2) were the proceedings before the Committee a nullity on the ground of denial of natural justice to the appellant?

(1) Is the appeal competent?

This question arose as a result of the repeal of the Solicitor's Law, Cap. 363 by the Legal Profession Act, 1971, Act 15 of 1971. This latter act contained no express savings. Dr. Watkins, for whose assistance this Court is much indebted, submitted that the effect of repealing the Solicitor's Law was "to obliterate it as completely from the records of Parliament as

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if it had never been passed". (Tindal C.J. in Kay v. Goodwin (1830) 6 Bing. 576, 582), and that as a consequence of this obliteration, the provisions of section 38 of the Solicitor's law which enabled "an appeal against any order made by the Committee" to the Court of Appeal must be considered as "law that never existed", Dr. Watkins submitted further that the position was not saved by the Interpretation Act, 1968, Act 8 of 1968, because by enabling an appeal to the Court of Appeal, section 38 of the Solicitor's Law did not create a right or a privilege acquired or accrued under that law, nor was the appeal itself an investigation, a legal proceeding, or a remedy in respect of such a right or privilege, so as to remain unaffected by the Legal Profession Act, 1971 in accordance with the provisions of subparagraph (c) and (e) of section 25 (2) of the Interpretation Act, 1968. Section 25(2) reads;

> "where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not -
>
> (c) affect any right, privilege, obligation, or liability, acquired, accrued, or incurred, under any enactment so repealed; or
>
> (e) affect any investigation, legal proceeding, or remedy, in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture, or punishment, as aforesaid
>
> and any such investigation, legal proceeding, or remedy, may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

In support of his submissions, Dr. Watkins referred to Director of Public Works and another v. Ho Po Sang and others (1961) 2 All E.R. 721. In that case the Privy Council held that, pursuant to a local ordinance, an appeal by the tenants and subtenants of Crown premises in Hong Kong to the Governor in Council against the proposal of the Director of Public Works to grant a rebuilding certificate to the lessee of the premises consequent upon the latter's intention to demolish existing buildings on the premises, and a cross

appeal by the lessee, were not "accrued rights or privileges" within the meaning of provisions corresponding to those of the Interpretation Act, 1968 which have been stated above. Consequently, when those parts of the local ordinance were repealed as from April 9, 1957, the Privy Council held that the repeal had rendered abortive the direction of the governor in October, 1957 that a rebuilding certificate be given, and had deprived the Director of Public Works of the power to issue such certificate. At p. 730 of the report Lord Morris stated the question thus:-

> "At the time of the repeal, all the procedure under s. 3A and s. 3B had been followed, and it can properly be said that the stage had been reached when the lessee could expect and was entitled to have the petitions and cross-petition considered in due course by the Governor in Council and to have a decision reached. Could such expectation or entitlement be regarded as a right or a privilege, either acquired or accrued, within the meaning and intendment of the Interpretation Ordinance? Or was such expectation or entitlement something that necessarily came to an end at the time of the repeal?"

At p. 731 Lord Morris gives the answer.

> "In their Lordships' view, the entitlement of the lessee in the period prior to Apr. 9 to have the petitions and cross-petition considered was not such a "right". On Apr. 9 the lessee was quite unable to know whether or not he would be given a rebuilding certificate, and, until the petitions and cross-petition were taken into consideration by the Governor in Council, no one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate, even though he may have had grounds for optismism as to his prospects. It is to be observed that, under s. 10(e), a repeal is not to affect any

> "investigation, legal proceeding or remedy "in respect of any such right". The right referred to is the right mentioned in s. 10(c) i.e., a right acquired or accrued under a repealed enactment. This part of the provisions in para. (e) of s. 10 does not and cannot operate unless there is a right as contemplated in para. (c). It may be, therefore, that, under some repealed enactment, a right has been given but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. On a repeal, the former is preserved by the Interpretation Act. The latter is not."

The important point to notice in this case is the nature of the function of the governor in council in determining appeals to him. Petitioners were not entitled to appear before him. He was obliged only to take their petitions into consideration. Once he did this he was free to "direct that a rebuilding certificate be given or be not given as he may think fit in his absolute discretion". To be able to show that his considerations of the petitions were right or wrong, wise or unwise, was not only impossible, but would be altogether extraneous and irrelevant to the validity of any direction he may give. So long as he took the petition into consideration, he would have acted within his jurisdiction. In short, his function in relation to appeals to him was entirely administrative in character. As Lord Morris indicated, that function involved nothing more than an investigation "to decide whether some right should or should not be given." On the other hand, the appeal jurisdiction which was conferred upon this Court by section 38 of the Solicitor's Law, Cap. 363 is fundamentally different from the jurisdiction which was given to

the governor in council in Ho Po Sang's case. The jurisdiction of this court to hear an appeal implies a power to consider the evidence adduced before the Committee and to give any judgment on that evidence that the court considers should have been given. This power received statutory expression in rules 7, 8 and 9 of the rules of the supreme court appertaining to appeals from the Committee. (vide Jamaica Gazette Supplement of 23rd October, 1941. No. 69). In relation to appeals under section 38, the function of this court therefore was to consider the rightness or the wrongness, in fact or law, of the decision of the Committee, and to arrive at its own conclusion by a "rehearsing" of the evidence. As an integral part of this function of the court, was the right of the parties to appear and to make submissions in support of their respective cases. The parties were also entitled to expect much more than compliance with a statutory procedure as a condition precedent for the exercise of a discretion which was absolute and final, as in Ho Po Sang. They were entitled to demand that the issues raised up by the appeal be determined on the evidence, in accordance with the judicial process, and for reasons which were manifestly consistent with legal principles and with justice. Such an entitlement may properly be regarded as a right which has accrued to the parties. It was so regarded in The Colonial Sugar Refining Company, Ltd. v. Irving (1905) A.C. 369. In that case the right of appeal from the Supreme Court of Queensland to His Majesty in Council which was given by the Order in Council of June 30, 1860 was taken away by the Australian Commonwealth Judiciary Act, 1903 which also provided that the only appeal therefrom was to the High Court of Australia. In giving the judgment of the Privy Council that the act was not retrospective, and that the right of appeal to the King in Council in a suit pending when the act was passed and decided

by the Supreme Court afterwards, was not taken away, Lord Macnaghten said at p.372

> "As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested".

In my view this case is conclusive of the first question raised up in this appeal. The appeal to this court which was provided by section 38 of the Solicitor's law was not a "mere matter of procedure" but a "right vested in the appellant" at the date in January 1972 when the Legal Profession Act, 1971, came into operation. It was therefore a right which in the circumstances of this case, had accrued, and which was preserved to the appellant by the saving provisions of the Interpretation Act, 1968. In view of this conclusion it is not necessary to discuss the other interesting cases referred to on the point during the submissions before us, to enable me to hold that the answer to the first question in this appeal is in the affirmative.

(2) Were the proceedings before the Committee a nullity on the ground of denial of natural justice to the appellant?

The basic facts

The complaint against the appellant was a failure to pay over to a plaintiff, the complainant respondent in this appeal, the fruits (£268.12.0) of a judgment in a civil action which was received by the appellant on 18th November 1963 in his professional capacity as the representative of the plaintiff in the action. On 26th June, 1969,

the complaint was heard by the committee and an order was made on that date that the appellant's name be removed from the roll of solicitors entitled to practise in the Island.

This was not the only complaint against the appellant which was heard by the Committee on 26th June, 1969. Prior to the hearing of that complaint, the committee had heard the evidence of another complainant Joyce Thompson in a first complaint against the appellant. The appellant was present throughout the case of Thompson. He was also present up to that stage of the hearing of the second complaint when that complainant (Edith Chin) had completed her sworn testimony, and the appellant would have been entitled to crossexamine her. At that point, the appellant announced and carried out his intention to leave the room. Thereafter, the Committee proceeded with the hearing to its conclusion by receiving the evidence of two other witnesses. It is this action of the committee in continuing with the hearing of the complaint in the absence of the appellant which is the basis of the contention on appeal before us that the appellant had been deprived of those incidents of natural justice which guaranteed to him a full and fair opportunity of being heard before he was condemned.

The background facts

This action of the committee was, as I say, the basis of this second contention on appeal, but in order to appreciate the full force as well as to assess the significance of the submissions of Mr. Alberga who, (if I may be permitted to say so with respect, and so as to acknowledge my indebtedness to him,) conducted the appeal with his customary thoroughness and skill, it is necessary to enumerate the following further facts and circumstances:-

(1) On 17th April, 1969, the complaint of Joyce Thompson came up before the Committee. The appellant was absent, but sent a medical certificate from Dr. Wilson James stating that he would be unable to do any heavy work for six weeks. The case was then adjourned to 19th June, 1969.

(2) On 19th June, 1969, the complaint of Joyce Thompson again came up before the Committee. The appellant appeared in person. He presented a second certificate from Dr. Wilson James which stated that the appellant was "ill" and "under my medical care"; and recommended "two weeks leave of absence from his duties in order that he might regain his health." On the strength of this certificate, his application for a further adjournment was granted, but upon Joyce Thompson intimating that she was leaving the Island on 29th June, the case was adjourned to 26th June. The appellant was informed that Thompson's evidence would be taken on 26th June, even if he was unable to be present

in person, and that in this event he should take steps to be represented by counsel or solicitor.

(3) On 26th June, 1969, the appellant was present in person without counsel or solicitor. The case of Joyce Thompson was first dealt with and after that the complaint of Edith Chin.

(4) At the completion of the evidence in chief of Joyce Thompson the appellant was invited to cross examine the witness and stated: "Mr. Emile George of counsel is appearing for me and he will do the cross examination of the witnesses". No further witnesses were called and that was the end of the case of Joyce Thompson. On being invited to say whether he wished to say anything, the appellant said: "I am ill. I am not well and I have produced a medical certificate on two occasions and I am asking the Committee to adjourn the matter to enable me to give evidence when I feel better." The committee then consulted in camera. The appellant was later recalled. A member of the Committee explained to the appellant that he had been given two opportunities (apparently to participate significantly in the hearing) which he had refused but if he wished to change his mind he could do so. The appellant said that he did not wish to change his mind but to make an additional statement which is thus recorded in the minutes. "I would like to present a further account in this matter - there are several matters omitted from the account put in". The application was refused and the Committee reserved its decision.

(5) At the commencement of the hearing of the complaint of the Respondent in this appeal which followed the conclusion of the hearing of the complaint of Joyce Thompson, the appellant was present in person. The respondent appeared with her brother and her nephew. The appellant stated that he paid £175 to the complainant on 23rd June, 1969. The respondent's nephew stated that it had indeed been agreed to accept that amount in February 1969 provided it was paid immediately. The Committee indicated that it would proceed with the hearing. The appellant stated: "I am applying that the application be adjourned because I am not well and that if the complainant is not satisfied with the agreement to pay her £175.0.0. I will proceed to tax my bill as soon as I feel well enough." Both applications were refused and the committee proceeded to receive the sworn testimony of the complainant respondent. During the giving of this evidence, the appellant participated in the hearing to the extent that he refused to consent to the admission of correspondence between himself and solicitors who had at different periods attempted to assist the respondent in securing for her the fruits of the judgment in her favour. Upon one such letter being shown to him, the appellant said that he "will take no further part in the proceedings".

(6) The medical certificate of Dr. James dated 19th June was in the possession of the secretary of the committee at the hearing on 26th June, and its contents were known to the members of the Committee.

What is natural justice?

In his submissions, Mr. Alberga did not go into the merits of the Committee's decision. He was content to rest the burden of the appeal on the contention that the principles of natural justice had been infringed in that the appellant had not been given a full and fair opportunity of being heard before he was condemned, and that as a consequence, the proceedings before the Committee were a nullity and should be set aside.

Admittedly, the function of the Solicitor's Committee at the hearing of a complaint against a solicitor is judicial in character. It follows therefore that in the conduct of such proceedings, the committee must adhere to the code of natural justice. In other words, the committee was required to observe that principle in the maxim audi alteram partem; "hear both sides". But the doctrine of that maxim does not imply that there must always be a hearing, or a hearing of both sides, but only that each party must be afforded an adequate opportunity of advancing his case. In short, natural justice is nothing more than fair play. To be understood in this realistic and straightforward manner, a definition of natural justice presents no problem. The real difficulty is one of application. This demands the ability to recognize when in any particular factual situation natural justice has been honoured or denied. Fair play then is nothing more than what seems to be fair to a given court in a given case. Shorn of its outwardly objective habiliments, natural justice is therefore, in actuality, a subjective concept. It is "the length of the Chancellor's foot" still, but it is, as well, the modern equity.

The complaint on appeal

In this appeal, the complaint of a denial of natural justice is based upon the refusal of the committee to grant an adjournment. It was not contended that this refusal was arbitrary or illegal in the sense that it was influenced by irrelevant or biased considerations. In the submission before us no attempt was made to identify considerations of this nature. That was not the appellant's case. The bona fides of the committee was not challenged. What was questioned was the exercise of the discretion of the committee.

That exercise was said to be erroneous in that it resulted in the appellant being deprived of a fair opportunity of meeting the charge against him, and in his having been condemned in absentia. The question in this appeal therefore is whether this court is in a position to conclude that the refusal of the adjournment did have this result.

The question before the Solicitor's Committee

In approaching a consideration of this question, it is important to be reminded that a person charged may waive his right to a "fair hearing of both sides". He may elect not to attend the hearing. If he attends at the commencement of the hearing he may elect not to continue in attendance. In either event, the tribunal would be justified in proceeding in his absence. He would have stood by with full knowledge of the nature of the proceedings which were afoot, and, of his own volition, have ignored the opportunity to participate in those proceedings. He could not subsequently complain of a denial of natural justice.

A person charged may elect to waive his right to a fair hearing of his side, either expressly or by conduct. An example of waiver by conduct is the case of a failure to attend a hearing on stated grounds such as lack of funds, or absence of transportation. If the tribunal should have good and sufficient reason for concluding that these claims were spurious, it would be entitled to treat the pretence as an election not to attend, and justification for proceeding in the absence of the person charged. This is not to say that on appeal it could not be shown that the thinking of the tribunal on the point was faulty, or that, on the merits, its decision was wrong. The latter position does not arise in this appeal. The former does.

The situation which faced the committee was precisely as initially indicated. It had to decide whether the application for an adjournment on the ground of the appellant's illness was authentic, or a sham being advanced for the purpose of delaying and frustrating the hearing. In arriving at its decision a number of relevant considerations were available to the Committee.

The relevant considerations

There was firstly the question of the sufficiency of the notice of the hearing of the particular complaint which has given rise to this appeal. As a concomitant of the right to be heard, is the right to receive sufficient notice of a hearing. Failure to give such a notice is a denial of natural

justice. In this case, the question of the sufficiency of the notice of the hearing is canvassed by correspondence which passed between counsel for the appellant (not at that stage Mr. Alberga) and the secretary of the Committee when the appeal was first listed in January 1972. This correspondence suggests that when the adjournment was granted on 19th June, 1969, the committee intimated then that it would meet on 26th June for the sole purpose of taking the evidence of Joyce Thompson. When the complaint of the respondent was called on before the Committee; that is, the second complaint being heard on 26th June,- if no other developments had taken place subsequent to the 19th June relating to notice of the hearing of that complaint, it may have been open to the appellant to object to the hearing on the ground of insufficient notice. But the appellant did not so object. The course which he adopted of applying for an adjournment on the ground of illness suggests that when the complaint was called on before the committee on 26th June, the position in connection with the sufficiency of the notice of the hearing was not perceived as presenting any difficulty. Mr. Alberga did not argue a denial of justice on the ground of insufficiency of notice of the hearing, but, in substantial effect, he advanced the circumstances in connection with the notice in support of the contention that the committee was wrong in refusing the application for an adjournment. In my view those circumstances are not capable of yielding that support.

A second consideration which the committee was entitled to make springs from the contents of the certificate dated 19th June, which was given by Dr. Wilson James. This certificate said that the appellant was ill, was under medical care, and had been recommended for two weeks leave of absence from his duties in order that he might regain his health. The nature or the severity of the illness were not stated. The committee was not free to conclude that the absence of this information in the certificate entitled it to accord the certificate no significance, but it was at liberty to notice that circumstance and to relate it to a third relevant consideration of critical importance arising from the advantage which the committee had in seeing and hearing the appellant. From his general appearance, and the manner in which he conducted himself, the committee was in a position to form some opinion of the state of the appellant's health, and to judge whether by reason of illness his critical faculties were so impaired, and the level of his

strength so reduced as to render him incapable of making adequate representations at the hearing. This is a primary consideration in that it depended entirely upon the sensibilities of the members of the committee. Such a consideration is not subordinate to the medical opinion. It is beyond the grasp, and therefore the assessment of this court which had not the advantage of seeing and hearing the appellant on 26th June, 1969.

Finally, it was open to the committee to consider whether the request for an adjournment was not all of a piece with the previous conduct of the appellant; whether he was not malingering then in the same way as the evidence of the complainant tended to show he had malingered throughout his dealings with her. The committee could not fail to have noticed that the appellant had stayed to listen to this evidence, but had thought it appropriate to take his departure just at that psychological moment when the opportunity for testing it in cross-examination had arisen. In this situation, it was open to the members of the committee to ask themselves whether this course had not been adopted as a tactical move by the appellant because, in truth, he had no sensible questions to ask the complainant whereby a valid defence to the complaint could have been suggested. The pith and substance of this complaint was the retention for over five years of money received by the appellant in his capacity of solicitor for the complainant. This money represented the fruits of a judgment in favour of the complainant. The committee could have rightly concluded that the appellant left the hearing at the time he did, because he well understood that the belated attempt at payment upon the threat of disciplinary proceedings and nearly five and a half years after the money was received, was in no way an answer to the complaint, and because he fully realized that the failure over such a long period to pay moneys received by him in trust was incapable of being justified or excused. In short, the Committee would have been justified in taking the view that in all the circumstances, the application for an adjournment on the ground of illness, was delaying tactics only, to be regarded as a part of overall conduct which enabled them to treat his walk out of the meeting as an election not to continue in attendance at the hearing.

CONCLUSION

The onus was on the appellant to satisfy this court that the Committee's refusal of the adjournment was an erroneous exercise of its

discretion. I consider that it has not been shown that the discretion has proceeded on wrong principles, or on some wrong ground, or on irrelevant or insufficient facts, or in any way manifestly contrary to justice. To the contrary, there is material in the record which is capable of justifying the refusal of the adjournment. It might have been possible on appeal to rebut this prima facie position in the record by showing the nature of the evidence which could have been adduced, and of the considerations which could have been urged against the decision of the Committee if the opportunity of a hearing had been enlarged by granting the adjournment. But that course was not pursued. The merits of the Committee's decision was questioned neither on the material in the record nor on any other material which might have been available. In the light of what I have said above this is not surprising. In my view, no good cause has been identified, and no reason exists for interference by this court with the exercise of the Committee's discretion. The appellant has not satisfied me that he was dealt with unfairly by the Committee. I would therefore answer the second question in this appeal in the negative. I would dismiss the appeal.

Before parting with the appeal, I must record my appreciation of the course taken by the general legal council in briefing Mr. Hugh Small to appear before us as amicus curiae. Mr. Small's submissions were concerned in the main with the proper course to be taken if the appeal was allowed. He suggested that in that event, the court would have no power to make any further consequential order. I agree.

SMITH, J.A.

I agree that this Court has jurisdiction to entertain the solicitor's appeal. I am in no doubt that the right of appeal which the solicitor undoubtedly had by virtue of s.38 of the Solicitors Law (Cap. 363) survived the repeal of that law by the Legal Profession Act, 1971. In my opinion, the right of appeal and the right to prosecute it survived both at common law and by virtue of the provisions of s.25(2) of the Interpretation Act, 1968.

The right survived at common law because of the long established and authoritatively settled principle upon the interpretation of statutes that "a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment." (See Re Athlumney, (1898) 2 Q.B. 547 per Wright, J. at p.551). For a right to survive at common law it must be an accrued or vested right at the time that the repealing statute takes effect or the new statute comes into force. The solicitor's appeal under consideration was perfected since 1969 so there can be no doubt that he had an accrued or vested right when the Act of 1971 came into force. He would lose this right only if the Act of 1971 has a retrospective effect, which it is not contended that it has.

Dr. Watkins conceded that at common law the solicitor had a "right" but disputed its survival. This in spite of the decision in The Colonial Sugar Refining Co. Ltd. v. Irving, (1905) A.C. 369, cited by Mr. Alberga and referred to in the judgment of Fox, J.A. Dr. Watkins contended that the "right" did not survive at common law because the common law principle was absorbed by s.25(2) of the Act of 1968. No authority was cited for this contention but it was pointed out that in Director of Public Works v. Ho Po Sang, (1961) 2 All E.R. 721 and in Free Lanka Insurance Co., Ltd. v Ranasinghe, (1964) 1 All E.R. 457 (both cited in support of another contention to be noticed) no reference was made to the common law principle. In my opinion, this is not a fact in support of the contention. In the Ho Po Sang case the common law principle would not have helped the appellants as they

would have been unable to show an accrued or vested right at common law and in the Free Lanka case it was not necessary to rely on it. I think that in practice it will be found that a "right" at common law is a "right" under the Interpretation Acts and vice versa. I doubt that what is really a principle of construction can be absorbed into a statute, so as to be no longer applicable except under the statute, without an express provision to this effect. The authorities, however, make it clear that the common law principle coexists with the relevant provisions of the Interpretation Acts. A reference to leading text books on the construction of statutes will show that since the passing of the (U.K.) Interpretation Act, 1889 a number of cases have been decided by the application of the common law presumption against retrospective operation of a statute in circumstances in which s.38 of the Act of 1889 could have been applied. And in Bowling v. Camp, (1922) 39 T.L.R. 31 and Henshall v. Porter, (1923) 2 K.B. 193 McCardie, J. expressly relied both on the common law rule of construction and on s.38 of the Act of 1889 in deciding that the statutes he had under consideration did not operate so as to affect existing rights. Finally, there are passages in Odgers' Construction of Deeds and Statutes and Craies on Statute Law which support the view that the common law principle co-exists with the statutory provisions in the Interpretation Acts. In the 5th edn. of the former it is stated, at p.358:

> "Similarly, rights acquired under a statute will not be taken away by the repeal of the statute conferring them. Sometimes a clause to this effect is inserted in the repealing statute, but this is really unnecessary both by the common law and now by section 38(2) of the Interpretation Act 1889."

And in the 7th edn. of the latter, at p.399:

> "In the absence of anything in an Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed, and so far as regards repealing Acts this rule is clearly recognised by section 38(2) of the Interpretation Act 1889."

though a "right" at common law, was not a "right" within the meaning of that word in para.(c) of s.25(2) of the Act of 1968, so was not preserved by the Act. Relying on the Ho Po Sang case, he submitted that the solicitor now has a mere right to a hearing before the Court of Appeal and not a right to be restored to the roll of solicitors. The latter, if he had it, it was argued, would be a "right" under the Act of 1968 but the former is not. It was said that the solicitor now has a mere hope or expectation of realising the right of restoration to the roll.

I can think of no reason, and none was suggested, why a right to which s.25(2) of the Act of 1968 refers should be any different in character to one which the common law recognises as surviving the repeal of a statute. Dr. Watkins said that all the leading cases point to the necessity for the "right" to have some constituent of substance in it in order to bring it within the meaning and intendment of the Act of 1968. This may be so, but I have no doubt at all that a right of appeal is such a right. A right of appeal was described by Lord Westbury, L.C. in The Attorney General v. Sillem, 33 L.J. Ex.209, at 213, as "the right of entering a superior Court and invoking its aid and its interposition to redress the error of the Court below." The Lord Chancellor continued, ibid: "It seems absurd to denominate this paramount right part of the practice of the inferior tribunal." This paramount right must surely be a right capable of being preserved by the Act of 1968.

With great respect, the fallacy in Dr. Watkins' argument is to treat a right of appeal merely as a right to be heard by a court of appeal. In this he was probably influenced by the reasoning in the Ho Po Sang case. In my opinion, the solicitor here did not have a mere right to be heard. The order of the solicitors' committee had deprived him of his undoubted substantial right to practise as a solicitor. The statute which gave the committee the authority to make that order gave to the solicitor the right to challenge the validity of that order in the Court of Appeal. This was a statutory right given to him and came into existence the moment the adverse order was made. It was a present right to contest the order on appeal and not merely a right to be heard in the future by the Court of Appeal. Indeed, he would have no right to be heard on appeal without that prior statutory

right. Viewed in this way the Ho Po Sang case is, in my view, clearly distinguishable. The relevant submission in that case was that presented on behalf of the lessee that he had an accrued right to have the matter taken into consideration by the Governor in Council, and that such right was (by reason of the Interpretation Ordinance) unaffected by the repeal. The Board said in its judgment that at the time of the repeal "all the procedure under s.3A and s.3B had been followed, and it can properly be said that the stage had been reached when the lessee could expect and was entitled to have the petitions and cross-petition considered in due course by the Governor in Council and to have a decision reached." It was held that the entitlement of the lessee in the period prior to the repeal to have the petitions and cross-petition considered was not a "right" within the meaning and entitlement of the Interpretation Ordinance. The Board regarded the steps taken by the lessee prior to the repeal as merely procedural steps in the hope of being able to obtain a rebuilding certificate. It is this that distinguishes the Ho Po Sang case from the case under consideration. At common law a matter of procedure does not benefit from the rule against the retrospective operation of a statute. As the Colonial Sugar Refining Co.'s case (supra) decided, a right of appeal is not a mere matter of procedure. It is clear, in my opinion, that the solicitor's perfected right of appeal is a right acquired or accrued under para.(c) of s.25(2) of the Act of 1968 and that this Court has jurisdiction under the section to entertain the appeal.

On the other question raised in this appeal, I respectfully disagree with the conclusions of Fox, J.A. The appellant complained that he was not treated fairly by the solicitors' committee; that the hearing of the respondent's complaint was conducted in breach of one of the principles of natural justice in that he was not given a full and fair opportunity of being heard. I now state and examine the facts which, in my view, are relevant to this complaint. The facts to which I shall refer are either admitted by the then secretary of the committee, or not contradicted or else appear in the minutes and notes of proceedings before the committee to which we were referred.

As the judgment of Fox, J.A. indicates, there were two complaints against the appellant pending before the committee. That of Joyce Thompson came on for hearing by the committee on April 17, 1969. The members of the committee then were Messrs. Clinton Hart, J.L.R. Bovell and A.C.L. Delgado. The appellant was absent but sent a medical certificate from Dr. K. Wilson James stating that the appellant would be unable to do any heavy work for six weeks. The hearing was adjourned to June 19, 1969. When the same complaint came on for hearing on this latter date the committee was differently constituted. The members present then were Messrs. A.E. Brandon, J.L.R. Bovell and Frank Myers. The appellant appeared and presented another certificate from Dr. Wilson James. The certificate bore the date of the hearing, June 19, and was in these terms:

> "This is to certify that Mr. Julius Aris of 32 Church Street is ill and is under my medical care. I have to recommend him for two weeks leave of absence from his duties in order that he might regain his health."

On the strength of this certificate the appellant applied for the hearing to be adjourned. The complainant, Joyce Thompson, told the committee that she would be leaving the Country permanently on June 29. As a consequence, the hearing was adjourned to June 26. The appellant was told that Joyce Thompson's evidence would be taken on June 26 whether he was able to be present or not and that if he could not be present he should take steps to be legally represented.

On June 26 the matter again came on for hearing. The appellant was present. He was not legally represented. The committee was differently constituted from the two former occasions. The members on this occasion were Messrs. Brandon, Delgado and Douglas Judah. It will be seen that the chairman, Mr. Brandon, was the only member who was present on June 19 when the hearing was adjourned because of the medical certificate recommending two weeks leave of absence. There was one week yet to run. The evidence-in-chief of Joyce Thompson was taken. The appellant was invited to cross-examine her. The signed minutes of the meeting of the committee record this reply by the appellant: "Mr. Emil George of Counsel is appearing for me and he will do the cross-examination of the witness." In the light of what transpired on June 19 this was a ridiculous reply. It was rightly ignored and the evidence of the witness was closed.

In my opinion, after this the committee started to go wrong.

Joyce Thompson called no witnesses and her case was closed. The appellant claims that his understanding was, from what was said to him on June 19, and in view of his medical certificate, that the hearing would have been adjourned after the evidence of Joyce Thompson was taken. The account I have given of what transpired on June 19 is taken from a letter written on January 21, 1972 to the appellant's attorney by the former secretary of the solicitors' committee, who was in attendance on June 19. I must confess that the account conveyed the same impression to me as it, obviously, conveyed to the appellant. Nevertheless, at the close of Joyce Thompson's case the appellant was called on in answer to her case. He was asked whether he wished to say anything. He replied, as appears in the minutes: "I am ill - I am not well and I have produced a medical certificate on two occasions and I am asking the committee to adjourn the matter to enable me to give evidence when I feel better." The minutes record that after this was said the complainant and the appellant withdrew and, apparently, the committee deliberated. When they were recalled Mr. Judah, not the chairman, "explained to Mr. Aris that he had been given two opportunities which he had refused but if he wished to change his mind he could do so." The appellant said he did not wish to change his mind but to make an additional statement. The additional statement is recorded as follows: "I would like to present a further account in this matter - there are several items omitted from the account put in." The two opportunities referred to are, presumably, the opportunities to cross-examine and to answer the complaint. The committee refused the application contained in the additional statement and reserved its decision on the complaint. It is against this background that the complaint of the respondent to this appeal came on for hearing.

It appears that the respondent's complaint had previously been fixed for hearing on June 26 and that the appellant had received prior notice because he does not complain of lack of notice. This complaint came on for hearing immediately after the decision in Joyce Thompson's complaint was reserved. The appellant told the committee that he had paid £175 to the complainant on June 23, 1969. The respondent's nephew, who was present with her, stated that they had agreed in February, 1969 to accept £175 provided it was paid immediately. The committee decided to proceed with the hearing.

The appellant is then recorded as saying: "I am applying that the application be adjourned because I am not well and that if the complainant is not satisfied with the agreement to pay her £175 I will proceed to tax my bill as soon as I feel well enough." Presumably the word "hearing" was intended for the word 'application'. Immediately after this statement the notes of evidence record: "Both applications rejected." The respondent then commenced to give evidence. It was, apparently, intended to put in certain correspondence involving the appellant and he was asked whether he will admit them. He replied that he will not consent. Several items of correspondence were then put to her, after which the notes of evidence record in parenthesis: "At this point Mr. Aris says he is leaving and he leaves the room." In his absence two witnesses were called in support of the complaint and the hearing closed. On July 1, 1969 the decision of the committee was given on the respondent's complaint finding him guilty of professional misconduct and ordering that his name be removed from the roll of solicitors.

In my opinion, the appellant was, on the face of it, not fairly treated. He had presented a medical certificate from a reputable medical practitioner. The committee, as constituted on June 19, acceded to his request for an adjournment. It is reasonable to assume that if the complainant Joyce Thompson had not indicated that she would be unavailable after June 28 the hearing of her complaint would have been adjourned for at least two weeks. It was also reasonable for the appellant to assume, in view of the committee's obvious deference to the medical certificate on June 19, that the committee would have been consistent and that he would not have been called upon to answer any of the complaints on June 26, before the expiration of the period stated in the medical certificate. Though the secretary of the committee admitted that the medical certificate was in his possession at the meeting on June 26, there is nothing to indicate that the members of the committee, other than the chairman, saw or asked to see the certificate. (The chairman, presumably, had seen it the week before.) The appellant had told them of its existence. I am not prepared to assume that they saw it because the secretary had it. There is nothing to indicate that the certificate was taken into account before the committee decided on two occasions on June 26 to reject the appellant's application for adjournment

on the ground of illness. In my view, the medical certificate could not properly be rejected in the circumstances unless there was overwhelming indication that the appellant was malingering. Again, I am not prepared to assume that this was what the committee found without some evidence or indication of it. One would have expected Mr. Judah to give an indication of this when he addressed the appellant after the committee's deliberation in the Joyce Thompson case, if this was what they had found. On the material before us I am compelled to the conclusion that the appellant's applications for adjournment on June 26 were rejected without due consideration. This is all the more to be regretted when it is borne in mind that the appellant faced the loss of his profession by an adverse decision.

If the appellant can be said to have waived his right to be heard then he cannot now justifiably complain. In my opinion, there was nothing that occurred during the hearing of the complaint up to the time that the appellant left the meeting that can amount to acceptance of the committee's rejection of his application and to willing participation by him in the hearing. It is only in those circumstances that his withdrawal could amount to a waiver of his rights. If the committee had accepted his statement before the hearing really began that the complainant had been duly paid what she had agreed to accept that might have been an end of the matter. By replying, when asked if he admitted the correspondence, cannot by itself be regarded as sufficient participation. Nor can the fact that he remained to the end of the complainant's evidence. When the correspondence was being put to the respondent during her evidence, the notes of the proceedings record that one of the letters was shown to the appellant and the note says ".. .... shown to Mr. Aris he says he will take no further part in the proceedings." Although on the face of it this note indicates that he had up to then participated in the proceedings, in my opinion it cannot, in the circumstances, be said to have been a willing participation. He may have been coerced by the course the hearing of the previous complaint took into submitting to the rejection of his application. His real complaint before the committee that day was that he was not well enough to answer the complaints against him and nothing that he did before he left, in my view, indicated the contrary.

Are the merits of the case against the appellant and his chances of success had he been heard relevant matters for consideration? The

authorities say they are not. I was tempted, having regard to the nature of the complaint against him, to say that the appellant was not prejudiced in the circumstances. But in Annamunthodo v. Oilfields Workers' Trade Union (1961) A.C. 945, in delivering the judgment of the Board of the Privy Council, Lord Denning said, at p. 956:

> "Mr. Lazarus did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the Courts. It is a prejudice to any man to be denied justice."

(See also Kanda v. Government of Malaya (1962) A.C. 322 at 337.)

In my judgment, the appellant was denied a full and fair opportunity of being heard in answer to the respondent's complaint. The consequence is that the committee's order cannot stand. I would allow the appeal and quash the order of the solicitors' committee.

ROBINSON J.A.

I agree with the conclusion arrived at by Smith J.A. and the reasoning contained in his Judgment. There is nothing to show that Aris had notice that the Chin's matter would be called on at any time or on the 26th June 1969; this quite apart from the question of the Committee's refusal of the adjournment on that day.
I also would allow the appeal and quash the order of the Solicitors' Committee.

FOX J.A.

The views of my brethren prevail. The appeal is allowed. The order of the Committee is set aside.