IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 18 of 1993

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	WINSTON WATERS McCALLA	APPLICANT/APPELLANT
AND	THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL	RESPONDENT/RESPONDENT

F. M. G. Phipps, Q.C.,
Enos Grant and Tracey Barnes, instructed by
R. Clough of Clough Long & Co., for the
appellant

Dennis Morrison and Allan Wood, instructed
by Dunn, Cox & Orrett, for the respondent

February 7, 8, 9, 10, 11, 14, 17, 18;
May 16, 17, 18 and December 20, 1994

RATTRAY, P.: (Dissenting)

On April 30, 1993, the Full Court of the Supreme Court in a Judgment delivered by Clarke, J. gave its reasons for dismissing the motion of the applicant Winston Waters McCalla an attorney-at-law duly admitted to practice in the several courts of this Island, for an Order Prohibiting the Disciplinary Committee of the General Legal Council from hearing complaint No. 1 of 1990 made by Joswyn Leo-Rhynie, Chairman of the General Legal Council against the applicant.

From this decision the applicant has appealed to this court on several grounds which I will deal with in this judgment.

The applicant was admitted to the Jamaican Bar in 1962. He was engaged in various legal capacities in Jamaica between that time and October 1977 when he migrated to Canada. As a result of passing the necessary examinations he was admitted to the

Saskachewan Bar in or about August 1978. In 1981 he was admitted to practice at the Ontario Bar.

He returned to Jamaica to resume his legal practice in this jurisdiction in May 1985. In January 1990 he received communication from the General Legal Council in the nature of a complaint from the Chairman of the Council, Joswyn Leo-Rhynie, Q.C. charging him with "Misconduct in a professional respect in that he conducted himself in a manner which is disgraceful, dishonourable, deplorable and unbecoming of an attorney-at-law and which tends to discredit the legal profession of which he is a member." Specific particulars of the charge were set out and related to allegations that:

> "(a) On or after August 23, 1982, while employed by the Federal Ministry of the Solicitor General as Co-ordinator, Criminal Procedure Project he corruptly abused his profession as an employee of the Federal Government of Canada by hiring two law students, Pearl Eliadis and Stephen Hamilton at Government expense to conduct research and prepare background papers on the Law of Search and Seizure by using Government funds and resources to have them prepare a manuscript and thereafter without the knowledge or consent of the appropriate Federal Government officials or the aforementioned researchers appropriated the aforesaid research work as his own by having it published by the Canada Law Company under his purported sole authorship and for his personal benefit in a text entitled 'Search and Seizure in Canada';
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> (b) that in respect of the academic year 1983 - 1984 he was employed and paid in full by the Department of Law at Carlton University in Canada to teach a Course in Juvenile Justice and thereafter without the knowledge or consent of officials at the University arranged for one Catherine Lattimer to teach the Course. In addition, despite his promise to do otherwise failed to compensate the said Catherine Lattimer for her efforts;
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> (c) he tendered a Curriculum Vitae in support of his application for employment with the Federal Government of Canada in which he falsely represented that:
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> 1. among his professional qualifications was the award of Queen's Counsel which he represented was conferred on him in Jamaica in 1973.

" 2. he was appointed and did hold the position of Deputy Minister of Justice in Jamaica between the years 1973 - 1977."

On 18th January, 1990, he replied to the Secretary of the Council alleging that the complaint did not comply with the Rules and inter alia requested further and better particulars. He also denied the charges made against him and stated his embarrassment in the preparation and presentation of his response by reason of the delay in making of the complaint in relation to matters which were supposed to have taken place more than six years ago.

By a Notice dated 16th October, 1991, the Disciplinary Committee fixed the 9th November, 1991, as the date for the hearing.

By letter dated October 19, 1991 to Mr. Macaulay, Q.C., then counsel for the appellant, Mrs. Hall writing as Secretary to the Disciplinary Committee stated the intention of the Committee to rely on affidavits and enclosing three specific affidavits. She stated - "Any further affidavits will be sent to you in advance of the date to be fixed for hearing.

Mr. Berthan Macaulay, Q.C., wrote to the Disciplinary Committee on the 23rd of October, 1991, pointing out the passage of twenty months since Mr. McCalla had asked for the further and better particulars, the non-receipt of those particulars and his reasonable assumption that the matter was no longer being pursued. He notified his intention of proposing to invite the Disciplinary Committee to decline to hear the application as not being pursued within a reasonable time. Mr. McCalla's rights therefore he maintained under section 20(2) of the Constitution of Jamaica had been infringed.

At the same time, Mr. Macaulay requested production of documents to be relied on for the presentation of the complaint and a request for the issuance of subpoenas ad testificandum and duces tecum with respect to certain records of the Council. Later in October, the Secretary of the Disciplinary Committee was advised of the postponement of the hearing to a new date to be fixed. To

this information Mr. Macaulay replied insisting that the matter be pursued on November 9, 1991 and waiving on behalf of his client the requirement of Rule 5 of the Legal Profession (Disciplinary Proceedings) Rules for 21 days notice to the attorney-at-law with respect to the date of the hearing. He further requested the names of the members of the Committee who would hear the complaint in the event he wished to object to any of them.

The Disciplinary Committee replied by letter dated 5th of November, 1991, that it would not be possible to proceed on the 9th of November, and pointed out the usual practice that objection to the composition of the Committee should be made when the matter was called on for hearing.

By letter dated 7th of January, 1992, Mr. Macaulay requested to be informed of the new date of hearing.

On the 5th of June, 1992, the General Legal Council informed Mr. Macaulay by letter that an application would be made at the commencement of the hearing to have the evidence given by affidavits of six named persons and would be contacting him shortly to fix a convenient date of hearing. The letter enclosed a copy of the complaint and copies of the affidavits on the basis of which "it is proposed to make an application to the panel of the Committee hearing the complaint that the matter be proceeded with..." This letter be it emphasised is the Council's letter. By letter dated 29th of July, 1992, Mr. Macaulay wrote to Mr. Dennis Morrison, counsel for the respondent, acknowledging receipt of a message from Mr. Morrison of July 23, when he Mr. Macaulay was away in the United Kingdom. He proposed a date 26th September, 1992, to be fixed for the trial. On July 30, 1992, Mr. Morrison confirmed that date in writing to Mr. Macaulay.

On the 22nd of September, 1992, Mr. Justice Walker granted leave to the appellant to apply for an Order of Prohibition directed to the Disciplinary Committee prohibiting the Committee from hearing the complaint and staying the proceedings until the application is heard.

Pursuant to that leave the Full Court was moved on several days between the 18th of January, 1993, and the 4th of February, 1993, for the Order of Prohibition. The Motion was dismissed.

The presentation of the submissions on behalf of the applicant was shared between Mr. Frank Phipps, Q.C. and Mr. Enos Grant. Mr. Phipps contended, inter alia, that by virtue of the relationship existing between the General Legal Council, the virtual complainant, and the Disciplinary Committee to which the complaint was made and a division of which body had the duty to try the complaint, it would not be possible for the appellant to receive a fair trial.

The complaint is in the name of Joswyn Leo-Rhynie, Q.C., the Chairman of the General Legal Council and described in the complaint as such. It does not, however, disclose that it is being brought on behalf of the Council or on the instructions of the Council, although the complainant's address, for the purpose of the affidavit of complaint is c/o the Office of the General Legal Council, 11 Duke Street in the parish of Kingston. It is to be noted that Mr. Leo-Rhynie's personal address is also given in the body of the affidavit. The complaint, it appears, was sent under cover of a letter from the Secretary of the General Legal Council dated 4th January, 1990. (See letter McCalla to Secretary, General Legal Council dated 12th January, 1990).

It is necessary to look at the structure of the General Legal Council and the Disciplinary Committee. The Legal Profession Act section 3 establishes the General Legal Council and states its functions which include "upholding standards of professional conduct." Section 11 of the Act mandates the Council to appoint from among four categories of persons, the Disciplinary Committee. One of these categories relates to "members or former members of the Council." For the purpose of hearing applications against attorneys-at-law, in respect to allegations of professional misconduct, the Disciplinary Committee

may sit in two or more divisions. Allegations against an attorney-at-law may be made under section 12(1) of the Act not only by aggrieved persons but by the Registrar of the Supreme Court or any member of the Council. The section reads as follows:

> "12. (1) Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by an attorney, that is to say--
>
> (a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect);
>
> (b) any such criminal offence as may for the purposes of this provision be prescribed in rules made by the Council under this Part."

The status of the Chairman of the Council as a member of the Council to make a complaint cannot therefore be challenged. The minimum number of members of the Disciplinary Committee sitting to hear a complaint is three. A division can therefore be empanelled which does not include a member of the Council if a member of the Council is the complainant. The constitution of the Disciplinary Committee is set out in the Third Schedule of the Act and this establishes, inter alia, a right of the Council to revoke the appointment of any member of the Committee. Thus the power to appoint and the power to dismiss the Committee is with the Council. Mr. C. D. R. Bovell is the Chairman of the Disciplinary Committee of the General Legal Council.

In an affidavit in these proceedings dated 18th November, 1992, Mr. Leo-Rhynie erased all doubts as to whether or not he was acting on behalf of the Council. He narrated certain facts

including the Council obtaining advice as to whether it could proceed on the basis of decisions taken against the appellant in Canada. He further stated:

> "The Council was advised that this disciplinary proceeding should be pursued in Jamaica and should take the form of a full re-hearing on the charges which were the subject of the applicant being struck off in Canada. As a consequence acting on behalf of the Council, (my emphasis) the complaint, the subject matter of the proceedings herein was laid by me together with an affidavit deponed to by me on the 3rd of January, 1990 and the applicant was so advised and his comments sought by letter dated 4th January, 1990 from the Secretary of the Council..."

He then further narrates efforts made by the Council to ascertain the identity and whereabouts of witnesses and to obtain from them the full particulars of the complaint against the applicant. He speaks of obtaining the affidavits of the various persons - "Upon which the Council intends to rely in proceeding before the Disciplinary Committee." It is interesting to note that in the appearance entered by Messrs. Dunn Cox and Orrett in this matter it was an appearance on behalf of Joswyn Leo-Rhynie, Chairman of the General Legal Council, and the General Legal Council who appear by their attorneys-at-law, Messrs. Dunn Cox and Orrett; although the General Legal Council was not a party named in these proceedings. As it now becomes clear that the allegations against the appellant have been made by the Council itself, through its Chairman, acting on its behalf and on its authority, the determination to be made is as to whether the Act permits the Council to be a complainant. The categories of persons identified in section 12 of the Act are:

> 1. Persons aggrieved by an act of professional misconduct (including any default) committed by an attorney.

This category clearly applies to persons who have dealings with the attorney, for example, his client or an adversary in proceedings or matters in which the attorney is engaged, and whose

complaint against the attorney is in respect of the conduct of the attorney acting in a professional capacity.

2. The Registrar of the Supreme Court

3. A member of the Council

The last two categories are restricted in the nature of the complaints upon which they may rely to:

(a) misconduct in a professional respect generally which includes but which is not restricted to specific acts identified by the Rules as being misconduct in a professional respect;

(b) specific criminal offences prescribed in the rules made by the Council. Thus the Registrar would have authority, for example, to make a complaint relating to misconduct of the attorney in the course of a trial and a member of the Council, for example, may complain of a breach of Canon 1(b) which reads:

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

A breach of this particular Canon is identified by Canon VIII (d) as constituting:

"...misconduct in a professional respect"

and makes the attorney subject to the dire penalties including striking off the roll which are contained in section 12(4) of the Legal Profession Act.

The question of whether the Council itself as distinct from a member of the Council is authorised under the Act to lay the complaint must be examined within the context of the submissions made by Mr. Phipps since the wording of the Act itself does not expressly identify the Council as the possible complainant and the consideration must be as to whether there is such a <u>necessary implication</u> arising on the interpretation of section 12 of the Act. It is to be noted that section 9(1) of the First Schedule to the Act states that:

> "The Council shall be a body corporate having perpetual succession and the common seal with power to acquire hold and dispose of land and other property of whatever kind."

Therefore, it is clear that the Council is a separate legal personality from the members who make up the Council.

Mr. Phipps rests his submission in relation to the ability of the Disciplinary Committee to hear this complaint upon the bedrock provisions of section 20 sub-section 2 of the Constitution of Jamaica:

> "2. Any Court or other authority prescribed by Law for the determination of the existence or the extent of civil rights obligations shall be independent and impartial and where proceedings for such a determination are instituted by any person before such a Court or other authority the case shall be given a fair hearing within a reasonable time."

Does the Disciplinary Committee meet the objective criteria of independence and impartiality in hearing a complaint brought by the Council? Undergirding this provision of our Constitution is the basic principle of fairness. That principle covers not only the mechanics of the process but the appearance of the process as well. The factors to be examined are these:

(1) The Disciplinary Committee is appointed by the Council and the appointment of its members can be revoked by the Council.

(2) Included in those appointed to the Committee are persons who are members or former members of the Council.

(3) The tenure of office of members of the Committee not exceeding three (3) years is determined by the Council (section 1 of the Third Schedule of the Act).

(4) Where the name of an attorney has been struck off the roll in consequence of a decision in a disciplinary case his name shall not again be entered on the roll except by the direction of the Council but the Council may at any time direct that his name be restored to

the roll (section 18 of the Legal Profession Act).

(5) The findings and orders of the Committee are required to be filed with the Registrar not the Council (Rule 14).

Bearing in mind, therefore, the relationship between the Council and the Disciplinary Committee, is the Committee being required in hearing this complaint to be a judge in its own cause? Is the interest of the Disciplinary Committee such, that apart from any language in the Legal Profession Act, the common law translated into section 20 subsection 2 of the Constitution disqualifies the Committee from adjudging a complaint in which the General Legal Council is the prosecutor?

The principle that a person cannot be a judge in his own cause is a very ancient one. The root of the discourse as to whether a statute can change this principle appears to be Bonham's case (8 CO. 116b) in which Chief Justice Sir Edward Coke examined the conflict between "common right and reason" and an Act of Parliament and maintained:

> "...and it appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void, for when an Act of Parliament is against common right or reason or repugnant or impossible to be performed the common law will control it and adjudge such act to be void."

An early inroad into Coke's principle was **Great Charte v. Kennington** [1742] 2 STR 1173; 93 E.R. 1107 in which the legitimacy of what was done was urged to be on the basis of long standing practice. The English Report at page 1108 records:

> "But the Court held that this was a judicial act and the party interested is tacitly excepted. They said the practice could not overturn so fundamental a rule of justice as that a party interested could not be a judge."

However, the report recognised an exception that if a situation exists in which:

> "The only competent Judge assigned by statute was interested in the dispute he could and ought to proceed notwithstanding."
>
> (See Bonham's Case and Judicial Review T.F.T. Plunket [1926 - 1927] 40 Harvard Law Review page 58).

In **Mersey Docks Justices v. Harbour Board Trustees and Gibbs** [1866] LRI HL 93 at page 110 Mr. Justice Blackbourne stated:

> "It is contrary to the general rule of law not only in this country but in every other to make a person judge in his own cause and though the legislature can and no doubt in a proper case would depart from that general rule an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes."

This raises for consideration whether in this case there is a necessary implication, since the Council is not listed in the Act as being specifically authorised to make complaints, that the Legal Profession Act confers on the Council authority to be a complainant in allegations against an attorney-at-law, and which would make the Council a prosecutor in proceedings in which the Judges are persons appointed by the Council and subject to dismissal by the Council. I bear in mind the language of Lord Cohen delivering the judgment of the Judicial Committee of the Privy Council in **Rice v. Commissioner of Stamp Duties** [1954] A.C. 216 at page 234:

> "It must be borne in mind that if the Commissioner's determination is to be regarded as the decision of the Court of Justice this means that he has been a judge in his own cause.
>
> An Executive Officer can no doubt be made a judge in his own cause but if there is an ambiguity in the statute their Lordships must lean against the construction which would have this effect."

Viscount Dilhorne in delivering the judgment of the Judicial Committee of the Privy Council in **Jeffs v. New Zealand Dairy Production and Marketing Board** [1967] 2 W.L.R. 136 at page 143 found that in the clear provisions of the Dairy Production and Marketing Board Act 1967 of New Zealand -

> "The conclusion is inescapable that it was intended that the Board should decide zoning questions even though its pecuniary interests might be affected."

Thus could statute in a particular case erase the general rule that a person could not be a judge in his own cause.

In the light of my consideration of the relevant principles and my view that Mr. Leo-Rhynie, Q.C., Chairman of the General Legal Council was acting in laying the complaint as an agent of the General Legal Council and under its instructions and on its behalf, I further consider the issues on the following basis:

Real likelihood of bias

Inherent in the submissions of Mr. Phipps is that there is a real likelihood of bias in any determination of the Committee because of the relationship between the Committee and the Council. If the interest of the judge in the outcome of the proceedings is pecuniary or proprietary no difficulty arises in identifying a real likelihood of bias unless of course the statute allows it. A greater difficulty is posed when it is not.

The correct test is as stated by Slade, J. delivering the judgment of the Divisional Court in **R. v. Cambourne Justices ex parte Pearce** [1955] 1 Q.B.D. 41 at page 51:

> "In the judgment of this court the right test is that prescribed by Blackbourne, J. namely, that to disqualify a person from acting in a quasi judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding a real likelihood of bias must be shown. This court is further of the opinion that a real likelihood of bias must be made to appear not only from the materials and facts as obtained by the party complaining but from such further facts as he might readily have ascertained and easily verified in the course of his enquiries."

He continued:

> "The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart's reminder in the Sussex Justices case that it 'is of fundamental importance

> "that justice should not only be done but should manifestly and undoubtedly seem to be done' is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and indeed in some cases upon the flimsiest pretext of bias. While endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

In **R. v. Barnesley Licensing Justices** [1960] 2 Q.B.D. 167 at page 186 Devlin, L.J. elaborated:

> "One has to look at the whole picture. Here is an application by the Co-operative Society and there is sitting to decide it a Bench which is wholly composed of members of the Society and one woman whose husband was a member of the Society presided over by a Chairman who had interested himself actively in the conduct of the affairs of the Society or was desirous of doing so. Is there in those circumstances a real likelihood of bias? I am not quite sure what test Salmon, J applied. If he applied the test based on the principle that justice must not only be done but manifestly be seen to be done I think he came to the right conclusion on that test. I cannot imagine anything more unsatisfactory from the public point of view than applications of this sort being dealt with by a Bench which was so composed and indeed it is conceded that steps will have to be taken to rectify the position. But in my judgment it is not the test. We have not to enquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there is a real likelihood of bias - not merely satisfy ourselves that there was a sort of impression that may reasonably get abroad. The term 'real likelihood of bias' is not used in my opinion to import the principle in **Rex v. Sussex Justices** to which Salmon, J. referred. It is used to show that it is not necessary that actual bias be proved. It is unnecessary and indeed might be most undesirable to investigate the state of mind of each individual justice. Real likelihood depends on the impression which the court gets from

> "the circumstances in which the Justices were sitting. Do they give rise to a real likelihood that the Justices might be biased? The court might come to the conclusion that there is such a likelihood without impugning the affidavit of a Justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred in the circumstances in which the Justices sit."

It seems to me that on the application of the proper test with the Council being the prosecutor and the Committee the judges, this court in deciding whether there was a real likelihood of bias must examine the purposes and objectives of the Council which include "the upholding of the standards of professional conduct." Is there a real likelihood of bias in the Committee when the prosecution is carrying out a function which is one of its main purposes? I think not. Can we infer the probabilities that because the Committee is appointed by the Council and can be dismissed by the Council there is a real likelihood of bias? Again I think not. That is not an impression which the court would get from the circumstances in which the Committee would be sitting.

My conclusions, therefore, on the points examined are as follows:

> 1. The Legal Profession Act does not authorise the Council to make and prosecute a complaint against an attorney-at-law. The Council does not fall directly or by necessary implication into one of the categories so authorised by section 12 of the Act. The Council therefore lacks the status in this regard. I do not agree with the submission of the counsel for the defendant Mr. Dennis Morrison, Q.C. and Mr. Allan Wood, attractive as it appears that since as a member of the Council, Mr. Leo-Rhynie, Q.C. the Chairman can make the complaint and since the complaint itself does not state him to be acting on behalf of the Council if it subsequently emerges that he made it with the authority and on behalf of the

"Council, the validity of the complaint is not affected. It is true that the complaint in the form presented does not disclose that Mr. Leo-Rhynie is making it on behalf of the Council. We, however, know now from his affidavit that he brought the complaint in that capacity. It is contended by the respondent that since on the face of the complaint he had the status as a member of the Council to bring it under the Act and no irregularity is therein revealed, the complaint is properly brought and is not affected by the subsequent revelation by him that he acted by the authority of the Council and on its behalf. To accede to this submission would be in my view to elevate form over substance, appearance over reality, and this is not permissible. Mr. Leo-Rhynie may properly act on the Council's request. The Council indeed may use its facilities to obtain the facts in the matter. The Council cannot itself acting through its Chairman or anyone else bring the complaint.

2. If it was the intention of Parliament to confer this status on the Council it should have done so specifically, particularly as the statute was listing the categories of those who could initiate complaints and also because of the necessarily close relationship between the Council and the Committee. It is this relationship which may have caused the legislature not to specifically empower the Council to lay complaints.

3. The Council as a body, a corporate entity is a separate and distinct legal personality from its members. The authority therefore in section 12 of a member of a Council to bring a complaint is not authority given to the Council itself.

4. The relationship between the Disciplinary Committee and the Council does not create a real likelihood of bias in the Committee in favour of the prosecutor, that is the Council. The Act, however, does not empower the Council to be prosecutor nor does it do so by necessary implication. As convenient as this may be in the particular circumstances the legislature would have to give the Council this specific authority.

The consequence of these conclusions would result in the appeal being allowed without reference to the other submissions on behalf of the appellant.

Nevertheless, I will deal with the other issues raised.

Delay

The other major assault on the judgment of the Full Court was in respect to the question of delay. Mr. Phipps submitted that by virtue of the delay -

(i) in bringing the proceedings; and

(ii) between the bringing of the proceedings and the fixing of a date for hearing the provisions of section 20(2) of the Constitution in respect of a fair hearing within a reasonable time had been infringed.

The judgment of the Full Court carefully analyses reasons why the delay existed before the charge was laid and the reasons leading to delay after the charge was laid. What is a reasonable time must depend always upon the circumstances of every case. The judgment of Clarke, J. examined the relevant factors not the least of which was the fact that the acts complained of were committed in Canada and the difficulties arising therefrom in obtaining the relevant information on a timely basis from outside the jurisdiction. The Full Court then applied the appropriate law and in keeping with the principles laid down in the authorities held that the delay was not unreasonable. With this conclusion I agree.

Is the Legal Profession Act a penal statute?

It was maintained by Mr. Grant that the Legal Profession Act being a penal statute it could not apply to acts committed outside the jurisdiction. An examination of the Legal Profession Act leads me to conclude to the contrary. As was stated in **Bolton v. Law Society** [1994] 1 WLR 512 by Sir Thomas Bingham, M.R. at page 518:

> "It is important that there should be full understanding of the reasons why the Tribunal make orders which might otherwise seem harsh. There is in some of these orders a punitive element: a penalty may be visited on a Solicitor who has fallen below the standard required of his profession in order to punish him for what he has done and to deter any other Solicitor tempting to

> "behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention.
>
> Particularly is this so where a criminal penalty has been imposed and satisfied. The Solicitor has paid his debt to society. There is no need and it would be unjust punishing again. In most cases the Order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an Order of suspension; plainly it is hoped that the experience of suspension will make the offender meticulous in his future compliance with the required standard. The purpose is achieved for a longer period and quite possibly indefinitely by an Order of striking off. The second purpose is the most fundamental of all; to maintain the reputation of the Solicitors profession as one in which every member of whatever standing may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admissions."

Since the fundamental principles of the Act is not primarily directed to punishment but to a well founded public confidence in the trustworthiness of all members of the profession and to ensure the discharge of any professional duty with no less than complete integrity the Act cannot be categorised as a penal statute.

Indeed, there are several cases in the United Kingdom in which disciplinary proceedings have been taken against members of the legal profession in relation to complaints made in respect of acts committed abroad: for example, see Bunny v. The Judges of the Supreme Court of New Zealand [1862] 15 E.R. 455; In Re a Solicitor [1928] 72 vol. T570; Re a Solicitor [1898] 1 QB 331; Re a Solicitor (1622) 2 All ER 335 all cited by counsel for the respondent.

Procedural impropriety

There were several areas of alleged procedural impropriety urged on us by Mr. Grant as being sufficient for the court to rely upon to cauterise the proceedings at this stage. Much time and effort went into the submissions in these areas and if I deal with

them summarily it is not for lack of close examination although we were inundated with authorities upon which reliance was being optimistically placed.

The fundamental determination to be made is as to whether the procedural requirements are mandatory or directory provisions. The proper approach is to consider the general object of the procedural requirements (see **Coney v. Choyce** [1957] 1 All ER 979). The submissions of Mr. Grant therefore in relation to the defective affidavit of Mr. Leo-Rhynie in which the complaint was made is met by the fact that the purpose of the affidavit is to bring to the notice of the appellant the charges which are being made and will be determined by the Disciplinary Committee. It clearly fulfilled that purpose. The provision as to the form of the complaint by affidavit is directory and I agree with the finding of the Full Court in this respect. In any event the procedural irregularity does not go to jurisdiction and the appellant by himself and through his attorneys-at-law carried on a course of correspondence terminating in the fixing of an agreed date for the hearing which effectively waived the defect which is being complained of.

Prima facie case

Rule 4 of the Legal Profession Disciplinary Rules which is the Fourth Schedule of the Act reads as follows:

> "Before fixing a day for the hearing the Committee may require the applicant to supply such further information and documents relating to the allegations as they think fit and in any case where in the opinion of the Committee no prima facie case is shown the Committee may without requiring the Attorney to answer the allegations dismiss the application. If required so to do either by the applicant or the Attorney the Committee shall make a formal order dismissing such application."

The appellant maintains that the finding of a prima facie case against him was not based on any or any sufficient evidence. In my view, all this Rule provides is that before a date for hearing is fixed a decision must be taken by the Committee based,

not on evidence, since none is before it at this stage but upon the nature of the allegations as to whether this is a matter on which the Committee should proceed. If the matter is trivial or frivolous there does not exist "a prima facie case" for the Committee to proceed to trial. Frivolous allegations may be made against attorneys-at-law, the frivolity of which is evident and this provides for the Committee a process by which it can weed out insubstantial complaints and clear the list of matters unmeritorious.

The provision is there for the protection of the attorney-at-law as well as the convenience of the Committee and cannot provide a valid ground for a complaint by the appellants.

Further submissions

I find also no merit in the submissions which attack procedurally the affidavits upon which the complainant intended to apply to the court to rely, since the Committee would have to rule at the hearing whether it was permitting the use of affidavit evidence generally, and particularly these specific affidavits. Any argument therefore as to whether these affidavits are procedurally deficient so as to debar their use must be made before the Committee.

Neither can the appellants successfully rely upon the submissions made that he did not receive the names of members of the Disciplinary Committee who would hear the complaint since he has the right to object when he appears before the Committee to any member on the Committee if he has good and sufficient reason to do so. The non-provision of further and better particulars is met by the fact that the affidavits which were served on the appellant disclosed the particulars. If they are not sufficient an application can be made at the appropriate time to the Committee.

The submission that the alleged misconduct of the appellant of which complaint is made has nothing to do with acts committed by the attorney while acting as a lawyer or in a professional

capacity did not find favour with me and are indeed well met by the arguments adduced by Mr. Dennis Morrison, Q.C. and Mr. Allan Wood for the respondent. The allegations which deal with dishonesty, plagiarism and passing off as a Queen's Counsel in Jamaica and one time Deputy Minister of Justice as part of the appellant's qualifications, if true, certainly infringe the Legal Profession (Canon of Professional Ethics) Rules 1978, Canon 1(b):

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

At the time of these alleged acts on the part of the appellant he was an attorney-at-law on the rolls in Jamaica.

For the reasons however already given I would allow the appeal and grant the Order of Prohibition as prayed.

WRIGHT, J.A.:

This is an appeal from the judgment of the Full Court (Walker, Ellis, Clarke, JJ) dismissing a Motion for an Order of Prohibition which sought to prohibit the Disciplinary Committee of the General Legal Council from hearing complaint No. 1/1990 which was made against the appellant by Joswyn Leo-Rhynie, Q.C., the Chairman of the General Legal Council, relating to the conduct of the appellant outside the shores of Jamaica, viz in Canada.

The appellant qualified as a Barrister-at-law at the English Bar and was admitted to practice at the Jamaican Bar on September 1962 and as such was subject to the discipline of the Disciplinary Committee of the Bar Association which came into operation on June 15, 1960. The Legal Profession Act (the Act) took effect as from January 3, 1972. Section 4(2) of the Act requires the Registrar of the Supreme Court, with effect from January 3, 1972, to enter in the roll of legal practitioners, which he was required to keep by section 4(1) of the Act, the names of each person who, previous to that date, was a barrister or solicitor and to "issue to every such person a certificate of enrolment in the prescribed form without the payment of any fee." Accordingly, with effect from that date the appellant became enrolled as an attorney-at-law, the new title for legal practitioners.

Discipline of the legal profession now became the responsibility of the General Legal Council which was established by section 3 of the Act, which reads in part:

> "3--(1) There shall be established for the purposes of this Act a body to be called the General Legal Council which shall be concerned with the legal profession and, in particular --
>
> (a) ...
>
> (b) with upholding standards of professional conduct.
>
> (2) The Council shall have power to do all such things as may appear to it to be necessary or desirable for carrying out its functions under this act."

The appellant practiced as an attorney-at-law in Jamaica until 1977 when he migrated to Canada but he did not have his name removed from the Roll of Attorneys-at-law in Jamaica. Out of this situation arises the question as to whether he still remained subject to the jurisdiction of the Disciplinary Committee.

While in Canada, by virtue of having passed the required examinations, he was admitted to practice at the Saskatchewan and Ontario Bars and he did so until 1985 when he returned to Jamaica. It was out of his activities during those years in Canada that he was subsequently summoned to answer to the Disciplinary Committee of the Legal Council. The complaint by the Chairman of the General Legal Council reads thus:

> "1. THAT I am the Chairman of the General Legal Council.
>
> 2. THAT I reside and have my true place of abode and postal address at 76 Norbrook Drive, Kingston 8, in the Parish of Saint Andrew and that my address for purposes of this affidavit is c/o the offices of the General Legal Council at 11 Duke Street in the Parish of Kingston.
>
> 3. THAT I have reasonable and probable grounds to believe and do believe that Winston Churchill Waters McCalla is guilty of misconduct in a professional respect in that he conducted himself in a manner which is disgraceful, dishonourable, deplorable and unbecoming of an Attorney-at-law and which tends to discredit the Legal Profession of which he is a member in that:
>
> (a) on or after August 23, 1982, while employed by the Federal Ministry of the Solicitor General as Co-ordinator, Criminal Procedure Project, he corruptly abused his profession as an employee of the Federal Government of Canada by hiring two law students, Pearl Eliadis and Stephen Hamilton, at Government's expense, to conduct research and prepare background papers on the law of search and seizure, by using government funds and resources to have them prepare a manuscript and thereafter, without the

" knowledge or consent of the appropriate Federal Government Officials or the aforementioned researchers, appropriated the aforesaid research work as his own by having it published by the Canada Law Company under his purported sole authorship and for his personal benefit in a text entitled 'Search and Seizure in Canada';

(b) that in respect of the academic year 1983 to 1984, he was employed and paid in full by the Department of Law at Carleton University in Canada to teach a course in Juvenile Justice and thereafter without the knowledge or consent of officials at the University, arranged for one Catherine Latimer to teach the course. In addition, despite his promise to do otherwise, he failed to compensate the said Catherine Latimer for her efforts;

(c) he tendered a Curriculum Vitae in support of his application for employment with the Federal Government of Canada in which he falsely represented that

(i) among his professional qualifications was the award of Queen's Counsel which, he represented, was conferred on him in Jamaica in 1973

(ii) he was appointed and did hold the position of Deputy Minister of Justice in Jamaica between the years 1973-1977.

4. The complaint I make against the Attorney-at-law is that:

his conduct hereinbefore described was disgraceful, dishonourable, unbecoming of an Attorney-at-law and was of a nature which tended to discredit the profession of which he is a member.

In substantiation of the complaint herein, reliance will be placed, inter alia, on Canon 1(b) of The Legal Profession (Canons of Professional Ethics) Rules."

Canon 1(b) of the Legal Profession (Canons of Professional Ethics) Rules published in the Jamaica Gazette Supplement dated December 29, 1978, reads as follows:

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

The constitution of the Disciplinary Committee and the authorisation to make a complaint are set out in sections 11 and 12 respectively:

" **PART IV. Discipline**

11--(1) The Council shall appoint from among persons --

(a) who are members, or former members, of the Council; or

(b) who hold or have held high judicial office; or

(c) who are attorneys who were members of a former disciplinary body; or

(d) who are attorneys who have been in practice for not less than ten years,

a Disciplinary Committee consisting of such number of persons, not being less than fifteen, as the Council thinks fit.

(2) ...

12--(1) Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by an attorney, that is to say --

(a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect);

(b) any such criminal offence as may for the purposes of this provision be prescribed in rules made by the Council under this Part."

Section 14(1) of the Act empowers the Disciplinary Committee from time to time to make rules regulating procedures before the

Committee and subsection 2 provides that the rules contained in the Fourth Schedule shall be in force until varied or revoked by rules made under subsection 1. Reference will be made to the relevant rules later in this judgment.

It is observed that the complaint is dated 3rd January, 1990, and on the following day a letter was addressed to the appellant as follows:

"January 4, 1990

Mr. Winston C. W. McCalla
Attorney-at-law
22-24 Duke Street
Kingston.

Dear Sir,

Re: Complaint No: 1/90
Chairman of General Legal Council vs
Winston Churchill Waters McCalla

I enclose herewith copy of Application together with Affidavit sworn by Mr. Joswyn Leo-Rhynie, Q.C. on the 3rd day of January, 1990 in the Parish of Kingston.

Please be good enough to let me have your comments within the next two weeks. If you fail to comply with this request, the matter will be placed before the Disciplinary Committee at its next meeting.

Yours faithfully,

Donna A.M. Parchment

DAMP/ab

encl."

A series of correspondence resulted, culminating in a letter dated 5th June, 1992, which precipitated the application to the court for an Order of Prohibition, directed to the Disciplinary Committee of the Legal Council, which as stated earlier was refused. The letter of the 5th June, 1992, stated:

"5th June, 1992

Mr. Berthan MaCauley, Q.C.
Attorney-at-law
22-24 Duke Street
Kingston

Dear Mr. MeCaulay,

Re: Dr. Winston McCalla

"As you are aware the Disciplinary Committee of the General Legal Council proposes to have a hearing into a complaint of professional misconduct by Dr. McCalla. A copy of the complaint is enclosed.

It is proposed to make an application to the panel of the Committee hearing the complaint that the matter be proceeded with upon the basis of evidence given by affidavit, pursuant to rule 10 of The Legal Profession (Disciplinary Proceedings) Rules. We enclose for your information, copies of all the affidavits upon which it is intended to rely, as listed below:

1. Affidavit of Francois Handfield
2. Affidavit of Stuart Morrison
3. Affidavit of Jean Charron
4. Affidavit of Calvin A. Becker
5. Affidavit of Stephen Hamilton
6. Affidavit of Pearl Eliadis.

We will be contacting you shortly with a view to arranging a convenient date for the commencement of the hearing.

Yours truly,

Barbara Hall (Mrs.)

c.c. Dr. W. McCalla
Enclosure
BH/bh"

The original grounds of appeal which were filed were abandoned in favour of three grounds argued before us dealing with:

(a) The competence of the Disciplinary Committee to hear the complaint;

(b) the effect of the lapse of time;

(c) procedural improprieties.

Before embarking on a consideration of the grounds of appeal, I should issue a word of caution that, of the plethora of cases (97 in all) with which the court was inundated, most will not be mentioned in this judgment for want of any discernible relevance.

The competence of the Disciplinary Committee to hear the complaint

The question to be resolved under this ground is whether the appellant is amenable to the discipline of the Disciplinary Committee for his conduct while absent from Jamaica. Canon 1(b) (supra) obliges an attorney:

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

This clearly is a requirement which adheres to the attorney without reference to territory. Again section 3(1)(b) of the Act charges the General Legal Council:

> "With upholding standards of professional conduct."

There is no qualification attached thereto. Indeed, it would be ludicrous in the extreme if a Jamaican attorney were free to roam the world conducting himself in a manner which breaches the rules of conduct which govern the profession of which he is a member and be allowed to maintain that he is not subject to the sanctions of those rules because his conduct was outside of Jamaica. The Act in no way pretends to have extra territorial effect. It is not concerned with where the misconduct occurred but with the person who misconducted himself. The Act is disciplinary, not penal as the appellant contends. It is clearly stated that what the Act is concerned with is "upholding standards of professional conduct": (Section 3(1)(b)). To be considered in this regard, too, is section 12(1)(a) which speaks of "misconduct in a professional respect" to which no limitation is set.

It is to be observed that far from derogating from principles of discipline in the legal practice which pre-dated it, the Act incorporates those principles by the provision in section 5(d)(c) that:

> "When acting as a lawyer be subject to all such liabilities as attach to a solicitor."

Solicitors were subject to the provisions of The Solicitors Law which came into force on the 25th February, 1869, but the supervising power of the Supreme Court was expressly retained by section 24 of that law. The Judges of the Supreme Court were required to appoint seven practising solicitors who would constitute the Disciplinary Committee of the profession under the watchful eyes of the Supreme Court. It is to be noted that the solicitor's position was more precarious than the attorney of today. Section 35 of the Solicitors Law provided for the striking of a Solicitor's name from the roll. Subsection 35(1)(a) enabled the solicitor to

procure the removal of his name from the roll. The remainder of the section reads as follows:

> "35--(1) Any application
>
> (a) ...
>
> (b) by any other person to strike the name of a solicitor off the roll, or to require a solicitor to answer allegations contained in an affidavit,
>
> shall be made to and heard by the Committee in accordance with rules made under section 36 of this Law:
>
> Provided that nothing in this section shall affect the jurisdiction which apart from the provisions of this section is exercisable by the Supreme Court or any Judge thereof over solicitors.
>
> (2) On the hearing of any such application the Committee shall have power to make any such order as to removing from or striking off the roll the name of the solicitor to whom the application relates as to suspending him from practice as to the payment by any party of costs, and otherwise in relation to the application and inquiry as they may think fit."

By providing that an application under this section could be made <u>by any other person</u> the law placed the profession under the watchful eye of the public at large. It is significant to note the sense of continuity in that Rules 4 and 5 of the Legal Profession (Disciplinary) Rules are the ipsissima verba of Rules 4 and 5 of the Solicitors (Disciplinary) Rules, 1941.

Canon VIII (d) regards a breach of 1(b) (supra) as constituting "misconduct in a professional respect" rendering the attorney subject to any of the orders contained in section 12(4) of the Principal Act which include, inter alia, an order that his name be struck off the roll. Though the standard of proof must be proof beyond reasonable doubt, the standard in criminal cases, there are no criminal sanctions provided for such a breach: <u>**In re a Solicitor**</u> [1992] 2 All E.R. 335.

A factor which must be borne in mind is that at all times the appellant regarded himself as being a Jamaican attorney because he returned to Jamaica from Canada in 1985 and resumed practice

without having to qualify afresh. Paragraphs 10 and 11 of his affidavit at page 7 of the record are relevant:

> "10. That in March 1985, I returned to Jamaica after eight years abroad from the time I migrated to Canada in October 1977.
>
> 11. That between October 1985 and January 1990, a period of almost five years in active practice as a Jamaican Attorney in Kingston, no notice of the complaint of misconduct in a professional capacity was ever addressed to me or brought to my attention by the General Legal Council or the Disciplinary Committee both of whom were at all times in possession of my professional address in Kingston."

By what logic of reasoning can he claim the rights to practice and yet be not subject to the disciplinary rules of the profession? At any time during the period when he lived in Canada he could have returned to Jamaica and be involved in legal practice and thereafter return to Canada as occasion warranted. And that is so because his name remained on the roll of attorneys entitled to practice as a lawyer in Jamaica. If the contention of the appellant is correct, no matter how reprehensible and deplorable his conduct may be while he is abroad the General Legal Council would remain powerless to affect his right to continue as a member of the profession despite its mandate to uphold standards of professional conduct. I am not persuaded to that view.

Section 20(2) of the Jamaica Constitution was invoked for two reasons, viz:

> 1. To bolster the challenge to the competence of the Disciplinary Committee, and
>
> 2. To justify the plea of delay.

Section 20(2) reads:

> "Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

The first contention is that because of what Mr. Phipps chose to label as the "incestuous relationship" between the General Legal Council and the Disciplinary Committee it would be impossible for the appellant to have the impartial hearing guaranteed by the section. Attention must then be directed to the constitution of these two bodies. As stated earlier, the General Legal Council was established by section 3 of the Act. Section 3(4) of the Act is in these terms:

> "The provisions of the First Schedule shall have effect as to the constitution of the Council and otherwise in relation thereto."

The relevant provisions in the First Schedule are as follows:

> "1--(1) The members of the Council shall be:
>
> (a) the Chief Justice or his nominee;
>
> (b) the Attorney-General or his nominee;
>
> (c) one member appointed by the Minister;
>
> (d) fourteen members, being legal practitioners, appointed in accordance with sub-paragraph (2).
>
> (2) The members specified at sub-paragraph (1)(d) (hereinafter referred to as nominated members) shall be appointed by the Minister upon nomination by such body or bodies as may for the time being be recognized by him as representing members of the legal profession, so, however, that until one or more other professional body or bodies is or are formed to represent attorneys in Jamaica the Minister shall recognize the Bar Association of Jamaica and the Incorporated Law Society of Jamaica as together representing the legal profession in Jamaica and shall appoint to the Council seven members upon the nomination of the said Association and seven members upon the nomination of the said Society.
>
> (3) In this paragraph 'legal practitioner' means:
>
> (a) in relation to any period prior to the appointed day, a barrister or solicitor; and

" (b) in relation to any period thereafter, an attorney-at-law.

2. The appointment of a nominated member or the member specified in sub-paragraph (1)(c) of paragraph 1 shall, subject to the provisions of this Schedule, be for a period not exceeding three years and such member shall be eligible for reappointment.

3. The Council shall appoint one of the members of the Council to be chairman thereof."

Section 11 of the Act provides for membership of the Disciplinary Committee as follows:

"11--(1) The Council shall appoint from among persons:

(a) who are members, or former members, of the Council; or

(b) who hold or have held high judicial office; or

(c) who are attorneys who were members of a former disciplinary body; or

(d) who are attorneys who have been in practice for not less than ten years,

a Disciplinary Committee consisting of such number of persons, not being less than fifteen, as the Council thinks fit.

(2) The provisions of the Third Schedule shall have effect as to the constitution of the Disciplinary Committee and otherwise in relation thereto."

The position, therefore, is that the Council is comprised of seventeen (17) members whereas the membership of the Committee may not be less than 15, all of whom must be attorneys but not all need be members of the Council. The position as disclosed to the Full Court is that the Disciplinary Committee consists of 28 members, 8 of whom are Council members.

Regarding sittings of the Committee, section 13 of the Act provides as follows:

"13--(1) For the purposes of hearing applications made pursuant to section 12 the Disciplinary Committee may sit in two or more divisions.

" (2) Each division shall be entitled to hear and determine any such application and shall be entitled to exercise all the powers of the Disciplinary Committee; and any hearing by or determination or order of such division shall be deemed to be a hearing by or determination or order of the Disciplinary Committee.

(3) Each division shall appoint its own chairman and shall act only while at least three members thereof are present.

(4) No order shall be made by the Disciplinary Committee under section 12 striking off the Roll the name of an attorney unless at least three members present vote in favour of the order."

It does not require the total membership of the Committee to carry out the preliminary exercise of determining whether there is a prima facie case as contemplated by Rule 4 of the Fourth Schedule. Accordingly, it should present no difficulty in naming a panel to hear the complaint against the appellant whose members took no part in the preliminary stage so that an independent and impartial authority as required by section 20(2) of the Constitution can conduct the hearing. But in this regard there are two things to be borne in mind. Firstly, it is a daily occurrence that submissions are made before Resident Magistrates that a prima facie case has not been made out and in the instances when he overrules the submission he proceeds to hear the case and yet, where the trial ends in a conviction, it has never been contended on that basis that section 20(1) of the Constitution, which requires the trial of criminal cases by an independent and impartial court established by law, has been violated and this is the same requirement in section 20(2) providing for the determining or extent of any civil rights or obligation. The finding that a prima facie case has been made out is an essential stage in a fair hearing. In the contemplation of both sections 20(1) and 20(2), independent and impartial must connote freedom on the part of the court or other authority to come to a just conclusion not being under any obligation to reach any other conclusion. So that to my mind, even if the panel hearing the complaint included members who had

determined that a prima facie case had been shown, the section would not have been violated. The second point is that since the scheme of the Act is to enable the profession to discipline itself, subject to the supervision of the court, no outside body can be empowered either to name any member of the Committee nor, in an endeavour to achieve independence and impartiality, undertake the process of disciplining. The Act, for obvious reasons, cannot name any person. The power to do so is reposed in the General Legal Council, the organ established by the Act to organize legal education and uphold standards of professional conduct (section 3(1)(a) & (b). Subsection 3(2) provides:

> "The Council shall have power to do all such things as may appear to it to be necessary or desirable for carrying out its functions under this Act."

Independence and impartiality must be found within the boundaries of the Act and the Rules made thereunder to effectuate its purposes. No intrusion is permissible. Ignorance is not a necessary component of either independence or impartiality. Not even jurors for the trial of criminal cases, at least in our jurisdiction, qualify to sit on the basis that they have no prior knowledge of the case. They are cautioned not to let such factor influence their thinking. No one can be required to be uninformed so that if the eventuality arises he will have an independent and impartial mind to apply to the determination of any issue he may be called upon to adjudicate. The same principle must apply to members of a profession regarding matters which may impact upon the integrity of the profession. Indeed, it is in the interest of the profession that they be informed so that the profession does not degenerate for want of diligence on the part of its members. In my judgment, the charge stemming from the relationship of the two bodies is baseless. The complaint fails since there is no one but the Council to name the members of the Committee and there can be no other persons to conduct hearings but the members named by the Council. It is in this narrow area that Mr. Phipps contended that section 20(2) of the Constitution

has been breached. He expressly refrained from challenging the constitutionality of the whole Act. Further, Mr. Phipps sought to rally support for his impeachment effort by reference to the letter heads of the Disciplinary Committee and the General Legal Council which revealed that both bodies share the same secretary but this could hardly be regarded as a serious contention.

The competence of the Chairman of the Council to make the application was also questioned the moreso that the Chairman in a subsequent document stated that he had made the application on behalf of the Council. However, the application does not itself say so and paragraph 3 of the application states in part:

> "That I have reasonable and propable grounds to believe and do believe etc. ..."

Here it is clearly the Chairman and not the Council speaking. Section 12(1) of the Act (supra) enables the Registrar or <u>any member of the Council</u> to "make a like application to the Committee etc" (Emphasis added).

The Chairman is a member of the Council and as such qualifies to make the application. It is not difficult to appreciate the **necessity** to give power to a member of the Council to so act. The person aggrieved by the professional misconduct of an attorney may, for several reasons including blood relationship, not wish to make an application to the Committee and the profession would be left to suffer the indignity of his misconduct. Mr. Phipps had asked rhetorically, "but who then is the judge if the Council is the accuser?" I feel quite certain that he would not opt instead for the profession to be left unprotected in such circumstances as I have instanced above. This is a necessary aspect of the self-disciplinary process.

<u>Delay</u>

It is upon the same section of the Constitution that reliance was placed for the submission that by reason of delay the Committee should not be allowed to proceed to hear the complaint. There is an evident distinction between section 20(1),

dealing with criminal offences, and section 20(2), which deals with civil rights. The former provides thus:

> "Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

A person may be charged promptly upon the occurrence of the event giving rise to the charge or the charge may be made sometime later depending on the relevant circumstances, including the nature of the investigations involved. Reasonableness of time must, therefore, be judged from the time the charge is made and not when the incident occurred: **Bell v. D.P.P.** [1985] 3 W.L.R. 73. The peculiarity about that case is that it was a re-trial after his conviction in 1973 had been quashed by the Court of Appeal in 1982 and the re-trial ordered. The Privy Council reckoned that time began to run from 1982 and regarded a delay of 32 months as being in breach of section 20(1). In coming to its decision the Privy Council confirmed that the Constitution was declaratory of the common law and that accordingly the practice and procedure of the courts established by law in the pre-Constitution period must be respected in determining whether a reasonable time had elapsed and that in so determining regard must be had to problems affecting the administration of justice in Jamaica.

The Board also identified four principal factors to be considered in the exercise of determining whether more than a reasonable time had elapsed:

1. The length of the delay;
2. The reason given to justify the delay;
3. The responsibility of the accused to assert his rights;
4. Prejudice to the accused.

The Full Court considered those factors at pages 183 - 184 of the record but found that the appellant "did not raise the question of delay before the Committee at any hearing before invoking the jurisdiction of the Supreme Court." Holding that

only the length of delay could now be raised, the Full Court decided that the explanation proffered was satisfactory and so refused relief. In **Mungro v. R.** [1991] 1 W.L.R. 1351 the Privy Council, while bearing in mind its ruling in **Bell**, held that a delay of four years in prosecuting criminal charges was not unreasonable having regard to the complexity of the necessary investigations as well as the complexity of the manner of proof.

Section 20(2) speaks of:

> "...where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

Accordingly, submissions that delay should be reckoned either from the date of the incidents being enquired into or the time when the Council first became aware of the allegations are untenable. The first intimation that the Council had was via allegations in a Canadian newspaper that the appellant was being sought on a warrant charging him with breach of trust and fraud. Correspondence began on October 18, 1985, between the Council and the Law Society of Upper Canada with a view to ascertaining the nature of the allegations and although the correspondence continued it was not until 1987 when by letter dated February 10, 1987, that an affidavit detailing the history of disciplinary proceedings concluding with the disbarment of the appellant in Canada was received by the Council. Consequently, it was not until then that the Council became fully seized of the matter. Proceedings were begun on January 3, 1990, but the period 1987-1990 is not the period which section 20(2) contemplates. Rather, it is the period since the institution of proceedings. But because, in keeping with the decision in **Mungro**, the circumstances confronting the Council must be regarded it is important to consider what those circumstances were. Paragraphs 4 to 5 of the affidavit of the Chairman of the Council dated 13th November, 1990, which speak to that situation, are set out hereunder:

"4. In or about the month of February 1987 the Law Society of Upper Canada provided the General Legal Council (hereinafter called 'the Council') with a history of the disciplinary proceedings in Canada brought against the Applicant and the Council sought and obtained Counsel's advice as to whether it could proceed on the basis of that decision Exhibit JL 1. The Council was advised that disciplinary proceedings should be pursued in Jamaica and should take the form of a full rehearing on the charges which were the subject of the Applicant being struck off in Canada. As a consequence acting on behalf of the Council the complaint the subject matter of the proceedings herein was laid by me together with an Affidavit deponed to by me on 3rd January 1990 and the Applicant was so advised and his comments sought by letter dated 4th January 1990 from the Secretary of the Council, which letter and Affidavit are Exhibit WM 1A and 1B to the Applicant's aforesaid Affidavit. By statement dated 17th January 1990 which is exhibit WM 2B to the Applicant's Affidavit, the Applicant denied the allegations and sought and requested particulars as shown by exhibits WM 2B and WM 3 to the Applicant's Affidavit.

5. Arising from the fact that the charges laid against the Applicant were all denied and particulars sought by him, the Council had to proceed to ascertain the identity and whereabouts of the witnesses required and to obtain from them full particulars of the complaint against the Applicant. All witnesses relevant to the complaint against the Applicant reside in Canada and to minimize the expense and inconvenience of bringing such persons to Jamaica and as a means of providing the information and particulars sought by the Applicant from the Council, Affidavits were obtained from such witnesses and I exhibit and annex hereto marked with the letters 'JL 2A to F' respectively photocopies of the Affidavits of Francois Handfield sworn to on 12th March 1992, Stuart Morrison sworn to on 20th November 1991, Jean Charron sworn to on 13th November 1991, Calvin A. Becker sworn to on 5th November 1991, Stephen Hamilton sworn to on 4th July 1991 and Pearl Eliadis sworn to on 18th June 1991 which support the complaint made against the Applicant and upon which the Council intends to rely in proceeding before the Disciplinary Committee. The aforesaid Affidavits were obtained with all due expedition having regard to the fact that the deponents, all of whom are in Canada, had to be located, instructions obtained, the Affidavits prepared and despatched."

In considering both the length of the delay and the reason for the delay, a relevant factor is the limited resources of the Council to undertake the necessary investigations both abroad and locally and to prosecute the complaint. The court was told that the Council has but one administrative officer, a secretary, whose duties are shared with the Disciplinary Committee. Further, there are no investigative facilities and most of its members, including the Chairman and persons retained to prosecute, are private practitioners who serve voluntarily. In fairness to the appellant, it should be noted that his counsel had pressed for expedition of the hearing and in consequence a hearing was fixed for November 9, 1991, but having regard to a request for further and better particulars made on October 23, 1991, at a time when the Council was not yet in possession of the relevant affidavits that fixture had to be cancelled. After the affidavits had all been received the secretary to the Council, by letter dated 5th June, 1992, forwarded copies of them to the appellant's attorney and by agreement September 26, 1992, was fixed for hearing. However, on September 22 the appellant obtained an ex parte order staying proceedings. Accordingly, the period to be explained is January 3, 1990 to September 1992 - a period of 32 months. The distinction to which reference was made earlier is that in a criminal case which exposes an accused to possible loss of liberty the question of delay is viewed more critically than in a civil case where it is almost the norm for a case to come on for trial some six years after filing. What is involved in this case is the status of the appellant as an attorney, the vital question being whether he is a fit person to be allowed to continue as a member of the honourable profession in the resolution of which issue decided cases have shown that the court will not allow the passage of time to deter its supervisory function.

In <u>Re Iles</u> [1992] 3.J. 297 the Privy Council upheld an order of the court in Trinidad striking a solicitor off the roll for what may appear to be a small infraction which took place 15 years earlier - altering a deed which resulted in the revenue being

defrauded the sum of fifteen shillings. The Board held that there ought not to be even small dishonesties and emphasized that more than the interest of the appellant was involved - the interest of the profession to which he belonged, the community in which he served and the government whose revenue had been defrauded. It was submitted on behalf of the appellant that delay was not a live issue in that case but the lapse of 15 years since the conduct complained of was so significant that it is difficult to understand how the prominence of that factor could be overlooked. Moreover, that case is still regarded as good authority. As recently as 1987 it was cited with approval by Bernard, C.J. who delivered the judgment of the Court of Appeal in Trinidad & Tobago in **Forde v. The Law Society** [1987] 40 W.I.R. 361. He took care to observe that although it was a pre-independence decision it was still good law. Then, too, in **Ex parte Brounsall** (1788) 98 E.R. 1365 a solicitor was struck off the roll after a conviction which took place five years previously. See, also, **In Re Wright ex parte Thomas** (1863) 12 C.B.N.S. 705 in which a delay of 11 years did not avail.

It is important to observe that as recently as last year in **Bolton v. The Law Society** The Times 8/12/93 the English Court of Appeal underscored the principles enunciated in **Re Iles** (supra) in dismissing the appeal of a solicitor who had been struck off the roll because two years previously he had been convicted of misappropriating funds deposited with him in respect of the purchase of a house, even though he had refunded the money. Sir Thomas Bingham, M.R. who delivered the judgment of the court had this to say:

> "Practising lawyers were required to discharge their professional duties with integrity, probity and complete trustworthiness. That applied as much to barristers as to solicitors."

Later in emphasizing the purpose of disciplinary orders the report continues:

> "Referring to the reasons why such orders, which might otherwise be thought harsh, were made, his Lordship said that there was in some cases a punitive and deterrent element. However, in most cases the tribunal's order would primarily be directed to one or other of two other purposes:
>
> 1. To be sure that the offending solicitor did not have the opportunity to repeat his offence;
>
> 2. The most fundamental of all: to maintain the reputation of the profession as one in which every member, of whatever standing, might be trusted to the ends of the earth. To maintain that reputation and sustain public confidence in the integrity of the profession it was often necessary that those guilty of serious lapses were not only expelled but denied re-admission.
>
> If a member of the public sold his house, very often his largest asset, and entrusted the proceeds of sale to his solicitor pending re-investment in another house, he was ordinarily entitled to expect that the solicitor would be a person whose trustworthiness was not and never had been seriously in question, otherwise the whole profession and the public as a whole was injured. A profession's most valuable asset was its collective reputation and the confidence which that inspired.
>
> Because orders made by the tribunal were not primarily punitive it followed that considerations ordinarily carrying weight in mitigation of punishment had less effect on the exercise of the jurisdiction."

It is not difficult to appreciate that in upholding such standards the mere passage of time cannot be allowed to blur the court's vision or stay its hand.

As regards prejudice resulting to the appellant as a result of the delay, the Full Court had found that no material of actual prejudice had been presented by him. In an affidavit dated 14.9.92 he had complained that the delay would affect him adversely so far as locating relevant witnesses and documents was concerned as well as in his ability to recall events. It was objected that what was involved was within his personal knowledge. Further, it was submitted that the delay has enured to his benefit because he has been

able to continue in practice without interruption and the Council would be unable to proceed with one charge because an important witness cannot be located. In deciding that issue, I must refer to words that fell from the Master of the Rolls in **Bolton v. The Law Society** (supra). Said he:

> "The reputation of the profession is more important than the fortunes of an individual member."

I am not persuaded that because of the delay the appellant will not be able to present his defence.

Procedural improprieties

Mr. Grant listed five such improprieties:

1. Assumption of jurisdiction to hear a complaint without due compliance with the legal requirements of the Disciplinary Rules.

2. Finding that there was a prima facie case on the basis of no or no sufficient evidence.

3. Declared intention of the respondent to hold a hearing in the absence of any sufficient evidence to support the complaint as the affidavits on which the respondent intends to rely are totally defective and so inadmissible.

4. Disregard of the legitimate expectation of the appellant in three named areas.

5. Attempt by the respondent to answer the wrong question by assuming jurisdiction to hear a complaint which falls outside the ambit of the Act.

It was submitted that these points amount to excess of jurisdiction or abuse of powers and/or failure to act fairly to the appellant.

Rules 3, 4 and 5 of the Legal Profession (Disciplinary Proceedings) Rules are set out hereunder for ease of reference:

> "3. An application to the Committee to require an attorney to answer allegations contained in an affidavit shall be in writing under the hand of the applicant in Form 1 of the Schedule to these Rules and shall be sent to the secretary, together with an affidavit by the applicant in Form 2 of

"the Schedule to these Rules stating the matters of fact on which he relies in support of his application.

4. Before fixing a day for the hearing, the Committee may require the applicant to supply such further information and documents relating to the allegations as they think fit, and in any case where, in the opinion of the Committee, no prima facie case is shown the Committee may, without requiring the attorney to answer the allegations, dismiss the application. If required so to do, either by the applicant or the attorney, the Committee shall make a formal order dismissing such application.

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

1. **The Chairman's affidavit to support the complaint**

Let me at the very outset state that the submissions under this heading are misconceived being predicated on the claim that there was in fact no affidavit as required by Rule 3 (supra) but that the proceedings began with the complaint which it is contended cannot be regarded as an affidavit. At page 11 of the record is the letter from the Secretary of the General Legal Council informing the appellant of the contemplated proceedings. It reads:

"January 4, 1990

Mr. Winston C. W. McCalla
Attorney-at-Law
22-24 Duke Street
Kingston

Dear Sir,

Re: Complaint No: 1/90
Chairman of General Legal Council
vs Winston Churchill Waters McCalla

I enclose herewith copy of Application together with Affidavit sworn by Mr. Joswyn Leo-Rhynie, Q.C. on the 3rd day of January, 1990 in the Parish of Kingston.

Please be good enough to let me have your comments within the next two weeks. If you fail to comply with this request,

"the matter will be placed before the Disciplinary Committee at its next meeting.

Yours faithfully,

Donna A.M. Parchment

DAMP/ab

encl."

The letter clearly states that two documents were enclosed:

(a) copy of the application;

(b) affidavit sworn to by Mr. Joswyn Leo-Rhynie, Q.C. sworn to on 3.1.90.

The acknowledgement of this letter is at page 16 of the record and is signed by the appellant himself. Insofar as is relevant, it states:

"I acknowledge receipt of your letter dated 4th January, 1990, which was received by me on the 5th January, 1990. ...

Yours truly,

Winston C. W. McCalla."

If the enclosures were not received as stated in the forwarding letter, one would expect this to be stated in the acknowledgement but there was no such protest. Finally, on this point the affidavit of Joswyn Leo-Rhynie dated 13th November, 1992, in answer to the Notice of Motion before the Supreme Court which appears at page 46 of the record (supra) states that an affidavit was sworn on the 3rd January, 1990.

Here again is a statement upon oath that two documents were presented on the 3rd January, 1990. To this there has been no demurrer. The mystery, however, is that neither party can account for the disappearance of the affidavit. On the part of the Council there have been changes of secretaries (3 in all), the ravages of Hurricane Gilbert in 1988 followed by a re-location of office which could possible account for the disappearance of the document. On the part of the appellant his attorney, Mr. Berthan Macaulay, Q.C., in a letter to the Secretary of the Council dated October 23, 1991, states in part:

"I may add that as a matter of fact when Dr. McCalla was first addressed on January 4, 1990, he sent me the affidavit containing the complaint. The matter not having been proceeded for over a year my secretary had put away my file. I cannot even find my file now."

I refuse to believe, and he has not so stated, that learned counsel would loosely refer to a document as an affidavit which was not in fact an affidavit. In the light of the foregoing it is not open to the appellant to contend that the requirement of Rule 3 for an affidavit in Form 2 of the Schedule has not been complied with. Let me include Form 2 to emphasize the fact that the complaint could not have been mistaken for this document.

" **Form of Affidavit by Applicant**

(a) Name of the attorney-at-law.	**In the matter** of (a) an attorney-at-law; and In the matter of the Legal Profession Act (Act 15 of 1971)
(b) Name of Applicant.	I, (b) make oath and say as follows--
(c) Place of residence.	(1) That I reside at (c)
(d) Parish.	in the parish of (d)
(e) Occupation.	and am a (e)
(f) Postal address.	and my postal address is (f) P.O.
(g) Name of attorney-at-law.	(2) That (g)
(h) Set out facts complained of.	(3) (h)
	(4) The complaint I make
(i) Set out shortly the ground of complaint.	against the attorney-at-law is that he (i)

.....
Signature or Mark of Applicant

"If the person making the affidavit can read and write strike out the words in brackets.

Sworn at in the parish of this day of 19 (the same having been first read over and explained to the deponent when he/she appeared fully to understand the same) before me:

.....
Justice of the Peace for the parish of ....."

I may add, however, that if I had to decide on the adequacy of the complaint, if that was the form which the affidavit filed was alleged to have taken, I would hold that there has been substantial compliance with what is required to be stated in the affidavit in addition to the fact that it was sworn to before a Justice of the Peace: **R. v. Lincolnshire Appeal Tribunal ex parte Stubbins** [1917] 86 L.J.K.B. 292. That was a case in which there was non-compliance with the Regulation governing appeals in that the prescribed form had not been lodged in time when filing an appeal. There had in fact been substantial compliance and the question was whether the appellate court in those circumstances had jurisdiction to entertain an appeal. In the King's Bench Division it was held by a majority that the purpose of the regulation had been served and that it was not necessary to comply with the letter of it. Accordingly, it was held, the appellate court had jurisdiction. On appeal to the Court of Appeal it was held, upholding the lower court's decision, that the regulation was not mandatory but directory, therefore, the appeal process had not been flawed by the non-compliance. Swinfen Eady, L.J. had this to say at page 298:

> "In my opinion these regulations are directory only. The right of appeal is the right given by the statute. The regulations prescribe the mode in which the appeal ought to be proceded with; but there are no negative words in the statute that unless the appeal is prosecuted in accordance with the regulations for the time being in force it shall not be allowed. There is no regulation that the appeal shall be presented in a particular manner but not in any other manner."

I reiterate that the application of the principle enunciated in this case would only arise if there were in fact no affidavit. See also **Coney v. Choyce** [1975] 1 All E.R. 979.

2. **Was there a prima facie case?**

At the outset I must record that objection was raised to this issue being brought before this court because it was not a matter on which prohibition had been sought. Nevertheless, the court indulged the appellant because it thought the question important and could be dealt with without embarrassment to the respondent.

Submissions on this aspect of the appeal proceeded on the basis that the lodging of the complaint is equivalent to lodging a criminal charge which requires that all the elements of the charge be established beyond a reasonable doubt. The fallacy of such a contention is obvious because if prima facie meant proof beyond a reasonable doubt, then by necessary implication the charge against the attorney would be held to be proved even before he has been notified of the complaint. The context in which the term "prima facie case" is used in Rule 4 demonstrates that it is a misnomer. The stage at which it can be contended in adversarial proceedings that a prima facie case has been made is reached when the accusing side has presented a sufficiency of evidence in support of the charge that the opponent is required to answer. It would, indeed, be startling to hold that before there has been any response from the attorney, the Committee could, on the untested information supplied by the appellant, find that a prima facie case, as the term is generally understood, has been made out. It would follow that when the complainant's case is presented at a hearing in which the attorney participates it would not be open to him/her to submit that he/she should not be called upon to answer because a prima facie case has not been made out since that stage had been reached long before the hearing began. 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. My opinion, therefore, is that counsel's submission being predicated upon an error induced by the Rule is misconceived.

3. **The state of the affidavit evidence to be adduced at the hearing**

It was submitted that the declared intention of the respondent to conduct the hearing on the basis of the affidavit evidence and exhibits which are patently defective is oppressive and an abuse of process and/or an improper exercise of discretion and/or an excess of jurisdiction.

The simple answer to this contention is, in my opinion, that objection to evidence ought properly to be taken before the tribunal empowered to hear and assess the evidence and where an affidavit is held to be objectionable because of defects that situation may be cured by the filing of a proper affidavit. It is not an issue that this court should be asked to resolve beforehand.

4. **Legitimate expectations**

The three areas in which it was complained that the appellant's legitimate expectations were being disregarded relate to receiving particulars, inspecting documents and being supplied with a list of members of the Council who had participated in deliberations concerning the laying of the complaint. With respect to the particulars and documents, the respondent's counsel pointed out, and this has not been challenged, that at paragraph 5 of the Chairman's affidavit dated 13th November, 1992 (at page 49 of the record), it is clearly stated that the five affidavits in question were copied and sent to the appellant to meet the need for particulars and inspection of documents. There has been no subsequent request. It was also contended that no request had even been made for a list of the Council members but that before the Full Court it was disclosed that of the 28 members of the Disciplinary

Committee eight were members of Council and of those eight two were appointed to the Council after the complaint was made. Section 13 of the Act empowers the Committee to sit in divisions, each with its own Chairman and having all the powers of the Committee. No division of the Committee had yet been named to hear the complaint; so no list of those members can be supplied the appellant. It is contended that this information is required to enable the appellant to challenge any member of the hearing panel who had had anything to do with the complaint. Clearly, therefore, this request is premature.

The final charge of procedural impropriety relates to what is termed the extra-territorial application of the Act. This has been dealt with earlier and there is no need to say anything more about it.

I conclude that the charge of acting in excess of jurisdiction fails. So, too, does the charge of abuse of process or failure to act fairly to the appellant. The appeal fails and is dismissed with costs to the respondent/respondent to be taxed if not agreed.

WOLFE, J.A.:

I have had the benefit of reading the judgments of my learned brothers Rattray, P. and Wright, J.A. and I agree entirely with the reasoning and the conclusion at which Wright, J.A. has arrived. However, I would wish to state that a court must always be loathe, except in exceptional circumstances, to order prohibition against a body which is entrusted with the statutory responsibility to ensure that members of that body be it a profession or group conduct themselves with the propriety which enhances the reputation of the profession or group. To prohibit such a body from hearing complaints of misconduct against its members, except in exceptional circumstances, could have serious consequences for the profession or group. The interest of the profession as a whole far supersedes the interest of the individual member.

> "A profession's most valuable asset was its collective reputation and the confidence which that inspired." per Bingham, M.R. in **Bolton v. The Law Society** - The Times 8/12/93.

Like my brother Wright, J.A., I too would order that the appeal be dismissed.