Privy Council Appeal No. 49 of 1997

Winston Waters McCalla *Appellant*

v.

The Disciplinary Committee of the General Legal Council *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 27th July 1998,
Delivered the 30th July 1998

Present at the hearing:-

Lord Browne-Wilkinson
Lord Lloyd of Berwick
Lord Steyn
Lord Clyde
Lord Hutton

[Majority Judgment Delivered by ***Lord Hutton****]*

On 27th July their Lordships indicated that they would humbly advise Her Majesty that the appeal should be allowed in respect of the complaint alleging plagiarism but not in respect of the complaint alleging false representations in relation to professional qualifications and past appointments, and that they would deliver their reasons later. Their Lordships now set out the reasons for the decision which they have reached. There will be no order as to costs.

The issue which arises on this appeal is whether the appellant, Mr. Winston Waters McCalla, is entitled to an order of prohibition directed to the Disciplinary Committee ("the Committee") of the General Legal Council of Jamaica ("the Council") prohibiting the Committee from hearing complaints against him of

professional misconduct. The appellant's application for an order of prohibition was dismissed by the Supreme Court on 4th February 1993, and an appeal from the decision of the Supreme Court was dismissed by the Court of Appeal on 20th December 1994.

The background to the appellant's application for prohibition is as follows. The appellant was admitted to the Bar of Jamaica in September 1962 and he was enrolled as an Attorney-at-Law, but prior to 1985 he did not hold a practising certificate and he did not practise as an Attorney-at-Law in Jamaica. He never became a Queen's Counsel in Jamaica, and he never held the position of Deputy Minister of Justice in Jamaica.

In October 1977 the appellant left Jamaica and went to live in Canada. In Canada in or about November 1977 the appellant was admitted as an articled student in Saskatchewan and passed the Bar examination of the Law Society of Saskatchewan. In or about August 1978 was admitted as a member of the Bar of Saskatchewan and in 1981 he was admitted as a member of the Bar of Ontario. The appellant did not hold a practising certificate in Saskatchewan or in any other province in Canada and he never practised as a lawyer in Canada, but from 1977 to 1985 he worked in Canada as a law lecturer and legal researcher and also wrote on legal subjects. In March 1985 the appellant returned to Jamaica and began to practise as an Attorney-at-Law in Kingston.

In September 1985 articles which had appeared in a newspaper in Ottawa in July 1985 were brought to the attention of the Council. These articles stated that Winston McCalla was being sought on a warrant for charges of fraud and breach of trust. By a letter dated 18th October 1985 the Council wrote to the Law Society of Upper Canada enquiring whether these allegations had been brought to the attention of the Law Society and, if so, whether any action was likely to be taken by the Law Society in respect of them. By a letter dated 8th November 1985 the Law Society of Upper Canada replied and stated that the articles had been brought to their attention and that they had begun an investigation into the matter.

In May 1986 a complaint was issued in Canada against the appellant alleging that he was guilty of professional misconduct and conduct unbecoming a barrister and solicitor. This complaint was served on the appellant in Jamaica on or about 28th May 1986. The Disciplinary Committee of the Law Society of Upper Canada sat to hear the complaint on 3rd June 1986. The appellant did not appear at the hearing and was not represented by counsel. The Disciplinary Committee found the following two particulars of professional misconduct to be established:-

> "(a) On or after August 23, 1982, while employed by the Federal Ministry of the Solicitor General as Coordinator, Criminal Law Review and later by the Law Reform Commission of Canada as Coordinator, Criminal Procedure Project, he abused his position of trust by arranging, in the course of his employment, for certain research contracts at government expense and thereafter, without the knowledge or consent of the appropriate Federal Government Officials or the researchers, presented the research material as his own work to the Canada Law Book Company which subsequently began publication and sales of the material under his name for his personal benefit in a text entitled 'Search and Seizure in Canada'.
>
> (b) He was employed and paid in full by the Department of Law at Carleton University to teach a course in Juvenile Justice and thereafter he did, without the knowledge or consent of officials at the University, arrange for Catherine Latimer to teach the entire course. In addition, despite his promise to do otherwise, he failed to compensate Catherine Latimer for her efforts."

In consequence of these findings the Disciplinary Committee recommended that the appellant be disbarred.

After the hearing by the Disciplinary Committee had been completed and its findings and recommendation had been made, the Disciplinary Committee received two

cables from the appellant telephoned to the Law Society of Upper Canada on 2nd and 3rd June protesting at the hearing on 3rd June for three reasons which, in summary, were as follows. First, there was no jurisdiction to hear the complaint as the appellant had ceased to be a member of the Law Society of Upper Canada. Secondly, excessive and biased pre-trial publicity would prejudice a fair hearing. Thirdly, the appellant had had inadequate notice of the hearing to enable him to prepare his defence.

On 25th September 1986, consequent on the report and recommendation of the Disciplinary Committee, the Convocation of the Law Society of Upper Canada ordered that the appellant be disbarred as a Barrister and that his name be struck off the Roll of Solicitors.

By a letter of 10th June 1986 the Law Society of Upper Canada sent to the Council a copy of the report and decision of the Disciplinary Committee in respect of the complaint against the appellant, and on 10th February 1987 the Clerk to the Disciplinary Committee of the Law Society of Upper Canada sent to the Council his affidavit setting out in detail the history of the disciplinary proceedings against the appellant in Canada.

On 3rd January 1990 Mr. Joswyn Leo-Rhynie Q.C., the Chairman of the Council, issued a complaint against the appellant alleging 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."

The first two particulars of complaint contained the same allegations as were found to be established by the Disciplinary Committee in Canada, but the wording of the first particular was more detailed and named the two students whose research work it is alleged the appellant appropriated and was as follows:-

> "(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'."

The third particular contained a complaint which had come to the attention of Mr. Leo-Rhynie by reason of the information sent to the Council by the Law Society of Upper Canada. The particular was as follows:-

"(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."

The complaint was served on the appellant on 4th January 1990. On 18th January 1990 the appellant sent a letter and statement to the Council in reply to the complaint. In the statement he denied the three allegations made against him and said:-

> "I am severely embarrassed in the preparation and presentation of a response to the allegations made in the said statement by reason of the delay in making the complaint in relation to incidents which allegedly took place more than six (6) years ago."

And in the letter he said:-

> "During my period in Ottawa, I was subject to racial harassment and discrimination on the job and otherwise. I can only assume that the information made available to the Chairman of the Legal Council was a continuation of this harassment."

On 16th October 1991 the appellant was given notice of the hearing of the complaint by the Committee on 9th November 1991. On 23rd October 1991 the Attorney-at-Law acting on behalf of the appellant, Mr. Berthan Macaulay Q.C., wrote to the Council stating:-

> " I note that by letter dated January 4, [1990] to Dr. McCalla by Ms. Donna A.M. Parchment, the Secretary of the Committee, it was indicated to him that the matter would be placed before the next meeting of the Disciplinary Committee, if he failed to reply to the request within 2 weeks of the date of the letter. Dr. McCalla sent his comments in a written document, signed by him dated 17th January, 1990. In a further correspondence, he forwarded a request for further and better particulars of paragraphs 3a and 3b of the complaint contained in the Affidavit of the complainant.
>
> Since then there has been no further communication from the Disciplinary Committee. The next communication was a notice which Dr. McCalla handed to me, dated October 16, 1991, a period of some 20 months having elapsed since the date of the request of the communication. In the circumstances which I have outlined in the foregoing paragraphs of this letter, it would not be unreasonable for Dr. McCalla, or anyone at all in his position, to have assumed that the matter was not being further pursued since it was not placed before the Disciplinary Committee at its next meeting, or the next meeting after that, or at any meeting in 1990,

nor at any meeting which has taken place during the 9 months in 1991. This assumption is fortified, in my opinion, that the matters complained of, allegedly occurred almost 10 years ago, sometime between 1982 and 1983. The rules require that Dr. McCalla should supply a list of all documents which he proposes to rely upon, that is to say, documents which existed 10 years ago, not in Jamaica, but in Canada, which may have been lost, destroyed, and presently unobtainable. I may add that, as a matter of fact, when Dr. McCalla was first addressed on January 4, 1990, he sent to me the Affidavit containing the complaint. The matter not having been proceeded for over a year, my secretary had put away the files. I cannot even find my file now.

I propose, therefore, without prejudice to any other objection, or application I may make elsewhere, to invite the Disciplinary Committee to decline to hear this application on the grounds that Dr. McCalla could not obtain a fair hearing for the reason that the complainant had seen it fit not to pursue this matter for a period of almost 2 years, which delay cannot be said, would ensure a fair hearing to Dr. McCalla within a reasonable time, a right under Section 20(2) of the Constitution which he reasonably expects that a body of Legal Professional gentlemen would appreciate and uphold."

On 31st October 1991 the Council wrote to Mr. Macaulay stating that the date of 9th November 1991 for the hearing had been vacated and he would be duly advised of the new date. Further correspondence then took place to which reference will be made later in this judgment, and the appellant was also informed that the complaint (b) in respect of the teaching by Catherine Latimer at Carleton University would not be pursued. It was eventually agreed in July 1992 between counsel for the complainant and counsel for the appellant that the hearing by the Committee would take place on 26th September 1992. On 22nd September 1992 the appellant applied to the Supreme Court for leave to apply for an order of prohibition against the Committee, and such leave was granted together with an order staying

proceedings in the complaint until the determination of the application for the order of prohibition.

It appears (although all the relevant papers were not included in the Record before the Board) that subsequent to the application by the appellant for an order of prohibition the appellant brought a further application claiming that a hearing of the complaint by the Committee would constitute a breach of his constitutional rights under section 20(2) of the Constitution of Jamaica, and the Supreme Court ordered that the two applications be consolidated and heard together.

The Supreme Court and the Court of Appeal considered both the claim of the appellant under the common law for an order of prohibition staying the hearing and his constitutional claim for a stay advanced under section 20(2) of the Constitution of Jamaica. Section 20 of the Constitution provides:-

> "20.-(1) 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.
>
> (2) 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."

Their Lordships propose to consider first the claim of the appellant under the common law. In delivering the judgment of the Supreme Court Clarke J. stated at page 194 of the record:-

> "... where delay has substantially prejudiced or is likely to prejudice substantially the fair hearing of a complaint, or has become oppressive we should be prepared to hold that on common law principles those proceedings should be stayed for abuse of process."

It is clear that the Court of Appeal also accepted that this was the correct statement of the common law principle.

Their Lordships are of the opinion that the Supreme Court and the Court of Appeal were right to hold that there is power under the common law to stay proceedings where there has been such delay in bringing a charge or complaint before a court or tribunal that a hearing of the matter would be likely to result in substantial prejudice to the person against whom the charge or complaint is brought. In *Bell v. Director of Public Prosecutions* [1985] A.C. 937, 950C Lord Templeman stated:-

> "Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening death of a witness. Their Lordships consider that, in a proper case without positive proof of prejudice, the courts of Jamaica would and could have insisted on setting a date for trial and then, if necessary, dismissing the charges for want of prosecution. Again, in a proper case, the court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the court. In *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, 1347, Lord Devlin rejected the argument that an English court had no power to stay a second indictment if it considered that a second trial would be oppressive. In his opinion:-
>
> > 'the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides ... First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law ... nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair

> and just was done between prosecutors and accused.'
>
> Lord Devlin was there speaking of the power of the court to stay a second indictment if satisfied that its subject matter ought to have been included in the first. But similar reasoning applies to the power of the court to prevent an oppressive trial after delay."

After a full examination of the history of the matter both the Supreme Court and the Court of Appeal concluded that the appellant had not been substantially prejudiced by the delay and refused to grant an order prohibiting the Committee from hearing the complaint. Delivering the judgment of the Supreme Court Clarke J. stated at page 192:-

> "Counsel for the applicant submitted that the delay in having the complaint heard has been so long that a continuation of the proceedings before the Disciplinary Committee would not only be unfair and unjust, but also oppressive to the applicant. Delay, he submitted, should be assessed in two different periods of time as follows:
>
> (1) the period commencing from the alleged acts of misconduct to the date on which it is proposed to commence a hearing;
>
> (2) from the date when the charges were brought up to the date fixed for hearing."

Later at page 192 he stated:-

> " In February, 1987 the Law Society of Upper Canada furnished the Council with a history of the consequential disciplinary proceedings in Canada brought against the applicant. The Council then became fully seized of the matter in the sense of having received documentation of the Canadian proceedings.
>
> The Court further finds that important factors contributed to the delay between the period February 1987 and January 1990: the Council properly took and obtained legal advice on the course of

proceedings to be pursued; the disruptive effect of Hurricane Gilbert in September 1988 as well as changes in the Council's secretarial staff hindered the preparation of the disciplinary proceedings.

From the commencement of those proceedings in January 1990 to the eventual date fixed for hearing the complaint two years and nine months elapsed. In the Court's view the following chronology account justifies, or, at any rate, explains, the delay during this period. On 3rd January 1990 the complaint was laid and a copy was delivered to the applicant under cover of a letter dated 4th January 1990 from the Secretary of the Council. The applicant denied the charges and sought further and better particulars of them. The Council thereupon embarked on the necessary but time consuming exercise of both locating the witnesses, all of whom resided in Canada, and obtaining from them documentation including affidavits. The affidavits were obtained by March, 1992 and served upon the applicant in June 1992 and the date of 26th September 1992 fixed for hearing.

Now, no material has been presented to show that the applicant has suffered actual prejudice by reason of the periods of delay."

At page 194 after stating (in the terms already set out at page 8 of this judgment) the power under the common law to stay where delay has become oppressive or is likely to prejudice substantially the fair hearing of a complaint, Clarke J. said:-

"However, as the period of delay in the proceedings under review have not produced any of the effects just adverted to, this Court cannot on the basis of the common law prohibit the Committee from hearing the complaint."

Later at page 194 he set out section 20(2) of the Constitution and stated:-

"That provision imposes upon the Court or authority a duty to hear such proceedings within a reasonable time after they have been instituted. So, in this case,

the duty cast upon the Committee arose in January 1990 when the complaint was laid. Indeed, until it was laid the Committee had no power to proceed: see section 12(1) of the Legal Profession Act."

At page 195 Clarke J. stated:-

" As we have already indicated the reasons given for the delay as set forth in the affidavit evidence are adequate. And not only has the applicant suffered no specific prejudice from the delay but he did not raise the question of delay before the Committee at any hearing, before invoking the jurisdiction of the Supreme Court.

So, in the result, the applicant can only pray in aid the first factor, namely, length of delay. As far as concerns that factor we take into account the fact that (a) the acts of misconduct are alleged to have occurred in Canada some 9 years and upwards prior to the date fixed by the Committee for the hearing and that (b) in October 1985 the Council became aware of newspaper reports of professional misconduct by the applicant. The Court holds, however, that the hearing was delayed from February, 1987, at the earliest, when the Committee became fully seized of the allegations.

Even though the Court 'cannot definitely say how long is too long' the Court finds that having regard to all the circumstances the delay that has occurred is not unreasonable. There is, therefore, no warrant for constitutional redress."

In the Court of Appeal Rattray P. agreed with the judgment of the Supreme Court on the issue of delay. Wright J.A. (with whose judgment Woolfe J.A. agreed) at page 237 set out section 20(1) of the Constitution and stated:-

"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."

At page 238 he set out section 20(2) of the Constitution and stated:-

> "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."

At page 240 after stating that on 22nd September 1992 the appellant obtained an ex parte order staying proceedings he said:-

> "Accordingly, the period to be explained is January 3, 1990 to September 1992 - a period of 32 months."

At page 242 he said:-

> "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."

Their Lordships recognise that in the parts of the judgments which they have set out above the Supreme Court and the Court of Appeal did not always distinguish between the claim for a stay made under the common law and the constitutional claim made under section 20(2). Their Lordships further recognise that in some of these passages the Supreme Court and the Court of Appeal were referring only to the constitutional claim. But their Lordships think that the Supreme Court and the Court of Appeal were of the opinion that in the claim for a stay under the common law as well as in the constitutional claim under section 20(2), the period of delay should only be considered as commencing in January 1990 when the complaint was made and served on the appellant, or at the earliest from February 1987 when the Council became fully seized of the allegations. Their Lordships take this view because although Clarke J. said at page 192 that counsel for the applicant submitted that the period of delay should be assessed commencing from the alleged acts of misconduct and further stated at page 195 that the Court took into account the fact that the acts of misconduct were alleged to have occurred 9 years and upwards prior to the date fixed for the hearing and that in October 1985 the Council became aware of newspaper

reports of professional misconduct by the applicant, he then said:-

> "The Court holds, however, that the hearing was delayed from February, 1987, at the earliest, when the Committee became fully seized of the allegations." (emphasis added)

And after he had stated at page 240 with reference to section 20(2) that "the period to be explained is January 3, 1990 to September 1992 - a period of 32 months", Wright J.A. made no observation suggesting that in his opinion the position under the common law was different.

Accordingly their Lordships are of opinion that the Supreme Court and the Court of Appeal were in error on this point in relation to the exercise of the common law power to stay. The approach of the common law is that stated by Lord Lane C.J. in *The Attorney-General's Reference (No. 1 of 1990)* [1992] 1 Q.B. 630, 641F where, referring to the powers of the court to intervene to stop abuse of its process, he said:-

> "However, the most usual ground is that based on delay, that is to say the lapse of time between the commission of the offence and the start of the trial."

Moreover if the appellant was entitled to have the hearing stayed because of prejudice to him by reason of delay their Lordships are of opinion that he was entitled to apply for relief to the Supreme Court rather than to wait and apply to the Committee for a stay. In *Bell v. Director of Public Prosecutions (supra)* Lord Templeman stated at page 947F:-

> "It was argued on behalf of the respondents, the Director of Public Prosecutions and the Attorney-General, that the applicant was able to obtain redress by waiting until his retrial, ordered for 11 May 1982, and then submitting to the Gun Court at the commencement of the retrial that the proceeding should be dismissed on the grounds that in the events which had happened a retrial would be an abuse of the process of the court. Their Lordships cannot accept this submission. If the constitutional rights of the applicant had been infringed by failing to try him within a reasonable time, he should not be obliged to

> prepare for a retrial which must necessarily be convened to take place after an unreasonable time."

Their Lordships consider that the same reasoning applies if the applicant relies on the common law principle and not on his constitutional rights.

Their Lordships would normally be very slow to differ from judgments of the Supreme Court and the Court of Appeal holding that there had been no likelihood of prejudice by reason of delay, but in this case, as their Lordships are of opinion that the courts in Jamaica did not apply the correct test and excluded from their consideration either the period prior to January 1990 or the period prior to February 1987, their Lordships consider that it is their duty to form their own opinion whether the appellant was likely to suffer substantial prejudice by reason of delay, approaching that issue on the basis that the relevant period of time commenced in 1982 or 1983 when the first acts of misconduct are alleged to have taken place.

As their Lordships have stated, the appellant denies the allegations made against him. In respect of the first complaint he claims that Pearl Eliadis and Stephen Hamilton were first year law students with no experience in criminal law procedure or comparative search and seizure law and, as far as he was aware, during 1983 they were part-time summer students for a period of 6 weeks and could not have prepared a manuscript as alleged. The appellant further claims that in Canada he was subjected to racial harassment and discrimination in his employment and that the allegations made against him have been falsely made in pursuance of, and inspired by, that harassment.

Their Lordships therefore consider that the allegation of plagiarism made against the appellant in respect of the research work of Pearl Eliadis and Stephen Hamilton would be a complex one to investigate and would give rise to difficult issues of fact. Their Lordships further consider that in 1992 the appellant's task of investigating the circumstances in which the allegation was made, and of marshalling witnesses and documents located in Canada in order to seek to present his defence that the

allegation was malicious and motivated by racial prejudice, would have been made much more difficult by the passage of time since 1982 or 1983. The appellant would have lost touch with persons who might have been able to give relevant evidence and it would have been difficult to trace relevant documents after so many years. Therefore their Lordships are of opinion that the period of delay, viewed as commencing in 1982 or 1983, would have been likely to prejudice substantially the fair hearing of the complaint against him in respect of the allegation of plagiarism.

Their Lordships are unable to accept the reasons referred to by Wright J.A. at page 242 as supporting the dismissal of the appellant's application. It cannot be an answer to the appellant's application that what was involved was within his personal knowledge, as the appellant, who is presumed to be innocent until proved guilty, claims that the conduct amounting to plagiarism alleged against him did not take place. Nor does the fact that the delay has meant that the appellant has been able to continue in practice without any interruption, and that a witness in relation to the Latimer allegation could not be located, constitute a justification for the complaint being heard if the delay would be likely to prejudice substantially a fair hearing.

In his judgment Wright J.A. cited the decision in *Re. Iles* [1922] S.J. 297 where this Board upheld the order of the Supreme Court of Trinidad and Tobago striking a solicitor off the Roll for altering, fifteen years earlier, the date of a deed after its execution so that the payment of 15 shillings stamp duty was evaded. But that case is distinguishable from the present case because in it the solicitor had admitted the misconduct alleged.

Accordingly, unless the appellant had waived his right to obtain an order, their Lordships are of opinion that he is entitled to an order of prohibition in respect of the hearing of the complaint of plagiarism. Their Lordships have already set out or described the correspondence which took place between the appellant and the Committee or the Council up to 31st October 1991. This correspondence then continued with a letter dated 1st

November 1991 from Mr. Macaulay to the Committee in which he stated:-

> "The hearing of this matter has been delayed for a long time and Dr. McCalla is anxious that it should be expedited and finally disposed of.
>
> My instructions are, which I am in complete agreement with, to restore the date of hearing so that the matter can be proceeded with on November 9, 1991."

By letter dated 5th November 1991 the Disciplinary Committee replied and stated that it was not then possible to have the matter started on November 9th 1991.

On 7th January 1992 Mr. Macaulay wrote to the Disciplinary Committee and stated:-

> "I refer to my letter to you of November 1, 1991 and Mr. Bovell's letter to me of November 5, 1991 and particularly to Dr. McCalla's anxiety, that this matter should be expedited and finally disposed of, after such a long delay.
>
> In the circumstances, without prejudice to any course of action Dr. McCalla might instruct me to pursue, I shall be grateful if you will let me know within 7 days, when this matter will be set for hearing."

On 5th June 1992 the Disciplinary Committee wrote to Mr. Macaulay and stated:-

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

On 29th July 1992 Mr. Macaulay wrote to counsel for the complainant, Mr. Morrison, stating:-

> "Re: Dates for Hearing and use of Affidavits.
>
> I returned to the Island yesterday afternoon, July 27, 1992 and read your message to me of July 23, 1992. I was away in the United Kingdom on that date.
>
> Re: Date

> I have since spoken to Dr. McCalla. He would prefer the 26th September, 1992 fixed as a hearing date. I have indicated to him that it would be subject to the convenience of Mr. Frank Phipps, Q.C., whom I have to contact later today. Speaking for myself, the 26th September is a suitable date. However, let me say, at once, that I am committed to appear in the Court of Appeal in West Africa in September, but will use my best endeavours to see that my appointment there does not clash with the 26th September."

On 30th July 1992 Mr. Morrison replied, and said:-

> "Thank you very much for your letter dated July 29, 1992.
>
> I confirm that September 26, 1992 is a convenient date. As I indicated to Mrs. Macaulay when we spoke, I think that it might be best to treat that date as first mention date, at which time all applications might be formally made and arrangements for the full hearing finalised. Perhaps you might let me know whether you are in agreement with this approach."

Then on 22nd September 1992 the appellant made the ex parte application for an order for prohibition to the Supreme Court.

The respondent submitted to the Board that the requests of the appellant that the hearing should be expedited and the agreement by Mr. Macaulay to a hearing on 26th September 1992 constituted a waiver of his right to seek an order of prohibition. Their Lordships do not accept this submission because in his letter of 23rd October 1991 Mr. Macaulay included the words "without prejudice to any other objection or application I may make elsewhere", and in his letter of 7th January 1992, requesting that the matter should be expedited and finally disposed of, he also said "without prejudice to any course of action Dr. McCalla might instruct me to pursue".

Therefore their Lordships are of opinion that the appellant should be granted an order prohibiting the Committee from hearing the complaint of plagiarism.

However their Lordships consider that there is no likelihood of prejudice to the appellant if the hearing takes place of the complaint that he made false representations in respect of his professional qualifications and past appointments in his application for employment with the Federal Government of Canada. It appears from the information sent to the Council by the Law Society of Upper Canada that this allegation is based on a document which appears on its face to be a curriculum vitae submitted by the appellant to the Law Reform Commission of Canada when he applied late in 1983 for an appointment as Co-ordinator of the Commission's Criminal Procedure Project. It further appears that the original of this curriculum vitae is in the files of the Commission and a copy of it was sent to the Council. The curriculum vitae is headed:-

"Dr. Winston McCalla
Apt. 1501
1435 Prince of Wales Drive
Ottawa, Ontario."

It lists in detail the educational and professional qualifications of the appellant, together with the academic posts held by him and his former appointments. It states that his professional qualifications include:-

"Q.C. (Jamaica, 1973)"

and that his former appointments include:-

"Deputy Minister of Justice, Jamaica (1973-77)."

Whether the complaint of making false representations is proved will depend on whether this curriculum vitae was, in truth, prepared and submitted by the appellant. Their Lordships consider that this issue will be determined very largely by a consideration of documents in the files of the Canadian Commission, and that any defence which the appellant seeks to put forward will not be prejudiced by the period which has elapsed since 1983. Therefore their Lordships consider that the appeal should be dismissed in respect of the refusal to grant an order prohibiting the hearing of this complaint.

Having reached a conclusion on the application of the common law principle in respect of delay, their Lordships consider it unnecessary to express an opinion on the point whether under section 20(2) of the Constitution of Jamaica in determining "a reasonable time", regard is to be had to the period commencing from the date of institution of proceedings or to the period commencing from the date of the conduct giving rise to the proceedings or to some other period, and their Lordships desire to reserve their opinion on that question.

The appellant advanced a further submission to the Board which had been advanced in the Supreme Court and the Court of Appeal. The submission related to section 12(1) of the Legal Profession Act 1979 which provides:-

> "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);"

As their Lordships have previously stated, the complaint against the appellant was made by Mr. Leo-Rhynie who stated in the complaint:-

> "1. That I am the Chairman of the General Legal Council ...
>
> 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. ..."

As a member of the Council Mr. Leo-Rhynie was empowered by section 12(1) to make the complaint of professional misconduct against the appellant and the complaint is regular on its face. But the appellant relied on a statement by Mr. Leo-Rhynie in an affidavit sworn by him on 13th November 1992 in the proceedings in the Supreme Court in which he stated:-

> "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 ..." (Emphasis added)

Under paragraph 9(1) of the First Schedule to the Legal Profession Act 1979 the Council is a body corporate and is thus separate and distinct from its members. The appellant submitted that Mr. Leo-Rhynie's affidavit showed that he was acting on behalf of the Council in making the complaint so that, in reality, the complaint was made by the Council, which was not empowered by section 12(1) to make it. Accordingly the Committee had no jurisdiction to hear the complaint. This submission was rejected by the Supreme Court and by the majority of the Court of Appeal, Rattray P. dissenting.

Their Lordships are of opinion that the Supreme Court and the majority of the Court of Appeal were correct in rejecting the appellant's submission on this point. The complaint was made by Mr. Leo-Rhynie in his own name as a member of the Council, and the fact that in making it he was acting on behalf of the Council does not mean that the complaint was not made by Mr. Leo-Rhynie. If a person is empowered by a statute to make a complaint and he does so in his own name, his complaint is not invalidated because he is requested to make it by another person or because he makes it on behalf of another person, unless it can be alleged that in making the complaint he is exercising the power *mala fide*; and in this case, where Mr. Leo-Rhynie as a member of the Council and the Council had the same interest in

upholding the standards of the legal profession, no such allegation has been made or could be made.

Dissenting judgment delivered by ***Lord Lloyd of Berwick***
Lord Clyde

While we entirely agree with the majority view as to the propriety of the Chairman of the Council initiating the complaint of professional misconduct against the appellant, we regret that we are unable to agree with the majority on the question of delay. No distinction was drawn in the courts below between the two remaining heads of complaint. We are not persuaded that a distinction should be drawn at this stage. Nor are we persuaded that there was any error on the part of the courts below which would justify their Lordships exercising their own discretion on the points in issue.

The Supreme Court and the Court of Appeal were unanimous in holding that the appellant had suffered no prejudice by reason of the delay, and accordingly refused to grant a stay whether at common law, or by reason of section 20(2) of the Constitution. We agree with the majority that in those circumstances their Lordships should be very slow to interfere.

But it is said that the courts below have applied the wrong test in respect of the stay at common law. They should have had regard to the whole period of delay, including the delay prior to 1987. Instead (so it is said) they have confined their regard to the period between 1987 and September 1992, when the hearing would have taken place.

We have read the judgment of Clarke J. in the Supreme Court with care. We can find no indication that he applied the wrong test. On the contrary he started his consideration of the point with a reference to the two periods of delay, the first being the period commencing with the alleged acts of misconduct, and the second being the period commencing with the date when the charges were brought. It seems incontrovertible that Clarke J.

had the whole period in mind when he said "... this Court cannot on the basis of the common law prohibit the Committee from hearing the complaint". Otherwise he would not have said, as he did towards the end of the judgment, that he took account of "the fact that the acts of misconduct are alleged to have occurred in Canada some 9 years and upwards prior to the date fixed by the Committee for the hearing ...". We can find no error in Clarke J.'s approach so far as it depends on the position at common law.

He then turned to the question of constitutional redress under section 20(2). Here the Supreme Court took February 1987 as the *terminus a quo*. It is not, as we understand it, suggested that this was wrong. If anything it may have been unduly favourable to the appellant. The Supreme Court found as a fact that the delay since 1987 had not been unreasonable having regard to all the circumstances, and therefore concluded that there was no warrant for constitutional redress. We can see no ground for challenging that conclusion.

In the Court of Appeal Rattray P. dealt briefly with the question of delay. He agreed with Clarke J. on both points. Wright J.A. dealt with the matter at greater length. He started with the constitutional point, as to which, as we have said, there is no suggestion of error. It is to be noted that Wright J.A. took the *terminus a quo* for delay in respect of the claim for constitutional redress as January 1990 rather than February 1987. But nothing turns on that.

As to the position at common law, and in particular whether the appellant has suffered any prejudice by reason of delay, it is significant that Wright J.A. refers to the appellant's affidavit sworn on 14th September 1992 which records events occurring in the years 1977 to 1985. So it is clear that the appellant was relying on the delay prior to 1987 when complaining that he was no longer in a position to defend the proceedings. It is equally clear that Wright J.A. must have had the whole period of delay in mind when agreeing with the Supreme Court that there was no evidence of actual prejudice, and when rejecting the appellant's argument that he was no longer able to present his defence. In any event if

Wright J.A. was intending to depart from the reasoning of Clarke J. in the Supreme Court he would surely have said so.

Wolfe J.A. agreed with both judgments in the Court of Appeal, and added the important rider that a court must always be loath to order prohibition against a body which is entrusted with the statutory responsibility of maintaining professional standards. We agree. Six judges in the courts below have decided that a fair hearing can be held in respect of both the remaining matters of complaint. We can see no room for their Lordships to exercise a fresh discretion. But even if there were, we have seen no material which would justify a different conclusion.