JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

MISCELLANEOUS NO COA2020MS00004

BETWEEN	**CARLEEN MCFARLANE**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Christopher Honeywell instructed by Christopher Honeywell & Company for the appellant

Mrs Caroline Hay QC and Miss Tereece K Campbell-Wong instructed by Caroline P Hay for the respondent

22 November 2021 and 9 December 2022

P WILLIAMS JA

[1] I have read in draft the judgment of my sister Dunbar Green JA. I agree with her reasoning and conclusion and have nothing to add.

DUNBAR GREEN JA

Introduction

[2] This is an appeal by attorney-at-law, Carleen McFarlane ('the appellant'), from a determination of the Disciplinary Committee of the General Legal Council ('the Committee'), on 17 July 2020, that she had been guilty of inexcusable or deplorable negligence in the performance of her duties as counsel for her former client, Carl Benjamin ('the complainant'), in breach of Canon IV(s) of The Legal Profession (Canons

of Professional Ethics) Rules; and its order of 18 September 2020, that she should pay restitution of $350,000.00 and costs of $300,000.00.

[3] Disciplinary proceedings were commenced against the appellant following a complaint, on 18 February 2014, wherein the complainant alleged, among other things, that on the cancellation of a sale agreement to which he was a party as a prospective co-purchaser, the appellant paid over the full deposit refund to the other prospective co-purchaser, without his consent or instructions, despite it having been made known to her that the deposit on the transaction was his money.

[4] In consequence, the appellant was charged by the respondent, the General Legal Council ('GLC'), and found liable for breach of Canon IV(s) which states:

> "In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."

Background

[5] The complainant, who resided in Canada, and Ms Kayon Thompson, a resident of Jamaica ('the prospective purchasers'), mutually agreed to purchase property at Sevens Road, May Pen in the parish of Clarendon, which is registered at Volume 1021 Folio 171 of the Register Book of Titles ('the property'). Ms Thompson contacted the law office of the appellant in July 2012 and advised the appellant's employee and para-legal, Miss Marva Morrison, of their intention. Subsequently, the prospective purchasers attended the appellant's office where a standard form questionnaire - "for prospective purchasers in conveyancing transactions" - was completed by Miss Morrison based on answers given by them.

[6] The prospective purchasers subsequently met with the appellant and confirmed the terms of the agreement for sale and the answers in the questionnaire. In the course of their conversation, the complainant supposedly indicated to Miss Morrison that he would be returning to Canada and that Ms Thompson should receive "all documents and all information" from the appellant during his absence from Jamaica. A manager's cheque

for $384,950.00, in favour of the vendor's attorneys-at-law, was then handed to Miss Morrison by the complainant. That cheque was for the deposit on the transaction and one-half of the costs for the preparation of the sale agreement. A receipt was subsequently drawn up by the vendor's attorney-at-law in the joint names of the prospective purchasers. In early August 2012, the retainer of $20,000.00 was paid to the appellant's office by Ms Thompson and a receipt was drawn up in her name. She also made payments for the valuation and surveyor's reports.

[7] The intended sale then fell through because of multiple breaches revealed by the surveyor's report. Arising from this, a cheque in the amount of $379,100.00, inclusive of the deposit refund, was paid over to Ms Thompson by the appellant.

[8] The complainant said that Ms Thompson made him aware that the sale agreement was cancelled but he only became aware of the deposit refund to her when he visited the appellant's office, in September 2013, having had several failed attempts to speak to her or Miss Morrison by phone. Aggrieved by this development, he filed a complaint with the GLC, alleging that the appellant had performed her duties with inexcusable or deplorable negligence.

[9] In response, the appellant wrote to the GLC, on 11 March 2014, indicating that payment of the refund deposit to Ms Thompson was authorised by the prospective purchasers' answer to question 19, in the questionnaire, which asked: "Who would be responsible for making arrangements for…[g]eneral conduct of the matter?" The answer was: "Kayon [Ms Thompson] and/or Carl [the complainant]."

The questionnaire/ prospective purchasers' instructions

[10] Since much in this case turns on the interpretation of the questionnaire, I will summarise the contents.

[11] Questions one to seven dealt with personal data. The complainant's marital status was recorded as" single" but the evidence reveals that he was married at the time. The answers to questions eight to 18 included information about the property and financing.

It was indicated that the prospective purchasers were to be tenants in common, in equal shares; Ms Thompson was to receive mortgage financing from the National Housing Trust ('NHT'), in the amount of 90% of the purchase price; and the source of funds was to be "personal savings".

[12] Question 19 was central to the appellant's case. It indicated which of the prospective purchasers would be "responsible for making arrangements for":

> "(i) Surveyor's Report…
>
> (ii) Valuation report…
>
> (iii) Refund of out of pocket expenses….
>
> (iv) Viewing of physical condition of premises…
>
> (v) Attendance at the mortgage institution…
>
> (vi) Payment of mortgage sum…
>
> (vii) Retainer payment or fees payable…
>
> (viii) If any shortfall in funds between Deposit & Mortgage sum, and;
>
> **(ix) General conduct of [the] matter**." (My emphasis)

[13] The answer to question 19 indicates that either party was responsible, with the exception of those at items (v) and (vi) (attendance at the mortgage institution and payment of the mortgage sum respectively), for which Ms Thompson would have sole responsibility.

[14] There was no specific question or instruction about the deposit and to whom any deposit refund should be paid.

[15] The questionnaire is unsigned but it was not disputed that the answers were provided by the prospective purchasers. The main contention was the appellant's interpretation of the "and/or" answer to question 19(ix) as the authorisation for payment

of the deposit refund to Ms Thompson. The complainant was only told about that interpretation after the payment of the refund had already been made to Ms Thompson.

Summary of proceedings before the Committee

[16] The complainant's application, supporting affidavit as well as letters and documents representing the parties' respective positions were admitted into evidence as exhibits one through eleven. Oral evidence was also received from the complainant, the appellant and their respective witness. A summary of the evidence follows.

Complainant's evidence

[17] The complainant stated that it "had been established" that he would be providing the "monetary fund" because Ms Thompson did not have the means to do so; the property was intended to be later subdivided to include his wife and children on the title; and Miss Morrison had assured him that should the purchase not be completed the deposit would be refunded to him.

[18] It was also his evidence that when he and Ms Thompson met with the appellant, she suggested to Ms Thompson that it was not a good idea for her to "...trust a man from a foreign country to follow through with the payments". This was before he and Ms Thompson left the appellant's office and returned with a manager's cheque, payable to the vendor's attorney-at-law, in the sum of $384, 950.00 (evidence was produced at the disciplinary hearing to confirm that this sum was taken from the complainant's bank account at the Jamaica National Building Society ('JNBS')). He stated that the cheque, for which he received a receipt in his and Ms Thompson's names, was placed by him on a table around which he, Ms Thompson, the appellant and Miss Morrison were seated. Subsequently, Miss Morrison informed him that more funds were needed to pay for the surveyor's report and he told her that he would give those sums to Ms Thompson as he would be returning to Canada in a few days.

[19] In November 2012, while in Canada, he was supposedly informed, by Ms Thompson, that the surveyors did not recommend the sale and the property would not

be purchased. He instructed her then, "not…do anything…leave the funds…[in] the lawyer's possession until [he consulted] with Ms Morrison". He was, however, unsuccessful in his attempts to contact the appellant's office until sometime in December 2012. That was when Miss Morrison informed him that the file had been closed and the deposit refunded to Ms Thompson. He was also informed that the deposit was refunded to her because Ms Thompson had threatened to "bring gunman to the place…". Miss Morrison, he said, had also promised to contact Ms Thompson to retrieve the deposit refund. At the time, as well as over the next several weeks, he was denied the opportunity to speak with the appellant. He eventually travelled to Jamaica and met with the appellant, on 30 September 2013, at which time it was confirmed to him that a cheque in the amount of $379,110.00 was given to Ms Thompson. This included the deposit refund.

[20] The complainant was cross-examined about the payment of the retainer and the deposit. A part of this exchange with counsel is recorded at page 37 of the record of appeal, thus:

> "Honeywell: And you told her because you were not living in Jamaica it was Kayon who would be doing everything in relation to the sale?
>
> Benjamin: If you are not living there wouldn't it be someone else…
>
> Honeywell: In fact, when the retainer money was paid it was Kayon who paid it?
>
> Benjamin: No, Ms McFarlane got in her statement that she did not know that the money was coming from me.
>
> Honeywell: I am talking about the retainer money now.
>
> Benjamin: Every money that came to the office was my money.
>
> Honeywell: I am suggesting that you did not tell Ms Morrison that the retainer money or the deposit was your money.

> Benjamin: I gave it to her, it came from my account.
>
> Honeywell: When you say you gave her the retainer money you carried and gave it physically to her?
>
> …..
>
> Benjamin: I sent it through Western Union to Kayon to give her and I approved it.
>
> Honeywell: And the first money it was you and Kayon who gave her?
>
> Benjamin: Yes, because it is me and her who went to the bank."

[21] When challenged, the complainant accepted that he did not tell Miss Morrison of the intention to put his wife's and children's names on the deed. However, he rejected counsel's suggestion that he and Ms Thompson had visited the appellant's office "arm in arm" and that Ms Thompson had introduced him as her spouse. To the latter suggestion he responded, "Sir, that could never be. I am a respectable person."

Mrs Annette Benjamin's evidence

[22] Mrs Benjamin is the wife of the complainant. Her evidence was mostly hearsay about what her husband had told her. She claimed knowledge that the deposit sum was withdrawn from her husband's account at JNBS and that Ms Thompson was unable to contribute to the deposit because of inconsistent employment.

The appellant's evidence

[23] The appellant responded to the complainant's allegations in letters of 28 October 2013, 11 March 2014 and 4 June 2014. These letters were received in evidence as exhibits four, six and seven, respectively. She did not deny paying over the deposit refund to Ms Thompson but explained that she had authority from her instructions so to do.

[24] She had first met Ms Thompson who said that the complainant, her spouse, would assist with the deposit for the purchase, with her (Ms Thompson) obtaining the mortgage

to which his name was to be added. On 23 July 2012, the prospective purchasers visited her office where they were interviewed by Miss Morrison who also completed a standard questionnaire for prospective purchasers. She explained that they gave instructions for the agreement to be "and/or" because the complainant resided outside the jurisdiction. It was also understood that Ms Thompson would be the one to pay in sums and make arrangements.

[25] The receipt for the deposit cheque was made out in the prospective purchasers' names and it was never disclosed to her or Miss Morrison that the funds belonged to the complainant. As far as she was concerned the complainant had not entrusted her with any funds and he had consented for Ms Thompson to handle the matter. Accordingly, it was "Ms Thompson who [gave] instructions and [dealt] with the matter" including payments for the valuation and surveyor's reports. Ms Thompson was also to obtain the 90% mortgage financing for the purchase. She said the documentation indicated that both prospective purchasers would be providing the deposit. Neither she nor Miss Morrison had any means of knowing that the complainant had done so, solely. There was also no disclosure that the complainant was married or had any children.

[26] The appellant relied on the answer to question 19(ix) to justify payment of the deposit refund to Ms Thompson. Her interpretation was that the transaction could be carried out with them individually or together.

[27] She denied having a discussion with the complainant about trusting men from foreign countries. She also said that when he came to her office about the deposit refund, he had requested help to recover funds that were allegedly fleeced from him by Ms Thompson. The appellant said that she was unable to speak to the issues concerning the denial of access to her and the threats about gunmen.

[28] Under cross-examination, it was suggested to the appellant that she did not explain the meaning of the "and/or" instruction to the complainant. Her response was that he had not indicated to her that the term was not understood and he ought to have

questioned the instruction if he did not wish for her to deal with Ms Thompson. It was also her position that the complainant should have made a request that the deposit refund be repaid only to him, if that was his intention.

Evidence of the appellant's employee, Marva Morrison

[29] Miss Morrison testified as to her understanding of the "and/or" answer to question 19. She said it meant that Ms Thompson would act while the complainant was away, "[so], while he [was] here [in Jamaica] either he or she would deal with the surveyor's report and valuation report".

[30] She accepted that the "funds were tendered" by the complainant and confirmed that the receipt was made out in both prospective purchasers' names. She did not tell the appellant who had given her the deposit because the purchase was by both prospective purchasers. She said Ms Thompson had introduced the complainant as her spouse but the complainant never said so.

[31] Miss Morrison confirmed that, in a telephone conversation with the complainant in December 2012, she told him that the deposit was refunded, but she denied that she gave him a reason for the payment to Ms Thompson. In answer to a question from the complainant, she said: "You started asking me where is your money and I said to you before you left the office you said to me all documents, all information were to be given to Kayon Thompson in your absence because sometimes you travel to different countries and you are not at your base sometimes and once the information is given to Kayon, you will get the information".

[32] Miss Morrison said it was because of her understanding of the complainant's instructions that she did not call him to discuss the breaches disclosed in the surveyor's report.

Findings of fact by the Committee

[33] The Committee found as a fact that:

" ...

a) The [appellant] was retained by the Complainant and Kayon Thompson in respect of her representing them in the purchase of [the land] …

b) Both the Complainant and Kayon Thompson executed an Agreement for Sale and witnessed by the [appellant] of the aforementioned land.

c) A cheque in the sum of $384,950.00 drawn on JNBS (which included a deposit of $350,000.00) made payable to Naylor & Turnquest was paid by the Complainant to Ms Morrison, Para-legal employed to the [appellant].

d) The deposit came from the Complainant's account at JNBS.

e) The Complainant made it known to the [appellant] and Ms Morrison that the cheque inclusive of the deposit was his money.

f) That the Questionnaire for the Prospective Purchasers was prepared by Ms Morrison based on information provided by the Complainant and Kayon Thompson and on completion the answers given were confirmed by both parties to Ms Morrison.

g) In the month of July 2012 the Complainant and Kayon Thompson met with the [appellant] who went through the Agreement for Sale and the Questionnaire with [them]. They both confirmed the information given in the Questionnaire.

h) In November 2012, immediately after being advised by Kayon Thompson that the purchase of the land did not go through, the Complainant contacted the [appellant's] office but did not succeed in speaking to Ms Morrison or the [appellant].

i) In December 2012 the Complainant managed to speak to Ms Morrison by telephone and she confirmed to him what Kayon Thompson told him.

j) [The complainant] attempted to speak to the [appellant] for several weeks without success and left messages that the [appellant] be informed and that his number be given to her.

k) Not having heard from the [appellant] the Complainant travelled to Jamaica to speak with her which he eventually did on September 30, 2013 when she confirmed that the refund was given to Kayon Thompson.

l) The sale transaction was cancelled and a cheque for $379,110.00 which included the deposit was given by Ms Morrison to Kayon Thompson on the instructions of the [appellant]."

The appeal

[34] On 15 October 2020, the appellant filed notice and grounds of appeal and, subsequently, a stay of execution of the orders of the Committee was granted. The grounds of appeals, set out verbatim, are as follows:

"a) The Disciplinary Committee erred in finding as a fact that the Complainant gave instructions to the Appellant and her employee, Ms. Morrison, that the cheque, inclusive of the deposit, was his money.

b) The Disciplinary Committee erred in finding that Kayon Thompson is not the ostensible or implied agent of the Complainant.

c) The [Disciplinary Committee] erred in finding that the Appellant acted with inexcusable or deplorable negligence in refunding the monies solely in Kayon Thompson's name.

d) The finding of fact of the Disciplinary Committee as set out in paragraph g, that the Complainant and Kayon Thompson both confirmed the information given in the questionnaire, is inconsistent with the decision of the said Disciplinary Committee that the Complainant made it known to the Attorney-at-Law and Ms. Morrison that the Deposit was his money.

e) That the Disciplinary Committee's decision that the Complainant should be refunded the entire Deposit, where the Disciplinary Committee and the Complainant accepted that the entire Deposit was returned to Kayon Thompson, is inconsistent with paragraphs 31,32,37 and 38 of the Judgment, that each party to the Agreement is entitled to a half share.

f) The Disciplinary Committee misapprehended the facts, issues and law applicable when it declared at paragraph 40 that it did not consider it necessary to rule whether there is a case of ostensible or implied agency.

g) That there is no basis in law or fact for the finding made by the Disciplinary Committee in paragraph 4 of its Decision, as there is no evidence to support this.

h) That the finding by the Disciplinary Committee as set out in paragraph 44 is inconsistent with paragraph 40, as to the type and/or extent of the agency of Kayon Thompson.

i) The Disciplinary Committee misdirected itself as to the facts and/or failed to sufficiently evaluate or analyse the evidence of the case.

j) The Disciplinary Committee failed to identify or appreciate the material facts in issue and the law related thereto, and reached a determination of the matter without proper adjudication of the issues to be determined, leading to a conclusion which is erroneous and unsupportable in the circumstances.

k) The Disciplinary Committee erred in its finding as set out in paragraph 23, that the Complainant's witness (his wife) was not cross- examined by Mr. Honeywell. This is factually incorrect.

l) The Disciplinary Committee failed to recognize that in light of the evidence of the Complainant's wife that the information that she proved to the Disciplinary Committee is exclusively based on what her husband, the Complainant, told her, renders this evidence hearsay and therefore inadmissible and irrelevant in a determination of the issue(s).

m) The failure of the Disciplinary Committee to properly consider or give sufficient analysis to the importance of the AND/OR instructions given to the Attorney-at-Law by the Complainant and Kayon Thompson, which resulted in its failure to properly analyse the available evidence in its entirety, to the detriment of the Attorney.

n) That the finding of fact at paragraph 27 which states that the Complainant was a party to the mortgage is incorrect and/or unreasonable, given that there was no document in support of any mortgage application or evidence of the date of the Agreement for Sale.

o) Given the Authorities in law, the issues to be determined by the Disciplinary Committee are:

> i. whether the [Appellant's] interpretation of their instructions as set out in the questionnaire was a reasonable one, using the usual Rules of Interpretation either at Common law or under the Interpretation Act;
>
> ii. whether the [Appellant's] interpretation of the instructions as set out in the questionnaire is one which could reasonably be concluded in the circumstances; and
>
> iii. whether the interpretation of the instructions, by the Attorney, as set out in the questionnaire is one which the Attorney failed to exercise reasonable care and skill or whether it

is an unreasonable interpretation of a document.

p) The Disciplinary Committee failed and/or neglected to consider the substantial inconsistencies in the Complainant's evidence, particularly as it relates to his instructions regarding the inclusion of his wife or children who reside in Canada on the Registration of the Title, particularly in light of question 5 of the Questionnaire/Instructions, where he stated that he is a single man, and question 8 where he stated that the property is to be purchased in his and Kayon Thompson names.

q) That the Disciplinary Committee erred in finding that the Complainant is entitled to full refund of the deposit of $379,100.00, whilst accepting that full refund had already been made to Kayon Thompson is contrary to the principle of Unjust Enrichment or the principle of Restitution.

r) That the Disciplinary Committee failed to accept that even if the law of Agency was not applicable, given the response of the Complainant to question 17 of the questionnaire, the complainant could only be entitled to a 50% of the refund based on paragraphs 31, 32, 37 and 38 of their Findings of Facts.

s) That the Disciplinary Committee placed reliance on the cases of **Earl Witter v Roy Forbes (1989) JLR 129, Cherril [sic] Lam & Fitzroy McLeish v Deyabo** [sic] **Adedipe and Elsie Taylor v The General Legal Council (Ex parte Fedrick** [sic] **Scott) at SCCA No. 8/04** which is erroneous given the substantial difference in the facts or allegations as set out in this cases which resulted in a decision not in keeping with the facts of this case

t) That the Disciplinary Committee in finding the Attorney to have acted with inexcusable or deplorable negligence in the performance of her duties is as a result of its failure to sufficiently evaluate or analyse the evidence in the case, and therefore its decision ought to be set aside.

u) That the Order of the Disciplinary Committee that the Attorney is to pay $379,100.00 in refund to the Complainant is manifestly excessive and/or excessive in the circumstances." (Emphasis as in the original)

Ground (g) was abandoned in written submissions filed on behalf of the appellant.

[35] These are the orders sought:

> "1. That the decision made by the Disciplinary Committee of the General Legal Council on the 17th day of July, 2020 in respect of the Appellant is unreasonable and inconsistent with the evidence;
>
> 2. That the decision made by the Disciplinary Committee of the General Legal Council on 17th day of July, 2020 in respect of the Appellant to be set aside;
>
> 3. That the sanction imposed upon the Appellant by the Disciplinary Committee of the General Legal Council on the 18th day of September, 2020 is excessive;
>
> 4. That the sanction imposed upon the Appellant by the Disciplinary Committee of the General Legal Council on the 18th day of September, 2020 be set aside.
>
> 5. ….
>
> 6. …; and
>
> 7. That costs to the Appellant."

The issues

[36] From the 21 grounds of appeal I have distilled eight main issues for determination. These issues are not discrete and involve overlapping evidence. They are:

1. whether the Committee erred in its finding that the complainant gave instructions to the appellant and her employee that the cheque inclusive of the deposit ($384,950.00) was his money (ground a);

2. whether the Committee misapprehended the facts, issues and law when it declared that it did not consider it necessary to rule on whether this was a case of ostensible or implied agency, and erred in its finding that Ms Thompson was not the ostensible or implied agent of the complainant (grounds b, f, h);

3. whether the Committee misdirected itself as to the facts and/or failed to sufficiently evaluate/analyse material facts/evidence, particularly the "and/or" instruction, as also the law related thereto, resulting in a conclusion which was erroneous and unsupportable in the circumstances, to the detriment of the appellant (grounds g, i, j, m and o);

4. whether the Committee failed/neglected to consider substantial inconsistencies in the complainant's evidence and their impact on his credibility (ground p);

5. whether the Committee made findings which were inconsistent with other findings, its decision and legal principles (grounds d and e);

6. whether the evidence elicited from the complainant's wife was inadmissible hearsay irrelevant to the determination of the issues and prejudicial in its effect (grounds k and l);

7. whether the Committee erred in finding that the appellant acted with inexcusable and deplorable negligence in refunding the monies solely to Ms Thompson, and had so found because of a failure to sufficiently analyse the evidence (grounds c, t and s); and

8. whether the Committee erred in finding that the complainant was entitled to the full refund of the deposit, acted contrary to the principle of unjust enrichment and/ or the principle of restitution, and made orders which were manifestly excessive (grounds q, r and u).

[37] The other issues raised in the grounds are inconsequential to the appeal. For example, we were asked to decide whether the Committee erred in its finding that the complainant's wife was not cross-examined (ground l) and whether the Committee's finding that the complainant was a party to the mortgage was incorrect (ground n). However, these will be addressed, briefly, later in the judgment.

Preliminary point

[38] At the commencement of the hearing of the instant appeal, counsel for the appellant, Mr Honeywell, asked the court to strike out paras. five to eight of the written submissions filed on behalf of the Committee. His contention was that those paragraphs were concerned with whether the appellant had accounted to the complainant for all monies to his credit, having been reasonably required to do so. That aspect of the complaint had been decided in the appellant's favour and was therefore irrelevant to the appeal, he submitted.

[39] Queen's Counsel, Mrs Hay, referred us to para. 51 of the Committee's decision and argued that the impugned submissions were relevant to the appeal because the Committee had used the same factual findings in coming to its decision about the appellant's professional conduct and the aspect of the complaint which forms the basis of this appeal. At the time, we indicated that we would give to those submissions the attention we considered appropriate.

[40] On a close examination of those submissions, it was noted that para. five attributes to the appellant certain beliefs and assumptions pertaining to payment of the deposit, the relationship between the complainant and Ms Thompson, and the basis for payment of the deposit refund to only one of the prospective purchasers. It is also apparent that paras. six to eight deal with the appellant's legal duty to account for a 'client's trust money' and her co-equal duty to each client, a point which was also raised by Mrs Hay.

[41] For those reasons, I have declined to strike out the submissions. Mrs Hay was correct that the Committee had used the same factual findings to arrive at its decision on both aspects of the complaint.

[42] I turn now to the principal issues raised by the grounds of appeal. For convenience, they will not always be dealt with sequentially. Due to the significant overlap in the submissions with respect to issues 1 and 4, they will be considered together.

Issue 1: whether the Committee erred in its finding that the complainant gave instructions to the appellant and her employee (or "made it known") that the cheque inclusive of the deposit ($384,950.00) was his money

Issue 4: whether the Committee failed/neglected to consider substantial inconsistencies in the complainant's evidence and their impact on his credibility

Submissions on behalf of the appellant

[43] Mr Honeywell submitted that there was no evidence which was supportive of the Committee's finding that the complainant had made it known that the deposit was his money; only an "unconvincing assertion by the complainant that he had made it known that the money was his". Counsel argued that when the deposit was paid, the prospective purchasers had already completed the questionnaire and indicated the source of funds as "personal savings". The reasonable conclusion was that this meant both their savings, particularly as they had visited the office purporting to be spouses, left together and returned with the cheque. Also, the appellant had no way of knowing where the cheque had come from as it was made out to the vendor's attorney, there was no cheque stub evidencing its source and there was no discussion on that matter. Counsel said the appellant had before her a questionnaire that spoke to joint funds and instructions to deal with both or either of the prospective purchasers in the "General conduct of the matter" (the "and/or" instructions).

[44] Mr Honeywell made six additional points to support this position. Firstly, during cross-examination, the complainant had failed or refused to say how he made it known that the deposit was his money. When it was suggested to him that Miss Morrison was

told no such thing, the claimant's answer was, "I gave it to her, it came from my account". Secondly, evidence that the money came from the complainant's account was only produced after the complaint to the GLC. Thirdly, the question asked of the appellant by the complainant - "Don't you as a lawyer ask your client where she is getting the money from?" – is hard to reconcile with his evidence that he had made it known that the money was his. Fourthly, a receipt was prepared in both prospective purchasers' names and there was no protest. Fifthly, at no time did the complainant suggest to Miss Morrison that he had made it known to her that the money was his. Sixthly, the complainant said he put the cheque down and "made it known" it was his money but when asked by the Committee what he meant by "made it known", he failed to answer and changed the subject.

[45] Counsel challenged the complainant's credibility on the bases that he had lied about his marital status and whether he gave instructions for his wife and children to be added to the title, and for the property to be subdivided. Such instructions, he argued, would make no sense in light of: (i) the claimant's explanation of the business arrangement between himself and Ms Thompson; (ii) the indication on the questionnaire that he was single; (iii) him having stated that he gave no particulars about his wife and children; and (iv) the fact that the assertion concerning his wife came well after he complained to the GLC. He said the complainant had described himself as "single" in the questionnaire and declared himself as "a respectable man" but contradicted himself when he told the Committee, "She (meaning the appellant) take my papers and give to my spouse".

[46] Mr Honeywell concluded that the glaring inconsistencies in the complainant's evidence went to the root of his credibility and cast doubt on the veracity of his evidence. He suggested that the complainant's evidence should not have been accepted above that of the appellant's, particularly as he needed to prove the complaint beyond reasonable doubt.

Submissions on behalf of the Committee

[47] Mrs Hay submitted that it was open to the Committee to find that the complainant communicated that the deposit was his money. She directed the court's attention to page 22 of the record where the complainant, recounting his first conversation with Miss Morrison, said: "...When we met, she told me to bring papers in and she told me to bring $384,000 and some change. I went to the bank the same day and brought back the cheque to her... Kayon went to the bank with me…I put the cheque down on the table and everyone was around the table. She was saying them foreign money and I made it known that it was my money". Queen's Counsel also highlighted page 24 of the record where the complainant said, "I explained to Ms Morrison that I needed my money. She said she was going to contact Kayon Thompson to see if she could get back my money…". Reference was also made to page 34 where the complainant answered in cross-examination, "I specifically told you that we would come to Jamaica, look at land and purchase it. When I came to Ms Morrison, she told me to go to the bank and get $384,950.00 in [m]anager cheque and take it back ...Ms Morrison knows that it was my money".

[48] Mrs Hay pointed out that Miss Morrison had acknowledged that 'the funds' were tendered by the complainant and he had provided documentary proof that it was so. Further, there was no evidence that either the complainant or Ms Thompson was asked to explain whose funds were represented as "personal savings". Rather, the appellant and Miss Morrison operated on the assumption that the savings were jointly owned and the deposit must have come from both of them because they were always together. She submitted that it was a question of whether the Committee believed the complainant that he had made it known that the money was his.

[49] Mrs Hay acknowledged that the complainant's oral evidence was deficient but said there was ample support for his position that he had made it known that the deposit was his. She pointed to averments in his affidavit, and also his testimony that Miss Morrison had informed him that the deposit refund was paid over to Ms Thompson because of

threats, and the purported promise by her to retrieve the deposit refund from Ms Thompson. She also highlighted that when Miss Morrison was asked if there was any explanation given to the complainant for paying over the money to Miss Thompson, she indicated there had been none.

[50] Mrs Hay acknowledged that the evidence from the bank could not be used to assess the appellant's state of mind at the time the deposit refund was paid over, and indicated that the Committee did not say it had used the evidence in that way. It was only a finding of fact which must have influenced its decision to order restitution, in the full deposit amount, to the complainant, she posited.

[51] Turning to the complainant's credibility, Queen's Counsel said he had been consistent in his evidence concerning the salient issues.

Discussion

Standard of review in appeals from decisions of the GLC

[52] This court will only disturb the Committee's decision if the findings of fact were unsupported by the evidence adduced, a mistake was made in its evaluation of the evidence which was sufficiently material to undermine the conclusion of guilt or it had been plainly wrong (see **Norman Samuels v General Legal Council** [2021] JMCA Civ 15; **Bahamasair Holdings Ltd v Messier Dowty Inc (Bahamas)** [2018] UKPC 25; **Donovan Hutchinson v Oshane Simon** [2019] JMCA App 18; and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21).

[53] In **Michael Lorne v The General Legal Council (ex parte Olive C Blake) [**2021 JMCA Civ 17, this court acknowledged, at para. [30], that "the intervention of the appellate court in matters of sentencing [sic] imposed by the disciplinary tribunal ought to be limited to cases where errors of law exist or where the sentence is demonstrated to be clearly inappropriate". Elaborating on that approach, in **Minett Lawrence v General Legal Council** [2022] JMCA Misc 1, at para. [104], McDonald Bishop JA observed that the disciplinary tribunal is comprised of "an experienced body of attorneys-

at-law who are best placed to weigh the seriousness of professional misconduct and the effect that their findings and sanction will have in promoting and maintaining the standard to be observed by individual members of the profession in the future, and the reputation and standing of the profession as a whole" (see also **Bolton v The Law Society** [1994] 2 ALL ER 486 and **Salsbury v Law Society** [2009] 1 WLR 1286, which were referenced, with approval).

[54] At the beginning of its assessment of the evidence, the Committee stated quite correctly that the burden was on the complainant to prove his case beyond reasonable doubt. It pointed to **Campbell v Hamlet** [2005] UKPC 19, where Lord Brown at paras. 16 – 24, writing on behalf the Board, said:

> "…the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession … [but, to] find [a] complaint proved it was not necessary for the committee or the Court of Appeal to find each and every sub-issue proved beyond reasonable doubt. A sufficient number of strong possibilities or even mere probabilities) can in aggregate amply support a finding of proof beyond reasonable doubt..."

[55] The central question is whether the evidence adduced was sufficient for the Committee to find, beyond reasonable doubt, that the complainant had made it known that the deposit was his money. Mr Honeywell sought to challenge the evidence by impugning the complainant's credibility. I acknowledge that the complainant was not always forthright and consistent. However, it was entirely for the Committee to determine which of those matters, on which he was not forthcoming or was discrepant, went to the core of what they had to decide; and whether in spite of any inconsistency, they could accept any part or parts of his evidence as proved beyond reasonable doubt.

[56] The Committee seems to have treated the prospective purchasers' relationship and whether the complainant had lied about his wife and children as peripheral to the core issues in the case. That was not unreasonable. I accept Mrs Hay's submission that the fact that the complainant seemed to have been in a relationship with someone other

than his wife would not erode the finding of the Committee on the aspect of the evidence which deals with the deposit refund.

[57] More to the point is Mr Honeywell's contention around the omission from the complainant's testimony as to how he had made it known that the deposit was his money. There is, however, affidavit evidence that the complainant had, "[informed Ms Marva Morrison that [he] would be providing the monetary funding because Kayon [did] not have access to such large amount of money… Furthermore, if the purchase [did] not take place, the deposit [would be] be refunded to [him]". He also said, "The conversation is when we met, she told me to bring papers in and she told me to bring $384,000.00 and some change. I went to the bank the same day and brought back the cheque to her". So too, "I specifically told you that we would come to Jamaica, look at land and purchase it. When I came to Miss Morrison, she told me to go to the bank and get $384,9500.00 in Manager cheque and take it back". There was also evidence that when the complainant took the cheque to the appellant's office, he put it on the table and the appellant made a remark about his "foreign money".

[58] In my opinion, those aspects of the evidence go directly to that issue. That is not to say that the Committee could not have insisted on an answer when, under cross-examination, the complainant failed or refused to say how he had made it known that the deposit was his. But, that criticism aside, the Committee had ample documentary and other evidence which was capable of supporting the complainant's position on the core issues.

[59] By contrast, the appellant's core position is akin to a double-edged sword. Her interpretation of the "and/or" instruction, in question 19, to justify payment of the deposit to Miss Thompson, meant it would have likely made no difference to the outcome had she even agreed that the funds were the complainant's. The appellant's claim to have no knowledge that the complainant contributed the deposit is refuted by her own letter of 28 October 2013 (exhibit 4), which reads, in part, "Ms Kayon Thompson told me that her

spouse [the complainant], would assist with the deposit, but she would get the mortgage…[and] would add his name".

[60] I also do not see how the attribution of 'source' to "personal funds" supports the appellant's contention that both prospective purchasers provided the deposit. Asking about "source of funds" is not the same as 'whose funds?'. One could be an inquiry to establish that the funds are not tainted, the other being about ownership. The Committee therefore had a basis on which to reject the appellant's argument about the "source of funds" answer in the questionnaire.

[61] I see no conflict between the Committee's finding that the complainant "made it known" that the deposit was his money and evidence that the source of funds was stated to be "personal savings". It is crystal clear from the evidence that the appellant made no specific enquiry as to the ownership of the funds and how they should be treated in the event of a refund. There is also no conflict between the Committee's finding that the complainant made it known that the deposit was his money and the absence of any objection by him when the receipt was issued in two names. That receipt from the vendor's attorneys-at-law could be taken as reflecting that a joint purchase was intended. In any event, the receipt was a distinctly different matter from how the reimbursable deposit was to be treated.

[62] There is also no apparent conflict between the evidence that the complainant told the appellant and Miss Morrison that the deposit was his money, and this question put to the appellant, by him - "Don't you as a lawyer ask your client where she is getting this money from?" The complainant's question, in that instance, was not in reference himself. The use of the pronoun 'she' suggests that his query pertained to Ms Thompson. His remark which followed immediately, suggests that his concern was whether the appellant had been sufficiently apprised of all the facts. That remark was: "You have all right to answer all questions. Ms [Morrison] interviewed us. [Ms Morrison] knows all about that, you came in last".

[63] As the arbiter of the facts, the Committee was at liberty to draw reasonable and inescapable inferences from the facts to arrive at its conclusions about the evidence. Those aspects of the decision, as elaborated, indicate that it considered the evidence and made findings as to facts which it determined had been proved to the requisite standard. As already indicated, the Committee had no need to make a finding in relation to every aspect of the evidence, but only what was relevant to the issues it had to decide, having considered the evidence as a whole.

[64] I should add that, although heavy weather was not made of it, note is taken of the appellant's evidence that Ms Thompson, her aunt and mother called and came to her office several times in relation to the deposit refund. She said, in the letter dated 28 October 2013 (exhibit four):

> "Ms Thompson also had paid for the Surveyor's and Valuation Reports and had given us instructions which indicated that she wanted the return of the funds. She insisted that we should refund to her the full $384,950.00 and refused to consider paying for our legal service for which she had paid $20,000.00.
>
> After several trips and telephone calls from Ms Thompson herself, her mother and aunt, we refunded to her the sum of $379,100.00, which included sums held for Valuation Report and the amount of $350,000.00 received from Naylor and Turnquest. This was on the understanding that she acted for herself and her spouse, Mr Carl Benjamin..."

[65] The fact that Ms Thompson and her relatives had to make several trips and telephone calls about the refund and Ms Thompson's "insistence" that she should receive it, suggests that the appellant capitulated to pressure than that she acted on the certain knowledge and professional confidence that Ms Thompson was entitled to the deposit.

[66] This aspect of the discussion cannot be concluded without acknowledging that Mr Honeywell was within his rights to point out that the complainant had not put his case to the appellant. However, the complainant's failure to do so was not insuperable. I adopt the observation by Foskett J in **Various Claimants v Giambrone & Law (A Firm) and**

others [2015] EWHC 1946 (QB), para. 21, that "the days of the 'I put it to you' cross-examination…have long since gone". That is the modern approach, save of course, as the learned judge made clear, where fairness may still require aspects of a witness' evidence to be "challenged head-on" such as when imputations are made about her honesty and integrity. This is not such a case. This case was about negligent conduct; not dishonesty, lack of integrity or anything of the sort.

[67] Where the unrepresented complainant alleged that he had disclosed that the deposit money was his, and the appellant relied on an "and/or" answer to say she was entitled to refund it to his co-purchaser, the failure to put each element of his case to the appellant (which in all likelihood she would reject) caused no prejudice or had any discernible effect on the outcome.

[68] I make a final observation on this question. I don't believe that most people ordinarily frame their thoughts, words and sentences in the alternative, as lawyers do when they use phrases such as "and/or". Therefore, the appellant's posture that the complainant should have understood the phrase and raise any questions if he did not, as against her explaining the meaning of the phrase and drawing attention to its implication, is not one which a conscientious lawyer would adopt.

[69] For all these reasons, issues 1 and 4 are not in the appellant's favour. Hence, there is no merit to grounds (a) and (p), and they, accordingly, fail.

Issue 2: Whether the committee misapprehended the facts, issues and law when it declared that it did not consider it necessary to rule on whether this was a case of ostensible or implied agency, and erred in its finding that Ms Thompson was not the ostensible or implied agent of the complainant

Issue 3: Whether the Committee misdirected itself on the facts and/or failed to sufficiently evaluate/analyse material facts/evidence, particularly the "and/or" instructions, as also the law related thereto, resulting in a conclusion that was erroneous and unsupportable in the circumstances, to the detriment of the appellant

[70] It is convenient to deal with these issues together because of the significant overlap in argument. I will, however, not repeat aspects of the previous submissions that arise because of duplication in the issues and arguments being raised here.

Submissions on behalf of the appellant

[71] Mr Honeywell contended that the Committee's decision that it did not find it necessary to rule whether this was a case of ostensible or implied agency was inconsistent with its finding that the prospective purchasers had confirmed the information given in the questionnaire, particularly, the "and/or" answer to question 19(ix) from which the issue of ostensible or implied agency arose. Counsel explained that since question 19 ended with a "catch all" phrase in which the prospective purchasers instructed that either one and/or both prospective purchasers would be in charge of "making arrangements for…. the [g]eneral conduct of the matter", the Committee was obliged to give due consideration to whether Ms Thompson was the ostensible agent or was by implication an agent of the complainant. Counsel argued, further, that any reasonable interpretation of the "and/or" instruction whether literal, golden or purposive, bestowed authority upon the appellant to pay over the deposit refund to either or both of the prospective purchasers (see **Fisher v Bell** (1960) 3 ALL ER 731).

[72] He was critical of the Committee's reasoning that question 19 did not disclose who was responsible for the "refund deposit", and at para. 34, where it observed that the words "making arrangements for" do not equate with "who should the refund be made payable to". Counsel contended that "General conduct of the matter" lent itself to wide interpretation and can properly justify the appellant's interpretation of the answer to para. 19(ix), and her reliance on it, to pay over the deposit refund to Ms Thompson.

[73] Counsel argued that by limiting the scope of the agency to "receiving all information and documents in the absence of the complainant", the Committee fell into error and excluded pertinent evidence. This included Ms Thompson having single-handedly selected the surveyor and the valuator, made payments toward the preparation of the valuation and surveyor's reports and unilaterally decided to cancel the sale

agreement (which the complainant later ratified). He also pointed to the absence of evidence that the complainant was involved in the general conduct of the sale transaction. Consequently, the Committee's analysis of the evidence was inadequate.

[74] Mr Honeywell submitted that the following exchange, at page 37 of the record, summed up and affirmed the agency relationship:

> "Honeywell: And you told her because you were not living in Jamaica it was Kayon who would be doing everything in relation to the sale?
>
> Benjamin: If you are not living there wouldn't it be someone else…."

[75] Counsel insisted that the Committee's decision not to rule on whether there was a case of ostensible agency should be read alongside its finding that the payment of the refund deposit to Ms Thompson was not as a result of her exercising "authority" as agent for the complainant, or in furtherance of her having general conduct of the matter but solely as a result of the appellant's interpretation of question 19 of the questionnaire. The interpretation of the answer given by the prospective purchasers in question 19 and whether either of them was responsible for the general conduct of the matter, including the collection of a refund by Ms Thompson on behalf of herself and the complainant, must be revisited, counsel concluded.

[76] He relied on **The Shell Company (W.I) Limited v Caribbean Cement Company Limited** (unreported), Supreme Court, Jamaica, Suit No CLS 18/1999, judgment delivered 19 October 1991, for general principles on agency; and **Lena Hamilton v Ryan Miller et al** [2016] JMCA 59 which states that, in making a determination on whether a person has authority to act as an agent one must look at all the circumstances affecting the parties and the relationship. He also referenced **Hely-Hutchinson v Brayhead Ltd and Another** [1967] 2 All ER 14 in which Lord Denning stated that "it is the authority as it appears to others" which characterises ostensible agency.

[77] Applying those authorities, counsel submitted that the answer given by the prospective purchasers at 19(ix) of the questionnaire would indicate that each prospective co-purchaser was being held out as the agent of the other as it concerned the general conduct of the sale which included the collection of a deposit refund. In this instance, accounting to an agent is deemed as accounting to the principal, counsel submitted. He also indicated that it was in recognition of Ms Thompson's apparent authority to receive the deposit refund from the appellant that the complainant had instructed Ms Thompson "not [to] do anything… [and] leave the funds" with the lawyer. Her authority would therefore have covered more than "information and documents".

Submissions on behalf of the Committee

[78] Mrs Hay contended that it was questionable whether any agency arose on the evidence, given the definition of agency, that is, "a relationship between two persons where one person has capacity to create legal relations between a third party and her principal" (**Lena Hamilton v Ryan Miller et al**, para. [22]). Nonetheless, she submitted that if there was an agency in any aspect of this matter it would have had to arise on a combination of oral and written instructions. That apart, she contended that the complainant's instructions were restricted to "all information and documents", as Miss Morrison had acknowledged when she told the complainant, in answer to his question, that his instructions were that "all documents, all information were to be given to Kayon Thompson…and once the information [was] given to Kayon, you will get the information".

[79] Queen's Counsel then went on to challenge the appellant's agency argument on the bases that: (i) payment over of the complainant's deposit ('trust money'), to Ms Thompson, was not contemplated since there was no question about it in the questionnaire; (ii) the "and/or" answer meant to Miss Morrison that when the complainant was away Ms Thompson would act and when he was present, either of them would deal with the surveyor's or valuation report; (iii) it was not explained to the complainant what "and/or" meant to the appellant; (iv) absent any explanation that the "and/or" answer meant to the appellant that 'trust money' could be paid to Ms Thompson, there could not

be said to be any such instructions; (v) since no advice or explanation was given to the complainant as to the meaning of the "and/or" answer, it could not be asserted that the complainant understood its significance to the appellant; (vi) there being no instructions in relation to the payment of the deposit refund, the issue must be resolved by determining whether the appellant, as a matter of law, was authorised to pay out a client's ' trust money' on the understanding placed on the answer to question 19(ix); and (vii) the "and/or" answer bestowed no authority upon the appellant to hand over the deposit refund to Ms Thompson.

[80] She contended that if the appellant's primary argument was that Ms Thompson was the agent of the complainant for the purpose of receiving the deposit refund, there would have had to be some evidence that on the discrete question of the deposit refund he had held out that Ms Thompson was capable. She indicated that when it comes to a client's 'trust money' express instructions have to be taken by the attorney-at-law involved. She also noted that, generally, the authorities have held attorneys accountable on conduct surrounding the mishandling of clients' 'trust money'.

[81] Mrs Hay argued that the Committee was only required to interpret the "and/or" answer on the evidence before it, particularly the meaning ascribed to it by Miss Morrison. On that meaning, the issue of the right to pay out the client's 'trust money' could not be determined by the law of agency as there was no express arrangement for the payment of the deposit refund, and there was no evidence that the complainant had held out to the appellant that Ms Thompson was authorised to collect it. In those circumstances, there was no need for the Committee to determine whether Ms Thompson was an "ostensible agent" for the complainant. The scope of any agency is always a question of fact.

[82] The following passage from Halsbury's Law of England Volume 1 (2017), para. 36, was cited in support of the argument that the law is not vague when it comes to determining the limits of agency:

> "When authority is given orally to the agent, its terms and extent are questions of fact, depending on the circumstances of the particular case and the usages of the profession, trade or business."

[83] Mrs Hay also contended that if there was a belief that an agency was operating then steps ought to have been taken by the appellant to verify its scope as such important matters could not be left to an interpretation that was not discussed with the prospective purchasers. She said there was no evidence that the appellant took instructions on the question of entitlement to the refund of the deposit (although Miss Morrison met with the prospective purchasers twice and the appellant did so at least, once), demonstrating an absence of appreciation of the appellant's "freestanding co-equal duties" to each client. This assumption that one client could always act for the other had an unfortunate outcome both for the complainant and the appellant, she indicated.

[84] Queen's Counsel further indicated that the Committee did not conclude that the words "and/or" in the questionnaire provided consent for one party to be entitled to the entire equity at the exclusion of the other, hence the appellant's authority to refund the deposit to either party. Instead, it considered that the questionnaire did not mention who would be responsible for making arrangements for the refund of deposit and that the words "making arrangements for" did not equate to 'who should the refund be made payable to'. It was her further submission that no authority had been provided to this court to demonstrate any principle in the law of agency that arises differently for spouses. She argued that the reference to the prospective purchasers as spouses did not improve the appellant's position and had no bearing on the issues in the appeal.

[85] She surmised that had the Committee determined the matter along the lines of agency, its decision would have been more firmly against the appellant. We were referred to this court's decision in **Clive Tomlinson v Almac Developments Ltd [**1976] 14 JLR 104 and also Halsbury's Laws of England, Volume 1 (2017), para. 38, where the learned authors stated:

> "Payment made in the ordinary course of business to the agent of the creditor discharges the debt **if the agent is authorised or held out as having authority to receive payment. An agent authorised to sell, however, does not necessarily have implied** authority to receive payment for their principal…. **In general, an agent has no implied authority to receive payment by cheque, by bill, by other goods, or before it becomes due, nor may he give credit**…
>
> An authority given to an agent to receive payment does not authorise a settlement of accounts between him and the third party by setting off a debt due from the agent to the third party, unless this can be justified by a known usage which is binding on the principal." (Emphasis as in the original)

[86] Finally, in relation to these grounds, Mrs Hay argued that the importance of the "and/or" instructions seemed known only to the appellant. This meant she failed to advise the client or take instructions. In the circumstances, there was no failure by the Committee to accurately analyse material facts and evidence.

Discussion

[87] The relevant authorities have established that agency arises from a relationship where a person (the agent) has the authority or capacity to create legal relations between his or her principal and third parties. The agency relationship may be established expressly in writing, implied by conduct of the parties, arise from the necessity of circumstances or by ratification of an act. The principal may be bound by the action of his agent even where he gave no express authorisation for the agent's action, if it falls within the scope of the agent's implied, apparent or ostensible authority (see Halsbury's Laws of England, 5th Ed Volume 1 at paras. 29 and 30). See also **Shell Company (WI) limited v Caribbean Cement Company Limited**, in which this court adopted the statement by Lord Denning MR in **Hely- Hutchinson v Brayhead Ltd and Another** "that ostensible or apparent authority is the authority as it appears to others"; and **Lena Hamilton v Ryan Miller et al**, where this court concluded, among other things, that the sale of a motor vehicle to a third party by an appellant - who had parted company,

possession, custody and control of the vehicle but retained the title and maintained the insurance in her name - was a compelling fact that would have served to displace the presumption of agency by a driver who was not driving for the appellant's benefit or purpose.

[88] How did the Committee deal with the circumstances which the appellant said gave rise to the appearance of ostensible or apparent authority, in her eyes, or from which agency could be implied? The Committee highlighted the appellant's evidence that the deposit refund cheque was written in Ms Thompson's name because she was acting for herself and the complainant. This was on the basis that the questionnaire contained the instruction which gave her (the appellant) authority to deal with either Ms Thompson or the complainant or both. But, the Committee characterised the appellant's action as having had more to do with her interpretation of the "and/or" answer than whether Ms Thompson was exercising her "authority" as agent for the complainant. At paras. 43 and 44 of the decision, the Committee states:

> "43. Further on, in answer to the Panel as to why were the funds paid out to Kayon Thompson when the Agreement for Sale did not say Kayon Thompson and/or Carl Benjamin the Attorney replied, 'the money was paid out…And the questionnaire contained the instruction which gave me the authority to deal with either Kayon or yourself or both.
>
> 44. From the Attorney's evidence it is therefore pellucid that the refunding of the deposit to Kayon was not as a result of Kayon exercising her 'authority' as agent for the Complainant or in furtherance of her having general conduct of the matter but solely as a result of the Attorney's interpretation of paragraph 19 of the questionnaire."

[89] Implied authority was dealt with at paras. 38 – 41 of the Committee's decision. There, the Committee pointed to what it termed a "factual inaccuracy" in counsel's submission that the complainant had advised the firm that it could deal with Ms Thompson on "anything regarding the matter." This was in contrast to Miss Morrison's testimony

that "... the complainant said that because he travelled and lived abroad all information and documents were to be handed to Ms Thompson". Although the Committee seems to have misrepresented what counsel actually said (as reflected by the notes of evidence), that did not blunt the fact that the Committee was entitled to find that the instructions derived from question 19 meant that when the complainant was abroad Ms Thompson would be his agent "for the purpose of receiving documents and information" on his behalf, even though the complainant refuted telling Ms Morrison so. Also, it was not unreasonable for the Committee to conclude that the words – "Who will be responsible for" do not equate with "who should the refund be made payable to?".

[90] I, therefore, do not agree with Mr Honeywell that the Committee's analysis at para. 44 of its decision or of the entire evidence was inadequate. I accept Mrs Hay's submissions that there was no need for the Committee to determine whether this was a case of ostensible or implied agency since there was no evidence that the complainant had held out to the appellant that Ms Thompson was authorised to collect the deposit refund, and the "and/or" instruction could not, on a reasonable interpretation, cover instructions as to whom the deposit refund could or should be made payable, particularly in circumstances where there was no discussion as to the meaning of the term. Also, there is force in Mrs Hay's argument that if the complainant did not understand what "and/or" meant in the context of the answer to question 19(ix), he could not possibly have been holding out that Ms Thompson was his agent for "the [g]eneral conduct of matters".

[91] Although the Committee did not consider it necessary to make a specific finding on whether there was a case of ostensible or implied agency, it did go on to find that in either case the authority would be limited in scope and would not include to whom the deposit refund was to be paid. This conclusion cannot be said to be plainly wrong as it is consistent with the evidence. The only express instructions, on the evidence, were limited to the passing of information and documents to Ms Thompson when the complainant was away.

[92] There were, nevertheless, instances where Ms Thompson performed acts for the benefit of herself and the complainant, specifically the payment of the retainer and some fees incidental to the transaction. But the phrase "who was responsible for making arrangements" in relation to activities contemplated by question 19 did not contain any express or implied agency for the collection of the deposit refund on the complainant's behalf. Moreover, I fail to see how the phrase "General conduct of the matter" and the responsibilities that are derived from the answer to question 19 could, by implication, include the collection of the deposit refund upon cancellation of the agreement for sale. It seems to me that, at the point of cancellation, there was no 'matter' to conduct because the deal had fallen through. Mrs Hay was correct that the payment of the deposit refund was not contemplated by the questionnaire; and that instructions to deal with a client's 'trust money' should be expressed, and cannot be assumed.

[93] Mr Honeywell found no support in **Weekes v Advocate Co Ltd** (2002) 66 WIR 26 ('**Weekes**'), a case cited by him, in which the Barbados Court of Appeal found that the trial judge had set out the evidence without attempting any critical analysis or evaluation of it. There is no question about the correctness of the well-established principle enunciated in **Weekes** that, where there exists, "an absence of findings of fact on material aspects of a case, a dearth of reasons informing the trial judge's ultimate conclusion, and a failure to weigh the evidence of witnesses", the interests of justice may require the appellate court to substitute its own findings and decision for that of the trial judge.

[94] That is not the situation before us. Mr Honeywell did not point to any instance in which the Committee failed to consider or had misdirected itself on the facts, and I was not able to find any. The Committee gave sufficient regard to the tasks performed by Ms Thompson in relation to the transaction but found that the performance of those tasks did not justify the payment of the deposit refund to her. It was also the case that the funds provided by the complainant for payment of the deposit were to be held upon trust by the appellant, and that she never explained to the complainant that her interpretation

of the "and/or" instruction was that if a refund of the deposit became necessary, the payment could be made to Ms Thompson. In such circumstances, the payment to Ms Thompson was a breach of trust.

[95] For the reasons above, grounds (b), (f),(g),(h),(i),(j),(m) and (o) also fail.

Issue 6: Whether the evidence elicited from the complainant's wife was inadmissible hearsay, irrelevant to the determination of the issues and prejudicial in its effect

Submissions

[96] Mr Honeywell conceded that Mrs Benjamin was, in fact, not cross-examined. However, he submitted that her evidence was irrelevant and inadmissible hearsay under section 31E of the Evidence Act**,** she having told the Committee, "I don't know anything else because I was not there, only what my husband told me". He said although the Committee did not quote from her evidence, it ought properly to have warned itself and state that no reliance was placed on it. Having failed to do so, the appellant was entitled to conclude that the prejudicial hearsay was taken into consideration by the Committee in coming to a conclusion which was adverse to her.

[97] In response, Mrs Hay stated that the substance of the evidence was that the funds for the deposit were withdrawn from the complainant's JNBS account. That fact was not in issue and there was no indication that the panel had any regard to the rest of her evidence.

Discussion

[98] There is no indication that when Mrs Benjamin's evidence was taken by the Committee there had been any objection on the basis that it was irrelevant and inadmissible. The only objection was that counsel did not know whether the witness was the complainant's wife. That objection was overruled.

[99] The evidence in issue was unremarkable. Mrs Benjamin added nothing to what the Committee had otherwise heard and there was no indication that her evidence influenced

the Committee's decision in any way. Mr Honeywell said the Committee should have warned itself but he provided no authority to support that position. In any event, no prejudice to the appellant was disclosed.

[100] I see no basis on which grounds (k) and (l) should succeed.

Issue 5: Whether the Committee made findings which were inconsistent with other findings, its decision and legal principles

Issue 7: Whether the Committee erred in its finding that the appellant acted with inexcusable and deplorable negligence in refunding the monies solely to Ms Thompson and had done so because of a failure to sufficiently analyse the evidence

Issue 8: Whether the Committee erred in finding that the complainant was entitled to the full refund of the deposit, acted contrary to the principle of unjust enrichment and/or the principle of restitution, and made orders which were manifestly excessive

[101] Issues 5, 7 and 8 are dealt with together because of the significant overlap in the evidence and arguments.

Submissions on behalf of appellant

[102] The thrust of Mr Honeywell's submission was that the appellant ought not to have been "penalized for professional misconduct" as the impugned conduct emanated from what at worst was a "mistaken" interpretation of instructions which is excusable conduct for which the proper remedy is redress in the Supreme Court, for negligence. He contrasted the appellant's 'mistake' to what he characterised as far more egregious acts in **Earl Witter v Roy Forbes** ('**Earl Witter**') (1989) 26 JLR 129 **-** where the culpable attorney-at-law had consistently failed to attend to the client's business over an extended period of time; **Elsie Taylor v The General Legal Council (Ex parte Fredrick Scott)** ('**Elsie Taylor**') unreported, Court of Appeal, Jamaica, Supreme Court Civil Appeal No 8/2004, judgment delivered 30 July 2009 **-** where the attorney-at-law paid over the purchaser's money to the vendor before an agreement for sale was executed; and **Cherrill Lam and Fitzroy McLeish v Debayo Adedipe** ('**Cherrill Lam**') Complaint No

82 of 2010, Disciplinary Committee decision delivered 8 October 2011 - which was about the failure to include the description of land in a sale agreement.

[103] Counsel submitted that the Committee's erroneous reliance on these cases led to adverse findings and a harsh sanction. He submitted further that the dictum of Carey JA, in **Earl Witter** at pages 132-133 and the GLC's decision of **John Grewcock v Lord Anthony Gifford** ('**John Grewcock**') Complaint No 59 of 2005, Disciplinary Committee decision delivered on 26 March 2008 (paras. 7-10), exemplify the correct analysis for determining "inexcusable or deplorable negligence or neglect". He said this would not normally include "a single act of negligence in the course of a matter" as acknowledged in **John Grewcock**.

[104] Counsel also referred us to **Norman Samuels v General Legal Council** and **Hope Marcia Ramsay** Complaint No 7 of 2018, Disciplinary Committee decision delivered on 7 March 2020. These are cases in which the professional misconduct was due to consistent failures by the attorney-at-law and not a single conduct. He suggested that in those cases the conduct was more egregious than the appellant's.

[105] Mr Honeywell submitted that it was unjust for an amount representing the full deposit to be awarded to the complainant when it had been established that the intention was for both prospective purchasers to own the property as tenants in common, in equal shares, which equated to neither of them having a greater interest in the equity of the property. He referred to paras. 31, 32, 37 and 38 of the decision and said the Committee's finding as to "equality of equity" was inconsistent with its decision and legal principles. In his view, even on the most benign interpretation, the complainant could only be entitled to half of the refunded sum.

Submissions on behalf of the Committee

[106] Mrs Hay pointed to the reasoning of Carey JA in **Earl Witter** that an action in negligence is the proper remedy for 'slips' in a busy practice but when the level of neglect or negligence is beyond what is expected of a reasonably competent attorney, it is

"inexcusable or deplorable negligence or neglect" under Canon IV(s), and amounts to professional misconduct." Next, she pointed to Carey JA's statement about the Committee's role, that "...it is for the Disciplinary Committee to determine whether the attorney had gone beyond an acceptable level of negligence or neglect into the realm of what is 'inexcusable and deplorable'".

[107] On the strength of the latter statement, Queen's Counsel submitted that the attorneys-at-law who comprised the panel had the advantage of seeing and hearing the witnesses, and would, therefore, know what results from oversight and what amounts to deliberate conduct. Consequently, their judgment in these matters should not be lightly interfered with.

[108] She highlighted two aspects of the appellant's conduct as being particularly relevant to the Committee's decision. These are:

1) the paying out of client's 'trust money' without the complainant's instructions; and

2) the failure of the appellant to indicate whether she had made any attempts to contact the complainant coupled with her failure or refusal to meet with him when he attended her office several months later.

[109] Mrs Hay submitted that **John Grewcock** bears some similarity to the instant case because in both situations the inexcusable or deplorable negligence arose from a single "critical" error or "hopeless mistake". In the instant case, the critical error was the appellant's decision to pay out the client's 'trust money' bereft of adequate instructions which could and should have been obtained. That was not an accidental slip or oversight, counsel argued, but an intentional and deliberate act which met the requisite disciplinary standard of being "inexcusable or deplorable negligence".

[110] She pointed to the provisions of regulation 3(1) of the Legal Profession (Accounts and Records) Regulations, 1999, as evidencing the discrete significance of clients' 'trust

money', and the seriousness with which that matter is treated in the law. Queen's Counsel submitted further that once there is an issue about mishandling of a client's 'trust money', the category of misconduct is inexcusable or deplorable because of the importance that the law attaches to the handling of such funds.

[111] We were referred to **Elsie Taylor** and **Cherrill Lam**, which, as was indicated earlier, involved the paying over of client's monies without following proper procedure. Queen's Counsel submitted that an attorney who takes a client's deposit but has no instructions about paying it out and does so to the wrong person, acts similarly to the attorney-at-law in **Elsie Taylor** and **Cherrill Lam.**

[112] Finally, as regards these issues, Mrs Hay made a distinction between payment of the retainer fees (which are non-refundable) and a reimbursable deposit, and submitted that the deposit is generally treated by the law as a separate, discrete payment from which certain obligations flow. She referred to the evidence and the Committee's finding that the funds provided for the deposit were the complainant's and said he was entitled to a full refund.

Discussion

[113] The Committee's findings of fact about the appellant's conduct are no doubt sufficient to establish negligent conduct. The question is whether such conduct rises to the level of "inexcusable or deplorable negligence or neglect". Mrs Hay suggested that the assessment should include the complainant's evidence that the appellant failed to communicate with him when the agreement was cancelled and her refusal to do so on several occasions when he attempted to make contact with her. The Committee made reference to that aspect of the appellant's conduct but stopped short of making it a basis for its findings. Accordingly, I will not accede to the subtle request for this court to express a view on that aspect of the evidence. The Committee was quite capable of weighing up that matter, it being comprised of experienced attorneys-at-law who could differentiate between challenges that could ordinarily arise in the course of running a busy practice and conduct which falls below the expected professional standard.

[114] The record discloses that the Committee assessed the relevant evidence and gave the weight it deemed appropriate. It concluded that the appellant acted with inexcusable or deplorable negligence when she paid over the deposit refund solely to Ms Thompson. That finding is set out at paras. 46, 47 and 51, viz:

> "46. Under Canon IV (s) of the Cannons [sic] of the Legal Professional Rules, for an Attorney to be found guilty of negligence his/her conduct to amount to being inexcusable or deplorable, not just ordinary negligence as understood under the Common Law Tort of negligence. Canons iv(s) is one of those Canons the breach of which ipso facto amounts to professional misconduct.
>
> 47. As to what constitutes inexcusable and deplorable negligence, the Panel is guided by the dictum of Carey JA in the case of **Earl Witter v Roy Forbes** (1989) JLR 129 where he stated in respect to Canon 1V(s) [sic] that… 'It is not advertence or carelessness that is being made punishable but culpable non-performance'.
>
> 51. Having carefully considered the oral and affidavit evidence, the exhibits and previous decisions, the Panel finds the Attorney is in breach of Canons IV(s) in that by refunding the deposit solely to Kayon Thompson she acted with inexcusable and deplorable negligence."

[115] It is plainly the case that the appellant failed to take proper instructions and consequently made a deposit refund to the wrong person. In my opinion, that was not a 'mere slip', 'error of judgment' or a 'simple mistake'. It was conduct unbecoming of a reasonably well-informed and competent attorney (see **Earl Witter**, **Saif Ali and Another v Sydney Mitchell & Co [A FIRM] and others** [1980] AC 198 and **Re Solicitor** [1972] 1 WLR 869).

[116] I am grateful to both counsel for all the cases which were cited. They demonstrated the application of the principle of "inexcusable or deplorable" conduct to different scenarios. It is not necessary to rehearse them but I should say that in **Elsie Taylor** there was no challenge to the finding of inexcusable or deplorable negligence, arising from a premature payment of the client's deposit to the vendor. In my view, the

inexcusable conduct is comparable to the instant case where the deposit refund was paid to the wrong person. Both cases involved a single error which, as in **John Grewcock**, was critical enough to be inexcusable or deplorable negligence. That is to say, clients' funds held in trust by an attorney-at-law must be treated as sacrosanct and when those funds have been negligently misdirected by the attorney-at-law, he or she is likely to have acted with inexcusable and deplorable negligence.

[117] In the course of argument, Mr Honeywell said the Committee should have considered that, as the appellant understood the complainant and Ms Thompson to be spouses, this must have had a significant influence on how she viewed the agency relationship between them vis-a-vis arms-length joint purchasers. It is noteworthy that the Committee made no finding about the relationship but nothing turns on it because even if the complainant and Ms Thompson were spouses or thought to be so, the appellant's duty to each of them, as a prospective co-purchaser, would be distinct.

[118] As already indicated, counsel's additional criticism that the Committee failed to sufficiently analyse the evidence is also misplaced. It is true that the discussion did not address each finding of fact separately but there could be no doubt as to the Committee's reasons for those findings. I also find no merit in Mr Honeywell's submission that the Committee relied on cases that are materially different in facts from the appellant's case. I saw nothing in the decision which led me to conclude that similarity in facts was the purpose for which the cases were used. They were illustrative of how Canon IV(s) has been interpreted in the past by the Committee and this court.

[119] I should add that Mr Honeywell was, however, correct in saying that the remedy for an honest mistake was tortious negligence (citing **Noel C Sale v Dunn Cox and Orrett, Christopher Bovell and Ethlyn Norton** (unreported, Supreme Court, Jamaica, Suit No CLS. 350/1985, judgment delivered 7 July 1995, in support), but this case is not about an honest mistake. It is about the appellant's failure to take proper instructions for the treatment of a client's funds, and how her reliance on an unreasonable interpretation

of a provision in her own questionnaire, which was never even explained to the client, resulted in the complainant's money being refunded to the wrong person.

[120] In the light of the above, I am of the view that the Committee was justified in its ultimate conclusion that the appellant acted with inexcusable and deplorable negligence in the performance of her duties.

[121] I turn next to Mr Honeywell's argument about inconsistencies that arise from paras. 21, 32, 37 and 36. In para. 31, the Committee reasoned that although the sale agreement did not mention the nature of the tenancy, the questionnaire made it clear that the intention of the purchasers was to own the property as tenants in common, in equal shares, which meant that neither of them was entitled to a greater interest in the equity held in the property. This was not a discussion on how the deposit refund should be apportioned on the termination of the agreement. At para. 32, the Committee went on to say, "For one of them to be entitled to the entire equity to the exclusion of the other, the excluded party would have had to have given his/her consent". Then at para. 37, the Committee said, "The question to be asked is: if their obligations are joint, would not their rights also be joint therefore entitling them to be refunded the deposit jointly?". This question had a bearing on what was said by the Committee in para. 36, in response to counsel's argument. There, it made this statement, "Given its widest possible interpretation the Panel cannot accept that the general conduct of Ms Thompson in paying the retainer fee, the surveyor's and valuator's fee and being given all information and documents can properly justify the payment of the refund cheque to her solely". Para. 38 also dealt with counsel's argument, and not a finding of fact by the Committee.

[122] It is clear to me that the Committee was, in those extracts, dealing with equity in the property and making an observation about the legal position with respect to the payment of a deposit refund where that obligation is jointly discharged, they having already found that the situation in this case was different because of the evidence (which it accepted) that the deposit was paid entirely from the personal funds of the complainant, and that he had made this known to the appellant and Miss Morrison. I, therefore, see

no inconsistency between those remarks and the Committee's finding that the entire deposit should be returned to the complainant.

[123] The final point to be addressed concerns whether restitution of the entire deposit refund, in the circumstances, would amount to unjust enrichment, as Mr Honeywell submitted.

[124] Section 12(4)(g) of the Legal Profession Act permits the making of restitution orders, by the Committee, in appropriate cases. The relevant evidence from the complainant was that the deposit was his money and the letter from JNBS confirmed that the amount was taken from his bank account. He had also indicated that he did not receive any portion of the deposit refund from Ms Thompson. That was evidence on which the Committee could rely, along with the evidence of the appellant's negligent conduct, to order a full repayment of the sum. In my opinion, it is not relevant to this determination whether the prospective purchasers intended to be tenants in common in equal shares. That pertains to ownership of property which does not arise, the contract for sale having been terminated. The only relevant questions are: who paid the deposit and who was entitled to receive the deposit refund?

[125] In the circumstances, the order for restitution was not only appropriate but will help to sustain public confidence in the integrity of the legal profession (see **Bolton v Law Society** [1994] 2 All ER 486 at page 492).

[126] For those reasons grounds (c), (d), (e), (q), (r) ,(s),(t) and (u) fail.

Subsidiary issues

Whether the Committee's finding that the complainant was a party to the mortgage incorrect and /or unreasonable (ground n)

Submissions

[127] Mr Honeywell contended that there was no basis for the Committee to have found that the complainant was a party to the mortgage given the fact that the agreement for

sale was undated and was never executed by the vendor. He also highlighted aspects of the evidence which showed that Ms Thompson would have been responsible for getting the mortgage.

[128] Mrs Hay did not regard this as a core issue. Nonetheless, she indicated that, at pages 38 and 52 of the record, there is evidence that both the complainant and Ms Thompson would have serviced the loan and be the registered proprietors.

Discussion

[129] I did not consider this issue to be relevant to whether the Committee erred in finding that the appellant was in breach of Canon IV(s), and whether the sanction was justified.

Conclusion

[130] Given the evidence that was before the Committee, I see no basis on which to disturb the Committee's decision and the sanction imposed. There is ample justification for the ultimate finding that the appellant acted with inexcusable and deplorable negligence in the performance of her duties, and that she should pay to the complainant restitution as determined, with costs to him and the respondent. I would, therefore, propose that the appeal be dismissed and the decision and order of the Committee made on 17 July and 18 September 2020 respectively, be affirmed with costs of the appeal to the respondent to be agreed or taxed.

G FRASER JA (AG)

[131] I too have read the draft judgment of my sister Dunbar Green JA. I agree with her reasoning and conclusion.

P WILLIAMS JA

ORDER

1. The appeal is dismissed.

2. The decision and order of the Disciplinary Committee made on 17 July and 18 September 2020 respectively are affirmed.

3. Costs of the appeal to the respondent, to be agreed or taxed.