Full Court - Legal Profession - Disciplinary Proceedings - Motion for Order of Prohibition [Prohibiting Disciplinary Committee of General Legal Council from hearing complaint against Applicant by Chairman of Council.] Notes on Retaining misconduct allegedly committed in Canada. S.12 and 14 Legal Profession Act. R. 13 Fourth Schedule Legal Prof Act - (1) Whether Committee has extra-territorial jurisdiction (2) whether delay in hearing complaint unfair and oppressive to applicant (3) Whether misconduct "in a professional respect" (4) whether General Legal Council or any Committee competent to hear allegations APPLICATION REFUSED Cases referred to (Back of page 17)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS SUIT NO. M. 75/92

IN THE FULL COURT

Before: THE HON. MR. JUSTICE WALKER
THE HON. MR. JUSTICE ELLIS
THE HON. MR. JUSTICE CLARKE

Status
Legal Drafting and Interpretation

Regina v. **Disciplinary Committee of the General Legal Council Exparte Winston Churchill Waters McCalla**

Motion for Order of Prohibition

Berthan McCaulay Q.C., Frank Phipps Q.C., Winston Spaulding Q.C., Enos Grant and Mrs. Margaret McCaulay instructed by Miss Aisha Mulendwe for the Applicant

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

January 18, 19, 20, 21, 22, 25, 26
27, 28, February 1, 2, 3, 4, and
April 30, 1993.

CLARKE J.

Winston Churchill Waters McCalla is an attorney-at-law and the applicant herein. Through his counsel he moved this Court for an order of prohibition directed to the Disciplinary Committee of the General Legal Council prohibiting the said Committee from hearing complaint No. 1 of 1990 made against him by Joswyn Leo-Rhynie Q.C., the Chairman of the General Legal Council.

After a hearing lasting some three weeks we dismissed the motion and we now keep our promise to give written reasons.

The applicant was enrolled in Jamaica as an attorney-at-law, his name having been entered on the Roll on 19th September, 1962. He lived and worked in Canada from 1977 to 1985. During that period he passed the required Bar examinations for Ontario, lectured, conducted research and often did academic

writing on legal matters. He returned to Jamaica in 1985 and on 25th September 1986 he was struck off the Roll of Solicitors and disbarred by convocation of the Law Society of Upper Canada.

In February 1987 that body provided the General Legal Council (hereinafter called "the Council") with a history of the disciplinary proceedings in Canada brought against the applicant.

Based both on the charges which led to the applicant being struck off in Canada and on the results of the Council's investigations disciplinary proceedings were commenced in Jamaica against the applicant on 3rd January 1990 by the Chairman of the Council.

The allegations of misconduct

It is common ground that the allegations forming the subject matter of the complaint are contained in a defective affidavit sworn to by the Chairman on 3rd January 1990. Nevertheless, for reasons we will give below the respondent has jurisdiction to consider the allegations.

The Chairman alleges that the applicant committed the following acts constituting, in the Chairman's view, misconduct in a professional respect:

(a) that on or after 23rd August 1982 the applicant hired two persons to prepare at the expense of the Canadian Government research material for the Canadian Government Department in which he was employed as Co-ordinator of the Criminal Procedure Project; that subsequently the applicant utilized in a book published as his work the research material so prepared by those persons, without obtaining the permission of his employer or the persons whose work he turned to his benefit;

(b) that for the academic year 1983 to 1984 the applicant was employed and paid in full by the Department of Law at Carelton University in Canada to teach a law course, and without the permission of the officials of the University he arranged for one Catherine Latimer to teach the course, and failed to compensate her for her efforts despite his promise to do so;

(c) in a curriculum vitae he tendered to support his application for employment with the Federal Government of Canada he represented that he became a Jamaican Queen's **Counsél** in 1973 and that between the years 1973 to 1977 he held the position of Deputy Minister of Justice in Jamaica.

The applicant denied the charges and sought full particulars. As a consequence the Council obtained in support of the allegations at (a) and (c) above evidence by affidavit from relevant witnesses who all reside in Canada. Mr. Morrison, however, indicated in the argument that the charge at (b) above will not be pursued as the witness Catherine Latimer cannot be located. Copies of the affidavits were forwarded to the applicant and finally with the agreement of counsel the Disciplinary Committee fixed the 26th September 1992 for the hearing of the complaint.

Subsequent to that agreement the applicant obtained an ex parte order for leave to apply for an order of prohibition upon two grounds.

Grounds on which prohibition sought

At the start of the hearing before us we allowed the statement of grounds to be amended to accommodate two additional grounds. Then on the 11th day of the hearing, applications were made by Mr. Grant to allow the statement to be further amended by adding five more grounds and to allow **further** affidavits to be used. We disallowed those applications. We found (a) that the new matters dealt with in the affidavits sought to be used do not arise out of the affidavit of the Chairman of the Council sworn to on the 13th November 1992 and (b) that those grounds sought to be added were to all intents and purposes mere aspects of one or two of the very grounds earlier argued by counsel for the applicant.

In the result the grounds the applicant relied on were:

> "(i) Section 12 of the Legal Profession Act 1972 being a penal enactment cannot be construed in any manner as to give it an extra territorial operation or effect, unless it is otherwise so expressly provided by Parliament or by necessary implication. The acts complained of in the said allegations are expressly stated to be outside the jurisdiction of both the Courts of Jamaica and the Disciplinary Committee established by section 11(1) of the Legal Profession Act 1972, that is to say, Canada;

(ii) That the institution of the said proceedings itself after a delay of 8 years and the further delay of almost 2 years from the said institution, neither for which the applicant was and is in any way directly or indirectly, in whole or in part responsible and the continuance of such proceedings would be not only manifestly unfair and unjust to, but also oppresive to the applicant;

(iii) That the Disciplinary Committee has no jurisdiction to hear the allegations preferred against the applicant as the allegations do not refer to any acts done in a "professional respect", that is, in any function capacity as an attorney-at-law under the Legal Profession Act.

PARTICULARS

That the applicant did not commit any act in a professional respect in that:

(a) at all material times the applicant did not hold a pracitising certificate issued under section 5 of the Legal Profession Act;

(b) at all material times the applicant did not practise law in Jamaica, Canada or elsewhere;

(c) that at all material times the applicant never acted as a lawyer nor as an attorney-at-law;

(d) that the allegations do not arise from any manner in relation to the practise of law by the applicant either in Jamaica, Canada or anywhere at all.

(iv) That neither the General Legal Council nor its agent or anyone acting on its behalf is competent to make or prefer allegations against an attorney-at-law under section 12 of the Legal Profession Act, and, in any event, the General Legal Council could not in law make an application to the Disciplinary Committee within the meaning of those words in section 12(1) and (3) section 14 and Rule 13 of the Fourth Schedule of the Legal Profession Act."

The legal issues

Of course, jurisdiction is the broad issue, for the order of prohibition lies for excess or lack of jurisdiction. By fixing a date for the hearing of the complaint the Disciplinary Committee assumed authority to exercise disciplinary jurisdiction over the applicant in respect of the matter complained of.

So the following are the jurisdictional issues raised in these proceedings:

(a) whether the Disciplinary Committee is competent to exercise disciplinary authority over an attorney-at-law for acts committed outside of Jamaica;

(b) whether jurisdiciton is exercisable only if the misconduct of the attorney occurs when he is acting as a lawyer, and in the pursuit of his profession;

(c) whether in instituting proceedings before the Disciplinary Committee essential procedural requirements have been disregarded, or whether those proceedings are otherwise improperly instituted; and

(d) whether any common law or constitutional right of the applicant has been infringed by reason of the delay in hearing and determining the charge before the Disciplinary Committee.

The legal issues identified, we will now treat of them **seriatim.**

Question of jurisdiction to discipline for conduct abroad

Mr. McCaulay submitted that the Disciplinary Committee has no jurisdiction to hear the charges because the Legal Profession Act, 1971, as a whole, and in particular, section 12, characterised by him as penal, ought on principle and authority to be construed as conferring local jurisdiction only. He relied on **McLeod v. Attorney General for New South Wales** [1891] A.C. 455 as exemplifying the presumption that penal legislation is inter-territorial in operation.

Be it observed, however, that the Legal Profession Act is not a penal statute. The object of section 12, and, indeed, the Act as a whole is to promote proper standards. As Mr. Morrison pointed out, limitation of the jurisdiction of the Disciplinary Committee to misconduct committed within our shores would result in a manifest absurdity, for an attorney instead of committing an act of misconduct or dishonesty locally could commit such an act abroad and thereby evade the disciplinary sanction. Such an absurd result would be inconsonant with the basis upon which the disciplinary jurisdiction was exercised at common law prior to the promulgation of the Act. And as the Act does not expressly provide otherwise, it must be deemed by necessary implication not to have altered the common law position that a solicitor can be disciplined for misconduct committed abroad. Illustrative

of that position are the cases: **Bunny v. The Judges of the Supreme Court of New Zealand** (1862) 15 E.R. 455 where the Judicial Committee of the Privy Council upheld an order striking a solicitor from the roll in New Zealand for acts committed by him in England prior to his being enrolled in New Zealand; **In re a Solictor** (1928) 72 Sol. J. 570 where the Divisional Court struck the name of a solicitor from the roll in England for misappropriation of money while he was practising in Bombay. In two other cases cited to us the English Court of Appeal and a Divisonal Court respectively acknowledged **sub silentio** the competence of the disciplinary tribunal of the Law Society in England to hear a complaint of misconduct committed by a solicitor abroad: see **Re a Solicitor ex parte The incorporate Law Society** [1898] 1 Q.B. 331; and **Re a Solicitor** [1922] 2 All E.R. 335.

We unhesitatingly agree with Mr. Morrison that the Act does not purport to have extra territorial operation. For example, the Act does not say that an attorney struck off in Jamaica cannot practise abroad. Rather, the operative principle is that, **once enrolled, an attorney-at-law is amenable to the jurisdiction** of the Disciplinary Committee for acts of professional misconduct wherever committed.

How did the Disciplinary Committee as distinct from the judges come to be vested with such a jurisdiction? Lord Denning gives the historical background:

> "By the common law of England the judges have the right to determine who shall be admitted to practise as barristers and solicitors, and as incidental thereto, the judges have the right to suspend or prohibit from practice. In England this power has for a very long time been delegated, so far as barristers are concerned, to the Inns of Court; and ... so far as solicitors are concerned, to the Law Society. In the colonies the judges have retained the power in their own hands, at any rate, in those colonies where the profession is 'fused'":
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> **Attorney General of the Gambia v. N'Jie** [1961] 2 All E.R. 504 at 508 (P.C.).

The Legal Profession Act, 1971 of the Parliament of independent Jamaica fused the profession and created in place of barristers and solicitors practitioners known as attorneys-at-law. At the same time the Act delegated the disciplinary jurisdiction to a Disciplinary Committee appointed by the General Legal Council, itself established by the Act.

Is the jurisdiction of the Disciplinary Committee limited to misconduct of the attorney committed qua lawyer in pursuance of his profession?

Section 12(1)(a) of the Act authorises a member of the Council to lay a complaint against an attorney for:

> "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)".

Mr. McCaulay submitted in the alternative that even if the disciplinary jurisdiction extends to misconduct committed abroad then such misconduct as would constitute "misconduct in a professional respect" must mean:

> "serious misconduct by an attorney when acting as a lawyer in the pursuit of his profession judged according to the canons of ethics under section 12(7)(a); and in particular those directed by the Council constitute misconduct in a professional respect".

According to counsel the Disciplinary Committee has no jurisdiction to hear and determine the aforesaid complaint because even assuming that the allegations contained therein are true, the applicant was not at any material time acting as a lawyer and in pursuit of his profession.

Those criteria are not, Mr. Morrison submitted, preconditions, but the phrase, "misconduct in any professional respect" as used in the subsection embraces conduct which, whether committed in a professional capacity or not, is unworthy of the profession and incompatible with the attorney remaining upon the Roll.

For their respective formulations counsel on both sides relied on section 5(1)(c) and on the canons of professional ethics made by the Counsel under section 12(7). In addition, counsel for the applicant relied on **Allinson v. General Council of Medical Education and Registration** [1894] 1 Q.B. 750, while, in contrast, counsel for the respondent relied on rules of the common law relating to the conduct of solicitors which the canons expressly preserve.

Section 5(1)(c) states:

> "Every person whose name is entered on the Roll shall be known as an attorney-at-law and ... when acting as a lawyer, be subject to all such liabilities as attach by law to a solicitor."

The primary purpose of this provision is, in our view, to subject all lawyers to liabilities solicitors were subject to by law. In this connnection we accept Mr. Morrison's submission that conduct which was sufficient to constitute professional misconduct at common law prior to the promulgation of the Legal Profession Act, remains a disciplinary offence after the Act, there being no express provision to the contrary. The inclusive common law principle proclaims that the jurisdiction of the disciplinary body extends not only to misconduct connected with the profession but also to conduct that, though not so connected, has been such as can render the attorney unfit to remain a member of the profession.

As Lopes L.J. put it:

> "It has been suggested that the power to strike off the roll only exists where there has been some professional misconduct. It appears to me that to hold that the jurisdiction of the Court to strike off the roll extends only to professional misconduct and neglect of duty as a solicitor, would be placing too narrow a limit on that most salutary disciplinary power that the Court exercises over its officers ...[T]he quesiton which the Court in cases like this ought always to put to itself is this, 'Is the Court, having regard to the circumstances brought before it, any longer justified in holding out the solicitor in question as a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor?'. That appears to me to be the question which the Court always has to answer when a matter of this kind comes before it":
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> **Re Weare** [1893] 2 Q.B. 439 at 448.

In that case the English Court of Appeal held that a solicitor could be struck off upon conviction for an offence of allowing houses to be used as a brothel by his tenants.

Moreover, on a motion brought by the Law Society in another case a Divisional Court struck off a solicitor for carrying on the business of a bookmaker, even though he was not at that time practising as a solicitor. The Court stressed that it is inconsistent with a solicitor's position on the roll that he carry on the business of a bookmaker, such conduct being unworthy of a member of the profession: see **Re A Solicitor ex parte The Law Society** (1906) 93 L.T. 838 and 839.

Allinson v. General Council of Medical Education and Registration (supra), on which the counsel for the applicant placed much reliance, does not violate the

principle. In that case the appellant, a doctor, had published several advertisements which contained reflections on medical men generally and their methods of treating their patients and advised the public to have nothing to do with them or their drugs, but instead to come to him at a stated fee. The Court of Appeal of England held that there was evidence upon which the General Council could reasonably hold that the appellant had been guilty of "infamous conduct in a professional respect" within the meaning of section 29 of the Medical Act, 1858 (U.K.). As it was not doubted that the acts done by the appellant were done in pursuit of his profession, it is not surprising that the Court adopted a definition predicated on a medical man acting in a professional capacity. Devised by Lopes L.J. the definition reads thus:

> "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional bretheren of good repute and competencey then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'."

The Court made it clear that, although the definition sufficed for the fact situation of that case, the defintion was not comprehensive. As Lopes L.J. himself said, "I do not propound it as an exhaustive definition; but I think it is strictly and properly applicable to the present case."

In a later case a strong Divisional Court, comprising Lord Parker C.J., Marshall and Widgery JJ, in rejecting the contention that the aforesaid definition was universal, acknowledged that there was no valid ground for limiting the phrase "[misconduct] in a professional respect" to misconduct done "in pursuit of his profession" or "in the course of the practice of the profession": see **Marten v. Disciplinary Committee of the Royal College of Veterinary Surgeons** [1965] 1 ALL E.R. 949 at 953.

Be it also noted that the Legal Profession (Canons of Professional Ethics) Rules made in pursuance of section 12(1)(a) and (7) of the Act, preserve and strengthen the common law position as to the ambit of professional misconduct: see **Sylvester Morris v. G.L.C. exparte Alpart Credit Union** (Unreported C.A. 30 of 1982) at p.9 per Carey J.A. The relevant canons are found in the Jamaica Gazette Supplement Proclamations Rules and Regulations No. 71 of 1978. Canon 1(b) provides:

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

Canon VIII(b) renders a breach by an attorney of Canon 1(b) misconduct in a professional respect. And because of an obvious printing error Canon VIII(c) is not expressly decreed to constitute misconduct in a professional respect. That canon, nevertheless states:

> "Where no provision is made herein in respect of any matter, the rules and practice of the legal profession which formerly governed the particular matter shall apply in so far as practicable, and a breach of such rules and practice (depending on the gravity of such breach) may constitute misconduct in a professional respect".

Finally Canon VIII(a) makes it clear that -

> "Nothing [contained in the Canons] shall be construed as derogating from any existing rules of professional conduct and duties of an attorney which are in keeping with the traditions of the legal profession, although not specifically mentioned [therein]".

We hold that the acts complained of in the instant case are acts capable, if proved, of constituting "misconduct in a professional respect". It is, therefore, clear beyond a peradventure that the phrase "misconduct in a professional respect" is not limited to misconduct committed by an attorney in a professional capacity, but extends to conduct which is unworthy of a member of the profession, or which may tend to discredit the profession. Interestingly, even if the **Allinson** definition were applicable, the complaint in the instant case that the applicant represented himself to be a Queen's Counsel of the Jamaican Bar having been so appointed in 1973, is, in our opinion, a complaint of an act done in the pursuit of his profession.

Issue as to whether essential procedural requirements have been disregarded or whether the proceedings under review have been otherwise improperly instituted.

Mr. Phipps submitted that essential procedural requirements have either been disregarded, or not followed, to the great prejudice of the applicant. Firstly, counsel contends that the application to the Committee was made by the Council through its Chairman in contravention of section 12(1) of the Act.

That subsection provides:

> "Any person alleging himself aggrieved by an act of professional misconduct ... 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 [certain] acts committed by an attorney ..."

The subsection clearly differentiates between a complaint of a person aggrieved and a complaint made either by the Registrar of the Supreme Court or a member of Council. The enactment obviously authorises each official to complain **ex officio** and not from any personal consideration as is the case with a person aggrieved by the attorney's alleged act of professional misconduct.

The authority thereby given to a member of the Council is, plainly, intended to facilitate the Council to discharge its responsibility to uphold standards of professional conduct: see section 3(1)(b). Where, as here, alleged breaches of those standards are brought to the attention of the Council we read section 12(1) as enabling a member to lay a complaint under the auspices of the Council. It would, in our view, be absurd to construe the provision as precluding participation by the Council in prosecuting such a complaint.

The affidavit of the Chairman of the Council sworn to on 13th November, 1992 shows that the Council has conformed to its power "to do all such things as may appear to it to be necessary or desirable for carrying out its functions under [the] Act": section 3(2).

Having been provided with a history of the disciplinary proceedings in Canada, the Council sought and obtained advice as to how to proceed. It expended time and expense to obtain affidavit evidence from Canada in support of the allegations of misconduct: see paragraphs 4, 5, and 7 of the said affidavit. Those were necessary and legitimate acts on the part of the Council and we are unable to agree with counsel for the applicant that the evidence shows that the Council has determined the guilt of the applicant or has assumed the role of determining whether a **prima facie** case has been made out against him. Those functions belong to the Disciplinary Committee constituted under section 11(1) and the Council has not unsurped them.

Mr. Phipps submitted that, in any event, the applicant is prejudiced because the Council, the veritable prosecutor, appoints the Committee the membership of which includes Council members.

Now, although it is the Council that appoints the Committee, both are, as Mr. Wood pointed out, separate and distinct organs with separate constitutions: see the First and Third Schedules made under sections 3 and 11 respectively. Parliament

has incorporated safeguards by specifying the categories of persons who can be appointed to the Committee and those appointed must be gazetted: section 11(1) and Rule 6 of the Third Schedule. The Committee has its own Chairman and is empowered to regulate its own proceedings and make rules of procedure in respect to applications made to it: Rule 7 of the Third Schedule and section 14(1).

The Committee, as distinct from the Council, hears and determines complaints of professional misconduct. When it makes an order under section 12(4) on hearing a complaint, it makes no report to the Council, but files such an order with the Registrar of the Supreme Court under section 15(2). When filed, that order is by section 15(3) enforceable in the same manner as a judgment of the Supreme Court. The Committee may by virtue of section 13 sit in divisions, each with its own Chairman and having all the powers of the Committee.

Then, too, the applicant impugns the Committee's capacity for impartiality on the ground that the Committee and the Council share common members. That attack also fails. It is not improper for a judge to hear a complaint where he is a member of a body making the complaint provided that he has not been involved in making the complaint, that is to say he has not been an accuser: see **Allison v. General Council of Medical Education** [1894] 1 Q.B. 750, 758 to 760, **The Queen v. Burton, ex parte Young** [1897] 2. Q.B. 470, 472, per Lawrence, J. As the trial has not yet been embarked upon no division of the Committee has been named to hear the complaint against the applicant. The Committee itself comprises twenty-eight members, eight of whom are members of the Council. Two of those eight were appointed to the Council after the complaint was made. As it is possible to empanel a division of the Committee pursuant to section 13(2) the members of which are neither members of the Council, nor connected with the laying and prosecution of the complaint, the applicant's objection based on interlocking membership is, as Mr. Wood submitted, at best premature.

The final aspect of this, the third issue under examination, concerns the significance of the failure of the Chairman of the Council to comply with the form of affidavit stipulated by Rule 3 of the Fourth Schedule to the Act. Although the document in question contains a jurat at the end of the text, the commencement states: "The Complainant says", instead of: "I ... make oath and say as follows", as required by Rule 3. On that basis, it was submitted that the Chairman breached a mandatoryrequirement of the statute.

The other side conceded that the affidavit is defective. That side, nevertheless, submitted that, not only has the applicant waived objection to the formal defect, but that rule 3 is merely directory in so far as it stipulates the use of particular forms for the commencement of a complaint.

Now, section 14 suggests that rule 3 is a directory provision as under the section the Committee has a discretion to vary rule 3. Further, what is the main objective of rule 3 and, indeed, of section 12(1) in so far as it speaks of allegations contained in an affidavit? Surely, it is, as Mr. Wood submitted, to bring to the attorney's attention the facts upon which complaint is made so that he can answer those facts and prepare his case. The Chairman's affidavit of 3rd January 1990, though defective in the manner already observed, achieves those objectives. He sets out at paragraph 3 thereof the nature of the alleged misconduct and the factual allegations upon which reliance is placed. His ground of complaint as set out in paragraph 4 thereof is that the applicant's conduct was disgraceful and unbecoming of an attorney and was of a nature tending to discredit his profession. We find that there has been substantial compliance with the statutory provisions. And the applicant cannot, in our view, reasonably complain that, because of the formal defect, he has suffered prejudice.

In any case we find that by filing his response to the Chairman's affidavit the applicant waived objection to the irregularity in the affidavit, as witness his subsequent conduct in having trial dates fixed and insisting upon a hearing.

For the foregoing reasons the Court refused the application for prohibition in so far as the applicant relied on grounds (i), (iii) and (iv) of his amended statement.

The issue of delay

Finally, for the reasons given below, the Court also refused the application for prohibition in so far as it was based on the remaining ground, that is to say, ground (ii) of the statement. That ground raised the question of delay.

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.

It is true that the acts of misconduct complained of are alleged to have occurred between 1982 and 1983 and that it was not until January 1990 that disciplinary proceedings were brought. It is also true that the hearing was eventually fixed for 26th September 1992, some 2 years and 9 months later. The Court, however, accepts the unchallenged history of the case and the reasons for the periods of delay set forth in the affidavits of the Chairman of the Council and the Secretary of the Council sworn to on 13th November 1992 and 1st February 1993, respectively. When, in October 1985, the Council became aware of Canadian newspaper reports of allegations of professional misconduct by the applicant, the Council promptly enquired of the Canadian Law Society whether the allegations were brought to its attention and, if so, what action was being taken. The Law Society of Upper Canada thereupon advised the Council that it was investigating the allegations and would in due course inform the Council of the results of its investigations.

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 chronologic 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. Whilst delay may in a given case be presumptively prejudicial, there is no common law right to a speedy trial or to be tried without unreasonable delay where, as here, the applicant has suffered no prejudice or unfairness because of the delay: see **Jago v. District Court of New South Wales** (1984) 63 A.J.L.R. 640. In that case which went up to the High Court of Australia **Mason C.J.** at page 660 of the report put into proper perspective a passage from **Bell v. D.P.P.** [1985] A.C. 937 at 950:

> " ... [T]here appears to be (at least until recently) no judicial decision giving recognition to a right to a speedy trial which stands independent of prejudice to the accused. In **Bell v. D.P.P. [supra]** the Privy Council said in relation to the Jamaica (Constitution) Order in Council 1962, s. 20(1) of which required that a person charged with a criminal offence be afforded a fair hearing within a reasonable time:
>
> > 'Their Lordships do not in any event accept the submissions 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 alternate 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 charge for want of prosecution'.
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> Several things may be noted about the passage. To begin with, it is obiter. It cites no authority for the proposition there stated. Though their Lordships found some guidance in **Barker v. Wingo** (1972) 407 U.S. 514, that case turned on the Sixth Amendment to the Constitution of the United States. Finally, the remedy seen by their Lordships to be generally appropriate was not the granting of a permanent stay but the bringing of the case to trial. In the **[Bell]** case there was a declaration that the applicant's 'right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed' (at 935), their Lordships anticipating that, in the particular circumstances, the applicant would be discharged and not tried again."

On the other hand, 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. 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.

Nor can the Committee be prohibited in this case by an appeal to the Constitution. As well as granting an accused person the right to have criminal proceedings brought against him determined within a reasonable time, the Constitution of Jamaica confers a right to have judicial or quasi-judicial proceedings pronouncing on civil rights and obligations of the individual determined within a reasonable time. Section 20(2) of the Constitution provides:

> "Any court or other authority prescribed by law for the determination 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."

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.

The helpful Privy Council cases of **Bell v. D.P.P. (supra)** and **Mungoo v. The Queen** [1991] 1 W.L.R. 1351 were concerned with the comparable constitutional provision which gives a person charged with a criminal offence the right to a trial "within a reasonable time". Lord Templeman who delivered the judgment of the Board in both cases pointed out in the latter case that in the former case "the Board adopted the approach of the Supreme Court in the United States in **Barker v. Wingo [supra]**, both with regard to the difficulty of applying the concept of a 'reasonable time' to any particular case and with regard to the factors relevant to any decision". The principal factors are: (1) the length of delay, (2) the reasons given to justify the delay, (3) the responsibility of the accused to assert his rights and (4) the prejudice to the accused.

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 so concluding the Court is fortified by cases such as **Re Iles** (1922) 66 Sol. J. 297 which, although they were not concerned with construing constitutional provisions, support Mr. Wood's submission that where an attorney is alleged to have committed serious acts of professional misconduct the lapse of considerable periods will not bar disciplinary proceedings. In **Re Iles (supra)** the Privy Council upheld an order striking off a solicitor in Trinidad for evading fifteen shillings stamp duty committed 15 years prior to the making of the order. The Board stressed that it was not the appellant's interest alone that had to be considered. Other interests which had to be considered included "[t]he profession to which he belonged [and] the community to which it had been his duty to serve".

The foregoing reasons make it plain, we think, that in seeking to have the aforesaid complaint heard and determined the Disciplinary Committee is neither assuming a jurisdiction which it does not have nor intending to exceed its jurisdiction in that matter.