[2024] JMCA Misc 2

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

MISCELLANEOUS APPEAL NO COA2022MS0007

BETWEEN	**TRUDY-ANN RUSSELL**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Hadrian Christie instructed by HRC law for the appellant

Mrs Sandra Minott-Phillips KC and Jamaiq Charles instructed by Myers Fletcher & Gordon for the respondent

14 November 2023 and 17 May 2024

Legal Profession - Professional misconduct – Whether breaches of Canons IV (f) and I(b) of the Legal Profession (Canons of Professional Ethics) Rules can constitute a breach of Canon VIII (d)

Contract – Whether a clause in a retainer agreement that permits a change of the basis of calculation of fees in the event of termination by the client from a fixed fee to time spent at an hourly rate is valid

Appeal - Powers of the appellate court when considering an appeal from the Disciplinary Committee - Sections 16(1) and 17 of the Legal Profession Act; Disciplinary Committee (Appeal Rules) 1972

F WILLIAMS JA

[1] I have read in draft the judgment of Laing JA (Ag) and agree with his reasoning and conclusion. I have nothing further to add.

D FRASER JA

[2] I, too, have read the judgment of my learned brother Laing JA (Ag) and agree with his reasoning and conclusion.

LAING JA (AG)

[3] This is an appeal by Trudy-Ann Russell ('the appellant') against the decision of the Disciplinary Committee of the General Legal Council ('the Committee'), dated 13 April 2022 ('the decision'), and its sanction handed down on 3 May 2022 ('the sanction decision') (which are together referred to herein as 'the judgment'). The details of the judgment appealed are:

> "i) The [appellant] is guilty of professional misconduct as per Canon VIII (d) in that she has breached Canon IV(f) and I of the Legal Profession (Canons of Professional Ethics) Rules; and
>
> ii) The [appellant] is fined the sum of $200,000.00 and is to pay costs of $50,000.00 to the [respondent] and costs of $50,000.00 to the complainant."

The background

[4] The complainant Sheldon Richards ('the complainant') and his sister Ayisha Richards purchased property located at 14 Stellar Road, Harbour View, Kingston 17 ('the property') on 31 August 2004, as tenants in common. On 16 September 2020, the complainant contacted the appellant with the intention of securing her services to obtain an order for the sale of the property. On 22 September 2020, the complainant executed the terms of engagement as contained in a letter dated 18 September 2020 ('the Retainer Agreement'), which reflected the complainant's instructions. In pursuance of those instructions, the appellant filed a fixed date claim form and supporting affidavit in the Supreme Court on 27 October 2020, on behalf of the complainant, naming Ayisha Richards as the defendant. The relief sought was that the property be sold, and the proceeds of the sale be shared equally between the complainant and Ayisha Richards.

[5] The complainant became dissatisfied with the level of service provided by the appellant and, by a letter dated 6 November 2020, he indicated to her that he was terminating her legal services ('the termination letter'). He requested a detailed invoice showing all the work she had done and a refund of all "unused monies". He also requested a copy of the wire transfer which the appellant received, which he said was to enable him to verify the $19,000.00 bank fees that she had passed on to him. Additionally, he asked for the return of his case file.

[6] The appellant responded to the termination letter by a letter dated 9 November 2020, attaching an invoice for professional services rendered in the amount of $935,000.00, of which $600,000.00 was stated to be due and owing. The services were calculated at the appellant's billable rate of $25,000.00 per hour. The complainant challenged the appellant's calculation of her fees on an hourly basis and asserted that the retainer letter provided for a fixed fee which had been paid in full. Being aggrieved by the appellant's position, the complainant sought recourse before the General Legal Council and filed a form of application against the appellant dated 16 November 2020, supported by an affidavit sworn on 7 December 2020 ('the complainant's affidavit in support').

The proceedings

[7] The complainant's allegations against the appellant are encapsulated in the complainant's affidavit in support as follows:

> "(a) [The appellant] has violated canons of professional ethics by charging me fees that are not fair and reasonable.
>
> (b) [The appellant] has not provided me with all information [as to the] progress of my business with due expedition, although I have reasonably required her to do so.
>
> (c) [The appellant] has not [dealt with] my business with all due expedition.

(d) [The appellant] has acted with inexcusable or deplorable negligence in the performance of her duties.

(e) [The appellant] charged me a flat fee of $300.000 [sic] JMD which was paid in full on the same day she was retained, during the first few weeks of retention she asked for more money which was paid in full. After Ms Russell was terminated, I received an incorrect, phony and embellished bill which is grossly retaliatory for [being] fired.

(f) [The appellant] is in breach of Canon I (b) which state[s] that, '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 she is a member'."

[8] In performing its analysis, the Committee concluded that the main complaint of the complainant was that the fees charged by the appellant were unreasonable in the circumstances. The Committee expressly indicated that it would not assess the reasonableness of the fees as would be the procedure on a taxation of fees but would focus on determining whether there was an agreement in respect of the calculation of fees and if so, whether it was adhered to by the appellant. The Committee stated that this analysis would in turn inform the determination of the ultimate issue which was whether the appellant failed to adhere to this agreement and by such failure, engaged in conduct unbecoming of the profession.

[9] The Committee considered whether the agreement was for a flat or fixed fee and its sanction decision delivered 3 May 2022 contains the following findings of fact which were extracted from its decision of 13 April 2022.

"THE COMMITTEE FINDS THAT:

1. As to facts:

   a) The Complainant retained the Attorney on the terms contained in the letter Agreement dated 18 September 2020.

b) The Complaint [sic] remitted the sum of US $2111.95 to pay the Attorney.
c) The rate applied to the transaction by the Attorney's Bank was the cheque buying rate of $133.23 as at 23 September 2020 as communicated by the Attorney to the Complainant.
d) That the sum received by the Attorney was J$281.375.10 [sic] leaving a shortfall of $18,624.90 payable by the Complainant.
e) The Agreement provided that the Complainant was to pay out of pocket expenses to third parties in addition to fees.
f) Having carefully reviewed and considered the contemporaneous documentary evidence, being the Retainer Agreement and the email of 1 October 2020 exhibit 4 p.15, the arrangement between the Attorney and the Complainant was that she would charge a flat fee of $300,000 plus disbursements and that if the matter was contested there would be an additional fee of $250,000.00.

2. The Attorney had earned the fee of $300,000.00 up to the point of the termination of the retainer by the Complainant, even to include the first hearing which would usually be set for no longer than one hour. She is not entitled to charge for time spent from the inception, even though the Complainant had terminated the retainer precipitously. He was disgruntled about the length of time that it took for the Attorney to respond to his email and that her responses were not fully responsive to forward his queries.

3. Usually, a flat fee is a fee charged up front before the attorney completes the work. It is also more usual in matters which are straightforward, predictable and routine or where the attorney handles a large volume of the particular type of matter. It is therefore usually based on a realistic estimate of the time expected to be spent on the matter based on the attorney's experience and expertise in the practice area. The fact then that the Attorney's Invoice for time spent exactly within the time frame as covered by the flat fee but is so substantially different from the flat fee raises a serious concern about the reasonableness of the Invoice."

[10] Based on these findings, the Committee found that the appellant was guilty of professional misconduct as per canon VIII (d) (in that she breached canons IV (f) and I (b) of the Legal Profession (Canons of Professional Ethics) Rules. These canons will be quoted and a more detailed reference made to them during the analysis of the respective grounds of appeal.

The grounds of appeal

[11] The grounds of appeal as filed were as follows:

> "i. The Disciplinary Committee of the General Legal Council erred in its interpretation of the written retainer agreement between the Appellant and the Complainant and erred in its conclusion that the said retainer agreement was a fixed fee agreement.
>
> ii. The Disciplinary Committee of the General Legal Council erred in invoking or relying on the contra proferentem rule in interpreting the said retainer agreement particularly as the Appellant's retainer agreement was clear and unambiguous.
>
> iii. The Disciplinary Committee of the General Legal Council erred in concluding that the Complainant's evidence that there was a fixed fee was entirely consistent with the documentary evidence.
>
> iv. The Disciplinary Committee of the General Legal Council erred in its interpretation of the Appellant's retainer agreement with the Complainant in concluding that in the circumstances the Attorney would only be entitled to fees charged on a time spent basis if the Complainant terminated the retainer before the fee had been earned or after the first stage of the retainer agreement.
>
> v. The Disciplinary Committee of the General Legal Council erred in finding that the 'Termination' clause of the Retainer Agreement for charging on an hourly rate was inapplicable despite the Complainant terminating the retainer precipitously.

vi. The Disciplinary Committee of the General Legal Council erred in concluding that the evidence presented by the Complainant met the required standard of proof, that is proof beyond a reasonable doubt.

vii. The Disciplinary Committee of the General Legal Council erred in concluding that the Appellant charged fees that were not fair and reasonable, and that the Appellant departed from the retainer agreement and consequently, violated the canons of professional ethics.

viii. The Disciplinary Committee of the General Legal Council erred in concluding that the Appellant denied that the fee agreement is a flat fee and consequently, brought dishonour to the dignity of her profession by proceeding to charge on a time spent basis that it [sic] so grossly exceeded the flat fee.

ix. The Disciplinary Committee of the General Legal Council erred in concluding that the Appellant was guilty of professional misconduct and that she breached Canons IV (f) and I (b) of the Legal Profession (Canons of Professional Ethics) Rules.

x. The Disciplinary Committee of the General Legal Council failed to adequately consider the mitigating factors in favour of the appellant; this failure led to the Disciplinary Committee of the General Legal Council imposing a sanction that was manifestly excessive and unwarranted and in all the circumstances disproportionate to the offence.

xi. The decision of the Disciplinary Committee of the General Legal Council was unreasonable having regard to the evidence."

[12] Mr Christie was permitted to abandon grounds of appeal i and iii and to argue the remaining grounds. He acknowledged that there was a degree of overlap between some of these grounds and that they could be most efficiently addressed by framing the appeal in terms of four issues as follows:

(1) Whether the Committee had the jurisdiction to find that there was professional misconduct based on breaches of canons IV (f) and I (b).

(2) Whether the appellant departed from the written retainer agreement.

(3) Whether the appellant denied that the Retainer Agreement was for a fixed fee; and

(4) Whether the appellant was prohibited from charging on a time-spent basis that exceeded the flat fee.

[13] Mr Christie approached his oral submissions within the framework of these issues and Mrs Minott-Phillips KC responded appropriately in like manner. I am attracted to this approach, save that in my opinion the question of whether the appellant departed from the written Retainer Agreement is related to the fourth issue. It is not disputed that the appellant charged fees on a time-spent basis that exceeded the flat fee. Her justification for doing this is that she acted pursuant to the valid termination clause ('the termination clause') contained in the Retainer Agreement. If the appellant's assertion in this regard is correct, that the termination clause is valid and justified her conduct, then it follows incontestably that there was no departure from the written agreement. For this reason, I will consolidate the submissions of counsel concerning these two issues. The following three issues will be analysed:

(1) Whether the Committee had the jurisdiction to find that there was professional misconduct based on breaches of canons IV (f) and I (b).

(2) Whether the termination clause was valid and permitted the appellant to charge fees on a time-spent basis that exceeded the flat fee; and

(3) Whether the appellant denied that the Retainer Agreement was for a fixed fee; and if so, the consequence of this.

Issue 1: Whether the Committee had the jurisdiction to find that there was professional misconduct based on breaches of canons IV (f) and I (b).

Submissions on behalf of the appellant

[14] Mrs Minott-Phillips raised a preliminary objection to Mr Christie arguing this ground on the basis that it was the first time that the issue of the Committee's jurisdiction was being raised. Mr Christie conceded that it was the first time this issue was being raised in these precise terms, but he argued that it was relevant to the matters raised concerning ground ix. The court accepted this position which he advanced and permitted him to argue the issue.

[15] Mr Christie examined section 12 of the Legal Profession Act ('LPA') which provides for complaints to be made to the Committee by any person alleging himself to be aggrieved by "an act of professional misconduct". He drew the court's attention to the absence of a definition of "professional misconduct" in that section. He proffered the meaning given in the Collins Dictionary which is "the violation of rules set by the governing body of a profession". Counsel acknowledged that canon VIII (d) expressly identifies the canons in respect of which a breach "shall" constitute misconduct in a professional sense, and they are also accompanied by an asterisk beside the respective canon, save for canon VIII(b).

[16] Counsel conceded that the issue of fees can be the subject of a disciplinary complaint. However, he argued that the reasonableness of fees is excluded from the remit of the Committee since the mechanism is created by Parliament under section 22(2) of the LPA and the procedure for taxation of costs. He argued that where section 12(1) of the LPA mentions "any misconduct in a professional respect", it is to be construed as limiting the scope of such conduct to that which is specifically identified and stated in canon VIII(d). He also noted that canon IV (f), which provides that an attorney must charge fees that are fair and reasonable, is not one of the canons so identified in canon VIII(d) as constituting misconduct in a professional respect. However, Mr Christie conceded that because section 12(1) states "including conduct which, in pursuance of

rules made by the Council under this part, is to be treated as misconduct in a professional respect", it is implicit that there may be other conduct which has not been specifically identified in the rules that could be considered misconduct in a professional respect.

[17] Mr Christie accepted that it may not have been practical to identify and list all the possible offending conduct. Nevertheless, because of the quasi-criminal nature of allegations of breaches of the LPA, he submitted that there should be certainty and clear directions. He argued that, although this does not mean all of the possible scenarios that might amount to a breach should be expressly identified, there should be clear directions on what is prohibited conduct, to avoid reliance on subjectivity and to permit the relevant persons to organize their affairs appropriately.

[18] Mr Christie contended that even if this court agrees with the respondent that the fees charged by the appellant were not fair and reasonable, or that they were grossly excessive, this does not amount to professional misconduct. He referred to the case of **Gresford Jones v The General Legal Council (ex parte Owen Ferron)** (unreported), Court of Appeal, Jamaica, Miscellaneous Appeal No 22/2002 & Cross Appeal No 27/2002, judgment delivered 18 March 2005, ('**Gresford Jones**') and acknowledged that in that case, the court held that the same set of facts may amount to separate breaches. However, he posited that by finding that the Committee can find a person guilty of professional misconduct arising from breaches other than those in the clearly defined list of what constitutes professional misconduct, the decision reflected a moving goalpost, and he urged the court to reconsider that decision.

[19] Counsel also argued that initially, it was an allegation of lack of communication that was used to ground a breach under canon I(b) by the appellant, and, subsequently, the issue of the unreasonableness of the fees she charged was put under canon I(b) to ground a breach of that canon by the appellant.

Respondent's submissions

[20] Mrs Minott-Philips argued that because the appellant withdrew the challenges contained in grounds of appeal i and iii, grounds ii, iv, and v had to go as well. The court explained to learned King's Counsel that it was not our understanding that Mr Christie was abandoning grounds ii, iv and v, nor were we of the view that they necessarily fell away. We expressed our position that, as we understood him, he was simply conceding that the issue of whether the agreement was a fixed fee agreement was no longer disputed. However, the use of the *contra proferentem* rule was not necessarily limited to the issue of whether the Retainer Agreement was for a fixed fee but extended to the construction to be placed on the termination clause contained therein.

[21] King's Counsel relied on the authority of **Gresford Jones** to support the Committee's interpretation that a finding of misconduct is possible where there is a breach of those canons that do not bear an asterisk. She submitted that the use of the word "including" in section 12(1)(a) of the LPA suggests that the Committee's jurisdiction to make a finding is broad and is not confined. Therefore, the use of the word "shall" in canon VIII(d) must be interpreted as requiring a finding by the Committee of misconduct in a professional respect where conduct prohibited by a canon bearing an asterisk has been proved by evidence. However, King's Counsel posited that where there are breaches of other canons not bearing an asterisk, the Committee is to be regarded as having the discretion to determine whether, on the evidence, such conduct warrants a finding of misconduct in a professional respect, or not.

[22] King's Counsel further submitted that **Gresford Jones** determined that the Committee is entitled to consider all the conduct of the attorney to determine whether there has been a breach of canon I(b) and that this may include whether there has been a breach of another canon. She highlighted the fact that the court found that a breach of canon IV(f) may constitute a breach of canon I(b). King's Counsel urged this court to conclude that, in the circumstances of the instant case, there is no proper basis for this authority and approach not to be followed. Counsel referred the court to the cases of

Lisamae Gordon v Disciplinary Committee of the General Legal Council [2022] JMCA App 11, **Angella Smith v The General Legal Council and Fay Chang Rhule** [2023] JMCA Misc 2 ('**Angella Smith v GLC**'), and **Don O Foote v General Legal Council** [2021] JMCA Misc 2.

[23] King's Counsel argued that there was no expansion of the case that the appellant had to meet because the appellant was aware of the complainant's complaint which alleged a breach of canon I(b) and the basis of the allegation. Accordingly, it was open to the Committee to find that the appellant breached that canon by breaching canon IV(f) which prohibits the charging of an unreasonable fee.

Discussion and analysis

[24] Section 12(1)(a) of the LPA provides as follows:

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

[25] In determining what is "misconduct in a professional respect" canon VIII(d) is of considerable assistance because it expressly states that the breach by an attorney of any of the provisions of certain enumerated canons, (to which counsel have referred as the asterisk canons), constitutes misconduct in a professional respect. These include canon IV(r) and IV(s) in respect of which the Committee found that the complainant did not make out a *prima facie* case and which are in the following terms:

> "(r) An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with all information as to the progress of the client's business with due expedition.
>
> (s) In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."

[26] It is appropriate at this juncture to reiterate the essence of the finding of the Committee which was that the appellant is guilty of professional misconduct as per canon VIII(d). This was based on its finding that she had breached canons IV(f) and I(b), and it should be noted that both are non-asterisk canons. Canon I(b) states that:

> "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."

[27] As it relates to fees, canon IV(f) is in these terms:

> "(f) The fees that an Attorney may charge shall be fair and reasonable and in determining the fairness and reasonableness of a fee any of the following factors may be taken into account:-
>
> (i) the time and labour required, the novelty and difficulty of the questions involved and the skill required to perform the legal service properly;
>
> (ii) the likelihood that the acceptance of the particular employment will preclude other employment by the Attorney;
>
> (iii) the fee customarily charged in the locality for similar legal services;
>
> (iv) the amount, if any, involved;
>
> (v) the time limitations imposed by the client or by the circumstances;
>
> (vi) the nature and length of the professional relationship with the client;

(vii) the experience, reputation and ability of the Attorney concerned;

(viii) whether the fee is fixed or contingent;

(ix) any scale of fees or recommended guide as to charges prescribed by the Incorporated Law Society of Jamaica, the Bar Association, the Northern Jamaica Law Society, or any other body approved by the General Legal Council for the purpose of prescribing fees."

[28] There are several decisions of this court in which it has been confirmed that the list of asterisk canons identified in canon VIII(d) is not exhaustive in determining what conduct or default amounts to misconduct in a professional sense. In **Gresford Jones** the court held, at page 49 of the judgment, that:

> "Section 12 of the Act is purposefully drafted in wide terms to embrace all areas of misconduct or wrongdoing of an attorney, in order to maintain a high level of good behaviour of persons in the legal profession."

The court went on to explain that the use of the phrase, "any misconduct in a professional respect" to describe the probable acts of "professional misconduct" is "comprehensive, non-restrictive and intended to embrace any form of conduct which deviates from normal acceptable mode of decent upright behaviour".

[29] The court also observed that section 12(1)(a) of the LPA which refers to "any misconduct in any professional respect" includes "conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect". The court concluded that the canons designated with an asterisk in canon VIII(d), as well as the non-asterisk VIII(b), are merely a segment of the wider area (or category), of misconduct in any professional respect.

[30] Harrison JA at page 22 of the judgment, in referring to canon I(b), opined as follows:

> "It is my view that the Canon is specifically widely drafted, in order to emphasize the ever prevailing high standard of conduct demanded by the profession and [reinforced] by all the Canons in the Rules."

The learned judge also stated that the "honour and dignity of the profession" mentioned in canon I(b) "may be besmirched by a breach of a particular canon or 'the behaviour (of an attorney) may tend to discredit the profession …' and be a breach of a specific canon".

[31] In **Gresford Jones** this court upheld the decision of the Committee that the appellant acted in breach of canon I(b) (related to the failure to maintain the honour and dignity of the profession), canon IV(f) (related to the issue of fees) and canon VII(b)(ii) (related to accounting to a client for monies). In my view that the court in **Gresford Jones** settled that canon VIII(d) does not provide an exhaustive list of behaviour that constitutes misconduct in a professional respect. Furthermore, canon I(b), which is an asterisk provision, the breach of which "shall constitute misconduct in a professional respect" is not to be construed narrowly and may be breached by conduct which also may amount to a breach of another specific canon.

Conclusion

[32] In the premises, there is no proper basis on which this court should review the decision in **Gresford Jones** as Mr Christie has urged the court to do. For the reasons already given, there is no merit in Mr Christie's submission that because canon IV(f) is not an asterisk canon, the Committee did not have the authority to find that there was a breach of canon I(b) on the basis that the fees charged on an hourly rate as reflected in the invoice issued to the complainant were unreasonable.

[33] In the circumstances, there was no lack of jurisdiction and consequential unfairness to the appellant caused merely by the Committee enquiring and finding at para. 61 of its decision that the appellant had "violated the canons of professional ethics by charging fees that are not fair and reasonable in that she departed from the Retainer Agreement". In keeping with **Gresford Jones**, it is to my mind irrefutable that the Committee had the jurisdiction, as it declared, to determine "…whether there was an

agreement for fees and if so, has it been followed and whether the [appellant's] conduct is unbecoming to the profession in that the fees charged are not in accordance with the agreement made with her client". Where there is a proper finding that the fees are not fair and reasonable, and not in keeping with the terms of the retainer agreement between an attorney and his client, this can support a breach of canon I(b). This is settled law and there is no need to further interrogate the issue of the Committee's jurisdiction.

[34] A separate issue that arises is whether the Committee was correct in its finding that the fees charged by the appellant were excessive. This is brought to the fore because the Committee expressly stated, at para. 46 of the decision, that it was "not engaged in determining whether the fees charged are reasonable by way of an assessment as on a taxation". This stated approach implies that there would be no analysis of the quantum of the fees charged as in a taxation, in other words, the Committee would not be using the factors identified in canon IV(f) as considerations in determining the reasonableness of fees. This leads to an enquiry into the process utilised in concluding that the fees were unreasonable, which was by reference to the fixed fees that were agreed, and which would have been applicable if the Retainer Agreement was not terminated. This will be fully explored under issue 2.

[35] It is also worth stating that I find no merit in Mr Christie's submission that the complainant indicated the specific conduct of the appellant of which he was complaining to ground the breach of canon I(b), which was centred on the allegation that she failed to deal with his matter in an expeditious manner, yet the Committee found her guilty based on different grounds surrounding the methodology employed in arriving at her fees and that this was linked to ground viii. He argued that this finding by the committee amounted to an error of fact and procedure.

[36] I am of the opinion that the various acts of the appellant, about which the complainant complained, were expressly stated and included in the complainant's complaint which at 1(a) contained the allegation that the appellant "violated [the] canons of professional ethics by charging me fees that are not fair and reasonable".

Consequently, the appellant ought to have appreciated that this conduct, if proved, could have grounded a breach of canon I(b) and, in anticipation, prepared her response accordingly. In such circumstances, I am of the view that there was no unfairness to the appellant and there was in fact enough information for her to know the nature of the complaint against her.

Issue 2: Whether the termination clause was valid and permitted the appellant to charge fees on a time-spent basis that exceeded the flat fee.

Submissions on behalf of the appellant

[37] Mr Christie acknowledged that the flat fee was the primary basis on which the matter proceeded initially. He argued that reliance was being placed by the appellant on the terms of the termination clause, the effect of which meant that the appellant did not depart from the agreement. Counsel posited that according to the general principles of contract law, the appellant and the client were entitled to negotiate the terms of the agreement.

[38] Counsel noted, in particular, the observation of the respondent in para. 54 of the decision that "The clause providing for the fee basis to be altered to one based on a time spent basis is usually seen in a contingency fee agreement where the attorney receives no fee until the matter is concluded favourably to the client…". Counsel argued that the Committee went beyond the terms of the agreement and rejected the termination clause without any analysis except the observation that it is usually found in contingency fee agreements. He submitted that the fact that such a clause is usually seen in a contingency agreement did not establish that this is the only place that it could exist.

[39] Counsel asked this court to consider the rationale behind the inclusion of the termination clause. He argued that the flat fee was premised on the appellant having the opportunity to earn additional fees from the conduct of the sale. Therefore, the purpose of the termination clause was to protect the appellant if she was deprived of this opportunity to earn additional fees from having carriage of the sale of the property, as a result of the client terminating the agreement. In such circumstances, counsel posited

that the termination clause provided a mechanism for the assessment of a more realistic value of the services she provided up to the point of termination, by allowing the assessment of fees on an alternative basis, that is, based on an hourly rate.

[40] Mr Christie submitted that the Committee was wrong to consider that the termination clause was inapplicable without such a declaration by a court of competent jurisdiction and to proceed to find that the appropriate fees had already been earned and could not be subject to revision as the appellant had proceeded to do. Counsel also noted that there was no position advanced by the Committee or by King's Counsel that the termination clause was null and void. He highlighted the fact that there was no evidence that the appellant had issued an invoice for the fixed fee of $300,000.00 or any similar sum and for that reason, this was not a situation where the complainant had been billed twice in respect of the same services.

[41] Counsel submitted that on a proper interpretation of the retainer agreement, the appellant had complied with its terms but that the strained construction placed on it by the Committee effectively robbed the appellant of the right to operate within the parameters of the agreement which were agreed between herself and her client.

[42] Mr Christie sought to distinguish the cases of **Griffiths v Evans** [1953] 2 All ER 1364 and **Ballantyne Beswick & Company v Mossell (Jamaica) Limited** [2020] JMCA Civ 21 ('**Ballantyne Beswick**') on the basis that these cases addressed situations where there was a conflict between the attorney and the client in respect of the terms of their agreement and there was either no written agreement or the written agreement did not contain the terms in respect of which there was a dispute. He argued that in this case there was a written agreement with clear terms. Based on general principles of contract there is no prohibition against the termination clause in the form it was agreed by the appellant and the complainant. Accordingly, the proper approach was to construe the agreement without giving any added weight to the construction being advanced by the complainant because he was the client.

[43] Counsel also argued that the case of **Angella Smith v GLC** was inapplicable because in that case the issue related to canon IV (s) and not I (b).

Respondent's submissions

[44] King's Counsel acknowledged that the crux of this issue is whether the appellant was permitted to charge on a time-spent basis after the complainant terminated the retainer agreement, but, submitted that the resolution of this issue turns entirely on the interpretation of the retainer agreement. King's Counsel conceded that there is no clear legal authority that there is anything in principle prohibiting the inclusion of a provision in the terms of the termination clause. However, she posited that its inclusion creates an inconsistency with the fixed-term provision of the agreement. On the premise that there was an inconsistency, counsel urged the court, in construing the agreement, to adopt the **Griffith v Evans** approach, which was followed in **Ballantyne Beswick**, and consistent with this approach, to prefer the word of the complainant or give more weight to it where it conflicts with the word of the attorney.

[45] She advanced that the Committee was correct to have found that since there was a fixed fee arrangement the termination clause which provides for the complainant to pay for the time spent based on the hourly charges plus expenses was not applicable. King's Counsel posited that this provision is inconsistent with the fixed fee provision of the agreement. Therefore, the Committee had correctly found that the appellant had earned the sum due of $300,000.00 under the fixed fee arrangement before the retainer was terminated. Consequently, the termination took place after the fees had been earned and for that reason, the termination clause had no effect. In such circumstances, the appellant could not retroactively charge on a time-spent basis following termination by the complainant. King's Counsel stated that, in so doing, the appellant reneged on the agreement by converting the fixed fee agreement into a time-spent agreement.

Discussion and analysis

[46] The law of contract governs the relationship between an attorney-at-law and his client. However, this may be subject to statutory or regulatory influence as a result of

the special, and arguably, unique nature of the legal profession. A fundamental principle of English contract law is that persons of full capacity have the power to create mutual rights and obligations by agreement, and, related to this principle of freedom of contract is the general recognition of the doctrine of the sanctity of contracts. In essence, this is the general principle that when parties enter into a contract they must honour and fulfil their obligations under the contract. Contracts may be terminated in several ways including by performance of the obligations contained therein, but parties are free to stipulate a termination clause that takes effect on the occurrence of a particular event, and it may also prescribe the obligations of one or more of those parties after the termination of the contract.

[47] In the case of a contract between an attorney-at-law and a client, usually referred to as a retainer agreement, there is usually no need for the inclusion of a clause giving the client the right to terminate the contract. This is because the client may terminate the retainer at any time and for any reason and it will not usually be open to the court to enquire into the client's motives for exercising such a right. This is a recognition of the special and personal nature of the attorney-client relationship. On the other hand, in the absence of an express termination clause permitting the attorney-at-law to withdraw his services, the attorney-at-law will only be able to terminate the retainer in certain circumstances. One example is for the non-payment of fees under the payment structure contained in a retainer agreement.

[48] Mr Christie submitted that the court should consider the explanation proffered by the appellant for the inclusion of the termination clause. It was submitted that, firstly, it provided an incentive for the complainant to allow the appellant to perform the contract to its completion by offering him a fee that was fixed, (and by implication, which was likely to be lower than fees charged at an hourly rate).

[49] Secondly, it was submitted that the termination clause also protected the appellant, in that, if the agreement was terminated by the complainant, she could be compensated for the lost opportunity of earning fees from having carriage of the sale of

the property. Although this position was advanced by Mr Christie, there was no evidence from the appellant in her affidavit or in her oral evidence before the Committee that this was a consideration.

[50] In any event, the Retainer Agreement provided for the appellant to obtain the order for sale of the property only. The appellant was not retained to have carriage of sale of the property, in the event that the desired order for sale was obtained. Even if the appellant had been so retained, this may not have been possible, because the terms of the order may have authorised another legal representative to perform that function. Once the appellant obtained the order for sale, then the service for which she had been retained would have been completed. In such circumstances, the termination clause would become inoperative.

[51] At the highest, the appellant may have had an undisclosed expectation, reasonable or not, that she would have the carriage of sale of the property, consequent upon the order for sale being obtained by her and would thereby supplement the fixed fees agreed under the Retainer Agreement. I am not convinced that the termination clause provided any practical assistance in making that expectation a reality. However, the expectation of the appellant as far as the sale of the property is concerned, is immaterial to the validity of the termination clause. The essential question is whether the clause is a legally binding provision.

[52] In the absence of any case law that is on all fours, I conducted my analysis by analogy and by exploring commercial agreements. I have not identified any authority, whether at common law or in any legislation that invalidates a termination clause that modifies the methodology to be employed in arriving at a price for goods or services if the consuming party terminates the agreement with the supplier. In considering the case at bar the question is then naturally raised whether there are any unique features or special characteristics of a retainer agreement between an attorney-at-law and his/her client, that might prohibit the operation of a termination clause that has the effect of varying the price of the service already provided, post termination of the retainer.

[53] I find considerable merit in the submission of Mr Christie that the observation by the Committee that the termination clause "is usually seen in a contingency fee agreement where the attorney receives no fee until the matter is concluded favourably to the client…" is unhelpful because, even if such a clause is usually seen in a contingency agreement, this did not establish that this is the only place that it could exist. I also noted that, when asked, learned King's Counsel admitted that in her research she did not locate any authority which supported the position that the termination clause was not valid as a matter of law or principle. This is unsurprising because at its core, the issue raised is the general principle of the freedom of individuals to contract.

[54] In assessing the effect of the termination clause, I did not accept the submission of King's Counsel that the cases of **Griffiths v Evans** and **Ballantyne Beswick** are of any assistance to this court for the purposes of construing the agreement. In **Griffiths v Evans** there was a dispute between a solicitor and his client as to the scope of the advice in respect of which the solicitor was being asked to provide. Denning LJ at page 1369 made the following observation:

> "…On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last hundred years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it: see *Crossley v Crowther* per Sir George J Turner, V-C; *Re Paine*, per Warrington J. The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences." (Italics as in the original)

[55] In **Ballantyne Beswick**, there was a dispute between a law firm and its client concerning certain party and party costs, such as refresher fees, which had not been provided for in the retainer agreement between the parties. At para. 47 of the judgment this court made the following statement:

> "[47] That does not, however, take away from the fact that the parties have agreed certain terms and should be made to abide by them. Equally, if the parties have agreed an hourly rate, which is reflected in the retainer agreement, although they can agree other terms orally (see **Fladgate LLP v Lee Harrison** [2012] EWHC 67 (QB)), once there is a dispute as to what those alleged changed rates are, then the attorney is bound by the terms as agreed in the retainer agreement, or other agreed documentation." (Emphasis as in the original)

The court then quoted the words of Denning LJ in **Griffiths v Evans** which were reproduced by me in the preceding paragraph.

[56] An important distinction between the cases of **Griffiths v Evans** and **Ballantyne Beswick** on the one hand, and the instant case being considered by this court, on the other, is that, before this court, there is no dispute between the parties in respect of terms that have not been provided for in the retainer agreement. The termination clause which is the major point of contention was included in the Retainer Agreement. Consequently, the task of this court is to construe the Retainer Agreement in accordance with the written terms without giving more weight to a construction that is more favourable to the position of the complainant. The parties ought to be held to abide by the clear and unambiguous terms of the Retainer Agreement.

[57] The reasons for the Committee's decision that the termination clause is inapplicable and cannot be relied on by the appellant are encapsulated in its decision, under the heading "CONCLUSION", the material portions of which are as follows:

> "…that the [appellant] has violated the canons of professional ethics by charging fees that are not fair and reasonable in that she departed from the Retainer Agreement. In doing so, and specifically by denying that the fee agreement was for a fixed fee and proceeding to charge on a time spent basis that was [sic] so grossly exceeded the flat fee, she brought dishonour to the dignity of the profession."

[58] In deconstructing this conclusion that the appellant departed from the retainer agreement, it is evident that this is based on what is alleged to be the conduct of the appellant in doing the following:

(i) denying that the agreement was for a flat fee and charging on a time-spent basis; and

(ii) charging a fee on a time-spent basis that grossly exceeded the flat fee.

[59] The Committee, in its findings of fact at para. 58 of its decision, found that the appellant had earned the fee of $300,000.00 up to the point of the termination of the retainer by the complainant. However, even if the Committee was correct in its conclusion that the fees had been earned (which I will demonstrate was flawed), it has not clearly explained the basis on which it concluded that as a matter of contract law because the fees had been earned the termination clause did not operate to permit the appellant to charge on a time spent basis for the work she had performed from the inception of the retainer agreement.

[60] The fact that the appellant purported to charge for work performed from the inception of the Retainer Agreement is, in my opinion, not material. That is what is contemplated by the termination clause, because there is no mention of any other juncture, in terms of chronology, from which the hourly fees could be charged. Any other date or point would be random and arbitrary. In any event, as I have already explained, charging from the inception of the Retainer Agreement does not offend any rule of law or practice.

[61] With the greatest of respect to the Committee, the effect of this finding that the fees had been earned and that this prohibits the reassessment of the fees, is to restrict the operation of the termination clause by reading an implied term into the retainer agreement. In effect, the Committee has implied a term, in the form of a proviso, that the termination clause shall not take effect and the appellant shall not be at liberty to

charge on a time spent basis if the appellant has already earned the fixed fee at the time of the termination of the retainer agreement.

[62] In para. 56 of the decision, the Committee explained the basis for its conclusion that the fee had been earned as follows:

> "56. The Fee was earned at the point of filing the claim initiating the proceedings and without the Attorney having to go to trial. Being a fixed date claim form, there would be a first hearing date at which point the court could treat it as a case management conference if it was contested or determine the claim summarily. The Retainer Agreement is construed to have included services up to the first hearing of the Fixed Date Claim Form."

Such an implication that the retainer is "construed to have included services up to the first hearing of the Fixed Date Claim Form" is fraught with difficulty. The Retainer Agreement is for a flat fee or fixed fee for specified services, akin to an entire agreement. It states that "…you will be charged a fee of $300,000 as retainer and initial Court proceedings, (and an additional $250,000 if the matter proceeds to trial.)". It appears that it was appreciated by the appellant, that the proceedings being initiated by the fixed date claim form procedure, would involve a first hearing of the fixed date claim form. In my opinion, only if the court at that first hearing dealt with the claim summarily and granted the order sought for the sale of the property, could the fee of $300,000.00 be considered to be earned. The Retainer Agreement was terminated before the first hearing of the fixed date claim form and before the contracted order for the sale of the property was obtained. Accordingly, the full amount of the fixed fees had not as yet been earned, nevertheless the appellant would still be entitled to compensation on a *quantum meruit* basis.

[63] In **Benedetti v Sawiris and others** [2013] UKSC 50 at para. 9 Lord Clarke, in giving the majority verdict, explained the circumstances in which a *quantum meruit* may become applicable as follows:

> "Thus, if A consults, say, a private doctor or a lawyer for advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelled out. In those circumstances, assuming there is a contract at all, the law will normally, imply a term into the agreement that the remuneration will be reasonable in all the circumstances. A claim for such remuneration has sometimes been referred to as a claim for a quantum meruit."

In the circumstances before us there is a contract for remuneration, and if the full amount of the fixed fee had not been earned, then one recourse available to the appellant would be to claim on a *quantum meruit* basis. The appellant with reasonable foresight, did not wish to depend on that common law method to obtain her remuneration. In anticipation she included a clause which would see to her payment in the event that the fixed fee arrangement fell through. Therefore, the appellant was entitled to rely on the fact that the complainant terminated the Retainer Agreement.

[64] A simple way to demonstrate the proposition that the fixed fees had not been earned at the point of the termination of the Retainer Agreement is to consider the parties' respective positions in the reverse and question whether the appellant would have been entitled to the full sum of $300,000.00 as fees earned, if it were the appellant who had terminated the agreement for a valid reason (at about the same point in the court process when the complainant did so by the termination letter). In my view, it is fairly well settled that in such circumstances, the appellant having not completed the task for which she was retained would not be entitled to the full amount of the $300,000.00 in fees but may have only been entitled to a lesser sum on a *quantum meruit* basis.

[65] Therefore, I conclude that as a matter of contract law, on the facts of this case, the appellant had not earned the full sum of $300,000.00 at the time the contract was terminated. Consequently, the Committee erred in respect of this finding. This error was compounded in that, that finding was incorrectly used, in part, to support the conclusion that the appellant departed from the Retainer Agreement by purporting to charge fees on an hourly basis in reliance on the termination clause.

[66] The other finding of fact on which the Committee relied to support its conclusion that the appellant violated the canons of professional ethics by charging fees that were not fair and reasonable, was that the fees charged on a time-spent basis grossly exceeded the flat fee.

[67] In my opinion, the termination clause either entitled the appellant to charge fees on an hourly basis or not. Whether the clause permits the charging of hourly rates is not dependent on the reasonableness of those rates when compared with the fixed fee.

[68] Assessing the reasonableness of the hourly fees charged solely by reference or comparison with the fixed fee is not an accurate manner of assessing the reasonableness of the hourly fees. The fact that fees for work billed at an hourly rate may be significantly higher than fees for the same product if billed at a flat rate, does not mean that the hourly fees are necessarily unreasonable.

[69] There was no evidence before the Committee as to whether the fixed fee which it used was a typical or accurate reflection of the fees for such services which could properly be used as a baseline from which to adjudge the reasonableness of the fees billed on an hourly rate. Therefore, to accurately assess the reasonableness of the fees billed on an hourly rate, it would have been necessary for the Committee to embark on an assessment as on a taxation. This was the very process the Committee said it would not adopt. However, by its decision, it adopted a less accurate method, to the disadvantage and prejudice of the appellant.

[70] By adopting the process of assessing the reasonableness of hourly rates solely by comparison with the fixed fee, the Committee ignored the factors listed in canon IV (f) (reproduced in para. [27] herein) as being factors that may be considered in the determination of the reasonableness of fees. Several of these factors would be relevant in the case of the appellant who gave evidence of her billable rate and the hours spent on the matter. These were not challenged. Furthermore, the appellant also gave evidence of other matters that would affect the fees charged, for example, the urgency with which

the matter needed to be attended to, having regard to the impending statutory limitation period.

Conclusion

[71] In my opinion, the Committee erred in its conclusion that the appellant violated the canons of professional ethics by charging fees that were not fair and reasonable in that she departed from the retainer agreement. I find that on the termination of the agreement by the complainant, the appellant was entitled as a matter of contract law and under the termination clause, to depart from the fixed fee provision and to charge fees on an hourly basis.

[72] The complainant had the option of triggering the statutory mechanisms for the determination of the reasonableness of those fees. He could have referred the appellant's bill of fees to the taxing officer for taxation within one month after the date on which the bill was served on him, pursuant to section 22(2) of the LPA. Alternatively, after the period of one month, he could have made an application to the court for an order for a reference for taxation pursuant to section 22(3) of the LPA. The complainant having not exercised either option, it was not accurate for the Committee to conclude that because the hourly fees grossly exceeded the fixed fee, then *ipso facto*, they were unreasonable. By utilising this comparative test as the sole criterion of reasonableness, this resulted in unfairness to the appellant since that is not the only consideration when assessing the reasonableness of fees billed on an hourly rate. Accordingly, the Committee erred in its conclusion that by billing on an hourly rate, the appellant can be said to have brought dishonour to the dignity of the profession.

Issue 3: Whether the appellant denied that the Retainer Agreement was for a fixed fee; and if so, the consequence of this.?

Submissions on behalf of the appellant

[73] Mr Christie argued that before the complaint was made to the GLC, the appellant did not deny that it was a fixed fee agreement. He posited that by generating an invoice for an hourly rate that was not a denial of the fixed fee provision, but instead was conduct that

was consistent with the termination clause contained within the retainer agreement. He conceded that before the Committee the appellant said that an hourly rate applied and asserted that it was not a fixed fee agreement. However, counsel submitted that it was improper for the Committee to use the evidence of her denial during the hearing to ground the complaint which was in respect of her conduct before the hearing.

Respondent's submissions

[74] In response, learned King's Counsel noted that the Committee formed the view, quite correctly, that the issuing of an invoice for $900,000.00 by the appellant amounted to a denial of the flat fee. Furthermore, King's Counsel asked the court to note that during the hearing when the appellant was asked by the complainant if they agreed to a flat fee of $300,000.00, her answer was "no" (see page 136 of the Record of Appeal Volume 1).

Discussion and analysis

[75] It is clear that the appellant denied that the agreement was for a fixed fee before the Committee. However, I do not agree that issuing the invoice based on an hourly rate was a denial that the Retainer Agreement contemplated a flat fee. It was merely the appellant asserting a new fee structure under the termination clause. In my view, there is no need to speculate as to her motives for denying the fixed fee during the hearing. Whether the appellant denied that the default position for remuneration under the agreement was for a flat fee, does not affect the validity of the termination clause which offered an alternative, hourly basis of calculation of fees. Furthermore, whether such a denial was because she misconceived the implication for her case of such an admission, or whether her reason for doing so was less than honourable, is irrelevant.

[76] The critical issue was whether the appellant was entitled to rely on the termination clause to charge fees based on an hourly rate. It would have been ideal if the appellant had asserted the more nuanced position which she advanced before this court which is that it was an agreement for a fixed fee, but the termination clause permitted her to charge on an hourly basis. However, her initial reluctance to accept that it was an agreement for a fixed fee ought not to prejudice her position, which is based on the

construction of the retainer agreement. Although the Committee referred to her denial, it is unclear whether this was seen as an independent factor that led the Committee to the conclusion that she brought dishonour to the profession. If the Committee did so conclude, it would have erred. In any event, the overarching finding of the Committee is that the appellant was not entitled to have relied on the termination clause to justify the hourly fees that she charged the complainant, and for the reasons to which I have already referred, this conclusion by the Committee was erroneous.

Conclusion and disposition

[77] There has been no dispute between the parties as to the standard of proof required in disciplinary proceedings. It is well settled by several decided cases including the case of **Campbell v Hamlet** [2005] UKPC 19, that the criminal standard of proof beyond a reasonable doubt is the appropriate standard of proof to be applied in disciplinary proceedings against an attorney-at-law.

[78] The conduct of the appellant should also be assessed in the context of the purpose of the termination clause, from the perspective of the appellant. Even if, for the sake of argument, the Committee was correct that the termination clause did not permit the appellant to charge on an hourly basis, such a construction would not necessarily have been patently obvious to the appellant. Therefore, if she arrived at an alternative conclusion, she would have acted based on her flawed interpretation of the termination clause, in respect of which there is room for reasonable disagreement between legal minds, as the result of this appeal has patently demonstrated. In such circumstances, her departure from the terms of the agreement would not be egregious or negligent, and it is difficult to see on what basis her conduct in this regard could be reasonably deemed, beyond a reasonable doubt, to rise to the level of conduct which would bring dishonour to the dignity of the profession.

[79] I agree with the Committee that the ultimate issue is whether the appellant failed to adhere to this agreement and by such failure, engaged in conduct unbecoming to the profession. For the reasons expressed herein I am of the view that the appellant acted

per the termination clause, and accordingly, there is no basis to find that she engaged in conduct unbecoming of the profession.

[80] Section 16(1) of the LPA provides that an appeal against any order made by the Committee under that act shall lie to the Court of Appeal by way of rehearing and section 17 provides for this court's powers in the following terms:

> "17.-(l) The Court of Appeal may dismiss the appeal and confirm the order or may allow the appeal and set aside the order or may vary the order or may allow the appeal and direct that the application be reheard by the Committee and may also make such order as to costs before the Committee and as to costs of the appeal, as the Court may think proper:"

[81] For the reasons expressed herein, I recommend that the appeal be allowed, and the order of the Committee be set aside with costs to the appellant to be taxed if not agreed.

F WILLIAMS JA

ORDER

1. The appeal is allowed.

2. The order of the Disciplinary Committee of the General Legal Council dated 13 April 2022, that the appellant is guilty of professional misconduct as per canon VIII(d) in that she has breached canons IV(f) and I(b) of the Legal Profession (Canons of Professional Ethics) Rules, and the sanction imposed, is set aside.

3. Costs of the appeal to the appellant to be taxed if not agreed.