NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 118/2008

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN **GEORGETTE SCOTT** **APPELLANT**

AND **THE GENERAL LEGAL COUNCIL** **RESPONDENT**
(Ex Parte Errol Cunningham)

Paul Beswick, instructed by Ms. Georgette Scott, for the appellant

Mrs. Sandra Minott-Phillips and Ms. Ky-Ann Lee, instructed by Myers Fletcher and Gordon for the respondent

March 16, 17 and July 30, 2009

PANTON, P.

1. This appeal is from a decision of the Disciplinary Committee of the General Legal Council (the Committee) dated 14th October, 2008, wherein the appellant was struck off the Roll of attorneys-at-law entitled to practise in the several courts in the island of Jamaica. The Committee also ordered her to make restitution of the sum of $750,000.00 to the complainant Mr. Errol Cunningham with interest at the rate of 12% per annum from May, 2005, until payment, and to pay him costs of $50,000.00.

The complaint

2. On August 9, 2006, Mr. Errol Cunningham, a retired engineer, living in Mandeville, filed an affidavit alleging that he retained the appellant to sell his apartment at Sand Castle, Ocho Rios, for J$2.2 million. The sale was effected during March, 2005. On May 26, 2005, he received a letter from the appellant indicating that the sum of $2,105,272.41 was due to him as a result of the transaction. Subsequently, he received a cheque dated June 6, 2005, from the appellant for the amount. He lodged this cheque to his account at the Victoria Mutual Building Society, but by letter dated June 20, 2005, it was returned dishonoured. Up to the date of the affidavit, the dishonoured cheque had not been made good.

The evidence

3. The Committee heard evidence on three days, commencing on January 31, and ending on October 31, 2007. During the hearing, in addition to confirming the details in his affidavit, Mr. Cunningham disclosed that he paid the appellant the costs of $95,000.00 "up front". Upon being advised of the dishonoured cheque, Mr. Cunningham informed the appellant who requested time to reimburse him. He allowed her a month but following that period, the appellant merely provided excuses for her failure to reimburse.

4. The appellant failed to appear on the first day of the hearing but the Committee, having satisfied itself that she had been notified, proceeded with the

hearing. We would not have expected the Committee to have done otherwise. At the resumed hearing, the appellant appeared and was represented by counsel, Mr. Christopher Townsend, who addressed the Committee thus:

> "I have just come into the matter and entered into negotiation with Mr. Cruickshank (representing the complainant). In his evidence (on 31/1/07) he had advised that Ms. Cruickshank had appeared for him. What happened initially was converted to a loan bearing interest. I have structured Miss Scott's practice to facilitate payment schedule with Mr. Cunningham. Mr. Cunningham had indicated to me that he would like to speak to the Panel".

The complainant then said this to the Panel:

> "I wish to withdraw the complaint. Payment arrangements have been made into November".

The Panel then inquired of Mr. Townsend whether they should ignore the fact that evidence "of a serious nature" had been given. If they were to do that, they wished to know the basis on which they could so do. Mr. Townsend responded thus:

> "The short answer to that is that I do not believe that you must ignore it. My difficulty is the instructions that I have received and the way that I have received these instructions I would not be able to effectively cross-examine the witness".

5. The hearing continued and the complainant stated that he was still owed $750,000.00 by the appellant – being $300,000.00 balance from the transaction plus interest. Under cross-examination, he said that he had not made any arrangement "by way of a loan" to the appellant, and he denied that there had

been a conversion to a loan. He also said in answer to Mr. Townsend that prior to the situation with the dishonoured cheque, he was not satisfied with the appellant as his attorney.

6. The hearing was adjourned to October 31, 2007, when the complainant continued his evidence under cross-examination. He said that the appellant had told him that during the period that she gave him the cheque, she was ill. However, he added that although he was sympathetic towards her, he had no proof of the illness.

7. The appellant gave evidence that she was called to the Bar in the year 2000. She became a sole practitioner after having practised in a firm for a brief period. She said that her "adopted mother" assists her with typing and administration, and that both of them sign on her general account and clients' account. The appellant said that she did not have a definite business address or office, but received correspondence at a named location. In her dealings with the complainant, she made arrangements to meet with him at a popular hotel in Kingston. She accepted the fact that DunnCox, the attorneys for the purchaser had given her a cheque in satisfaction of the balance of the proceeds of sale. The cheque was lodged to her account, but her cheque to the complainant was dishonoured. She gave a multi-faceted explanation for this occurrence. The following questions and answers appear at page 23 of the record:

"Townsend: And what did you tell him? (meaning the complainant)

Scott: I told him that when I checked with the bank, the money was no longer in place. I told him that I was going to try my best to find out what has happened, in the meantime I don't want him to think I was unscrupulous. And in the meantime I would give him the cheque to hold ... at the time he was upset but he said that he had children my age and ..."

Townsend: Did you find out what had happened to the funds?

Scott: I found out that my father and some other persons that I owed that I was supposed to have gotten –

Panel: I don't understand.

Townsend: What happened to the money, was it there?

Scott: No, it was not there.

Townsend: Do you know what happened to the money?

Scott: What I later found out is that my adopted mother was trying to secure some money for me because I was in great financial debt because of certain situation with my father which put me in serious financial debt

Townsend: What happened, you said that your adopted mother – great financial debt, what happened?

Scott: She was expecting some money from overseas and she was hoping that those funds would clear the financial debt. What happened is that Mr. Cunningham's cheque was lodged in the general account which

> was there to clear things and when that cheque came, she thought it was the money she was expecting so that fund was used to pay persons who I had owed. That fund she was expecting never came. I explained to him initially that the money was not in place but I was giving him the cheque as a form of promissory note and that I would investigate what happened. As soon as I found out, I communicated with him what happened, he was sympathetic with me. I told him that I was expecting some funds and he should work with me and I tried to get some money from family and friends."

8. The appellant apparently in mitigation mentioned her recollection of abusive acts done to her by her father in her formative years, and that he had caused her to incur financial debts. She stated that she had suffered a mental breakdown, beginning in 2003, and that she came under the care of a psychiatrist, Dr. Aggrey Irons who prepared a medical report which was admitted in evidence. Dr. Irons' report is dated October 29, 2007, and states that he examined her on the 5th and 12th September, and 24th October, 2007, for the purpose of a report on her mental status. He found her fully oriented in time, place and person but she was very age inappropriate in her speech and mannerisms. She was excessively nervous with overt tearfulness and showed signs and symptoms of reactive depression. He found her life history spotted with multiple issues related to poor judgment in relationships. He concluded that her condition was a reactive depression in a primarily personality disordered

(dependent type) individual with diminished judgment and enhanced phobic reactions.

The Committee's decision

9. The Committee, having heard the evidence, listed twenty-four undisputed and five disputed facts (pp.45, 46 record). The disputed facts are as follows:

> " 1. Did the complainant loan the proceeds of sale to the attorney?
>
> 2. Did the attorney mistakenly misuse the funds of the complainant?
>
> 3. Did the attorney misappropriate the proceeds of sale due to the complainant?
>
> 4. Did the attorney suffer from mental illness at the time that she had carriage of sale?
>
> 5. Did this mental illness cause her to misuse or misappropriate the complainant's funds?"

10. Having found that the complainant was a truthful witness who was sympathetic to the appellant, and having directed itself on the burden of proof, the Committee made the following findings of fact:

> 1. All the undisputed facts have been proven;
>
> 2. The appellant used the proceeds of sale entrusted to her for and on behalf of the complainant to her own use and benefit or to the benefit of others;
>
> 3. The appellant acted dishonestly in her use of the complainant's funds;

4. The complainant did not loan the proceeds of sale to the appellant;

5. The complainant made a concerted effort to persuade the appellant to hand over his funds to him, including seeking the services of an attorney-at-law before laying the complaint;

6. There is no credible evidence that the appellant suffered from any mental illness at the time she had conduct of the sale in 2004 and 2005;

7. The medical report does not relate the appellant's problems to her conduct in 2005;

8. To date, the appellant has failed to account to the complainant for the sum of $750,000.00 being principal and interest in relation to the balance of the proceeds of sale;

9. The appellant has admitted that she has similar problems with funds belonging to other clients; and

10. There is nothing disclosed in the evidence that has persuaded the Committee that the alleged abuse by the appellant's father contributed to her misappropriation of the complainant's funds.

The Committee's conclusions

11. The Committee found that the appellant had breached canon VII (b)(ii) of the Legal Profession (Canons of Professional Ethics) Rules in that she "failed to account to the complainant ... for all the monies in her hands for his account or credit although reasonably required to do so." She also breached canon 1(b) of the said Rules in that by her conduct "she has failed to maintain the honour and

dignity of the profession and has not abstained from behaviour which may tend to discredit the profession of which she is a member."

12. In light of the findings and conclusions, the Committee found the appellant guilty of professional misconduct contrary to section 12(4) of the Legal Profession Act as amended by the Legal Profession (Amendment) Act 2007. The Committee said:

> "The very existence of the legal profession depends on the collective integrity of all its members. The custom of conveyancing practice depends on the reliance on and complete trust in the integrity of all attorneys-at-law. The public's interest must be protected at all times."

The Committee also referred to the well-known case ***Bolton v The Law Society*** [1992] 2 All ER 486.

The grounds of appeal

13. The appellant filed thirteen grounds of appeal. They may be summarized thus:

1. There was a serious procedural irregularity when the Committee rejected the complainant's wish to withdraw the complaint;

2. There was bias on the part of the three panel members who failed to recuse themselves;

3. The decision was unreasonable having regard to the evidence;

4. The Committee erred in failing to consider sufficiently, or at all, the medical report of Dr. Aggrey Irons;

5. The Committee failed to consider and weigh each sanction available under section 12 of the Legal Profession (Amendment) Act 2007 against the available evidence; and

6. The penalty imposed was manifestly excessive, and unwarranted.

Procedural irregularity

14. In written submissions prepared by the appellant herself, it was said that the Committee's rejection of the request by the complainant to withdraw the complaint was a serious procedural irregularity that has caused substantial injustice to the appellant. In his oral submissions, Mr. Paul Beswick, for the appellant, said that upon the receipt of such a request, the panel was obliged to refer the complaint to the entire Committee set up under the Legal Profession Act. The 3-member panel, he said, had no authority to refuse the request. Section 11 of the Legal Profession Act and Rule 15 of the Fourth Schedule to the Act, it was said, supported the submission.

15. In order to treat with the submissions, it is necessary to set out the relevant legislative provisions.

Section 11 of the Act reads:

"(1) The Council shall appoint from among persons –

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

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

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

(d) who are attorneys who have been in practice for not less than ten years, a Disciplinary Committee consisting of such number of persons, not being less than fifteen, as the Council thinks fit.

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

Rule 7 of the Third Schedule provides, among other things, that:

(a) the Committee shall meet at such times as may be necessary or expedient for the transaction of business, and such meetings shall be held at such places and times and on such days as the Committee shall determine; and

(b) the quorum of the Committee shall, subject to section 13 of the Act, be five.

Section 13, so far as is relevant for this judgment, reads:

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

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

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

> (3A) ...
>
> (4) Subject to subsection (3A), no order shall be made by the Disciplinary Committee under section 12 striking off the Roll the name of an attorney unless at least three members present vote in favour of the order."

Rule 15 of the Fourth Schedule reads:

> "No application shall be withdrawn after it has been sent to the secretary, except by leave of the Committee. Application for leave to withdraw shall be made on the day fixed for the hearing unless the Committee otherwise direct. The Committee may grant leave subject to such terms as to costs or otherwise as they think fit, or they may adjourn the matter under Rule 16 of these Rules."

16. It was Mr. Beswick's view that the request for a withdrawal of the complaint was outside the scope of the panel as they had no discretion in the matter. The request, he said, had to be referred to the entire Committee en banc as it was to them that the complaint had been made. Mrs. Sandra Minott-Phillips, for the respondent, submitted that the tenor of the Rules indicates that "Committee" means division or panel. In any event, she said, the request for withdrawal was made after the hearing had commenced.

17. As set out above, section 11 of the Act gives the General Legal Council the power to appoint not less than fifteen persons to comprise the Committee. Section 13 provides that the Committee may sit in divisions, and that each division, comprised of at least three members, is entitled to hear and determine applications and make orders and any such hearing, determination or order is

deemed to be by the Committee. In the light of these provisions, Mr. Beswick's contention seems untenable. His submission, if correct, would make for an unwieldy situation which could not have been contemplated by the framers or drafters of the legislation. It is certainly not a position that can be said to have been gleaned from the legislation as worded. The natural meaning of the words in the Act and the Rules in the Schedules quoted above point to the panel of at least three members being total masters in their own house, within the confines of the Act. There is no question of any request for a withdrawal of a complaint being referred to the entire Committee of at least fifteen members, with its various divisions and panels.

18. Mrs. Minott–Phillips submitted that the complaint was sufficiently grave to warrant an answer from the appellant even if the complainant wished to withdraw the matter. The Committee, she submitted, as an instrument of the General Legal Council is vested by statute with the responsibility of upholding the standards of professional conduct, and the Supreme Court and Court of Appeal were charged with the responsibility of safeguarding the public interest in the maintenance of the standards of the legal profession, as attorneys are officers of the court. She referred the Court to the comments of Pollock, C.B. in the case ***Re – (an Attorney)*** [1863] Law Times Reports [Vol. 1X., N.S. -299]. When that case was called on, there was no one appearing on either side. Apparently, this was by arrangement between the parties. The learned judge did not think kindly of the situation and delivered himself thus:

> "This is an application against an attorney, an officer of this court. The application was grounded upon alleged misconduct disclosed in certain affidavits filed, and which have been very carefully perused by one of my learned brothers. Grave charges are made against the attorney, which must be answered by him, and if not answered he ought to be punished. If the charges are not properly and fully explained, the attorney is a fit subject for a prosecution in some way. The court will therefore not discharge the rule which has been obtained, neither will it be struck out. If those whose duty it is to be here and proceed with the matter forget their duty, the court will not forget its duty, but take care that such steps are taken as will prevent a private settlement of the proceedings by smothering it and so getting rid of the matter. A rule with such charges as the present shall not be disposed of at the will of the parties themselves, and we hope these observations will be conveyed to the parties concerned in the rule."

The words of Pollock, C.B. are relevant to the instant situation. The nature of the allegations was such that it would have been clearly wrong for the complainant to have been permitted to withdraw the complaint. This ground of appeal is, in my view, misconceived.

Bias

19. The appellant contended that there was bias on the part of the individual panel members and the constituted panel as a whole. The complaint in respect of Mr. Charles Piper, panel member, related to a suit filed by the appellant as attorney-at-law. That suit was ***Joy Hew v Sandals Resorts International* Ltd.** ***and Sandals Grande Ocho Rios.*** Mr. Piper appeared for the defendants. He filed an acknowledgment of service on March 5, 2007, the defence of the first

defendant on March 22, 2007, and the defence of the second defendant on November 16, 2007. The matter was referred to the Dispute Resolution Foundation and scheduled for hearing on October 15 and 16, 2008. The Committee handed down its decision on October 14, 2008.

20. In respect of Mr. David Batts, panel member, the complaint is that there existed at the time of the hearing, litigation in which his firm appeared for one of the defendants and the appellant appeared for the claimant. That case was ***Keema Richards v Dr. Junior Taylor, Dr. Kenneth Appiah and The National Chest Hospital.*** The appellant presented documents to show that the firm of Livingston, Alexander & Levy filed a defence for the first defendant. There is a "without prejudice" letter from the appellant to the firm but it was addressed for the attention of another attorney-at-law, Mr. Ransford Braham.

21. As far as Mrs. Pamela Benka-Coker, Q.C. the other panel member is concerned, the bias complained of is her failure, as chairman of the panel, to accept the complainant's proposal to withdraw his complaint against the appellant. This complaint would also affect the other members of the panel as they participated in the refusal to entertain the proposed withdrawal.

22. The appellant contends that the cases ***Re Medicaments and Related Classes of Goods*** (No.2) [2001] 1 WLR 700 and ***In Re Pinochet*** [1999] UKHL 1; [1999] 1 All ER 577 are relevant so far as this ground of appeal is concerned. Mr. Beswick submitted that Mr. Piper should not have sat on the panel as he was

sitting in his own cause. According to him, Mr. Piper's presence on the panel alone invalidates the hearing. The existence of contested suits between the appellant and members of the panel, in Mr. Beswick's view, amounted to the existence of bias and forms a basis for the automatic disqualification of the panel. Mrs. Minott-Phillips pointed out that the ***Hew v Sandals*** matter commenced after the disciplinary hearing had begun. In any event, she said, it should be borne in mind that the attorneys-at-law are merely agents of the persons they represent.

23. I am experiencing some difficulty in appreciating the point that is being made by Mr. Beswick in respect of bias, so far as it relates to the instant case. For example, it has been said that by refusing to allow the withdrawal of the complaint, the head of the panel, learned Queen's Counsel, Mrs. Benka-Coker, has demonstrated bias. This submission is, in my view, unacceptable. From time to time, during the course of an hearing, a Court or tribunal will find it necessary to make rulings. The making of a ruling as to the course of proceedings cannot, per se, be an indication of bias. In refusing to allow the withdrawal of the complaint, the panel was exercising a right which it had to hear the complaint. Bearing in mind the nature of the allegations, and the role of the Committee, the panel was entitled to say: "this is not a matter which should be withdrawn, let us hear it". It was not an indication that they had arrived at an adverse conclusion in respect of the appellant. The point being advanced on behalf of the appellant is, in my view, without merit. Support for this position comes from the erstwhile

attorney for the appellant, Mr. Christopher Townsend who, at para. 4 above, told the Committee that he did not think that the Committee should have ignored the complaint and the evidence that they had already heard. He merely needed to be afforded the opportunity to cross-examine the complainant.

24. The principle that Mr. Beswick has urged as being applicable is that a man should not be a judge in his own cause. In the instant case, it is difficult to appreciate why it is thought that that principle is applicable. The fact that a panel member is appearing as an attorney-at-law in a suit against the appellant cannot by itself amount to a reason for the disqualification of the panel member. There is no evidence of any issue having arisen in the suit ***Hew v Sandals*** to lead to the view that Mr. Piper may have been a judge in his own cause. The first hearing of the complaint against the appellant took place before the suit ***Hew v Sandals*** was filed. There is nothing to indicate the existence of the likelihood of bias at the commencement of the hearing, and there has been nothing shown to have occurred after the filing of the suit that could possibly have led to the perception of the likelihood of bias. In fact, in ***Hew v Sandals*** the matter has been referred to the Dispute Resolution Foundation.

25. In relation to the suit ***Keema Richards v. Dr. Junior Taylor and Others***, it seems that Mr. Ransford Braham of the firm of Livingston Alexander & Levy has conduct of the matter. The appellant has submitted for consideration two rather cordial letters between the attorneys (the appellant and Mr. Braham)

in respect of photographs of the claimant who was the alleged victim of improper medical procedures. Here again, there is no question of Mr. Batts being a judge in his own cause, and there is nothing to indicate the likelihood of bias on his part. I am of the view that there is no merit in the ground of appeal alleging actual bias or the perception of bias.

The evidence of Dr. Aggrey Irons

26. The complaint here is that the Committee failed to consider sufficiently, or at all, the evidence of Dr. Aggrey Irons. No submissions were advanced in respect of this ground. However, it is important to point out that Dr. Irons examined the appellant in September and October, 2007, whereas the events complained of by Mr. Cunningham occurred in 2005. Nevertheless, Dr. Irons found her "fully oriented in time, place and person". He also found that she was excessively nervous with symptoms of reactive depression. He concluded that she was a primarily personality disordered individual with diminished judgment and enhanced phobic reactions. The appellant has not said what beneficial effects would have resulted from a proper consideration of this evidence, assuming there has been no proper consideration. And I have been unable to see any beneficial effects.

The sanction

27. Mr. Beswick has questioned why the appellant has been disbarred as opposed to being suspended. He said that the Committee should have given

reasons for imposing the sentence it did. In this regard, he referred to ***Flannery and another v Halifax Estate Agencies Ltd.*** [2000] 1 All ER 372, the headnote of which reads:

> "Where a failure by a judge to give reasons made it impossible to tell whether he had gone wrong on the law or the facts, that failure could itself constitute a self-standing ground of appeal since the losing side would otherwise be deprived of its chance of appeal. The duty to give reasons was a function of due process and, therefore, of justice. Its rationale was, first, that parties should not be left in doubt as to the reasons why they had won or lost, particularly since, without reasons, the losing party would not know whether the court had misdirected itself and thus whether he might have any cause for appeal. Second, a requirement to give reasons concentrated the mind, and the resulting decision was therefore more likely to be soundly based on the evidence. The extent of that duty depended upon the subject matter of the case. Thus in a straightforward factual dispute, which depended upon which witness was telling the truth, it would probably be enough for the judge to indicate that he believed the evidence of one witness over that of another. However, where the dispute was more in the nature of an intellectual exchange, with reason and analysis exchanged on either side, the judge had to enter into the issues canvassed before him and explain why he preferred one case over the other. That was particularly likely to apply in litigation involving disputed expert evidence, and it should be possible for the judge to be explicit in giving reasons in cases which involved such conflicts of expert evidence. In all cases, however, transparency should be the watchword. In the instant case, the judge had been under a duty to give reasons, and had not done so. Without such reasons, his judgment was not transparent and it was impossible to tell whether the judge had adequate or inadequate reasons for

> his conclusion. Accordingly, the appeal would be allowed and a new trial ordered."

28. It is inaccurate for Mr. Beswick to have said that the Committee did not give their reasons for imposing the ultimate sanction . In fact, at page 47 of the record, the Committee expressed itself thus:

> "The very existence of the legal profession depends on the collective integrity of all its members. The custom of conveyancing practice depends on the reliance on and complete trust in the integrity of all attorneys-at-law. The public's interests must be protected at all times. I quote here from the judgment of the Master of the Rolls in the English Court of Appeal case of ***Bolton v The Law Society*** reported at [1992] 2 All ER 486 and at p 491 paragraph h:
>
> > 'It is required of Lawyers practicing in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness ... Any solicitor who is shown to have discharged his professional duties with less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors' Disciplinary Tribunal. Lapses from the required high standard may of course take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties.'
>
> On p 492 Sir Thomas Bingham went on to say "If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending reinvestment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not and has never been seriously in question. Otherwise the whole profession and the public as a whole is injured."

The reasons for the decision of the Committee could not have been more clearly stated. In the instant case, the complainant sold his apartment in the tourist

town of Ocho Rios only to have the appellant misappropriate a portion of the monies received. And the misappropriation occurred after he had paid her costs in advance. This type of behaviour by an attorney-at-law is inexcusable and unacceptable. The appropriate sanction has to be disbarment.

29. In the circumstances, I see no merit in the grounds that have been advanced. The Committee had more than sufficient evidence of the stated breaches of the Legal Profession (Canons of Professional Ethics) Rules. Accordingly, I would dismiss the appeal and confirm the orders made by the Committee.

HARRISON J.A.

30. The General Legal Council ("the Council") was established by section 3(1) of the Legal Profession Act 1971 ("the Act") and one of its functions is to uphold standards of professional conduct by attorneys at law. By section 3(2), the Council has power to do all such things as may appear to it to be necessary or desirable for carrying out its functions under the Act. A Disciplinary Committee ("the Committee") has been constituted under the Act and section 11(1) provides as follows:

> "11. (1) The Council shall appoint from among persons - (a) who are members, or former members, of the Council; or (b) who hold or have held high judicial office; or (c) who are attorneys who were members of a former disciplinary body; or (d) who are attorneys who have been in practice for not less

> than ten years, a Disciplinary Committee consisting of such number of persons, not being less than fifteen, as the Council thinks fit. (2) The provisions of the Third Schedule shall have effect as to the constitution of the Disciplinary Committee and otherwise in relation thereto. (3) It is hereby declared for the avoidance of doubt, that the Committee shall have jurisdiction to hear and determine or continue to hear and determine or otherwise deal with the following allegations made under section 12, that is to say- (a) in the case of attorneys who are suspended from practice, allegation of misconduct committed prior to or during suspension; and (b) in the case of persons whose names are struck off the Roll, allegations of misconduct committed prior to such striking off. (4) Subsection (3) shall apply in like manner to any case where the striking off or suspension took place before the coming into operation of Legal Profession (Amendment) Act, 2006, as it applies to such cases subsequent thereto".

31. Professional misconduct under the Act includes:

> "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)." (Section 12 (1))

Section 12(7) (a) provides that the Council may:

> "prescribe standards of professional etiquette and professional conduct for attorneys and may by rules made for this purpose direct that any specified breach of the rules shall for the purposes of this Part constitute misconduct in a professional respect."

32. Any person who is aggrieved by an act of professional misconduct on the part of an attorney, may apply to the Disciplinary Committee of the General Legal Council to require the attorney to answer the allegations.

33. On August 9, 2006 Mr. Errol Cunningham ("the complainant") lodged an application supported by affidavit with the General Legal Council complaining about the conduct of the Appellant Miss Georgette Scott ("the appellant"). The complainant alleged that the appellant was retained by him to have carriage of sale of his property at Sand Castles, Ocho Rios in the parish of St. Ann, which was to be sold for the sum of $2,200,000.00. The complainant further alleged (i) that he had only received a portion of the proceeds of sale from the appellant and; (ii) that at the time of lodging the complaint, the appellant still had a balance $1,040,000.00 for him.

34. The disciplinary hearing began on January 31, 2007 but the appellant was absent. She subsequently attended and was represented by Counsel on October 13, 2007. On that date, the complainant indicated to the panel that he wished to withdraw his complaint. The Committee refused however, to allow the complaint to be withdrawn and continued with the hearing. On October 14, 2008 the following orders were made by the Committee:

> "(a) That the Attorney Georgette Scott do make restitution of the sum of $750,000.00 to the complainant Errol Cunningham with interest thereon at the rate of 12% per annum from May 2005 until payment.
>
> (b) That the Attorney at law Georgette Scott be struck from the roll of attorneys at law entitled to practice in the several courts in the Island of Jamaica.
>
> (c) That costs of $50,000.00 are warded to the complainant against Georgette Scott".

This appeal challenges the decision of the Committee.

Ground 1

35. The appellant has contended in ground 1 of appeal, that the rejection of the complainant's request to withdraw his complaint against the Appellant was a serious procedural irregularity which has caused substantial injustice to the Appellant.

36. Mr. Beswick for the appellant has relied on Rule 15 of the 4th Schedule of the Act which states:

> "**No application shall be withdrawn after it has been sent to the secretary, except by leave of the Committee**. Application for leave to withdraw shall be made on the day fixed for the hearing unless the Committee otherwise direct. The Committee may grant leave subject to such terms as to costs or otherwise as they think fit, or they may adjourn the matter under rule 16 of these Rules". (my emphasis)

37. Mr. Beswick submitted that once the complainant indicated his desire to withdraw the complaint, the three member panel should have adjourned the hearing and referred the matter to all fifteen (15) members constituting the Disciplinary Committee in compliance with Rule 15 (supra). He further submitted that since the panel as constituted was not the disciplinary committee as provided by section 11(1) (supra) they had no legal authority under the Legal Profession Act to have refused the request to withdraw the complaint.

38. Mrs. Minott-Phillips for the respondent submitted however, that the Committee was acting intra vires when it said it would not allow the complainant to withdraw the complaint and was therefore correct to have called upon the Attorney to explain her conduct. She further submitted that the word "Committee" referred to in the 4th Schedule (supra) would include a division of the Committee pursuant to section 13(1) of the Act.

39. It is my considered view that there is merit in the submissions of Mrs. Minott-Phillips. There is clearly no need for the question of withdrawal of the complaint to be referred to all fifteen (15) members of the Committee. In my judgment, section 13(1) is quite explicit and presents no problem to be construed. The section states as follows:

> "13. (1) For the purposes of hearing applications made pursuant to section 12 and of reviewing its decision pursuant to section 19, **the Disciplinary Committee may sit in two or more divisions.** (2) **Each division shall be entitled to hear and determine any such application or carry out such review and shall be entitled to exercise all the powers of the Disciplinary Committee**; and any hearing by or determination or order of such division shall be deemed to be a hearing by or determination review or order of the Disciplinary Committee". (emphasis supplied)

I therefore find no merit in ground of appeal 1.

Grounds 2, 3, 4, 5 and 6

40. Grounds 2, 3, 4, 5 and 6 were argued together. They deal with the issue of bias which was not argued below. For my part, I would agree with Mr. Beswick that this issue can be raised at the stage of the appeal hearing. It was contended:

- 1. That there was bias on the part of Mr. Charles Piper in failing to recuse himself from the hearing on the basis that there existed at the time of the hearing litigation: Hew v Sandals International Ltd. in the Supreme Court, in which the Appellant represented the claimant and Mr. Piper represented the defendant.

- 2. That there was bias on the part of Mr. David Batts in failing to recuse himself from the hearing on the basis that at the time of the hearing there was litigation – Richards v Dr. Junior Taylor et al, in which the Appellant represented the Claimant and Mr. Batts, who is a partner of Livingston Alexander & Levy, the firm that represented the defendant.

- 3. That there was bias on the part of Mrs. Benka-Coker Q.C in failing to accept the complainant's withdrawal of his complaint against the Appellant.

- 4. That the Panel's failure to recuse itself on the ground that their decision was tainted by the apparent bias of the Panel Members, Charles Piper, David Batts and Pamela Benka-Coker.

Mr. Beswick submitted that the apparent bias by one or more of the members would cause the hearing of the matter to be void.

41. I do agree with Mrs. Minott-Phillips when she submitted that even though Mrs. Benka-Coker, Q.C., Mr. Charles Piper and Mr. David Batts are members of the panel and may have opposed the appellant in various cases it is not, without

more, a sufficient basis to support a case of bias or for that matter to say that there was an alleged conflict of interest. The bias alleged on the part of Mrs. Benka-Coker Q.C., Chairman of the panel is also without merit in my view. The ruling on whether or not to accept the complainant's withdrawal of his compliant had been made by the panel during the course of the proceedings and it fell squarely within the provisions of Rule 15 (supra). I also agree with Mrs. Minott-Phillips when she submitted that even if there was no rule 15, section 3(1) of the Act would cover the situation since it was intended that the General Legal Council through its Committee would regulate the conduct of proceedings against the members of the profession. Section 3(1) state as follows:

> "3 (1) There shall be established for the purposes of this a body to be called the General Legal Council which shall be concerned with the legal profession and, in particular - (a) subject to the provisions of Part III, with the organization of legal education; and (b) with upholding standards of professional conduct. (2) The Council shall have power to do all such things as may appear to it to be necessary or desirable for carrying out its functions under this Act. (3) **The Council shall appoint on such terms and conditions as it thinks fit a secretary and such other officers as it may think necessary for the proper carrying out of its functions.** (4) The provisions of the First Schedule shall have effect as to the constitution of the Council and otherwise in relation thereto". (emphasis supplied)

I respectfully find that there is no merit in the submissions made by Mr. Beswick on these grounds of appeal and they also fail.

Ground 7

42. It was contended by the appellant that the Committee had erred when they made their decision because it was not reasonably arrived at when one considers the evidence adduced.

43. In ***Re Browne*** (1972) 19 WIR 1, it was held that a solicitor's failure to account for and to pay over amounts received by him after numerous requests, and unfulfilled promises to pay, with no explanations constituted conduct unbecoming a solicitor of the Supreme Court. That solicitor was suspended from practice for two years.

44. The Australian case of ***Law Society of New South Wales v Moulton*** [1981] 2 NSWLR 736 is also quite instructive. In that case the Court of Appeal of New South Wales held that failure by a solicitor to understand and appreciate the proper conduct and standards to be observed in dealings with clients constitutes professional misconduct and will generally constitute grounds for striking off the Roll.

45. What difference does it make, that the appellant had agreed to the payment of interest on the outstanding sum to the complainant? It had been disclosed during the hearing that the parties who were represented by their respective attorneys had negotiated to settle the matter. According to Mr. Townsend who appeared at the hearing, the transaction between the appellant and complainant was converted to an interest bearing loan account and that he

Mr. Townsend had structured the appellant's practice in order to facilitate the payment schedule. It was at that point of the hearing that the complainant interjected and informed the Committee that he wished to withdraw the complaint. He had also disclosed that the sum owing up to that point was $750,000.00. The appellant had also informed the Committee that she had repaid the sum of $1,300,000.00 including interest at 4% per annum which was agreed to in writing.

46. The learned authors of "Corderry on Solicitors" (8th Edition) have stated at page 322:

> "Reparation to the client made by the solicitor during the proceedings is no reason for the court to stay its hand (Re Holmes (1875) 31 LT 730; Re A Solicitor (1877) 36 LT 113) and a matter once brought before the court is not allowed to drop by private arrangement ..."

47. The rule that the client's money must be kept different from the attorney's bank account is well-known to all practising attorneys. The appellant herself has acknowledged to the Committee that she knows this. In further answer to the Committee when asked if she was indebted to other clients of hers she said yes. See pages 25 and 26 of the record.

48. In this particular case, the appellant's cheque for $2,105,272.41 to the complainant had been "bounced" by the bank because of an alteration of the figure in the cheque which had required a signature. The appellant had promised

to rectify this problem but had breached her undertaking to make good on the dishonoured cheque within a month. She had also told the complainant that she would sell her motor car in order to reimburse the complainant. She had given him two cheques and had remained indebted to him in the sum of $1,040,000.00. This was the sum that was referred to in the complainant's affidavit on the lodging of the complaint to the Council.

49. It is abundantly clear that the Committee has a duty under section 3(1) of the Act to uphold the standards of professional conduct of attorneys at law. Barwick CJ stated in ***Harvey v Law Society of New South Wales*** (1975) 49 ALJ 362 at page 364:

> 'The court's duty is to ensure that those standards of the profession are fully maintained particularly in relation to the proper relationship of practitioner with practitioner, practitioner with the court and practitioner with the members of the public who find need to use the services of the profession.'

50. The Court ought to bear in mind also what Lord Parker C.J said ***In re A Solicitor*** (supra):

> "...A cash shortage of this nature inevitably meant that a solicitor had spent a client's money for the purposes other than those of the client. Public confidence in the profession would be shaken if such conduct were tolerated."

51. I find that there is absolutely no merit in this ground of appeal.

Grounds 9 and 10

52. Grounds 9 and 10 contend that the Committee failed to consider the report of Dr. Aggrey Irons and that they erred in the interest of natural justice to make enquiries of the medical expert concerning the ongoing treatment of the appellant. Dr. Irons is a Consultant Psychiatrist and his report (exhibit 5) speaks of examining the appellant on September 5, 2007, September 12, 2007 and October 24, 2007. His findings were as follows:

> (a) She was fully oriented in time, place and person but was very age inappropriate in her speech and mannerisms.
>
> (b) She was excessively nervous with overt tearfulness and other signs and symptoms or reactive depression.
>
> (c) She had a history of paternal child abuse and an abnormal fear of males leading to ambivalence.
>
> (d) Her life history is spotted with multiple issues related to poor judgment in relationships.
>
> (e) There was no evidence of malingering.

53. Dr. Irons concluded that the appellant's case was "a reactive depression in a primarily PERSONALITY DISORDERED (Dependent Type) individual with diminished judgment and enhanced phobic reactions". He opined that she would require a lengthy period of reconstructive psychotherapy and had been on prescribed antidepressants.

54. The Committee in their written judgment listed five (5) areas of disputed facts. Among them were:

(iv) Did the attorney suffer from any mental illness at the time that she had carriage of sale?

(v) Did this mental illness cause her to misuse or misappropriate the complainant's funds?

55. The Committee found that there was no credible evidence that the appellant suffered from any mental illness at the time she had conduct of the sale in 2004 and 2005. Neither did exhibit 5 (supra) speak to when her alleged psychiatric problem began. In my view, these findings are unchallengeable. I therefore find no merit in these grounds of appeal.

Grounds 8, 11 and 12

56. It is my view that these three (3) grounds of appeal can be conveniently dealt with together. They all deal with the sanctions which have been pronounced by the Committee.

57. It is contended that the Committee did not have a hearing before the imposition of the sanctions; that they gave no reasons for the sanctions handed down and that in any event the striking off of the appellant's name from the roll of attorneys at law was manifestly excessive and unwarranted. Mr. Beswick referred the court to the case of ***Flannery and Another v Halifax Estate Agencies Ltd.*** [2000] 1 All ER 373 and to section 12(4) of the Act. Mrs. Minott-Phillips referred to the cases of ***In re A Solicitor*** (1959) 103 Sol Jo. 875 and ***McCoan v General Medical Council*** [1964] 3 All ER 143 as well as section 12(4).

58. Let me say from the very outset that there is no merit in the appellant's contention that the Committee gave no reasons for the sanctions that were imposed. It is my considered view that the Committee had delivered a well-structured judgment. One ought to bear in mind the protective role which the court has to perform in exercising the power to discipline. ***In re A Solicitor*** (1959) 103 Sol Jo. 875 a solicitor was charged before the Disciplinary Committee of the Law Society with inter alia, professional misconduct in utilization for his own purposes of money received on behalf of his clients. Lord Parker C.J said:

> "His Lordship found it unnecessary to go into the details of how the deficiency arose. A cash shortage of this nature inevitably meant that a solicitor had spent a client's money for the purposes other than those of the client. Public confidence in the profession would be shaken if such conduct were tolerated."

59. It all comes down now to the order made by the Committee. Mrs. Minott-Phillips submitted that it would require a very strong case for this court to interfere with a sentence for professional misconduct imposed by the Disciplinary Committee. She submitted that the Committee would be the best persons for weighing the seriousness of professional misconduct. She had referred to, and relied on, the case of ***McCoan v General Medical Council*** [1964] 3 All ER 143. Their Lordships in the Judicial Committee of the Privy Council held inter alia in that case, that the sentence must appear to be wrong and unjustified before they vary the sentence.

60. The powers of the Disciplinary Committee in relation to punishment are set out in section 12(4) of the Act as amended by the Legal Profession (Amendment) Act 2007. The section provides that the Disciplinary Committee may, as they think just, make any such order as to (a) striking the attorney's name off the roll, or (b) suspending him from practice, (c) imposing a fine, (d) reprimanding him, as they may consider reasonable and (e) the payment of costs to the complainant. However, orders made under paragraphs (a) and (b) shall not be made together.

61. The appellant must have been fully aware of the duty placed on her when she was retained by the complainant in the sale of his property. She had failed to discharge that duty. She had breached the provisions under the Act as they relate to the client's funds and was in my view, correctly found guilty of misconduct in a professional respect. I can find no extenuating circumstances in this case which this court could use to vary the sentence recommended by the Committee. The sanctions were all legally imposed by virtue of section 12(4) supra. It is also my judgment that the Committee was not obliged to give any indication as to why they imposed all three of the sanctions in their order.

Conclusion

62. It is therefore my considered view, that the appeal should be dismissed and that the order of the Committee be affirmed. Costs of the appeal should be awarded to the Respondent.

DUKHARAN, J.A.

I have read the draft judgments of Panton, P., and Harrison, J. A. I agree with their reasoning and conclusion. There is nothing further that I wish to add.

ORDER

PANTON, P.

The appeal is dismissed and the order of the Committee is affirmed. Costs of the appeal are awarded to the respondent to be taxed if not agreed.