JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

MISCELLANEOUS APPEAL NO COA2021MS0002

BETWEEN	**ANGELLA SMITH**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**1ST RESPONDENT**
AND	**FAY CHANG RHULE**	**2ND RESPONDENT**

Lemar Neale instructed by NEA|LEX for the appellant

Mrs Sandra Minott-Phillips KC and Jahmar Clarke instructed by Myers Fletcher & Gordon for the 1st respondent

Mrs Caroline Hay KC and Mrs Tereece Campbell-Wong for the 2nd respondent

15 November 2022 and 26 May 2023

Professional misconduct and negligence- alleged breaches of Canon 1(b) and Canon IV(s) of the Legal Profession (Canons of Professional Ethics) Rules - duty of an attorney-at-law when acting for the donee of a power of attorney – significance of risk factors - Scope of the attorney-at-law's duty to act in accordance with the standards of the profession

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

EDWARDS JA

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

SIMMONS JA

[2] I, too, have read the judgment of my learned brother Laing JA (Ag). I agree with his reasoning and conclusion and have nothing useful to add.

LAING JA (AG)

[3] This is an appeal by Angella Smith ('the appellant') against the decision of the Disciplinary Committee of the General Legal Council ('the Committee'), on 13 January 2021, that Fay Chang Rhule, an attorney-at-law ('the second respondent') had not breached Canon 1(b) of the Legal Profession (Canons of Professional Ethics) Rules ('LPR').

The background

[4] The appellant and Denton Mckenzie ('Mr McKenzie') were married on 17 November 1990. In 1994, they became registered as joint proprietors of property situated at lot 393, Charlemont, in the parish of Saint Catherine, registered at Volume 1250 Folio 215 of the Register Book of Titles ('the property'). The property was subject to a mortgage held by the Victoria Mutual Building Society ('VMBS').

[5] In 2011, Carolyn Alexander ('Ms Alexander'), with whom Mr McKenzie shared an intimate relationship, engaged the second respondent in relation to the sale of the property, and presented to her, a power of attorney signed by Mr McKenzie, as the donor, and dated 6 March 2011 ('Mr McKenzie's power of attorney'). That power of attorney authorized Ms Alexander to act as the vendor for the sale of the property. Having researched the title at the National Land Agency, the second respondent discovered that the appellant was a co-owner of the property, as a joint tenant. This prompted her to make enquiries of Ms Alexander who told her that both owners of the property were incarcerated in Canada. The second respondent was then later, provided with a power of attorney ('the appellant's power of attorney') purported to have been made in favour of Ms Alexander by the appellant, as donor. There was no evidence as to how long after the fact of the appellant's ownership was raised, that the appellant's power of attorney was

produced to the second respondent by Ms Alexander, but it was dated 21 November, 2011.

[6] The second respondent conducted the sale of the land and paid the proceeds to Ms Alexander. The appellant made a complaint to the General Legal Council that she had not signed the appellant's power of attorney or consented to the sale of the property, and that the second respondent had breached Canon I(b), by acting pursuant to the appellant's powers of attorney.

The proceedings

[7] The appellant averred in her affidavit in support of the complaint, sworn on 12 June 2015, and which was before the Committee, that she never gave Ms Alexander the appellant's power of attorney and that the signature and handwriting purporting to be hers, were not hers. Mr McKenzie by his affidavit, sworn on 30 April 2015, also denied having signed a power of attorney in favour of Ms Alexander. He deponed that he received a sentence of five years' imprisonment in 2009 and was serving his sentence up to the time of making his affidavit.

[8] The appellant sought to call two witnesses to give expert evidence on handwriting. The Committee conducted a *voir dir*e to determine whether the two witnesses would be accepted as expert witnesses. The Committee ruled that neither witness was qualified to be an expert witness.

[9] The second respondent, in her affidavit sworn on 31 August 2015, asserted that both powers of attorney were signed and sealed by a duly commissioned notary public. Accordingly, she acted in accordance with the instructions given to her by her client Ms Alexander, completed the sale of the property, and disbursed the proceeds of the sale to her.

[10] The Committee considered the following issues:

> "1. What is the duty of an attorney-at-law in relation to acting on the instruction of a donee of a Power of Attorney in a Real Estate transaction?
>
> 2. Whether on a true construction of [the appellant's power of attorney] did the Attorney act outside the power granted in the disbursement of the proceeds?
>
> 3. Whether in the circumstances the attorney's conduct in relying on [the appellant's power of attorney] without more to conclude the sale and disburse the proceeds as she did, means that she is guilty of professional misconduct."

[11] In respect of the first issue, the Committee concluded that based on the statutory framework, an attorney when reviewing a power of attorney has a duty to determine whether it is satisfactory for the purposes of the transaction (its substance) and whether its execution is in the form required by the laws of Jamaica (its form). If attorneys during the course of their practice, satisfy themselves as to the substance and form of the power of attorney, then in the absence of any risk factors, no further duty would arise.

[12] In respect of the second issue, the Committee noted that the powers of attorney do not include an expressly stated power of the donee to engage an attorney or to receive the proceeds of the sale of the property. Nevertheless, the Committee was persuaded by the principle stated in Halsbury's Law of England Volume 1 (2008) at para. 31 which is expressed in the following terms:

> "A power to complete all contracts which the donee may deem necessary for a specific object, however, includes authority to obtain money for payment in respect of such contracts, where the payment is necessary and incidental to the completion."

The Committee held that the disbursement of the proceeds of the sale of the property in the circumstances presented, would necessarily be incidental to the completion of the transaction.

[13] Having regard to its findings in respect of issues one and two, the Committee at page 13 of the decision arrived at the following conclusion:

> "In conclusion therefore, we find that the attorney in reviewing the power of attorney satisfied herself that in form and substance the statutory requirements of the laws of Jamaica, were complied with. There was not on the face of the document or the circumstance that arose, sufficient risk factors that would cause her to have a duty to enquire further into the authenticity of the power. The attorney therefore, would not have been guilty of inexcusable or deplorable negligence in acting on the power nor would her action be considered behaviour which did not maintain the honour and dignity of the profession of [sic] discredit the profession of which she is a member."

The statutory basis for the appeal to this court

[14] Section 16(1) of the Legal Profession Act ('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. Section 17 which provides for this court's powers is 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:
>
> Provided that in the rehearing of an application following an appeal by the attorney no greater punishment shall be inflicted upon the attorney concerned than was inflicted by the order made at the first hearing.
>
> (2) Where the Court of Appeal confirms the order (whether with or without variation) it shall take effect from the date specified in the order made by the Court of Appeal confirming it."

[15] The Disciplinary Committee (Appeal Rules) 1972, provides that an appeal to the Court of Appeal, shall be by way of a re-hearing. It provides at section 11 that the Court of Appeal Rules ('the CAR') apply to appeals under sections 16 or 18 of the Legal Profession Act, insofar as they do not conflict with the Disciplinary Committee (Appeal Rules) 1972. Section 18 which deals with restoration of the name of an attorney to the

roll is not relevant for these purposes. The Disciplinary Committee Appeal Rules 1972, in rule 4(2) and (3), provide that:

> "Except with the leave of the Court the appellant shall not be entitled on the hearing of an appeal to rely upon any grounds of appeal not specified in the notice of appeal.
>
> (3) The Court may give leave to amend the notice and grounds of appeal upon such terms as may be just."

The grounds of appeal

[16] Mr Neale, for the appellant, was granted leave to amend the original grounds of appeal and to argue the following amended grounds of appeal filed on 17 May 2021:

> "a. The learned panel of the Disciplinary Committee of the General Legal Council, having properly directed itself on the law, erred in ruling after a Voir Dire that neither of the two proposed expert witnesses intended to be called by the Appellant qualified as expert witnesses.
>
> b. The learned panel of the Disciplinary Committee of the General Legal Council erred as a matter of fact and/or law in finding that there was not on the face of the document [the appellant's power of attorney] or the circumstances that arose, sufficient risk factors that would cause her [the second respondent] to have a duty to enquire further into the authenticity of the power. In so finding the learned panel failed to appreciate that the circumstances were such as to put [the second respondent] on enquiry for the following reasons which are not exhaustive:
>
> i. The fact that two powers of attorney were purportedly issued by each of the two joint tenants of the property.
>
> ii. The fact that the powers of attorney did not speak to the distribution of the proceeds of sale.
>
> iii. The fact that it was alleged that the Appellant was incarcerated. This would

cause [the second respondent] to require proof of same.

iv. The fact that the powers of attorney were made in standard form and contained handwritten information.

v. The fact that the powers of attorney were made pursuant to a foreign enactment, being the Substitute Decisions Act, for which there is no equivalent in Jamaica.

c. The learned panel of the Disciplinary Committee of the General Legal Council erred as a matter of law in construing [the appellant's power of attorney] to include the authority to disburse the proceeds of sale to the donee in circumstances where the [appellant's power of attorney] does not expressly provide for disbursement.

d. The learned panel of the Disciplinary Committee of the General Legal Council erred as a matter of fact and/or law in finding that [the second respondent] did not act with deplorable or inexcusable negligence in the transaction which deprived the Appellant of her interest in the property without her knowledge or consent.

e. The learned panel of the Disciplinary Committee of the General Legal Council erred as a matter of fact and/or law in finding that [the second respondent] was not in breach of Canon 1(b) of the Legal Profession (Canons of Professional Ethics Rules)."

Submissions on behalf of the appellant

[17] Mr Neale was permitted to abandon ground a. He acknowledged that there was an element of overlap in the remaining grounds. On that basis, he argued grounds b and c together, and grounds d and e together.

[18] In his written submissions, Mr Neale advanced the position that the second respondent, having been engaged to act for the vendors in the sale of the property, was put on notice that she owed a fiduciary duty to the vendors and included in that duty, is an obligation to know her ultimate clients. This created a concomitant duty to make direct

contact with the vendors, and to obtain copies of their respective photo identification, verified by the same notary public who verified the powers of attorney.

[19] Although Mr Neale argued that the Committee did not appreciate the *ratio decidendi* of the case of **Shiokawa v Pacific Coast Savings Credit Union and Woods Adair** 2005 BCJ No 294 ('**Shiokawa**') on which it relied, the presentation of his arguments suggested that he accepted the principle stated by the Committee, at page 7 of its decision, that:

> "… it would appear that as a general rule an attorney at law is not under a duty to validate or authenticate a power of attorney unless on the face of it, there are certain risk factors that should cause the attorney to take such steps. The question therefore is whether the power of attorney that was presented to the attorney and the circumstances of it being handed to her was [sic] such as to be categorized as risk factors."

Regarding the issue of "risk factors" or "red flags", the main thrust of Mr Neale's submissions was that there were risk factors or red flags that arose from the circumstances of the second respondent's interaction with Ms Alexander which imposed a duty on her to validate or authenticate the appellant's power of attorney.

[20] In arguing ground b.(i) Mr Neale noted that the second respondent's affidavit suggested that when she was retained by Ms Alexander, she was only presented with Mr McKenzie's power of attorney and she only discovered that the appellant was a joint owner of the property when she made checks at the National Land Agency. It was argued that Ms Alexander's failure to have disclosed this fact should have created at least "an ounce of doubt in the [second respondent's] mind as to whether Ms. Alexander was making full and frank disclosure".

[21] Furthermore, counsel noted that the second respondent, having discovered the existence of the appellant as a joint owner, made a request of Ms Alexander as to whether she had a power of attorney from the second owner, and it was only then that the appellant's power of attorney was produced.

[22] Mr Neale further argued that the circumstances surrounding the production of the appellants' power of attorney were made more suspicious in light of the fact that the second respondent was advised that both owners of the property were incarcerated.

[23] He posited that the fact of the incarceration of the appellant and Mr McKenzie should also have placed the second respondent on inquiry, due to several curious features which arose primarily from the circumstances of both owners being incarcerated. These included the following:

a) The addresses of the appellant and Mr McKenzie were not stated on the powers of attorney to be a correctional facility;

b) The address of Mr McKenzie and Carolyn Alexander was the same; and

c) Both powers of attorney had the same person, Angela Gordon, as one of the witnesses, although the dates of execution were March 2011 for Mr McKenzie and November 2011 for the appellant respectively.

[24] Mr Neale also submitted that the timing of the production of the appellants' power of attorney was suspicious. He highlighted the evidence of the second respondent that two months before the sale of the property, there were negotiations in respect of a sale to a different party that was not completed. Mr Neale argued that it could reasonably be inferred that the failed sale would have been in train before the power of attorney had been secured for the sale, in respect of which the appellant complains, and the preliminary preparatory work such as the procuring of the two powers of attorney ought to have already been completed.

[25] Mr Neale also contended that a separate risk factor was that the powers of attorney were in a standard form and contained handwritten information and amendments.

Additionally, only Mr McKenzie's power of attorney specifically gave the power to deal with VMBS, although both owners of the property were parties to the mortgage documents. Mr Neale suggested that the fact that VMBS also relied on the powers of attorney should be irrelevant because as mortgagee, it is only concerned with receiving payment.

[26] Mr Neale submitted that in Jamaica, the making of powers of attorney is governed by the common law and the formalities for validity regulated by, the Registration of Titles Act, the Probate of Deeds Act, and the Conveyancing Act. The powers of attorney were made pursuant to the Substitution of Decisions Act 1992, and served a particular purpose in the province of Ontario, Canada, related to cases of incapacity. It was further submitted that the second respondent was obliged to determine whether those types of powers of attorney are applicable to Jamaican law. However, counsel did not pursue this particular submission with any vigour.

[27] In capping his submission, Mr Neale contended that the second respondent exercised wilful blindness which facilitated Ms Alexander's fraudulent conduct, as is evidenced by the fact that she did not even meet with Ms. Alexander.

[28] With respect to the power to distribute the proceeds of sale Mr Neale did not make any robust arguments on this point after he was pressed by the court as to what he considered would have been the practical course to be adopted by the second respondent after having received the proceeds of sale.

[29] Mr Neale reiterated his position that the Committee did not appreciate the *ratio decidendi* of **Shiokawa**. He relied on the cases of **Ginelle Finance v Diakakis** [2007] NSWSC 60, **Sansregret v R** [1985] 1 SCR 570, and **Law Society of Upper Canada v Marshall Kazman** 2005 ONLSHP 0032, in respect of the standard of proof, and in particular the distinction between wilful blindness and recklessness.

[30] Mr Neale concluded by suggesting that it was open to the Committee to have found that the second respondent's conduct fell below the required standard in failing to

take account of all the "red flags" and in the circumstances, the decision of the Committee should be overturned.

Submissions on behalf of the first respondent

[31] In relation to the first issue as framed by the Committee, Mrs Minott-Phillips KC noted that the Committee examined in detail the form and substance of the powers of attorney and found that they satisfied the appropriate legal requirements.

[32] Learned King's Counsel submitted that there are two separate and distinct fiduciary relationships that are in operation. The first is the fiduciary relationship between the donors and the donee of the powers of attorney. The second is the fiduciary relationship between the donee and the attorney who was assisting her in exercising her duties under the powers of attorney. The attorney's fiduciary duty, it was argued, was only owed to her client Ms Alexander, the donee of the powers of attorney. In this regard, Mrs Minott-Phillips submitted that the existence or non-existence of "red flags" is more related to the question of carelessness or the standard of care than to the duty of care. That being so, the standard of care is generally considered only after a duty of care has been found. This position as articulated by her is in accordance with the law as expressed in **Esser v Luoma** 2004 BCCA 359.

[33] Mrs Minott-Phillips stated that the position would not change even if there were clear red flags, because there was no underlying duty to the appellant. This is because attorneys are not accountable to persons other than their clients.

[34] Mrs Minott-Phillips submitted that the Committee quite correctly found that on the facts of the case, the second respondent having concluded that the powers of attorney presented to her by Ms Alexander complied with the statutory requirements of the laws of Jamaica in form and substance, there was no need for her to check behind the legal powers disclosed on the face of the powers of attorney.

[35] Mrs Minott-Philips submitted that, furthermore, even if it was possible to establish that Ms Alexander perpetrated a fraud on the appellant, the fact that the second

respondent used the powers of attorney to act in the sale of the property and pay over the net proceeds of sale to Ms Alexander would not be sufficient to constitute professional misconduct.

[36] In passing, it was submitted that there was doubt as to the appellant's credibility in relation to her evidence that the powers of attorney were not legitimate. However, King's Counsel conceded that the decision does not make any reference to the issue of the appellant's credibility.

Submissions on behalf of the second respondent

[37] Mrs Hay KC, on behalf of the second respondent, adopted and relied on both the written and oral submissions of Mrs Minott-Phillips which were made on behalf of the first respondent.

[38] In respect of the first issue, Mrs Hay agreed with the submissions made by Mrs Minott-Phillips that there is no general duty on an attorney to look behind or verify the authenticity of a power of attorney, which, on its face, is valid in both form and content.

[39] However, Mrs Hay adopted a more nuanced approach in respect of the significance of risk factors. Mrs Hay relied on the case of **Shiokawa** and noted that, in that case, the court accepted that there may be circumstances surrounding a power of attorney which are so suspicious as to put the lawyers on their inquiry. The complainant described the power of attorney in that case as having so many warning signs that the appellant's lawyers ought to have been put on enquiry and the issue at the heart of the case was "whether the circumstances concerning the power of attorney were so suspicious as to put the lawyers on their inquiry".

[40] Mrs Hay argued that the law suggests that as a general rule, the second respondent did not owe a fiduciary duty to the appellant. However, an important distinction that was identified by Mrs Hay, was that whereas the second respondent did not owe a fiduciary duty to the appellant, she nevertheless had a duty to act in keeping with the standards of the profession. Accordingly, Mrs Hay did not assert an absolute

proposition that there was no duty whatsoever on the second respondent, but articulated the position that no duty should be imposed on her outside the bounds of what the law recognizes.

[41] The position that was advanced by Mrs Hay is conveniently summarized at para. 16 of the written submissions of the second respondent as follows:

> "[16] The standard of care laid down in **Shiokawa** is that a reasonably competent solicitor dealing with documents executed out of the jurisdiction, having determined that the form of documentation meets the criteria of due execution may accept those documents for the purpose intended without making further inquiry, unless there is some additional obligation on her to do so. There is none in this case."

[42] She conceded that in certain circumstances an attorney may be held accountable for failing to look behind a power of attorney and failing to take note of its content, form, or directions as occurred in the case of **Reviczky v Melekenia et al and Caplan, Intervenor** 2007 CanLII 56494 (ON SC). However, King's Counsel emphasized that the Committee accepted the second respondent's evidence that she observed that the powers of attorney were in proper form and content and that they were duly signed and notarized. She argued that as a consequence, matters of form and substance were not in issue in this case. At issue was whether there were 'warnings', 'red flags', or 'unusual circumstances' which should have caused the second respondent to take any step beyond that which she did and it was submitted that there were none.

[43] In relation to Mr Neale's submission of what he considered unusual features of the transaction because both owners were incarcerated, Mrs Hay addressed them in turn. Learned King's Counsel argued that on an objective assessment, the fact of a party being incarcerated and utilizing a power of attorney was not in and of itself suspicious, since the incarceration of the donor explained the necessity for him or her to utilize a power of attorney. She cautioned the court to remember that, in retrospect, everything seems clear but in order to assess the quality of the second respondent's decision we must

consider the information that was available to the second respondent and to the Committee. This was especially in the context of the fact that the second respondent was the only person who could give most of the details about what transpired between herself and her client.

[44] Mrs Hay directed the court to para. 25 of the second respondent's affidavit in which she stated that after she learned that the appellant was a co-owner of the property, she contacted Ms Alexander and enquired about the appellant and was informed that she was incarcerated. Mrs Hay argued that there is no evidence that at the time the second respondent learned of the appellant's incarceration or at the time she received the appellant's power of attorney, she already knew that Mr McKenzie was then also incarcerated. King's Counsel directed the court's attention to the cross-examination of the second respondent (during the session on 16 March 2019) where in the notes of evidence she said:

> "There are two donors as you read out in the paragraph, I enquired about Ms. Smith, Ms. McKenzie [sic] and I was informed she was incarcerated. Same for Mr. Mckenzie."

[45] King's Counsel also referred to the cross-examination during the same session where the second respondent was questioned in respect of the address of Mr McKenzie and Ms Alexander being the same. The second respondent indicated that at the time she asked about the incarceration, she did not ask whether Mr McKenzie executed his affidavit before his incarceration, because his power of attorney is dated 6 March 2011. She stated that she did not find the similarity in the address to be curious because Mr McKenzie could have gone to jail after he executed his power of attorney.

[46] Mrs Hay noted that the second respondent was cross-examined in relation to the fact that both powers of attorney had the same person, Angela Gordon, as one of the witnesses, although the dates of execution were March 2011 for Mr Mckenzie and November 2011 for the appellant respectively. When asked if she found that to be

curious, she explained that at the time she noted that both documents were notarized and she relied on the fact that the documents were certified before a notary public.

[47] In relation to the proceeds of the sale, Mrs Hay submitted that implicit in the right to sell a property which was the specific object of the powers of attorney, is the right to complete tasks incidental to the exercise of the power. In this case, incidental to the completion of the contract for sale, was a right to collect the net sale proceeds, and accordingly the second respondent's act of remitting these proceeds to Ms Alexander was in the proper performance of her duty.

[48] Regarding the standard of care to be applied in cases of professional misconduct, Mrs Hay relied on the cases of **Witter v Forbes** (1989) 26 JLR 129 and **Leonard Wellesley v Lynden Wellesley:** Complaint No 25 of 2009 and **John Grewcock v Lord Anthony Gifford** Complaint No 59 of 2005 ('**Gifford**').

[49] King's Counsel submitted that the sale of the property was achieved by Ms Alexander and Mr McKenzie colluding and the appellant became aware of this. King's Counsel stated that this is evident in the cross-examination of the appellant in which she explained that she had a telephone conversation with Mr McKenzie and when she asked him why he and Ms Alexander sold the property, he told her that "he needed money for lawyer". It was posited by King's Counsel Mrs Hay that even if the appellant's power of attorney was not executed by the appellant, the second respondent had met the appropriate duty and standard of care and that is the end of the matter, as far as the obligations of the second respondent are concerned.

Discussion and analysis

(i) The Complaint

[50] The natural starting point for this analysis is the complaint, which is framed by the Committee in its written decision at page one in the following terms:

> "The complaint made against the Attorney is that she is in breach of Canon 1 [b] of the Legal Profession (Canons of Professional Ethics Rules) which 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.'"

[51] The Committee observed, at page 13 of its decision, that the appellant was also alleging a breach of Canon IV(r), and notwithstanding that there was no amendment to the form of the complaint in order to allege this breach, it would give due consideration to it in deciding the matter. Canon IV(r) provides that:

> "An Attorney shall deal with the 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."

There was no issue raised on the appeal relating to Canon IV(r) and there is no need for me to give it further treatment. This Canon seems wholly inapplicable to the facts with which the Committee dealt, since, among other things, the appellant was not the second respondent's client. However, I am led to conclude that the reference to Canon IV(r) is an error and that what was intended was a reference to Canon IV(s), particularly in light of the fact that it is Canon IV(s) that is quoted by the Committee, and it is in the following terms:

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

[52] My conclusion, in this regard, is bolstered by the reference by the Committee to **Gifford** in which the panel said that it was guided by the decision of this court in **Witter v Roy Forbes** at 132 to 133, where Carey JA made a number of observations. In the portion of his judgment that the Committee paraphrased, Carey JA concentrated on Canon V(s) and the use of the words "inexcusable or deplorable", with a minor reference to Canon IV(r) as follows:

> "… The council is empowered to prescribe rules of professional etiquette and professional conduct. Specifically, rule(s) of Canon IV is concerned with professional conduct for attorneys. It is expected that in any busy practice some negligence or neglect will occur in dealing with the business of different clients. But there is a level which may be acceptable or to be expected and beyond which no reasonable competent Attorney would be expected to venture. That level is characterised as 'inexcusable or deplorable'. The attorney [sic] who comprise a tribunal for the hearing of disciplinary complaints, are all in practice and therefore appreciate the problems and difficulties which crop up from time to time in a reasonably busy practice and are eminently qualified to adjudge when the level expected has not been reached. I cannot accept that the determination of the standard set, will vary as the composition of the tribunal changes. The likelihood of variation is in the sentence which different panels might impose but that, doubtless, cannot be monitored by the Court or the council itself.
>
> What I have said in regard to Canon IV (s) applies equally to a submission challenging the validity of Canon IV (r) on the ground that the phrase 'with due expedition' is not certain and positive in its terms."

[53] I am further fortified in my view by the final paragraph on page 13 of the decision in which the Committee arrived at the following conclusion:

> "… The attorney therefore, would not have been guilty of inexcusable or deplorable negligence in acting on the power nor would her action be considered behavior [sic] which did not maintain the honour and dignity of the profession of [sic] discredit the profession of which she is a member."

It is, therefore, patently clear to me from this conclusion, that the Canons which were being considered by the Committee were Canons I(b) and (IV) (s).

(ii)The standard of proof

[54] The standard of proof required in disciplinary proceedings is well settled and this is evidenced by a number of decided cases. In the case of **Campbell v Hamlet** [2005] UKPC 19, the appellant was an attorney-at-law in respect of whose conduct a complaint

of professional misconduct had been made to the Attorneys-at-Law Disciplinary Committee in Trinidad and Tobago. Lord Brown of Eaton-under-Heywood in delivering the judgment of the Board and in addressing the appropriate standard of proof in disciplinary proceedings, at para. 16, stated the following:

> "That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt. If and in so far as the Privy Council in *Bhandari v Advocates Committee* [1956] 3 All ER 742, [1956] 1 WLR 1442 may be thought to have approved some lesser standard, then that decision ought no longer, nearly fifty years on, to be followed ..."

[55] Later in the judgment at para. 20, he made the following observation:

> "Perhaps more directly in point, however, is the decision of the Divisional Court in *Re A Solicitor* [1992] 2 All ER 335, [1993] QB 69, concerning the standard of proof to be applied by the Disciplinary Tribunal of the Law Society. Lord Lane CJ, giving the judgment of the court, referred to the Privy Council's opinion in Bhandari's case and continued at page 81:
>
> > 'It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standards. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or, to put it another way, proof beyond reasonable doubt. This would seem to accord with decisions in several of the provinces of Canada.'"

Accepting the conclusion arrived at by the Board after it analysed a number of cases after **Bhandari v Advocates Committee**, it is clear to me 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.

[56] In the light of the issues raised in the grounds of appeal argued before us, ground a having been abandoned, I have found it convenient to deal with grounds c and d first, and then grounds b, and e together.

(iii) Was there a breach of Canon (IV)(s)? – Grounds c and d

[57] The Committee considered whether the second respondent was guilty of a breach of Canon IV(s) since, although there had been no such charge initially preferred against her, and no formal amendment made, the allegations supporting the charge were raised orally and the charge was permitted.

[58] I have considered the view expressed by the authors in Clerk and Lindsel on Torts, nineteenth edition (10-103 and the following paragraphs), that there may be circumstances in which a lawyer may be liable for negligence to a third party especially if the lawyer's obligation to his client can be said to be undertaken or imposed for the benefit of a third party. However, this is not the situation in the instant case.

[59] The law of negligence does not easily lend itself to the extension of a duty of care to a third party, who is not the client of the attorney. I, therefore, have reservations as to whether the scheme of the Legal Profession Act or the Legal Profession (Canons of Professional Ethics) Rules contemplated that a third party who is not the client of the attorney is permitted to properly assert a breach of Canon IV(s) by the attorney especially where the client is not making such an assertion.

[60] Whether a complaint against an attorney for negligence is maintainable by a third party will always be dependent on the particular facts or circumstances of each case. However, it poses difficulties because, as a general rule, the duty of care in negligence is owed by the attorney to the client and any breach of that duty, must be assessed in the context of the client's instructions and whether such instructions were fulfilled by the attorney in the provision of the appropriate services.

[61] I have concluded that when the facts are analysed in the context of a standard negligence claim, the conduct of the second respondent, in acting for her client Ms

Alexander by relying on the powers of attorney and in providing the proceeds of sale to her, could not amount to negligence by the second respondent contrary to Canon IV (s). Accordingly, this ground fails.

(iv) Was there a breach of Canon I (b)? – Grounds b and e

[62] The appellant complained that there were a number of red flags (risk factors or warning signs), that required the second respondent to do further checks in relation to the authenticity of the powers of attorney before acting on them. The appellant submitted that the failure of the second respondent to do further checks or make enquiries based on the circumstances, resulted in her interest in the said property being transferred without her consent, and that the second respondent thereby breached Canon I(b).

[63] In analysing whether the second respondent breached Canon I(b), it is helpful to revisit the first issue which was framed by the Committee in the following terms:

> "1. What is the duty of an attorney-at-law in relation to acting on the instruction of a donee of a Power of Attorney in a Real Estate transaction?"

[64] Considerable time was spent in this appeal, by both King's Counsel for the respondents, attempting to prove the proposition that where an attorney is presented with a power of attorney by his or her client, which on its face is valid in substance and form, and the client is the donee of the power, the attorney has no fiduciary duty to the donor of that power of attorney. However, in my respectful opinion, this appeal does not require a lengthy consideration of whether a fiduciary duty is owed by an attorney to the donor of the power of attorney. The short answer is that the attorney in Jamaica does not owe a fiduciary duty to a third party. However, although there is no such duty, that does not dispose of the appeal.

[65] The Committee in analysing the duty owed by an attorney in circumstances as obtained in this case, considered the approach in the **Shiokawa** case. Mrs Hay also relied on that case, and it is helpful to briefly consider the facts which led to the decision of the Court of Appeal of British Colombia. The relevant facts are that the Pacific Coast Savings

Credit Union ('the credit union') retained a firm of attorneys to place a mortgage against real property owned by Mr Shiokawa. The mortgage was to provide security for a loan by the credit union to him. The law firm was instructed by the credit union to prepare documents including a mortgage and to ensure that a special power of attorney from Mr Shiokawa, appointing Mr Tohyama to represent him in the transaction, was "satisfactory for the transaction". Mr Tohyama forged the signatures of Mr Shiokawa and also that of a witness on a special power of attorney, purportedly from Mr Shiokawa, appointing Mr Tohyama as attorney. He also forged the signatures on the mortgage documents. He then used the mortgage proceeds for his own purposes.

[66] Mr Shiokawa brought a claim against Mr Tohyama, the credit union and the Attorney General of British Columbia, seeking various declarations that the power of attorney and the mortgage be cancelled, and for other relief. These were granted by the trial judge.

[67] In an appeal against a judge's decision in third-party proceedings brought by the credit union against Mr Tohyama and his businesses to recover the amount of the mortgage loan, interest and costs, the Court of Appeal, at para. [31] of the judgment, addressed the relevance of suspicious circumstances in the following manner:

> "[31] The heart of the matter on appeal is whether the circumstances concerning the power of attorney were so suspicious as to put the lawyers on their inquiry, and to require them to report those suspicions to the Credit Union. The further question is whether the failure to report those circumstances amounts to the 'non-disclosure of material facts', so as to constitute a breach of the lawyers' fiduciary duty."

It is clear from the facts of the case, and the Court of Appeal's analysis, that this was a claim by the credit union as client, against its attorneys for breach of a duty to it and the nature of that duty was an important issue for the court's determination. It is in the context of determining whether that duty had been breached that the examination of the "suspicious circumstances" had significance.

[68] The case of **Ginnelle Finance v Diakakis**, to which the Committee referred, was a case in which there was a cross-claim by a defendant against the two solicitors who purported to act for him in related transactions. The court found that both solicitors had failed in their duty to their client, the defendant. One attorney failed by falsely attesting to witnessing the defendant's signature, the other, by failing to confirm the client's instructions, although he was not necessarily under a duty to do so. Germane to this finding of a breach by failure to confirm instructions, was the presence of several risk factors which should have raised an alarm and accordingly the court found this imposed a positive duty to confirm the instructions.

[69] The facts of **Shiokawa** and **Ginelle Finance v Diakakis**, and some of the issues which arose in those cases are, therefore, markedly different from those with which we are concerned. In the case before us, the scope of the duty of an attorney-at-law which is being considered is being assessed in the context of the complaint made against the second respondent, by the appellant, who is not her client. As a consequence, what is at issue is not the duty of the second respondent to her client, but rather, her duty (in acting on the instructions of a donee of a power of attorney in a real estate transaction), under Canon 1(b), to: "…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 [s]he is a member".

[70] As Mrs Hay appreciated, what is in issue is the scope of the duty to act in accordance with the reasonable standards of the profession. In my view, although Canon 1(b) does not expressly impose an obligation on attorneys to "act in accordance with the reasonable standards of the profession", that is the reasonable construction to be placed on the Canon. The existence or imposition of such a duty is manifestly sensible, in that, it prevents an attorney from relying on an absence of a fiduciary or other duty to third parties affected by his conduct, to behave in a manner which by bringing harm to third parties, may tend to discredit the profession.

[71] The importance placed on Canon 1(b) is evident in that Canon VIII(d) provides that the breach of a number of specified Canons, including 1(b) shall constitute misconduct in a professional respect.

[72] Although **Shiokawa** and **Ginelle Finance v Diakakis** are concerned about claims by clients against their lawyers, the importance of risk factors is also demonstrated in a number of cases concerning allegations of professional misconduct by parties other than those in a lawyer/client relationship. The complaint under consideration, being a complaint against the second respondent which is not by her client, falls squarely into the latter category.

[73] In the case of **Law Society of Upper Canada v Shirley Joyce Virginia Henry** 2018 ONLSTH 36, which was commended to us by Mr Neale, the law society found that the lawyer failed to be on guard against fraud or dishonesty and, thereby, placed herself in a position to be used by a client or an associated person to engage in fraudulent or dishonest conduct, in respect of four real estate transactions. This, led to a finding of professional misconduct on her part. One of the transactions involved the use, by her client, of a foreign power of attorney which was purportedly signed by a notary public in Sri Lanka giving her client the authority to deal with the property. It was subsequently discovered that the owner of the property had not signed the power of attorney and that the document was forged.

[74] The attorney had attempted to verify that the power of attorney was genuine and spoke with a Sri Lankan lawyer but did not speak to the donor directly. She could not verify that the purported execution of the power of attorney complied with and was valid under the enabling Substitute Decisions Act, in that the grantor had the necessary capacity, and that her signature had been properly witnessed. Nevertheless, using the power of attorney, she witnessed her client's signature on an acknowledgment and direction document, which facilitated the transfer of the property from the donor of the power of attorney to named transferees.

[75] The law society found that, in not paying attention to several red flags and thereby making the appropriate checks, the lawyer failed to perform legal services to the standard of a competent lawyer, and this facilitated fraudulent transactions. At para. [55] the law society noted that the transactions did not consist of elaborate schemes and the four transactions all displayed clear signs of irregular behaviour that could easily have been discovered by the lawyer exercising due diligence.

[76] In this case under consideration, the Committee found that, if the power of attorney appears on its face to be proper in form and substance, then the attorney does not need to go any further. In principle, I consider this to be a useful starting point.

[77] The evidence of the second respondent is that when she received a power of attorney, such as Mr McKenzie's power of attorney, her duties were as follows:

> "To examine the document to ensure that there is a donor and a donee. To examine what the Power of Attorney is asking the donee to do. To ensure the donor signs the Power of Attorney. To ensure that there is a witness or witnesses to the donor's signature. That there is a certifying official who witnessed the signature of the donor and the witness or witnesses if there is more than one witness, that along with the signature of the certifying official, that there is a seal or stamp affixed or attached to the Power of Attorney which shows that the certifying official is a certifying official in his or her capacity."

In respect of the appellant's power of attorney, the evidence of the second respondent is that as a prudent attorney, she performed the same checks she made in respect of Mr McKenzie's power of attorney, and she saw the signature and stamp of Marie-Jose Beauplan-Mann, a notary public for Ontario.

[78] I accept that the checks described by the second respondent are those which would be sufficient in the ordinary course. However, in my opinion the case of **Law Society of Upper Canada v Shirley Joyce Virginia Henry** supports the position that the duty of an attorney is acutely fact sensitive and, in the event that there are risk factors, suspicious circumstances or red flags, then the attorney does have a duty to be

on guard against fraud or dishonesty, and to make additional checks in order to satisfy himself or herself that all is in order, and that he is not unwittingly facilitating dishonesty, fraud or illegal conduct. The extent of the checks which may be necessary will, of course, vary from case to case. The primary question which falls for determination in this appeal, is whether there were risk factors that imposed an obligation on the second respondent to make further checks.

[79] It is against the backdrop of the law as I have stated it in the preceding paragraph, that I now come to analyse the conduct of the second respondent about which there has been a complaint. It is not in dispute that she made no checks in relation to the circumstances which led to the execution of the appellant's power of attorney or indeed, whether the appellant was the person who executed it.

[80] The reason advanced by the second respondent for not having made any checks is that there were no red flags arising from the circumstances of her interaction with her client, Ms Alexander, which caused her to feel that such elevated checks were necessary. The narrow issue is, therefore, whether she failed to act in accordance with the reasonable standards of the profession.

[81] In performing this assessment, I have found merit in some of the submissions of Mrs Hay that the factors which Mr Neale described as red flags must be considered in the context of the state of the second respondent's knowledge at the time. However, it must also be determined whether it was appropriate, in respect of certain facts, for her to have expanded the scope of her knowledge by performing enquiries, rather than simply relying on what was told to her by Ms Alexander.

Ms Alexander's failure to disclose the appellant's interest and the appellant's power of attorney

[82] The fact that Ms Alexander was, initially, in the first and subsequently aborted sale, attempting to sell the property without the involvement of the appellant ought to have been considered a red flag by the second appellant. It is passing strange that a client giving instructions for the sale of a property for which she is not the legal or beneficial

owner, does not know who those owners are. It is not a meritorious response to suggest that she may have been given instructions by only one owner, in this case Mr McKenzie, and was, therefore, not aware of the appellant's interest. Furthermore, Ms Alexander did not express any such ignorance to the second respondent.

[83] The evidence of the second respondent, contained in para. 25 of her affidavit sworn to on 21 August 2015, is that after she learned that the appellant was a co-owner of the property, she contacted Ms Alexander and enquired about the appellant. It was then that she was informed by Ms Alexander that the appellant was incarcerated. The second respondent averred that she asked if there was a power of attorney from the appellant and was told by Ms Alexander that there was one.

[84] If Ms Alexander at that time had the appellant's power of attorney in her possession, or had knowledge of its existence, it begs the question as to why this was not communicated to the second respondent as a part of the instructions to her. This omission ought reasonably to have raised doubt in the second respondent's mind as to whether Ms Alexander was making full and frank disclosure.

[85] If Ms Alexander was not making full and frank disclosure to the second respondent, then the question which should have arisen was, why not? A prudent course of enquiry would in all likelihood have led to the real answer, which is that the statement that the appellant was incarcerated, and the concealment of her interest, was a part of a fraudulent scheme to sell the property without her knowledge. The scheme was not elaborate, but its success was predicated on the second respondent not making any checks to verify the accuracy of the information she was told about the appellant's incarceration and the existence of the appellant's power of attorney.

[86] The evidence of the second respondent was that this communication between herself and Ms Alexander was at least a month or two before the actual sale. There was a previous sale which fell through because those purchasers could not afford the property and that sale was on hold. She explained that she did not at any time make any enquiries

about the registered owners because "she did not expect the sale to come back". She "discarded" Ms Alexander's file, then Ms Alexander contacted her to let her know there was a new prospective purchaser.

[87] In the light of the fact that Ms Alexander had approached the second respondent in respect of the earlier intended sale, with a power of attorney for only one vendor, and her subsequent disclosure of the existence of the appellant's power of attorney only after the second respondent questioned her, is quite curious. The second respondent's failure to find it curious is even more puzzling. Based on the timeline which can be deduced from the second respondent's evidence, a reasonable inference can be drawn that the appellant's power of attorney dated 21 November 2011 would not have been in existence when Ms Alexander approached the second respondent with respect to the first sale which was aborted. This, in my view was a red flag, which ought to have given the second respondent reason for pause.

[88] The date that the second respondent received the appellant's power of attorney from Ms Alexander is not disclosed on the evidence, and the second respondent stated during the proceedings that she only had preliminary discussions with Ms Alexander when the first sale fell through. However, on whatever date the appellant's power of attorney was received, the second respondent should have noted its date and having borne in mind, in retrospect, the aborted transaction, sought an explanation of Ms Alexander for its absence at the time when the first sale was being explored. Having regard to its date, the second appellant should also have enquired as to when Ms Alexander obtained it. Furthermore, whereas the second respondent's evidence was that she, at no time during the aborted sale, made any enquiries about the registered owners because "she did not expect the sale to come back", it is my view that, another sale having materialised and the appellant's power of attorney having been belatedly produced, an enquiry ought to have been made. It is noteworthy that there is no evidence of any connection between the appellant and Ms Alexander which would account for the appellant's willingness to appoint Ms Alexander as her attorney. This may not have been a material consideration in the usual course, but was made so by the circumstances as they unfolded.

The fact of incarceration

[89] I accept that the information conveyed to the second respondent that Mr McKenzie and the appellant were incarcerated, without more, would not necessarily have been considered by her to be a red flag since, the incarceration of the appellant and Mr McKenzie could, *prima facie*, account for the need for them to utilize a power of attorney.

[90] However, there are other possibilities, one of which was raised by the second respondent herself, that is, that Mr McKenzie could have executed his power of attorney before he went to prison, therefore, incarceration would not have been the *prima facie* reason for his power of attorney in favour of Ms Alexander. The date of the appellant's power of attorney is, therefore, of considerable significance. As previously highlighted, it is dated 21 November 2011. The instrument of transfer of the property was signed by Ms Alexander on 10 January 2012 and is dated 13 January 2012. However, as also noted earlier, the evidence of the second respondent was that the conversation between herself and Ms Alexander in which she was told that the appellant was in custody was at least a month or two before the actual sale. There is no evidence as to the date of the conversation, but it is possible on this evidence that the conversation was subsequent to the date of the appellant's power of attorney.

[91] The date of the appellant's power of attorney in relation to this conversation was not explored at the hearing. Nevertheless, it is possible to make a reasonable assessment of the proximity of that date to the conversation, based on the evidence that the conversation was at least a month or two before the actual sale. Whether one uses one month or two, this would suggest that the date of the appellant's power of attorney would have been proximate to the conversation in which Ms Alexander stated that the appellant was incarcerated. It is my opinion that this ought to have naturally prompted an enquiry by the second respondent as to whether the appellant was in custody when she executed it.

[92] The issue as to whether the second respondent was in custody on the date when her power of attorney was executed is important. This is because if she was in custody,

then different considerations would have applied to the assessment of her execution of her power of attorney than applied in the case of Mr McKenzie. In his case, the second respondent said she assumed he may have executed his power of attorney before he was incarcerated.

[93] If the appellant executed her power of attorney in prison, unlike Mr McKenzie who the second respondent assumed may have not, that ought reasonably to have placed the second appellant on enquiry as to the circumstances of its execution. Such enquiry to be effective would include determining whether the witnesses and the notary had visited the appellant in prison in order to have the appellant's power of attorney executed.

[94] It is noteworthy that the purported notary's certification on the appellant's power of attorney states that it was subscribed and sworn before the notary at Brampton, Ontario "this 21 day of November 2011". There is no indication that it was done at a prison located in Brampton or some other correctional facility.

[95] The appellant had also made a complaint to the Law Society of Upper Canada and this court was directed to its conclusion that its investigation did not uncover any evidence of professional misconduct on the part of the notary. In fact, curiously, the Law Society indicated in its letter to the appellant dated 29 November 2013 that it accepted the notary's assertion that she had never met the appellant, nor had she "prepared" (and I presume this includes "certified"), a Continuing Power of Attorney for the appellant or anyone purporting to be the appellant. However, I acknowledge that the conclusion reached by the Law Society following its investigation is of no assistance for the purposes of determining whether, based on the information which the second respondent had at the relevant time, she acted reasonably in concluding that she could properly have relied on the appellant's power of attorney without performing additional checks.

[96] In any event, the facts which were subsequently considered by the Law Society were not known by the second respondent when she utilized the appellant's power of attorney. All that the second respondent knew was that she had what appeared on its

face to be a valid power of attorney, purportedly signed by the appellant, and which purported to have been witnessed before a notary public. This was produced to her by Ms Alexander, to be used to sell the property, at a time when Ms Alexander said that the appellant was incarcerated, and which she had not previously produced for the earlier aborted sale.

[97] In my opinion, given the initial non-disclosure by Ms Alexander of the appellant's power of attorney, the second respondent ought to have investigated whether the appellant was incarcerated when she executed the appellant's power of attorney which was later produced. On the assumption that there are established protocols in a correctional facility for executing, and having a power of attorney witnessed and notarised by persons who are not ordinarily present in a correctional facility, it would have been the duty of the second respondent to have confirmed the validity of the notary's certification in these circumstances, rather than assuming that it was proper.

[98] The unchallenged evidence of the appellant is that she has never been incarcerated. Therefore, had the second respondent pursued enquiries about the circumstances of the execution of the appellant's power of attorney, it is almost a certainty that she would have discovered that the notary did not in fact certify the appellant's power of attorney, which was also the finding of Law Society. The imposition of such a duty on the second respondent to make additional enquiries would not have been an unreasonable burden on an attorney, in the face of the suspicious circumstances surrounding the belated production of a power of attorney said to have been executed by the appellant whilst incarcerated.

The similar address and the witness common to the two powers of attorney

[99] The second respondent explained that, although Mr McKenzie's power of attorney is dated 6 March 2011, she did not find the fact that Mr McKenzie and Ms Alexander had the same address to be curious because Mr McKenzie could have gone to jail after he executed his power of attorney. This explanation is plausible. However, if the appellant and Mr McKenzie were both serving sentences in prison, even if Mr McKenzie executed

his power of attorney before he was incarcerated, it is interesting, that both powers of attorney had the same person, Angela Gordon, as one of the witnesses. This is so especially since the dates of execution were approximately eight months apart.

[100] I appreciate there might have been a good explanation, such as a special connection or relationship between them, or factors including proximity or convenience which explains her use as a witness for both powers of attorney. That notwithstanding, when juxtaposed against the circumstances surrounding the belated production of the appellant's power of attorney to which I have already averred, I find that the common witness in this case amounted to a red flag which required the second respondent to make additional enquiries.

[101] The second respondent's explanation, in cross-examination, when asked if she found the use of a common witness to be curious, was that at the time she noted that both documents were notarized and she relied on the certification before a notary public. In essence, she thought nothing of it. However, in my view, had she enquired further into the use of the common witness, having regard to Ms Alexander's statement that the appellant was incarcerated, this would also very likely have led the second respondent to undertake a line of enquiry which may have led her to the conclusion that the appellant's power of attorney may not have been executed by the appellant.

[102] Having due regard to the risk factors which I have identified, I have concluded that there were sufficient risk factors in the circumstances that existed at the relevant time, which imposed a duty on the second respondent to enquire further into the authenticity of the appellant's power of attorney.

Should this court set aside the decision of the Committee?

[103] Sections 16 and 17 of the LPA, to which reference has previously been made, set out the powers of this court to hear and determine appeals from the decisions of the Committee. Those sections provide that an appeal to this court is by way of a rehearing,

and it may dismiss the appeal, confirm or vary the orders of the Committee, or it may allow the appeal, set aside the orders, or order a re-hearing by the Committee.

[104] The approach this court ought to take in coming to its decision is well documented. In **Julius Libman v General Medical Council** [1972] AC 217 at page 221 the Board made the following observation:

> "In the result, although the jurisdiction conferred by the statute is unlimited, the circumstances in which it is exercised in accordance with the rules approved by Parliament are such as to make it difficult for an appellant to displace a finding or order of the Committee unless it can be shown that something was clearly wrong either (i) in the conduct of the trial or (ii) in the legal principles applied or (iii) unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread. Or, of course, an appellant can rely cumulatively or in the alternative on any combination of the three. In the present case, for instance, counsel for the appellant relied on criticisms of the assessor's advice to supplement what he alleged was the weakness of the evidence against the appellant."

[105] That case was considered against the background of the legal framework provided by the Medical Act 1956 (UK), Part V, which provides for the discipline of the medical profession, and the proceedings before that disciplinary committee are governed by two statutory instruments. Nevertheless, it is my view that the general propositions which can be extracted from the case relating to the approach to be taken by the appellate tribunal are apt. In summary, an appellate court will be slow to set aside a decision of a disciplinary body, unless it can be shown that the decision was plainly wrong (see also **Re A Solicitor** [1974] 3 All ER 853).

[106] In the premises, I find that the Committee was plainly wrong in concluding that the circumstances did not raise red flags that were sufficient to require the second respondent to do further checks to verify the authenticity of the powers of attorney. There were sufficient red flags that, if they had been considered by the Committee, it would

have concluded that the second respondent should have made checks in respect of the circumstances of the execution of the appellant's power of attorney. This would have been necessary especially bearing in mind the assertion by Ms Alexander that the appellant was incarcerated. The inescapable conclusion which would have been reached by the Committee would have been that, in failing to make further checks and acting on the appellant's power of attorney, the second respondent breached Canon I(b). This breach was compounded by the payment of the proceeds of sale to Ms Alexander in those circumstances. The Committee, therefore, erred in only considering whether the form and substance of the powers of attorney complied with Jamaican law, without taking into account the context of the second respondent's actions. In the circumstances, it is my opinion that the decision of the Committee that the second respondent was not guilty of breaching Canon 1(b) of the LPR ought to be set aside. Accordingly, the matter will have to be remitted for a sanction hearing to be held.

EDWARDS JA

ORDER

1. The appeal is allowed.

2. The decision of the Disciplinary Committee of the General Legal Council made on 13 January 2021, that the second respondent is not guilty of a breach of Canon 1(b), is set aside.

3. The second respondent Fay Chang Rhule is in breach of Canon 1(b) and is guilty of professional misconduct.

4. The matter is remitted to the Committee for a sanction hearing to be held.

5. Costs to the appellant to be taxed if not agreed.