Easter Term
[2024] UKPC 12
Privy Council Appeal No 0083 of 2022

JUDGMENT

General Legal Council (Appellant) *v* Michael Lorne (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Hodge
Lord Sales
Lord Leggatt
Lord Richards
Lady Simler

JUDGMENT GIVEN ON
23 May 2024

Heard on 20 February 2024

Appellant
Sandra Minott-Phillips KC
Jacob Phillips
(Instructed by Myers Fletcher & Gordon (London))

Respondent
Julian Malins KC
Linda Hudson
Bianca Samuels
(Instructed by VH Lawyers Ltd (London))

LORD HODGE AND LADY SIMLER:

1. This appeal concerns the correctness of a striking off sanction for misconduct short of dishonesty imposed by the disciplinary committee of the General Legal Council ("the Committee") against a practising attorney-at-law.

2. The attorney is Michael Lorne, admitted to practise at the Jamaican Bar in 1979. The sanction followed a finding of professional misconduct against him for failure to account to his client, Olive Blake, for her share of the proceeds of sale of a property at 10 Fairbourne Road, Kingston, Jamaica, that was jointly owned by Ms Blake and her brother. As part of the sanction imposed for this professional misconduct, Mr Lorne was struck off the Roll of Attorneys-at-law entitled to practise in Jamaica.

3. Mr Lorne initially challenged both the finding of professional misconduct and the sanction on appeal to the Court of Appeal. However, at the hearing he limited his appeal to the severity of the sanction of striking off. The Court of Appeal allowed his appeal against sanction, set aside the striking off order and substituted a sanction of suspension from practice for five years combined with compulsory attendance at additional continuing legal professional development ("CLPD") courses. Mr Lorne has obtained the needed CLPD credits and served the period of suspension from practice in full.

4. The General Legal Council (the "Council") now appeals to the Board with leave of the Court of Appeal. In short, it submits that the Committee made no error of law, the sanction was not wrong, and the Court of Appeal ought not to have interfered with the striking off imposed in this case. It also contends that the Court of Appeal failed to show appropriate deference to the specialist disciplinary tribunal's sanction decision.

5. For the reasons set out below, the Board has concluded that the Court of Appeal was entitled to interfere with the decision of the Committee as to the appropriate sanction and to substitute its own judgment. The Board seeks to give the guidance which the Court of Appeal has requested on the role of the Court of Appeal in relation to a sanction imposed by the Committee and on the proper approach by such a committee to misconduct by an attorney which is very serious but falls short of dishonesty.

The legislative framework

6. The Legal Profession Act sets out the qualifications required for enrolment on the Roll of attorneys-at-law and makes provision in Part IV for discipline. Section 11 provides for the appointment of the Committee, which has jurisdiction to hear and determine allegations of misconduct against attorneys. Section 12 provides:

> "12.(1) Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, …"

7. A complaint under section 12(1) must be heard in accordance with rules of procedure made under section 14. Section 12(4) sets out the sanctions that the Committee "may, as it thinks just," impose on an attorney found to have committed professional misconduct. These include striking the attorney off the Roll and suspending the attorney from practice.

8. Section 12(7) of the Legal Profession Act confers power on the Council to make rules regarding professional conduct. Among the rules made under that power are the Legal Profession (Canons of Professional Ethics) Rules. Canon VII is the relevant canon in this case. By paragraph (b) it requires an attorney to:

> "(i) keep such accounts as shall clearly and accurately distinguish the financial position between himself and his client as and when required; and
>
> (ii) account to his client for all monies in the hands of the Attorney for the account or credit of the client, whenever reasonably required to do so and he shall for these purposes keep the said accounts in conformity with the regulations which may from time to time be prescribed by the General Legal Council."

9. Section 16 of the Legal Profession Act provides:

> " 16.-(1) An appeal against any order made by the Committee under this Act shall lie to the Court of Appeal by way of rehearing at the instance of the attorney or the person aggrieved to whom the application relates, including the Registrar of the Supreme Court or any member of the Council, and every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court. …"

10. Section 17 of the Legal Profession Act provides:

> "17.-(1) 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."

11. These sections make clear that an appeal from the Committee lies to the Court of Appeal and is a rehearing rather than a review. In other words, the Court of Appeal has full appellate rather than simply a supervisory jurisdiction. That means that rather than being limited to reviewing the legality of the decision, the Court of Appeal can conduct a rehearing and can substitute its own decision for that of the decision-maker in an appropriate case, provided always that caution is exercised before overturning a disciplinary decision in the absence of an error of law or principle. It may allow the appeal, set aside the decision and/or vary the sanction imposed.

The factual background

12. Michael Lorne was called to the Bar in 1979. He was in private practice, practising alone but employed other lawyers from time to time. There was no dispute that he had experience of estate matters and conveyancing. He knew both Olive Blake and her brother, Howard Wilson, and had known them for about 10 years at the date of the disciplinary conduct hearing.

13. The property at 10 Fairbourne Road ("the property") was bequeathed to Olive Blake and Howard Wilson by their father in his will in equal shares. Both were executors of their father's estate. Their father died on 9 November 1999. In late October 2002, Mr Lorne agreed to act in the administration of the estate on behalf of Mr Wilson and Ms Blake. At the time, Mr Wilson was living in England and Ms Blake was living in America. They wanted the property to be sold.

14. Mr Lorne was directly responsible for the work involved in this transaction. It took some years for letters of administration and probate to be secured. Having done so, the property was put up for sale. In December 2009 agreement was reached with a purchaser to buy the property at a purchase price of JM$6m. Mr Lorne had carriage of the sale agreement. The sale duly completed and title to the property transferred to the

purchaser on 22 November 2011. Mr Lorne received the sale proceeds and other sums collected on behalf of the estate (totalling JM$6,071,604.54). All sums received by him for and on behalf of the estate were undoubtedly held on trust by him and there can equally have been no doubt that he owed a fiduciary duty to each of Mr Wilson and Ms Blake, for both of whom he acted.

15. By a written complaint dated 8 October 2012, Ms Blake made an allegation of professional misconduct against Mr Lorne to the Committee. Her supporting affidavit explained that he was employed to sell the property and to distribute the proceeds equally between her and her brother. She said Mr Lorne told her that the property was sold and that he sent a portion of the money to her brother. However, she did not receive her share of the proceeds of sale and Mr Lorne refused to answer or contact her. Her complaint was that he had not accounted to her for moneys held by him on her account despite being reasonably required to do so.

16. Mr Lorne's explanation for his failure to account to Ms Blake for her share of the sale proceeds was that he had been instructed by Howard Wilson to send all the proceeds of sale to him, Mr Wilson, as Ms Blake had received other funds from the estate which exceeded her half share in relation to the sale of the property. Mr Lorne maintained that, acting on those instructions, he had forwarded all proceeds of the sale to Mr Wilson. He denied any suggestion that he had dishonestly handled client moneys. The Board notes that in the course of the disciplinary process, by a written agreement dated 30 April 2014, Mr Lorne agreed to pay Olive Blake the amount of JM$2.5m (described as her share of the sale proceeds). A schedule of payments was set out in the agreement, with the last payment to be on 30 September 2014. The agreed payments were not made by Mr Lorne in accordance with the schedule, and indeed, the total amount remained outstanding until 10 April 2017.

The findings of the Committee

17. It is regrettable that although the Committee started to hear evidence in July 2013, the taking of evidence was not itself completed until two years later, on 2 July 2015, as a result of repeated adjournments and the Committee did not make its misconduct determination until 2 March 2017. The Board observes that there was further delay at the appeal stage, resulting in a process that has taken more than 10 years to resolve. It is unnecessary to set out the reasons for each successive adjournment or to identify the causes of delay, beyond stating that Mr Lorne's behaviour caused several of the adjournments. But the Board observes that timely disciplinary procedures are important in ensuring fairness as between the parties involved, and the significant delay in this case cannot have helped anyone in resolving it.

18. Both Ms Blake and Mr Lorne gave evidence to the Committee, and both were cross-examined. Howard Wilson did not give evidence at all.

19. In its decision of 2 March 2017, the Committee found that Ms Blake had proved her complaint of professional misconduct. The panel made 58 findings of fact. Among these findings were criticisms of Mr Lorne's record keeping, of the fact that he had unnecessarily paid transfer tax on the estate of Constance Wilson who predeceased Ms Blake's father, of the fact that he registered the purchase of the property before the full purchase price had been paid, and of certain deductions he made from the balance of the proceeds when he was not entitled to do so. Since these serious criticisms of Mr Lorne's professional competence formed no part of Ms Blake's complaint and the Committee's misconduct finding, the Board does not set them out. Giving its account of the evidence, the Committee also noted:

> "There is no credible documentary evidence that the attorney did in fact send proceeds of sale to Mr Howard Wilson. There is no letter from Mr Wilson acknowledging receipt of any such sums. The telegraphic transfer exhibits were not clear and unequivocal that proceeds of sale had indeed been sent to Mr Howard Wilson."

However, the Committee made no finding of fact that the sale proceeds were not paid over to Mr Wilson by Mr Lorne and, further, the Committee made no finding of dishonesty against Mr Lorne.

20. It is sufficient to record the following material findings made by the Committee:

> "20. The complainant was a client of the attorney.
>
> 21. Howard Wilson was a client of the attorney.
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> 22. The attorney had a fiduciary duty to both Howard Wilson and the complainant Olive Constance Blake.
>
> …
>
> 36. The attorney was obliged in law to fulfil the mandate of the Will of Herbert Wilson wherein the testator had stated that 'I devise and bequeath all my real – and personal property – to

the said Olive Constance Blake and Howard Wilson in equal shares.'

37. The complainant, Olive Constance Blake, was entitled in law to the same share in the balance proceeds of sale after all legitimate expenses had been paid, as was Howard Wilson.

38. The attorney had no authority in law to send to Howard Wilson any sums to which Olive Constance Blake was entitled.

39. The attorney held the sums due to Olive Constance Blake in trust for her.

40. The attorney was obliged in law to use the funds due to Olive Constance Blake only for the purposes connected to her interests and on her sole direction.

…

42. By document dated the 30th April 2014 and headed Agreement, the attorney agreed to pay the sum of 2.5 million dollars to the complainant representing her share of the proceeds of sale.

43. The attorney made no payments pursuant to that document.

…

48. The complainant has not received from the attorney any monies representing her share of the proceeds of sale of 10 Fairbourne Road after all legitimate expenses have been paid.

49. The attorney breached his fiduciary duty to the complainant, if as he says, he paid over monies due to her brother Howard Wilson without her authority. …

> 52. The attorney is obliged in law to pay over the sum due to the complainant representing her share of the balance of proceeds of sale with interest."

21. The Committee recorded the law applicable to the complaint as canon VII (b)(ii) of the Legal Profession (Canons of Professional Ethics) Rules which provides:

> "An Attorney shall account to his client for all monies in the hands of the Attorney for the account or credit of the client whenever reasonably required to do so".

22. The Committee concluded, based on all the evidence and its findings, that a breach of this canon had been proved beyond reasonable doubt (although it mis-recorded the relevant canon as VII (b)(i)) in that Mr Lorne had failed to pay over to Ms Blake her share of the balance of the proceeds of sale of the property to which she was entitled, when reasonably required to do so. Accordingly, it held that he had failed to account to Ms Blake for the following sums:

"Half balance proceeds of sale -	$1,935,913.40
Half of outstanding proceeds of sale -	$38,310.23
Half Transfer Tax on Estate Constance Wilson -	$91,651.92
Half Real Estate Commission -	$90,000.00
Half Rental & Initial Retainer -	$84,236.85
	$2,240,112.40

The attorney is obliged in law to pay interest on these sums."

23. The question of sanction was otherwise adjourned.

24. There were further hearings to address sanction on 11 April and 4 May 2017. At the hearing on 4 May 2017, the Committee received evidence about Mr Lorne's positive contribution to the community and work for his clients as an attorney, together with

other submissions in mitigation. Mr Lorne had paid the sums identified above as outstanding to Ms Blake on 10 April 2017, the eve of the first sanction hearing.

25. By its sanction decision of 24 June 2017, the Committee directed that Mr Lorne be struck from the Roll. Because it is central to the appeal, the Board sets out the Committee's reasoning for that decision. First, the Committee repeated its salient findings, including the fact that even after the complaint had been instituted in October 2012, Mr Lorne had failed to pay the sums due to Ms Blake throughout the course of the disciplinary proceedings, and had not done so until the eve of the scheduled date for hearing his mitigation. Next it described Mr Lorne's "unethical acts" as "very serious, … extremely egregious, inexcusable and unacceptable." Then it rightly said that such conduct undermines trust in attorneys-at-law on which the entire practice of conveyancing in Jamaica is based, explaining that attorneys-at-law are expected to adhere to the highest ethical standards when dealing with the business of clients and third parties. They are obliged to account for and pay over client money as it becomes due. They are obliged to keep funds in trust accounts and deal with them in a manner that is wholly in the interest of and at the direction of the client. As the Committee observed, Mr Lorne did not do these things.

26. The Committee then quoted from the following passages in the judgment of Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512, 518; [1994] 2 All ER 486, 491F to J and 492D to G ("*Bolton*"):

> "It is required of lawyers practising 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 anything 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. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. …
>
> In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to

> repeat the offence. … The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor pending re-investment in another house, he is ordinarily entitled to expect the solicitor will be a person whose trustworthiness is not, and never has been seriously, in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires".

27. Having cited these passages, the Committee continued immediately as follows:

> "The legal reasoning in this case has been adopted in many disciplinary cases against attorneys in Jamaica and these attorneys have been struck from the Roll of Attorneys-at-law entitled to practise in Jamaica for dishonestly handling monies belonging to clients or to third parties. These decisions by the Disciplinary Committee have been upheld by the Court of Appeal."

The Committee then set out the payments that Mr Lorne was required to make to reimburse Ms Blake, including the agreed sums payable as interest and costs, and continued:

> "Lastly, based on the detailed analysis of the evidence and the relevant law outlined above, and in spite of the fact that the attorney has repaid the sums incorporated in the order, and the glowing tributes made by the character witnesses of the attorney, it is the decision and order of the panel that the Attorney Michael Lorne be struck from the Roll of Attorneys-at-law entitled to practise in Jamaica …"

The judgment of the Court of Appeal

28. Mr Lorne appealed against the finding of professional misconduct, and the sanction imposed by the Committee, although as the Board has already indicated, the

appeal ultimately focussed on the sanction decision alone. In relation to sanction he contended that the striking off order was manifestly excessive and unsupported by the evidence. By a judgment dated 26 March 2021 ([2021] JMCA Civ 17), the Court of Appeal (the Hon Mr Justice F Williams JA, the Hon Miss Justice P Williams JA and the Hon Miss Justice Straw JA) affirmed the Committee's finding of professional misconduct in breach of canon VII(b)(ii). However, it allowed the appeal against sanction, setting aside the striking off order and substituting a five-year suspension with additional training requirements. The sanctions judgment was affirmed in all other respects.

29. The Court of Appeal started its discussion of sanction with a recognition that appellate courts are generally reluctant to interfere with a sanction imposed by a specialist disciplinary tribunal. It referred to *Bolton*, and to *The Law Society v Brendan John Salsbury* [2008] EWCA Civ 1285 ("*Salsbury*"), in which at para 30, the Court of Appeal of England and Wales said:

> "In applying the *Bolton* principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under articles 6 and 8 of the Convention. It is now an overstatement to say that 'a very strong case' is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere. It should also be noted that an appeal from the Solicitors Disciplinary Tribunal to the High Court normally proceeds by way of review …"

30. In relation to the reference to article 6 of the Convention, it has an approximate equivalent in section 16 of the Jamaican Charter of Fundamental Rights and Freedoms ("the Charter"), which, the Court of Appeal said, called for greater awareness of the importance of the fair trial rights of those appearing before disciplinary tribunals. The Court of Appeal held accordingly, that:

> "[30] … the intervention of the appellate court in matters of sentencing, imposed by the disciplinary tribunal ought to be

> limited to cases where errors of law exist or where the sentence is demonstrated to be clearly inappropriate."

31. Applying that test to its consideration of the appropriateness of the sanction of striking off in Mr Lorne's case, the Court of Appeal's further reasoning was as follows:

> "[35] ...There can be no doubt that a panel of the disciplinary committee of the GLC is authorised to strike attorneys-at-law off the Roll. However, such a sanction, being the most draconian of those provided, must be appropriate to the circumstances of the particular case. ...
>
> [36] One matter that is of great concern is the panel's reference, as the last matter in its discussion of *Bolton v Law Society,* to the following:
>
>> 'The legal reasoning in this case has been adopted in many disciplinary cases against attorneys in Jamaica and these attorneys have been struck from the Roll of Attorneys-at-law entitled to practise in Jamaica for dishonestly handling monies belonging to clients or to third parties. These decisions by the Disciplinary Committee have been upheld by the Court of Appeal.' (Emphasis added)
>
> [37] It is not unreasonable to conclude that, implicit in this reference to striking dishonest lawyers from the Roll and then proceeding immediately thereafter to impose the said sanction, is the presumption that the appellant also handled clients' money dishonestly. However, of its 58 findings in the complaint brought against the appellant, none related to dishonesty in the strict or usual sense. ...
>
> [38] … the panel clearly indicated that it was not taking any previous interaction between itself and the appellant into account. So, to all intents and purposes, the appellant would have been dealt with by the panel as an attorney-at-law running afoul of the canons for the first time.

> [39] Although this court gives every deference to the panel in its finding of guilt of the complaint alleged, the actions of the appellant in relation to the complainant strike us as being more in the nature of professional naïveté bordering on, if not directly amounting to, gross negligence. It seems that the appellant's conduct in this case and in relation to this complainant could very well have come about due to a lack of familiarity with the law and practice in the area of conveyancing and probate of wills and the interplay of those two areas of law and practice. In the circumstances of this case, the appellant's conduct, though wholly unacceptable and a flagrant departure from acceptable professional standards, could not reasonably be regarded as giving rise to dishonesty.
>
> [40] In again weighing the suitability or otherwise of the imposition of the sanction of striking off, we observe that the appellant, despite his earlier challenging of the complaint, towards the end of the proceedings, complied with the requirement of the sanctions imposed on him for the payment of money to the complainant amounting to $2,240,112.40 [and with other sums paid] he has made full restitution to the complainant and complied with all the orders of the panel … All in all, he has therefore co-operated in helping to lessen the impact of his breach that was felt by the complainant."

32. These considerations led the Court of Appeal to hold that that the imposition of the ultimate sanction of striking off was not appropriate in this case. The twin purposes of disciplinary tribunals (namely to ensure the offender has no opportunity to repeat the offending and to maintain the reputation of the profession and sustain public confidence in its integrity) could have been adequately met by a sufficiently lengthy period of suspension, coupled with the requirement to attend additional CLPD courses in client welfare and business management with an emphasis on conflict of interest.

33. Leave to appeal to the Board was given by the Court of Appeal (the Hon Mrs Justice McDonald-Bishop JA, the Hon Mrs Justice Harris JA, the Hon Mrs Justice Dunbar-Green JA (Ag)) in a judgment dated 8 April 2022: [2022] JMCA App 12.

34. The Court of Appeal, in granting leave to appeal, considered the evolving standard of review required by appellate courts in considering appeals from specialist disciplinary tribunals. It referred to *Ghosh v General Medical Council* [2001] UKPC 29; [2001] 1 WLR 1915 ("*Ghosh*"), *Preiss v General Dental Council* [2001] UKPC 36; [2001] 1 WLR 1926 ("*Preiss*"), *Salsbury* and *Bolton*, and expressed the view that the Board's determination of whether the threshold for the Court of Appeal's intervention

was reached in this case would provide guidance to courts in future, especially in cases involving misconduct short of dishonesty where the sanction of striking off is imposed. It held (para 45) that the question of whether the striking-off sanction imposed by the Committee in the circumstances of this case was clearly inappropriate, unnecessary in the public interest, disproportionate or excessive, thereby warranting the intervention of the court, was controversial and of public importance both as regards the administration of justice and the Council's regulation of the legal profession.

35. Moreover, at para 43 the Court of Appeal identified another important question: namely, whether, as the Council had submitted, the court failed to give the appropriate degree of deference to the views of the specialist disciplinary committee regarding the appropriate sanction:

> "Given the role of the GLC as a public body, established to maintain the standards of the legal profession for the protection of the public, there is a high public interest quotient in the conduct of proceedings before it and, by extension, how the appellate court deals with the sanctions it imposes. This question of whether this court was justified in disturbing the sanction of the disciplinary committee and substituting its own for the reasons it did is, undoubtedly, in my view, one capable of and requires debate before the Privy Council."

36. These two questions were closely linked and together they were considered appropriate to be considered by the Board on this appeal.

The appeal

37. The two questions for the Board are accordingly:

(1) Whether the sanction imposed by the Committee, striking Mr Lorne from the Roll of Attorneys-at-law entitled to practise law in Jamaica, was unquestionably an error of law or clearly inappropriate, unnecessary in the public interest, disproportionate or excessive to warrant the intervention of the Court of Appeal in setting aside the order and imposing a lesser sanction.

(2) Whether in the circumstances of the case, the Court of Appeal ought to have deferred to the decision of the Committee, as an expert and informed tribunal, to determine the measures required to deal with the defaulting attorney-at-law and to protect the public interest.

Addressing those questions

(i) The role of the appellate court and the test for intervening

38. It is clear from the Court of Appeal's judgment that Jamaican jurisprudence on the role of an appellate court on appeals from a disciplinary tribunal is consistent with the development of the common law in England and Wales. Rather than set out the cases in any detail, the Board in this judgment will draw on its case law and that of the courts of England and Wales, as well as that of Jamaica, in providing the requested guidance.

39. There is a clear difference between an appeal against a challenged decision that is a re-hearing of a case and a review of the legality of the decision in the exercise of the court's supervisory jurisdiction. In the former case, subject to the constraints discussed below, the appellate court is entitled to substitute its own decision for that of the disciplinary committee on its assessment of the evidence before it. In the latter case the appellate body can overturn a disciplinary committee's decision only if the applicant establishes his or her challenge on well-recognised judicial review grounds, such as that the committee has exceeded its powers or made a decision which no reasonable and properly instructed committee would have made. As the Court of Appeal has recognised in this case, appeals from the Committee are in the former category. In *Ghosh*, which was an appeal from a decision of the General Medical Council Professional Conduct Committee under section 40 of the Medical Act 1983 in which the Board performs a similar role to that of the Court of Appeal in this case, Lord Millett, giving the judgment of the Board, stated at para 33:

> "The Board's jurisdiction is appellate, not supervisory. The appeal is by way of a rehearing in which the Board is fully entitled to substitute its own decision for that of the committee. The fact that the appeal is on paper and that witnesses are not recalled makes it incumbent upon the appellant to demonstrate that some error occurred in the proceedings before the committee or in its decision, but this is true of most appellate processes."

40. As the Court of Appeal has recognised in this case, an appellate court in exercising its jurisdiction to rehear a case must have regard to the appellant's rights under section 16(2) of the Constitution as amended in 2011. This section contains the relevant provision of the Charter, conferring on the appellant the right to a fair hearing within a reasonable time by an independent and impartial court or authority established by law. In England and Wales the courts have recognised that the conferral of a similar right in the Human Rights Act 1998 militates against any tendency to read down an

appellant's rights of appeal in disciplinary cases. See *Preiss*, Lord Cooke giving the judgment of the Board at para 27. Thus, for example, as in the case of *Preiss*, where there are weaknesses in a professional disciplinary structure which call into question the independence and impartiality of the disciplinary committee, the appellate body will show less respect for the judgment of the committee than might otherwise be the case. But there is no suggestion on this appeal that the Committee lacked independence or impartiality.

41. The approach of an appellate court in a rehearing of a complaint will depend upon the statutory context, including the nature, constitution and relevant experience of the disciplinary committee from which the appeal is taken. In this case the Committee is constituted under section 11 of the Legal Profession Act, which provides that a disciplinary committee is to be appointed from among "persons (a) who are members, or former members, of the Council; or (b) who hold or have held high judicial office; or … (d) who are attorneys who have been in practice for not less than ten years." It is likely therefore that the members of the Committee are persons with experience of legal practice and able to make informed judgments as to the gravity of complaints which are established against an attorney.

42. It is common now in many jurisdictions for a disciplinary committee to include within its membership lay people as well as members drawn from the relevant profession. This is a recognition of the public interest in the effective regulation of a profession whose work has a significant impact on members of the public. Those members, through their work on a disciplinary committee gain valuable experience in grading the seriousness of complaints against a professional.

43. Where a disciplinary committee has the relevant expertise to make judgments on professional practice and professional discipline, the appellate court approaches its task "with diffidence" (ie by exercising caution before overturning the disciplinary committee's decision in the absence of an error of law or principle). In *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169 ("*Khan*") Lord Wilson, giving the judgment of the UK Supreme Court, stated at para 36:

> "An appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence. In a case such as the present, the committee's concern is for the damage already done or likely to be done to the reputation of the profession and it is best qualified to judge the measures required to address it: *Marinovich v General Medical Council* [2002] UKPC 36, para 28."

44. In *Ghosh* at para 34 Lord Millett referred to an earlier case, *Evans v General Medical Council* (unreported) 19 November 1984 in which the Board acknowledged the importance of the professional experience of a disciplinary committee in weighing the seriousness of professional misconduct and stated:

> "The committee are familiar with the whole gradation of seriousness of the cases of various types which come before them, and are peculiarly well qualified to say at what point on that gradation erasure becomes the appropriate sentence. The Board does not have that advantage nor can it have the same capacity for judging what measures are from time to time required for the purpose of maintaining professional standards."

For similar comments see also the judgment of the Canadian Supreme Court in *Law Society of New Brunswick v Ryan* 2003 SCC 20; [2003] 5 LRC 201, paras 30-34. The Board therefore accords an appropriate level of respect to the disciplinary committee's judgment both as to the seriousness of the professional's misconduct and as to the measures needed to maintain professional standards and provide adequate protection to the public. But, as Lord Millett explained, at para 34 in *Ghosh*, "the Board will not defer to the committee's judgment more than is warranted by the circumstances."

45. The question therefore arises as to what, other than the relevant professional experience of the disciplinary committee, ie the respect to be shown to "an expert and informed body" (*Salsbury* at para 38), causes the appellate court to exercise caution before intervening in the disciplinary committee's decision as to the appropriate sanction.

46. One important consideration is whether evidence is led afresh on the appeal or, as is the norm, the appeal is conducted by reference to the findings of fact made by the relevant disciplinary committee.

47. Where the appellate committee is faced with a challenge to a primary finding of fact, and the tribunal has relied to a significant extent on oral evidence in reaching its judgment on a professional's misconduct and on the appropriate sanction for that misconduct, it is well established that the appellate court must exercise caution because it has not seen or heard the evidence of the witnesses of both sides. See for example *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] QB 462, para 197 per Auld LJ; *Ghosh*, Lord Millett at para 33, which the Board has quoted in para 39 above. See also *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477, paras 1-6; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600, para 67; *Assicurazioni Generali SpA v Arab Insurance Group (Practice note)* [2002]

EWCA Civ 1642; [2003] 1 WLR 577, paras 13, 15 and 21. The appellate court has jurisdiction to correct material errors of fact as well as law, but in assessing whether the former errors exist, it must recognise that it does not have the advantages which the disciplinary tribunal has had in observing the witnesses and in reaching a view on the totality of the evidence led before it.

48. Where, in the absence of such a challenge, the appellate court relies on the findings of fact of the disciplinary tribunal there is again a need for appellate caution and it is helpful to recall Lord Hoffmann's words in giving the judgment of the House of Lords in *Biogen Inc v Medeva plc* [1997] RPC 1, 45:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la verité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. … Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

49. Thus, where an appellate court is faced with a challenge to the evaluation by a disciplinary tribunal of the proper sanction for misconduct and not to any facts as found by the tribunal, the appellate court needs to be aware that the findings of fact on the written pages of the tribunal's determination are inherently incomplete and so not the whole picture which was before the tribunal.

50. The degree of respect to be accorded to the decision of a disciplinary tribunal is likely to depend, at least to some extent, on the quality of the reasoning. A factor which may point in favour of an intervention by the appellate court is where a disciplinary tribunal fails to give adequate reasons for its decision. This can occur, for example, if the tribunal fails to explain why a lesser sanction than that which it imposes is not sufficient to maintain the reputation of the profession and uphold the public interest. It is therefore a good discipline for tribunals to consider and state in their determination their reasons for deciding not to impose a lesser sanction which might be available on the facts of the case.

51. When addressing the considerations that the Board has set out at paras 41 to 50 above, judges have often said that the court should show "deference" to the primary decision-maker, including a professional disciplinary tribunal. In the Board's view, "deference" is not the correct expression. It is helpful to recall the words of Lord Hoffmann in *R (Pro-Life Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185, para 75:

> "although the word 'deference' is now very popular in describing the relationship between the judicial and other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening."

Lord Hoffmann made that statement in the context of a judicial review against a public broadcaster and was addressing the separation of powers between the judicial branch and other branches of government. As he stated in para 76, the separation of powers means that the courts themselves often have to decide the limits of their own decision-making power.

52. The present case is not concerned with the separation of powers between the branches of government but with the appellate role of a court in an appeal from a specialist disciplinary tribunal, which has been entrusted by Parliament with the function of being the primary decision maker. Nonetheless, in each case, it is not a question of deference; it is rather a question of identifying the proper role of each body concerned.

53. The task of role recognition differs between the two cases. In the case of judicial review, the court's role is to decide on disputed legal rights or claims of violation of human rights and not to decide on policy or the allocation of resources. When deciding an appeal from a disciplinary committee, including an appeal which is a rehearing on the merits, the court recognises its appellate role, bearing in mind such matters as (i) the experience, which an appellate court does not have, of the professional disciplinary committee in grading the seriousness of professional misconduct and in imposing sanctions across a number and range of cases, which entitles its determinations to be shown respect, (ii) the fact that the committee has heard all the evidence and seen witnesses give their evidence , and (iii) the fact that the committee's findings of fact may not capture the whole picture that was before it and which influenced its evaluation. A further matter to be borne in mind, particularly in relation to professions in which judges have no training, is that a specialist tribunal may have more experience in addressing questions of professional regulation and thus be better qualified to judge whether and to what extent there has been a failure to comply with the standards expected of members in a particular field of practice. Nevertheless, where the allegations against the professional involve dishonesty or sexual misconduct, the court

is as well placed as the tribunal to assess what is needed to protect the public and maintain the reputation of the profession.

54. In the Board's view, such matters cause the appellate court to approach a challenge to the sanction imposed by a professional disciplinary body with diffidence: *Khan*, para 36. Such matters also explain why in *Ghosh*, para 33, Lord Millett stated:

> "The fact that the appeal is on paper and that witnesses are not recalled makes it incumbent upon the appellant to demonstrate that some error has occurred in the proceedings before the committee or in its decision, but this is true of most appellate processes."

The mere fact that that an appellate court disagrees with the disciplinary committee and would itself have imposed a different sanction is nothing to the point.

55. The appellate court should always bear in mind these matters when deciding on the merits of an appeal. With these matters in mind, the test which the appellate court must apply, absent any error of law or principle in the decision of the disciplinary tribunal, is now well-established. Where the appeal, as in this case, is a rehearing and the appellate court is entitled to substitute its own decision for that of the committee, the test is whether the sanction was appropriate and necessary in the public interest or was excessive and disproportionate. See *Ghosh*, para 34; *Salsbury,* paras 24 and 30; *Khan*, para 36; and *Sastry and Okpara v General Medical Council* [2021] EWCA Civ 623, paras 31 and 105. The Board observes that the Court of Appeal has applied the same test in its jurisprudence: see, for example, *Audley Melhado v General Legal Council* [2014] JMCA Civ 41, para 8, and *Ian Robins v General Legal Council* [2019] JMCA Civ 30, para 64.

56. On an appeal which is a rehearing the duty of the appellate court is to make its own assessment and to apply this test. In *Salsbury* at para 30, Jackson LJ referred to a test of "clearly inappropriate" whereas some judges have on occasion criticised the use of the adverb "clearly" before the word "inappropriate". In the Board's view, the use of the adverb "clearly" is not objectionable so long as it is understood as merely a reminder to the appellate court to take into account such matters as those mentioned in para 53 above before applying the test in para 55 above.

(ii) No need for dishonesty for striking off the roll

57. Before the Board applies the law as set out above to the facts, it is necessary to mention the relevance of dishonesty. As the Court of Appeal recognised, it is not

necessary that there be a finding of dishonesty before the tribunal can strike an attorney's name off the Roll of Attorneys. In *Hopeton Karl Clarke v The General Legal Council* [2021] JMCA Civ 13, the Court of Appeal (McDonald-Bishop, Sinclair-Haynes and Straw JJA) affirmed the decision of the disciplinary committee to strike Mr Clarke off the Roll after the committee found him guilty of misconduct in failing to file accountant's reports for 14 years and failing to apply and pay for practising certificates for five years. The court treated those failures and the failure to rectify them to be a very serious default. Similarly, in England and Wales in *Mohammad Iqbal v Solicitors Regulations Authority* [2012] EWHC 3251 (Admin) the Administrative Court (Sir John Thomas P and Silber J) upheld the decision of the Solicitors Tribunal to strike the appellant off the roll of solicitors. In that case the solicitor repeatedly and wrongly held himself out to, among others, the Law Society and mortgage lenders as practising in a partnership when he was not. The tribunal did not find the solicitor guilty of dishonesty but of behaviour which was manifestly incompetent. At para 23 of the judgment Sir John Thomas stated that trustworthiness

> "extends to those standards which the public are entitled to expect of a solicitor, including competence. If a solicitor exhibits manifest incompetence, as, in my judgment, the appellant did, then it is impossible to see how the public can have confidence in a person who has exhibited such incompetence. … The only appropriate remedy is to remove him from the roll. … The public is entitled not only to solicitors who behave with honesty and integrity, but solicitors in whom they can [repose] trust by reason of competence."

The law of Jamaica and the law of England and Wales are consistent in this regard.

(iii) Applying the law to the facts

58. In para 31 above the Board has quoted from paras 35 to 40 of the judgment of the Court of Appeal, which interpreted the Committee's decision as containing an error of law or principle. In particular, the Court of Appeal found as "one matter that is of great concern" the Committee's reference to the statement of principle in *Bolton* regarding the treatment of attorneys who handle money dishonestly as an immediate prelude to its imposition of the sanction of striking off the roll. This suggested to the Court of Appeal that the Committee had committed an error of principle by treating Mr Lorne's case as one of dishonesty, although there was no finding of dishonesty. The presence or absence of dishonesty is highly relevant to sanction. As Sir Thomas Bingham stated in *Bolton* in the passage which the Board has quoted in para 26 above, the most serious lapse from high professional standards is dishonesty in which "the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck

off the Roll of Solicitors…". In the Board's view, the Court of Appeal was entitled to infer from the text of the Committee's decision that the Committee had made such an error. As a result, the Court of Appeal was entitled to carry out a fresh evaluation of the circumstances of the case and to impose what it considered to be the correct sanction without further regard to the constraints of its appellate role which the Board has discussed above.

59. The Council has not argued that, if the Court of Appeal were entitled to substitute its own assessment as to the correct sanction, it was wrong to impose the sanction that it did. As a result, the sanction imposed by the Court of Appeal must stand.

60. The Board nonetheless makes two further points.

61. First, as discussed above, the Board is satisfied that a disciplinary tribunal may strike an attorney off the Roll for lapses which do not involve dishonesty. Egregious conduct short of dishonesty and chaotic mismanagement of a client's affairs could justify striking off in the public interest. Mr Lorne's behaviour in this case was egregious, as the Committee found. He knew that both Ms Blake and Mr Wilson were his clients, that each was entitled to an equal share of the sale proceeds of the property and that he owed each of them fiduciary duties. He failed to account to Ms Blake for her share of the sale proceeds in breach of Canon VII (b)(ii) of the professional ethics and, notwithstanding his undertaking in 2014, did not pay her until 10 April 2017 on the eve of the scheduled date of the hearing on sanction. Such behaviour could justify striking off and it would be difficult, absent error of law or principle on the Committee's part, for an appellate court to say that striking off was inappropriate.

62. There was other evidence of Mr Lorne's incompetence in handling the transaction, including his unnecessary payment of transfer tax on the estate of Constance Wilson, his premature registration of the sale of the property, and his unwarranted deductions and charges, and the Committee reflected the financial consequences of those errors in its order for payment of JM$2,240,112.40 to Ms Blake. But, as those matters were not part of Ms Blake's complaint, the Committee could not take them into account in the imposition of its sanction and does not appear to have done so.

63. This was a case of very serious professional misconduct which, depending upon the evaluation of the facts by a disciplinary committee, could justify either a striking off or a significant suspension from practice. In such circumstances, it was incumbent on the Committee to explain what it was in this case that warranted a striking off rather than a lesser sanction and it did not do so. Instead, its reasons were essentially a description of the conduct as egregious, but no more.

64. Secondly, there are two aspects of the reasoning of the Court of Appeal with which the Board respectfully disagrees. First, in para 39 of its judgment the Court of Appeal spoke of Mr Lorne's naïvety and lack of experience and familiarity with conveyancing and probate. There was no evidence recorded in the Committee's decision to support this view; it was contradicted by Mr Lorne's own evidence; and it ignores the context that he knew that he owed his clients fiduciary duties and that each was entitled to an equal share of the proceeds. Secondly, there was no proper basis for treating Mr Lorne's payment of the sums due to Ms Wilson as a significant mitigating factor. His failure to honour his undertaking to pay in April 2014 for three years until the eve of the hearing in mitigation compounded the seriousness of his professional lapses.

Conclusion

65. The Board answers the two questions posed in para 37 above as follows:

(1) The sanction imposed by the Committee was the consequence of an error of law as the Court of Appeal inferred and that error entitled the Court of Appeal to substitute its own assessment as to the correct sanction.

(2) No. As the Court of Appeal identified an error of law in the Committee's reasoning, it was entitled to interfere and determine for itself the needed sanction. There was not otherwise a basis for interfering with the Committee's determination on the ground that the sanction was disproportionate.

66. The Board will humbly advise His Majesty that the appeal should be dismissed.