[2017] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 2/2015

BEFORE: **THE HON MISS JUSTICE PHILLIPS JA**
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS (AG)

BETWEEN	**JADE HOLLIS**	**APPELLANT**
AND	**THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Miss Carol Davis for the appellant

Mrs Daniella Gentles-Silvera and Mr Miguel Williams instructed by Livingston, Alexander & Levy for the respondent

Gregory Duncan, interested third party, appearing in person

14, 15 March 2016 and 5 May 2017

PHILLIPS JA

[1] I have read, in draft, the judgment of my learned sister McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing useful to add.

MCDONALD-BISHOP JA

[2] This appeal challenges a decision of the Disciplinary Committee of the General Legal Council ("the Committee"), made on 28 November 2015, whereby it refused the appellant's application for an adjournment of the hearing of Complaint No 45/2014, brought by Mr Gregory Duncan on 10 March 2014 against the appellant. The appellant was Mr Duncan's attorney-at-law. Mr Duncan in his complaint against the appellant, has alleged, *inter alia*, that:

> "i. [the appellant] has acted with inexcusable or deplorable negligence in the performance of her duties.
>
> ii. [the appellant] has not accounted to [him] for all monies in her hands for [his] account and credit, though reasonably requested to do so.
>
> iii. [the appellant] has not handled [his] business [with] competence and due expedition.
>
> iv. [the appellant] has breached Canon 1(b) which requires that she at all times maintain the honour and dignity of the profession and abstain from behavior [sic] which may tend to discredit the profession of which she is a member."

[3] In refusing the application for the adjournment, the Committee directed that the examination-in-chief of Mr Duncan, which had already commenced, should continue in the absence of the appellant until the appellant was available for her counsel to conduct the cross-examination on her behalf.

[4] The appellant was absent from the disciplinary hearing on 28 November 2015 ("the 28 November hearing") at which the decision was taken, due to illness. Her illness was confirmed by a medical certificate dated 25 November 2015 and issued under the

hand of Dr Hope Anderson, her attending physician. This medical certifcate was submitted to the Committee in support of the application for the adjournment. The doctor indicated that the appellant would have been unable to be at work from 25 November 2015 to 21 December 2015. The Committee, however, proceeded with the hearing on 28 November and again on 5 December 2015 ("the 5 December hearing"), thereafter, setting it for continuation on 12 December 2015, which would have been during the period that the appellant would have been ill and unable to attend. It is the decision of the Committee refusing the application for the adjournment and its subsequent action in continuing the proceedings in the absence of the appellant that have given rise to the appeal.

The background to the appeal: the proceedings before the Committee

[5] The facts of what obtained before the Committee that led to this appeal have been garnered primarily from the notes of the proceedings and several affidavits that comprise the record of appeal. These affidavits are: (i) the affidavit of the appellant, filed in support of her application for a stay of proceedings pending appeal and of urgency, dated 8 December 2015; (ii) the affidavit of Dahlia Davis, dated 16 December 2015, filed on behalf of the Committee; (iii) the affidavit of the appellant in response, dated 7 January 2016; and (iv) the further affidavit of Dahlia Davis, filed on behalf of the Committee, dated 15 March 2016. From the pertinent facts disclosed in these affidavits, a broad outline of the chronology of events during the course of the hearing before the Committee, leading up to the appeal, will now be provided.

[6] On 8 November 2014, the first date that the complaint came before the Committee, it was adjourned to 14 March 2015, with directions given for the appellant to submit a response to it. However, on 9 March 2015, prior to the scheduled hearing date, Miss Carol Davis, acting on behalf of the appellant, submitted an application to the Committee for, *inter alia*, the hearing of the complaint to be stayed, pending the resolution of criminal proceedings to be brought against the appellant at the instance of Mr Duncan, the same complainant in the proceedings before the Committee. The application for stay of the proceedings was refused by the Committee and the hearing of the complaint was adjourned to 13 June 2015. In dismissing the application, the Committee held that with the appellant having not yet been charged, there were no concurrent criminal proceedings and, as such, the disciplinary hearing should proceed.

[7] The appellant, who was overseas at the time of Miss Davis' application, undergoing medical treatment, which included major surgery, returned to Jamaica and, on 20 April 2015, was charged with four counts of fraudulent conversion, arising out of facts similar to those stated by Mr Duncan in his complaint to the Committee. Counsel for the appellant subsequently renewed her application before the Committee on 13 June 2015, again, seeking a stay of the disciplinary hearing until the completion of the criminal proceedings. Her application was premised on the fact that criminal charges had then been laid and that should the hearing proceed, the appellant would be required to file an affidavit, the contents of which it was submitted, may be prejudicial to her in the criminal proceedings. The Committee again refused the application indicating that it intended to continue with the hearing. Mr Duncan then commenced

his sworn testimony. Mr Duncan's evidence having not been concluded, the hearing was adjourned to 18 July 2015.

[8] The appellant subsequently brought on application for leave to apply for judicial review of the decision of the Committee, which was made on 13 June 2015. Being aware of the pending application for judicial review and that a temporary stay of the hearing had been granted, the Committee adjourned the disciplinary hearing to 26 September 2015. The application for leave to apply for judicial review was subsequently refused.

[9] On 26 September 2015, the disciplinary hearing was unable to proceed as counsel for the appellant had filed an appeal from the decision of the Committee refusing to stay the hearing pending the completion of the criminal proceedings. Consequently, the disciplinary hearing was further adjourned to 24 October 2015 at 10:00 am. On that date, counsel for the appellant attended the hearing as scheduled, however, due to a general meeting of the Committee (of which it is agreed that counsel for the appellant was not aware), the proceedings did not commence at the scheduled time, and counsel left after having waited for an hour. The hearing was then fixed for 7 November 2015.

[10] On 14 October 2015, Phillips JA, sitting as a single judge in chambers, ruled that the application for stay of the disciplinary proceedings could not be pursued as the application was a procedural appeal and had been filed out of time. The appellant required an application for extension of time to file the appeal. As there was no appeal

properly filed, the application for stay of the disciplinary hearing into the complaint of Mr Duncan could not proceed.

[11] After the order of Phillips JA, the applicant filed an application to the court for extension of time within which to file her notice and grounds of appeal as well as a fresh application for stay of the disciplinary hearing, pending the determination of the appeal. The applications were considered and refused by the court (by a majority), which indicated that there was no merit in the argument that the disciplinary proceedings should be stayed pending the conclusion of the criminal proceedings.

[12] When the matter resumed before the Committee at the 28 November hearing, the appellant was absent, and, through her counsel, sought an adjournment of the hearing on the basis of her ill health. In making her application, counsel relied on the medical certificate of Dr Hope Anderson, dated 25 November 2015, which stated, *inter alia*, that the appellant presented to the doctor on 16 November 2015 with a specified ailment and that she was placed on various medications but continued to feel unwell. According to the medical certificate, "[h]er most disturbing symptom was the blurring of her vision, which made reading difficult". The appellant was placed under the management of her doctor for treatment and it was indicated that "[a]s a result of the above, [the appellant] will be unable to be at work from November 25, 2015 to December 21, 2015".

[13] Having seen the contents of the medical certificate and heard submissions from both counsel present, the Committee refused the appellant's application for an adjournment, stating the following as its reasons for doing so:

> "We have looked at the medical certificate produced on behalf of [the appellant]. We have considered its content. We have listened to Mr. Honeywell's submission as to the protracted manner in which the matter has been heard and the number of adjournments and where you cannot inflict illness on oneself but in the interest of the parties we should continue with the evidence of Mr. Duncan and permit [the appellant] the opportunity [sic] when she can do so."

[14] Upon the Committee pronouncing their decision, Miss Davis left the hearing, after indicating that she would have had a difficulty in properly representing her client in her absence and so she was not prepared to participate. Notwithstanding Miss Davis' position and the absence of the appellant, the examination-in-chief of Mr Duncan was allowed by the Committee to continue.

[15] The hearing was further adjourned to 5 December 2015 for Mr Duncan to continue giving his evidence. Miss Davis was served with notice of that hearing on 30 November 2015, which she contended was short service. Notes of the proceedings of the 28 November hearing, taken by Mr Charles Piper QC, a member of the panel of the Committee, were also made available to Miss Davis. However, by letter dated 3 December 2015, Miss Davis again sought an adjournment of the 5 December hearing. In doing so, she wrote, in part, in so far as is relevant at this time (page 38 of the record of appeal):

"Dear Sirs:

Re: Complaint No 45/2014 Gregory Duncan v Jade Hollis

Your letter of 30th November refers.

I have further perused the notes of Mr. Piper Q.C, and I would wish to thank you for making same available to me. However I must say that there are certain aspects of Mr. Piper's note which are not in accord with my recollection of the proceedings. In particular I would wish to say that I had indicated in my response to the submissions of Mr. Honeywell words to the effect that I would have difficulty in properly representing my client given her absence from the proceedings.

I note from the proceedings that took place in the absence of myself and my client that the matter has been adjourned to 5th December, 2015 at 10:30 am.

I hereby apply for the hearing set for 5th December, 2015 to be adjourned, on the basis that [the appellant] remains unwell and for that reason will be unable to participate in the proceedings. I again rely on the medical certificate of Dr. Hope Anderson which was presented to the Panel on 28th November. As you will recall the Doctor had indicated that [the appellant] would be unwell until December 21st, 2015. I wish to make it clear that whilst I intend no disrespect to the panel, my instructions do not permit me to attend on 5th December. As I had previously indicated and again repeat, I am unable to properly represent my client in her absence**.** My client is unable to attend because of ill health, and she has **not** consented to the matter proceeding in her absence. I require my client's presence so that she can hear the evidence given, and herself give instructions to her Attorney with respect to same. By way of example, I would expect the evidence to be given by Mr. Duncan to include a number of documents, and I would specially need my client's instructions with respect to these. This is the main reason why I considered myself unable to remain in attendance after the Panel gave their order refusing the application for adjournment on 28th November. I am also of the opinion that the order of the panel refusing

> the application for an adjournment is entirely unfair to my client, who is absent by reason of being unwell.
>
> Further I would point out that although I did on 30th November receive a Notice of Hearing, same is short served. On my understanding of the rules, 21 days notice is required. Even further this date was set without any consultation with me, and quite frankly quite apart from the matters set out above I have other commitments and would have been unavailable." (Emphasis as in original)

[16] Despite the position taken by Miss Davis and the concerns expressed by her in the letter, the matter, however, continued on 5 December 2015, with Mr Duncan giving further evidence-in-chief in the absence of both the appellant and her counsel. At the end of that hearing, Mr Piper's notes show that the hearing was adjourned to continue on 12 December 2015. The hearing, however, did not continue on that date as the appellant embarked on taking steps to appeal the Committee's decision.

The appeal

[17] On 7 December 2015, the appellant filed a notice of appeal which included an application for an order that the proceedings before the Committee be stayed, pending the appeal. These are the grounds of appeal:

> "a. The panel of the Disciplinary Committee erred in effectively refusing the application of the Attorney-at-law that the disciplinary proceedings be adjourned by reason of the ill health of the Attorney.
>
> b. The panel of the Disciplinary Committee erred in continuing the disciplinary proceedings in circumstances where the Attorney-at-Law was unable to attend the proceedings because of ill health.

c. The panel of the Disciplinary Committee wrongly exercised its discretion in refusing the Attorneys Application for Adjournment [sic] on the grounds of ill health.

d. In effectively refusing the application for adjournment, the panel of the Disciplinary Committee infringed the principles of natural justice in that the Appellant was not given a proper opportunity to see and hear the evidence given against her by the Complainant.

e. In ordering the proceedings to continue in the absence of the Appellant the Committee of the Disciplinary Committee infringed the Appellants [sic] constitutional rights to a fair hearing pursuant to s. 16(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment Act) 2011."

The orders sought

[18] In the notice of appeal, the appellant seeks these orders:

"i. That the Order of the Disciplinary Committee be set aside.

ii. That the complaint no 40/2014 [sic] Gregory Duncan v Jade Hollis be restarted before a differently constituted panel of the General Legal Council.

iii. That there be a stay of the disciplinary proceedings pending the hearing and determination of the appeal herein.

iv. Costs to the Appellant/Claimant."

[19] On 21 January 2016, an order was granted by a single judge of this court, sitting in chambers, that the disciplinary hearing be stayed pending the determination of the appeal.

The issues

[20] The primary issues that have emerged for consideration from the grounds of appeal have been identified to be as follows:

> (1) Whether the Committee, in refusing the appellant's application for an adjournment on the ground of ill health, had failed to exercise its discretion judicially, having regard to all the prevailing circumstances.
>
> (2) Whether the Committee, in refusing the appellant's application for an adjournment on the ground of ill health and proceeding with the hearing in her absence, infringed the principles of natural justice and the appellant's constitutional right to a fair hearing.

Whether the decision of the Committee is appealable

[21] Mrs Gentles-Silvera, for the Committee, raised a question for consideration, which falls to be determined as a preliminary point going to the court's jurisdiction. It is therefore imperative and, indeed logical to first dispose of that issue before the merits of the grounds of appeal may properly be considered. The question, in essence, is whether the decision of the Committee is amenable to appeal.

[22] It was argued on the respondent's behalf that the refusal to grant the adjournment at the 28 November hearing was a ruling made during the course of the hearing, instead of an order, and as such is not appealable under section 16 of the Legal Profession Act ("the Act").

[23] In relying on such authorities as, **Moncris Investments Limited, Allan Deans and Reynu Deans v Lans Efford Francis and others**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 50/1992, judgment delivered 23 June 1992, **Wilmot Perkins v Noel B Irving** (1997) 34 JLR 396 and **Garth Dyche v Juliet Richards Michael Banbury** [2014] JMCA Civ 23, Mrs Gentles-Silvera submitted that a ruling is not subject to an appeal as opposed to an order, which is. Counsel contended that the test to be applied, when determining whether a decision of a court was a ruling or an order, is whether an application required (a) a determination of rights which would be final; or (b) it goes to fundamental issues which has nothing to do with (i) the actual conduct of the trial process; or (ii) the admissibility of evidence during a trial.

[24] Learned Counsel further argued that of importance is the fact that the application for an adjournment in this case was made after the hearing had already commenced, with the complainant already giving his evidence-in-chief. This, counsel argued, was significant as the decision of the Committee was in the form of a ruling as to how in the future the hearing would proceed. The Committee, according to counsel, decided that they would complete the evidence-in-chief of Mr Duncan and then allow the appellant time to recover from her illness so that she could attend the hearing and be able to instruct counsel on his cross-examination. Counsel further contended that this had to do with the trial process and how it was to be conducted rather than affecting a fundamental issue, which had nothing to do with the trial process.

[25] Miss Davis, in response, relied on several authorities, to include, Halsbury's Laws of England, 4th edition, paragraphs 508 and 509; **Re: Yates' Settlement Trusts,**

Yates and Another v Paterson and Others [1954] 1 All ER 619; **Amybelle Smith v Noel Smith** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Civil Appeal No 4/2005, judgment delivered 24 April 2009; **Wilmot Perkins v Noel B Irving** and **Dick v Piller** [1943] KB 497, in making the point that the refusal of the application for an adjournment was an order that is reviewable on appeal.

[26] Learned counsel also drew the court's attention to the decision of this court in **American Jewellery Company Limited and another v Commercial Corporation Jamaica Limited and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2004, judgment delivered 17 May 2005, in which a refusal to grant an adjournment upon an application made in the Supreme Court during the course of a trial was made the subject of an appeal. The appeal was allowed by the court.

Analysis and findings

[27] Section 16 of the Act provides that:

> "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." (Emphasis added)

[28] It is this provision that has given rise to the issue now being considered as to whether the Committee, in refusing the application for the adjournment and continuing

the case in the absence of the appellant, had made an order under the Act that can properly be the subject of appeal.

[29] In considering the point raised for consideration, an apt starting point seems to be the recognition that the Committee had the power to adjourn the hearing. The legal basis for the Committee's power to adjourn the hearing is rule 16 of The Legal Profession (Disciplinary Proceedings) Rules. It reads:

> "16. The Committee may of their own motion, or upon the application of either party, adjourn the hearing upon such terms as to costs, or otherwise, as to the Committee may appear just."

[30] It is evident that the statutory power given to the Committee to adjourn a hearing is no different from that granted to the Supreme Court, by the rules of court (Civil Procedure Rules 2002 ("CPR"), rule 39.7 (1)) or under the inherent jurisdiction of the court. It is for that reason that it is accepted that the principles of law that govern the power of the court to adjourn a trial are the same principles that would be applicable to the exercise of the Committee's power to adjourn the hearing before it. Accordingly, the authorities cited by the parties in the instant case that have emanated from the court are found to be directly relevant to the issues under consideration in this appeal.

[31] Having reviewed the authorities relied on by the appellant as set out in paragraphs [25] and [26] above, I am satisfied that the refusal of the application for an adjournment, along with the consequent conduct of proceedings in the appellant's

absence, is appealable. In Halsbury's Laws of England, 4th edition, Volume 37 paragraphs 508 at footnote 2, the learned authors, upon citing several authorities, made it absolutely clear that the grant or refusal of an adjournment of a trial, is a judicial decision, which may be reviewed on appeal.

[32] In **Dick v Piller**, which dealt specifically with the refusal of an adjournment in a case where the defendant, in a civil action, was absent due to illness, the headnote, which accurately reflects the decision of the majority of the court, reads:

> "When a witness in, or a fortiori a party to, an action in a county court is alleged to be prevented by illness from attending the court for a hearing of the case and the judge is satisfied of the fact of his illness and of the materiality and importance of his evidence and that the granting of an adjournment will not cause an injustice to the other party which cannot be reduced by costs, it is the duty of the judge to grant an adjournment, it may be on terms, and failure on his part to do so constitutes a miscarriage of justice which necessarily involves all [sic] error of law on which an appeal may be founded."

[33] In **Wilmot Perkins v Noel B Irving**, at the commencement of the hearing, an application was made for an adjournment, which was refused. Thereafter, a second application was made for the judge to recuse himself from the hearing on the basis of bias. That application was also refused. Leave to appeal was refused by the judge but was obtained on appeal. Forte JA (as he then was) highlighted that the issue for consideration was whether the judge's refusal to recuse himself was a ruling or an order, and in those circumstances appealable. The court considered whether the decision had affected a fundamental right, that of the appellant's constitutional right to have his matter determined by an independent and impartial tribunal, and therefore his

right to a fair hearing. In determining that it was not a ruling but an appealable order, Forte JA opined as follows:

> "In the instant case, it was before the commencement of the trial, that counsel moved the Court to allow for another Judge to try the case, as the appellant contended that a real danger of bias was likely. This was not an application made during the process of trial as to a matter affecting evidence which required a ruling as to admissibility or other matters of that sort. This application affected the more fundamental question of whether the particular tribunal was competent (in the sense of likely bias (unfairness) to adjudicate upon the issues joined. In those circumstances the learned judge was bound to determine that issue once and for all, and having done so to make an order consequential on his determination." (Emphasis added)

[34] Further at page 401, Forte JA, stated:

> "...The application here went to a more fundamental issue which really had nothing to do with the actual conduct of the trial process, but related to the competence of the tribunal to adjudicate on the particular case. **The Gleaner Co.** case (*supra*) is also a case which went to the fundamental issue: as to whether the jurors, having regard to the likely bias, were competent to continue the case, and in those circumstances I would agree that there was an order by the learned judge which was an appealable order."

He continued:

> "In my judgment, the preliminary point by the appellant with the purpose of avoiding what he perceived as a danger of bias, was a motion which called for a determination which would be final as to that fundamental question, and consequently the result was an order by the learned judge that he would proceed to adjudicate on the case. This being an order, I would rule that it is appealable."

[35] Unfortunately, there are no written reasons for the judgment of this court in **American Jewellery Company Limited and another v Commercial Corporation Jamaica Limited and others**, relied on by the appellant. However, the appellant has submitted the court documents that had been filed in the case for consideration. The record of appeal has proved helpful. It is clear that the trial in the matter had started. The examination-in-chief and cross-examination of the first witness had concluded and the witness was to be re-examined. An application was made during the course of the hearing for an adjournment in order to facilitate a case management conference to deal with consolidation of relevant claims, amendments to pleadings/ statements of case and the addition of parties. The application for the adjournment was refused by the trial judge.

[36] The appellant sought permission to appeal the decision of the trial judge refusing to grant the adjournment. Permission was granted in the absence of the respondent by Cooke JA, sitting as a single judge in chambers. The appeal was brought on the following grounds:

> "1) The Learned Trial Judge erred in refusing the application for the adjournment;
>
> 2) That the Learned Trail [sic] Judge wrongly exercised her discretion in refusing the application for the adjournment in all the circumstances."

[37] The respondent, being aggrieved by that decision, applied to the court for the order of Cooke JA to be discharged. The grounds on which they sought that order were, *inter alia,* that:

> "The purported Order was in fact and in law no more than a ruling by the trial judge on an application for an adjournment given in the course of a trial."

[38] The application to discharge the order of the single judge granting permission to appeal was however rejected by the court, comprising Forte P; Smith JA and Harrison JA (Ag) (as he then was), by order made on 10 December 2004. The order of Cooke JA, granting permission to appeal the decision, was affirmed.

[39] The appeal then came before a differently constituted court, comprising Forte P, Smith JA and McCalla JA (Ag) (as she then was) who, on 9 May 2005, allowed the appeal from the refusal of the trial judge to grant the adjournment during the course of the trial. It was also ordered that the matter be returned for continuation before the same judge. Although there are no written reasons for the judgment, it is evident from the record that the court had to consider: (a) whether the refusal of the adjournment during the course of a trial was a ruling or an order; (b) whether the decision refusing the adjournment was subject to an appeal; and (c) whether the judge, in refusing to grant the adjournment, erred in the exercise of her discretion. Having considered these issues, the court found that the decision in the lower court, refusing the adjournment, was appealable and allowed the appeal.

[40] What is evident from the decision of the court in **American Jewellery Company v Commercial Corporation Jamaica Limited** is that, the fact that a trial may have commenced, and the case was not yet complete, does not preclude an appeal being brought against a refusal of a trial judge to grant an adjournment upon an application brought for that purpose. Thus the mere stage at which the proceedings

have reached cannot, in and of itself, be determinative of the matter. It must be, as the authorities have stated, that the refusal of an application for an adjournment has given rise to determination of rights which would be final or goes to a fundamental issue, which has nothing to do with the trial process or the admissibility of evidence. Ultimately, in my view, the bottom line must be what is in the interests of justice.

[41] In my view, the decision of the Committee, in refusing the adjournment, was determinative of a fundamental question or issue, which was whether the disciplinary hearing should continue in the absence of the appellant, although she was ill. The decision that there would be no adjournment, and that the hearing would proceed in the appellant's absence, was determinative of the solitary issue raised on the application. Furthermore, the decision was not without consequences that would have implications for the fair conduct of the proceedings. The exercise of the Committee's discretion to proceed in such a manner and in such circumstances as it did, does give rise to a broader fundamental question, which is whether the constitutional right of the appellant to a fair hearing was infringed or likely to have been infringed. In the circumstances, it cannot be accepted that the decision of the Committee was merely an uncomplicated ruling as to how the matter was to proceed and nothing else.

[42] I am of the opinion, therefore, that this court has the jurisdiction to review the exercise of the discretion of the Committee given the issues raised consequent on the refusal to grant the adjournment and, more particularly, to proceed with the hearing of the complaint in the appellant's absence. The decision is, therefore, appealable.

Accordingly, the preliminary point raised on behalf of the Committee cannot succeed and is rejected. The substantive grounds of appeal will now be considered.

Examination of the grounds of appeal

[43] Although five grounds of appeal were filed by the appellant, some are correlated in fundamental respects, and so, for the purposes of analysis, those related grounds will be examined together under the two broad issues which have been identified at paragraph [20].

Issue 1: Whether the Committee, in refusing the appellant's application for an adjournment on the ground of ill health, had failed to exercise its discretion judicially, having regard to all the prevailing circumstances (grounds (a), (b) and (c))

[44] The relevant submissions of Miss Davis on behalf of the appellant on this issue may be outlined as follows:

(a) The medical evidence presented at the hearing confirms that the appellant had been suffering from blurred vision and a recent diagnosis of an ailment, which her doctors were trying to ascertain how to manage. The appellant's absence at the hearing was, therefore, involuntary.

(b) The Committee, in stating that one cannot inflict sickness on oneself, did accept that the appellant was, indeed, unwell and did not question the authenticity of the appellant's medical certificate.

Accordingly, the Committee having continued with the disciplinary hearing as well as setting its continuation on dates that were covered in the medical certificate, demonstrated that they were "prepared to proceed behind the appellant's back". This course of action would raise serious questions of bias in the mind of any reasonable person.

(c) Adjournments in the hearing that were attributable to the appellant, were largely due to her illness, which was outside of her control. They were also due to the fact that the appellant had pursued legal action, which was not "frivolous, and was undertaken on the advice of counsel in pursuance of her legal rights".

(d) Whilst it is accepted that the Committee's decision to refuse the application for an adjournment was discretionary, it should be exercised judicially, and not to the detriment of the appellant, particularly, as her reasons for having not attended the hearing was due to ill health. The refusal of the adjournment denied the appellant a full and fair opportunity to be heard.

[45] In support of these submissions, Miss Davis urged this court to consider, in addition to the cases already cited at paragraphs [25] and [26], the cases of **Yunez Teinaz v London Borough of Wandsworth** [2002] EWCA Civ 1040; **Aris v Chin**

[1972] 19 WIR 459; **R v Jones** [2002] UKHL 5, **R v John Victor Hayward and others** [2001] EWCA Crim 168 and **Alan Roderick Tait v The Royal College of Veterinary Surgeons** [2003] UKPC 34. Learned counsel submitted that although some of the authorities related to criminal proceedings, the Privy Council's decision in **Tait** confirms their applicability to disciplinary hearings, they being "quasi-criminal in nature". As such, the principles to be derived from them would be applicable to the circumstances of this case.

[46] In response, Mrs Gentles-Silvera highlighted several bases on which the decision of the Committee should be upheld. She posited these arguments as summarized:

(a) Whether or not to grant an adjournment is an exercise of a discretion and it is an accepted principle that the court will only review the exercise of such discretion where a judge or tribunal was plainly wrong. A court ought not to substitute its own discretion for a discretion already exercised and ought not to reverse an order merely because they themselves would have exercised the discretion differently (**Amybelle Smith v Noel Smith** and **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188).

(b) It could not be said that the actions of the Committee were "so blatantly wrong" or that it "failed to take into account relevant considerations or took into account irrelevant ones", in refusing

the adjournment. The test that is to be adopted in considering whether the Committee was wrong in allowing the hearing to proceed in the appellant's absence was whether the decision was fair and would lead to a just outcome as laid down in the authorities cited by the appellant (**R v Jones** and **R v Hayward**).

(c) Prior to the 28 November hearing, there had been "a number of adjournments, no less than six, all at the insistence of the Appellant and three for medical reasons...".

(d) In light of the deliberation by the Committee at the 28 November hearing, it was clear that the salient factors were taken into account in coming to its decision, such as, the nature of the appellant's illness and the numerous adjournments at the instance of the appellant; the need to balance justice between the parties; and the fact that the appellant was not without legal representation.

Analysis and findings

[47] There is no question that the decision as to whether or not to grant the adjournment, during the course of the proceedings, was in the discretion of the

Committee. The discretion, however, is not an absolute one. It is to be exercised judicially and, so, is subject to review by this court.

[48] However, an appellate court is usually reluctant to interfere with the exercise of such discretion. The appellate court would interfere only if it is evident that the Committee, in exercising this discretion, on the particular facts of the case, failed to take into account relevant issues; had taken into account irrelevant issues that would be prejudicial; was misdirected in the application of the law and was therefore unmistakably or palpably wrong (see for instance, **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042).

[49] In **Maxwell v Keun** [1927] All ER Rep 335 at pages 338, 339, Atkin LJ stated the applicable principles in this way:

> "I quite agree that the Court of Appeal ought to be very slow, indeed, to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

[50] This court in **Amybelle Smith v Noel Smith**, through Harrison JA, reiterated these relevant principles with the important extension that the court will interfere where the decision is palpably unreasonable or unfair. The dicta of Sir Jocelyn Simon P and Karminski J in **Walker v Walker** [1967] 1 All ER 412, at pages 414 and 415,

respectively, are also very instructive on this point. It is quite clear on the authorities that the appellate court will interfere in the interests of justice.

[51] In applying the relevant law to this case, the point of departure should be the reason for the appellant's absence, which was illness. The medical certificate expressly set out when it was that she would have been unable to perform her duties due to illness. Despite this, the Committee not only refused to adjourn the 28 November hearing, at which the medical certificate was provided, but proceeded to set the hearing to continue during the same period they were advised that the appellant would have been ill. The action of the Committee, in such circumstances, warrants close consideration to determine whether it had acted judicially.

[52] In determining the question whether the Committee acted judicially in refusing to adjourn the hearing and proceeding in the absence of the appellant, the principles governing the issue in criminal proceedings are applicable. In **Tait v The Royal College of Veterniary Surgeons**, the Privy Council examined the issue concerning the commencement of a disciplinary hearing in the absence of the defendant who was reportedly ill. The Board unequivocally accepted the dictum of Lord Bingham in **R v Jones** that "the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution". Their Lordships also endorsed and applied the checklist of matters relevant to the exercise of the discretion that were laid down in **R v Hayward**, and adopted by Lord Bingham in **R v Jones**, and found that the refusal to grant the adjournment was wrong.

[53] In **R v Hayward**, Rose LJ, in considering whether a trial ought to have been continued in the absence of the defendant, gave these salient directives at paragraph 22 of the judgment:

> "In our judgment, in the light of the submissions which we have heard and the English and European authorities to which we have referred, the principles which should guide the English courts in relation to the trial of a defendant in his absence are these:
>
> (1) A defendant has, in general, a right to be present at his trial and a right to be legally represented.
>
> (2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.
>
> (3) The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.
>
> (4) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
>
> (5) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular: (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to

> appear; (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings; (iii) the likely length of such an adjournment; (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation; (v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence; (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him; (vii) the risk of the jury reaching an improper conclusion about the absence of the defendant; (viii) the seriousness of the offence, which affects defendant, victim and public; (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates; (x) the effect of delay on the memories of witnesses; (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.
>
> (6) If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case."

[54] In the instant case, the hearing did not commence in the absence of the appellant but continued in her absence. This, however, would make no difference to the application of the principles discussed above. The same considerations would apply whether the refusal to adjourn is at the commencement or at the continuation of proceedings (see **R v Jones)**.

[55] It is evident from the Committee's deliberations and the submissions of learned counsel on their behalf at the hearing of the appeal that, in deciding whether to allow the adjournment, the Committee was making an effort to be fair to the complainant as well as to the appellant. In fact, Mrs Gentles-Silvera clearly highlighted the factors as outlined in paragraph [46](d) above, that were paramount in the Committee's mind in considering whether to grant the adjournment.

[56] The first consideration for the Committee, and which it did take into account, was the reason for the adjournment, which was illness. The nature of the appellant's illness was before them as evidenced by a medical report, the authenticity and credibility of which was not challenged or impeached. The Committee therefore accepted as a genuine excuse that the appellant was ill. That would have amounted to an acceptance that her absence was involuntary. It follows then, that the appellant did not waive her right to be present.

[57] The illness of a defendant in criminal proceedings (and by analogy in disciplinary proceedings) has been recognised as a strong and compelling basis for the grant of an adjournment. In **R v Jones,** Lord Bingham, in speaking definitively to the situation where the absence is due to illness, usefully opined that while the courts do have a general discretion whether or not to continue a trial in the absence of a defendant, **"a defendant afflicted by involuntary illness or incapacity will have much stronger grounds for resisting the continuance of the trial than one who has voluntarily chosen to abscond"**. (Emphasis added)

[58] Lord Bingham also noted, at paragraph 13 of the judgment:

> "If the absence of a defendant is attributable to involuntary illness or incapacity it would be very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin."

[59] In **Teinaz v London Borough of Wandsworth**, heavily relied on by the appellant, the England and Wales Court of Appeal also examined the issue of a refusal of an adjournment for medical reasons leading to conduct of proceedings in the absence of a party before the Employment Tribunal. Gibson LJ, in expressing the unanimous view of the court, stated at paragraph 21:

> "A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."

His Lordship went on further to state at paragraph 22 of the judgment:

> "If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is

> that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

[60] In this case, there was no doubt expressed by the Committee about the credibility or sufficiency of the medical evidence. So, as it stands, the appellant would have established, to the satisfaction of the Committee, that she was ill. There was no doubt on the part of the Committee to be resolved. The appellant had therefore established a basis that strongly favoured an adjournment, in the light of all the authorities. The question now is whether, in the light of such overwhelming reason that existed that would have favoured an adjournment, the Committee, in refusing it, had exercised their discretion judicially. The other factors that were considered by the Committee have to be examined.

[61] The Committee took into account the adjournments that were previously made at the instance of the appellant and the effect that the delay may be having on the complainant who had made his complaint from 2014. The number of adjournments was a relevant consideration for the Committee and so they cannot be faulted for considering the delay. Delay is, indeed, inimical to the proper administration of justice. The interest of Mr Duncan was also within that context, a relevant and important

consideration. Again, the Committee cannot, at all, be faulted for considering his position.

[62] However, while the recognition by the Committee of its duty to balance justice between the parties must be commended, it does not appear that they gave sufficient and careful regard to the reason for the appellant's absence, which was warranted. Once the Committee had accepted, as they had evidently done, that the appellant was genuinely ill and, therefore, not malingering, they ought to have given more careful consideration to proceeding in her absence, given the nature of the allegations against her and the fact that she was unable to be there due to no fault of her own. The Committee itself in arriving at its decision had indicated that it was cognisant of the fact that one cannot inflict illness on oneself. The appellant was facing serious allegations which could lead to grave and lasting sanctions against her if they were proved. In the face of the seriousness of the allegations, her right to be present was even more pressing.

[63] The Committee, in arriving at its decision to proceed in the appellant's absence, evidently gave no consideration as to whether what it perceived as the likely unfairness or prejudice to Mr Duncan could have been reduced by an award of costs or by any other means. No effort was made to see if there was any other arrangement that could have secured an outcome that was not disadvantageous to the appellant, given the reason for her absence. It does seem that the appellant's right to a fair hearing and the demands of justice would have been substantial enough to outweigh the regrettable inconvenience to Mr Duncan. So, while the concern for Mr Duncan cannot be brushed

aside, in the scheme of things, it must give way to the reason advanced for the application for the adjournment and the right of the appellant to be present. It cannot be said then that the Committee in their decision have sufficiently demonstrated that they had a proper basis to conclude that Mr Duncan's interest to have his complaint disposed of within a reasonable time would have outweighed the appellant's fundamental right to be present and to participate during the hearing, when her absence was due to illness.

[64] Mrs Gentles-Silvera pointed out, what she hoped to be a countervailing factor, and that is, that Miss Davis was present for the appellant at the 28 November hearing when the decision was made to proceed with the hearing and that she was not barred from participating on behalf of the appellant. According to counsel, had Miss Davis remained at the 28 November hearing, "one would have expected her to take notes of the evidence in chief of [Mr Duncan] and make objections based on law which is usually the purview of a litigant's legal representative and not the litigant". The appellant, she contended, need not have been present for this. Moreover, she pointed out, the parties would have been provided with the official transcript of the evidence of the hearing and as such, would have been able to see what had transpired for the next hearing to proceed.

[65] Miss Davis was indeed present on the date in question but, as the official transcript shows, she had indicated that she had no instructions from the appellant to proceed and that she was not in a position to proceed in the absene of her client. In fact, in Miss Davis' letter to the General Legal Council of 3 December 2015, she

indicated that she had made submissions to the Committee that she would have had a "difficulty in properly representing [her] client given her absence from the proceedings". This was evidently not accepted by the Committee, which seems unreasonable.

[66] The presence of counsel would not have been sufficient, especially in the context of a case, where from the transcript it could be seen that documentary evidence was being elicited from the complainant. The appellant would have had a right to inspect them at the point at which they were to be admitted into evidence, in order to ensure authenticity and/or to raise any objection. Counsel would have had to rely on the appellant's instructions in determining whether to take objection to their admissibility. Those instructions could not have been obtained in the appellant's absence. Furthermore, the medical evidence suggested that the appellant's sight was affected by her illness. This gives rise to the question as to whether, even if she were present, she would have been able to participate properly in the proceedings.

[67] The appellant's right to a fair hearing includes her right to be present, her right to participate in the hearing and her right to be legally represented. She waived none of those rights. Therefore, the fact that her counsel was present at the 28 November hearing and could have remained is not accepted as a good and compelling reason in all the circumstances, strong enough to override the appellant's right to an adjournment on the basis of illness.

[68] Notwithstanding the Committee's clear duty to ensure that there was a balancing of justice between the parties, there was also a duty that was incumbent upon them, to

ensure on a whole, that the proper administration of justice was not compromised so as to lead to a miscarriage of justice. It is observed, within this context, that the medical certificate had given a clear time frame within which the doctor would have managed the appellant's illness and reviewed her progress. If the Committee were of the view that the time frame for review of the appellant's status was too long, then it was open to them to take steps to procure further information from the doctor or from the appellant herself about the effect of the illness on the appellant and whether a shorter time for recovery was at all possible, with more aggressive treatment. But no such steps were taken.

[69] The Committee, it seems, would have failed to take into account other relevant considerations that would have had a bearing on the question whether it was fair to refuse the adjournment and continue in the appellant's absence. In all the circumstances, I find that the Committee was not at liberty to conclude as they did that it was proper for them to conduct the hearing in the appellant's absence on 28 November 2015 and then to further continue it on 5 December 2015. The decision to proceed, particularly in light of the reasons proffered by the appellant, ought to have been examined with much greater care and caution and more steps taken by the Committee to secure a more just outcome.

[70] In Halsbury's Laws of England Vol 37 at paragraph 508, the learned authors noted that:

> "The refusal to allow an adjournment properly applied for on the ground of ill-health constitutes a substantial injustice,

> and a determination made after such a refusal in the absence of a party will be set aside."

In the instant case, the adjournment was one that was properly applied for on the ground of ill-health. The reasons given by the Committee for refusing the application are not acceptable in all the circumstances, especially when no thought was given to whether any other step could have been taken or conditions imposed to reduce the inconvenience or unfairness to Mr Duncan. It is therefore hard to resist a finding, that the refusal to grant the adjournment in the circumstances and for continuing the hearing on two days when the Committee accepted that the appellant would have been unable to attend due to illness "consitutes a substantial injustice".

[71] I find that the duty on the appellant to satisfy this court that the Committee's refusal of the adjournment was an erroneous exercise of its discretion, is in my view adequately discharged. I conclude, therefore, that the Committee, in refusing the appellant's application for an adjournment on the ground of ill-health, had failed to exercise their discretion judicially, having regard to all the prevailing circumstances. Grounds of appeal (a), (b) and (c) succeed.

Issue 2: Whether the Committee, in refusing the appellant's application for an adjournment on the ground of ill-health and proceeding with the hearing in her absence, infringed the principles of natural justice and the appellant's constitutional right to a fair hearing (grounds (d) and (e)).

[72] The appellant also contended that the principles of natural justice and her constitutional right to a fair hearing as enshrined in section 16(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter") had been infringed and so, on that basis, the decision of the Committee ought

to be set aside. Counsel on her behalf submitted that a fair hearing required giving a person the full opportunity to be present during a trial as well as allowing them to see and hear all the evidence against them and so the Committee, in failing to grant the adjournment, had denied the appellant these fundamental rights. In support of her arguments, counsel placed reliance on dicta from **Tait v The Royal College of Veterniary Surgeons**, **Nash Lawson v R** [2014] JMCA Crim 29 and **Aris v Chin.**

[73] Miss Davis also emphasised that she was unable to properly represent the appellant during the hearing, in her absence. She argued that had the appellant been present, the appellant would have been able to provide instructions in respect of matters to be raised in cross-examination or objections to be taken to the evidence as given. She maintained that permitting the appellant to cross-examine at a later date would not compensate for her having been deprived of her constitutional right to be present during the taking of the evidence.

[74] Learned Counsel further pointed out that there were no stenographers present at the hearing and that the notes of what transpired before the Committee were the personal notes of a member of the Committee, Mr Piper. These notes were given to the appellant with a caveat that they were not to be regarded as being the official transcript of the proceedings. In light of this, Miss Davis argued that it would be unfair to ask the appellant to cross-examine the complainant "based on what was an 'approximation' of what occurred in Mr. Piper's personal notes". This, counsel argued, was worsened by the fact that neither she nor the appellant had received the official transcript up to 12 February 2016, the date of the filing of her written submissions for the appeal.

[75] Mrs Gentles–Silvera, however, submitted that the decision to proceed with the hearing on the two occasions was fair in all the circumstances. The decision of the Committee, she said, was only for the examination-in-chief of Mr Duncan to be completed and thereafter the appellant's attorney-at-law would have had an opportunity to cross-examine him when the appellant became available. She maintained that there was no breach of the principles of natural justice or the appellant's consitutional right to a fair hearing and so the appeal should not be allowed on this ground.

Analysis and findings

[76] Both counsel are in agreement that in assessing whether to exercise its discretion to grant an adjournment one of the foremost considerations for the Committee at the time, was to ensure that the proceeding would have been fair to both the appellant and Mr Duncan, and that the approach they took would have resulted in a just outcome.

[77] In **Aris v Chin**, two complaints were made to the Solicitors Disciplinary Committee against the appellant, who was a solicitor. With respect to the first complaint, the appellant had made two previous successful applications for an adjournment based on his ill-health, which had been confirmed by a medical certificate. On the next hearing date, the appellant was present but not legally represented. The complainant's evidence was taken, and the appellant declined the Solicitors Disciplinary Committee's invitation to cross-examine the witness. The case for the first complainant

was closed. The appellant made an application for an adjournment to enable him to give evidence when he felt better. This request was refused and the Solicitors Disciplinary Committee reserved its decision. Immediately thereafter, the second complaint, made by the respondent (Edith Chin), the subject matter of the appeal, came on for hearing and the Committee decided to proceed. The appellant applied for an adjournment, and his application was refused. Ms Chin commenced her evidence during which she sought to put into evidence certain correspondence. The appellant refused to consent to the admissibility of those correspondence and left the room. The Solicitors Disciplinary Committee completed the hearing, found the appellant guilty of professional misconduct and ordered that his name be removed from the roll of solicitors. The action of the Committee, in continuing with the hearing of the Ms Chin's complaint in the absence of the appellant, was the basis of the contention on appeal that the appellant had been deprived of those incidents of natural justice which guaranteed to him a full and fair opportunity of being heard.

[78] Smith JA (with whom Robinson JA (Ag) agreed) held that the appellant had not been treated fairly. In his opinion, the solicitor, having presented a medical certificate from a reputable practitioner, was denied a full and fair opportunity of being heard in answer to the complaint. The learned judge of appeal emphasized that the medical certificate, having been obtained from a reputable medical practitioner, could not have been properly rejected in the circumstances, unless there was overwhelming indication that the appellant was malingering.

[79] Mrs Gentles-Silvera has pointed out that the instant case is distinguishable from **Aris v Chin**, because in that case, the solicitor was deprived of a fair opportunity to meet the charges against him and was penalised in his absence, which is not the situtation in this case because the appellant will have an opportunity to cross-examine Mr Duncan and to state her case.

[80] The facts are, of course, distinguishable but the principle can nevertheless be applied to this case. Following on the reasoning of the majority of the court, it does seem reasonable to conclude that in this case, where there was no indication of the appellant malingering, and with the medical certificate having been accepted, the Committee was wrong to refuse the application for an adjournment, without more. So, even though the appellant still has the opportunity to cross-examine and to present her own case, she was absent at the taking of material aspects of Mr Duncan's evidence, when she had a right to be present. This cannot be said to be in keeping with the principles of natural justice.

[81] Section 16(1) and (2) of the Charter provides:

> "16.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

[82] It cannot be disputed that the appellant had a constitutional right to a fair hearing. In examining the appellant's complaint that her right to a fair hearing was breached by the action taken by the Committee, I have also taken into account, among other things, the delay in the production to the appellant of the official transcript of the proceedings as well as the evidence that was led before the Committee, as gleaned from the exhibited portions of the official transcript and the notes of Mr Piper.

A. The record of proceedings

[83] Mrs Gentles-Silvera has placed much significance on the fact that the Committee was simply aiming to complete the examination-in-chief of Mr Duncan and that the intention was for the appellant's counsel to cross-examine him when the appellant was available. However, in order for the appellant's counsel to have been able to do this properly, she would have had to rely heavily on the record of what took place at the hearing. Miss Davis, however, only received the official transcript of both hearings during the course of the hearing of this appeal. This delay in providing the official record to the appellant is rather unfortunate.

[84] As previously noted, the 5 December hearing was fixed during the period that the medical certificate stated that the appellant would have been unavailable for work due to her illness. On that date, neither the appellant nor her counsel appeared before the Committee. Up until then, however, the appellant was still not provided with the official transcript of the 28 November hearing. So even though arrangements were made for the continuation of the matter, the appellant would not have been placed in a

proper position to cross-examine Mr Duncan on the evidence that was adduced at the previous hearing.

[85] Given that the appellant was involuntarily absent as a result of illness, and the Committee had decided to continue the hearing, nevertheless, on the basis that she would be given the opportunity to cross-examine when she was better, there was a duty on them, in the interests of justice, to, at least, provide the appellant with the official notes of the proceedings. This would have placed her in a position for her counsel to properly prepare to cross-examine Mr Duncan. I find that the unavailability or non-production of the official transcipt until the hearing of the appeal was unfair to the appellant.

B. The evidence at the hearing

[86] It is also of importance to note that in comparing Mr Piper's notes with the official transcript of the 28 November and 5 December hearings, it is found that there are some material dissimilarity, as pointed out by Miss Davis. This raises questions concerning the accuracy of the notes of what transpired at the proceedings and whether the appellant could have been prejudiced by her absence.

[87] By way of illustration, it is of significance, for instance, that Mr Piper’s notes do not reflect Miss Davis' assertion that the appellant was not in a position to give her instructions for her to continue the hearing in her absence. Mr Piper’s notes merely indicated in this regard that Miss Davis "advises that she is unable to remain and asks

that whatever evidence is given she be provided with same and that whatever date is fixed she be advised as early as possible".

[88] However, the official transcript, read as follows, in relation to Miss Davis' indication to the panel:

> "Davis: She should not be working and should not participate in these proceedings. My understanding is that it is something that makes you quite unwell. The doctor is saying there has to be a process of.....They have to do some test to manage the disease. She is not there now. In the circumstances she is not in a position to attend. She is not, feeling well. Not in a position to give instructions. As Counsel I could not proceed in the circumstances." (Emphasis added)

[89] This omission in Mr Piper's notes of Miss Davis' indication that the appellant was not in a position to give her instructions was highlighted in the letter of 3 December 2015 (set out in paragraph [15] above), which was sent by her to the Committee. In that letter, she indicated that the notes of Mr Piper was not in accordance with her recollection of the proceedings. She pointed out that those notes did not reflect, for instance, her indication to the Committee of her "difficulty in properly representing [the appellant] given [the appellant's] absence from the proceedings".

[90] Similarly, by way of comparison, it is seen that Mr Piper's notes made reference to hearsay evidence given by Mr Duncan about what he said that a third party (Aubyn Hill who he had retained to restructure his company) had told him about the appellant's

dealings with his company's money (page 33 of the record of appeal). This evidence was not only hearsay but highly prejudicial to the appellant. It is, however, missing from the official transcript and there is no indication that the panel had ordered it to be struck from the record. Also, there is nothing from Mr Piper's notes to demonstrate that the evidential value or lack thereof of that aspect of the evidence was recognised by him (and the other members of the Committee) as evidence that should be disregarded.

[91] Unfortunately, this highly prejudicial evidence was heard by the panel, without any indication to formally show that it was recognised as being prejudicial and therefore would not be acted on. Therefore, on the face of it, there is a real danger that the evidence adduced could operate to the prejudice of the appellant thereby affecting the just outcome of the proceedings.

[92] Mr Duncan was also allowed to speak to what he learnt from what he called "recent revelations" concerning the appellant's non-payment of monies relating to his business. It is not clear whether those "recent revelations" had formed part of his initial complaint that was being dealt with and had been disclosed to the appellant prior to the hearing or they were just being disclosed during the course of the hearing, in the absence of the appellant. The important question that looms large is whether anything else could have been stated by Mr Duncan, which has not been recorded in writing by either Mr Piper or the official recorder since there are discrepancies between the two sets of notes. All these matters do raise concern as to whether the appellant may have been unfairly disadvantaged by her absence.

[93] Therefore, the questioned accuracy of the official notes, in the light of the serious ommission noted, and the fact that inadmissible, and on the face of it, highly prejudicial evidence was adduced in the absence of the appellant, which was not recorded in the official notes but in the notes of a member of the panel, weigh very heavily in favour of a finding that the conduct of the hearing in the absence of the appellant may not result in a just outcome.

[94] In addition to all this, it cannot be said to have been fair to the appellant for documentary evidence to be led in her absence, without her first having had an opportunity to inspect those documents before they were admitted into evidence. In her letter of 3 December 2015, Miss Davis had indicated her concern about representing the appellant in her absence due to this very fact that it was expected that documents would be tendered in evidence by Mr Duncan and she would not have been properly instructed to assist the appellant in that regard (see letter at paragraph [15] above).

[95] Despite Miss Davis' indication of her lack of preparedness to represent the appellant in her absence, given the nature of the evidence likely to be led, the Committee proceeded with the hearing on 5 December, without any reason advanced by them for doing so in the light of Miss Davis' objection, which was brought to their attention. The panel apparently made no comment or ruling about the contents of the letter, as nothing is recorded in the transcript in this regard. It seems that no consideration was given to counsel’s concerns. The failure of the Committee to pay regard to the concern raised by Miss Davis, and to demonstrate how they treated with

that concern during the course of the taking of Mr Duncan's evidence, means that they again failed to take into account a relevant consideration, which would go to the issue of fairness in the conduct of the proceedings.

[96] The Committee was quite mindful of the position being taken by Miss Davis that she would have required her client to be present to give instructions concerning the documentary evidence being relied on by Mr Duncan. The Committee paid no regard to the fact that the appellant would have been deprived the opportunity, to which she was entitled, to examine the documents tendered into evidence. Given that counsel had expressed her concerns about the documents being tendered into evidence in the appellant's absence, steps could have been taken by the Committee to ensure that the documents, even if mentioned and identified by Mr Duncan, were not admitted into evidence until they were viewed by the appellant. In the absence of any indication that they were agreed, the documents could have been marked for identity and their admission into evidence deferred until the appellant was given an opportunity to view them, out of an abundance of caution. Such an approach would have served to safeguard the appellant's right to a fair hearing. The Committee by conducting the hearing as it did in her absence failed to take the necessary steps to ensure that no prejudice to the appellant was occasioned by the refusal of the adjournment.

[97] The fact that numerous documents were admitted into evidence in the absence of both the appellant and her counsel is compounded by the failure of the Committee, to provide the appellant with copies of those exhibits, up to the hearing of the appeal. This was also a ground of contention of the appellant.

[98] When the entire circumstances of this case are considered, it is hard to resist a conclusion that even though the Committee may have acted with what they thought were the best intentions to achieve some measure of fairness, given the history of the matter before them, they failed to exercise scrupulous care to ensure that the evidence adduced against the appellant, in her absence, was not prejudicial to her or that the proceedings in her absence were not otherwise unfair.

[99] The appellant's rights to be present and to have counsel appear on her behalf, were of capital importance and were at no time waived by her. The Committee, in coming to their decision to continue the hearing in the absence of the appellant, having accepted that she was ill and therefore not deliberately or voluntarily absent, failed to demonstrate that it appreciated the weight and significance of these considerations as going to her fundamental right to a fair hearing.

[100] In the premises, it cannot be said that the principles of natural justice and the appellant's constitutional right to a fair hearing were not compromised, or not likely to be compromised, by the decision made by the Committee to conduct the hearing in the absence of the appellant on the two occasions in question. Accordingly, the hearing of the complaint against the appellant in her absence, in all the circumstances, does not seem likely to lead to a just outcome. For this reason, it cannot be said that the Committee acted judicially and so on that basis this court can interfere with the exercise of their discretion. Grounds of appeal (d) and (e) also succeed.

[101] I would allow the appeal and set aside the order of the Committee refusing the adjournment and ordering that Mr Duncan's evidence-in-chief proceed in the absence of the appellant.

Whether the proceedings should commence de novo

[102] The question now, is whether the proceedings should be allowed to continue from where it had reached prior to the 28 November hearing or whether it should commence *de novo* before a differently constituted panel of the Committee, as applied for by the appellant. Despite the regrettable history of this matter, and the inconvenience to Mr Duncan, there is a real possibility that the appellant may not secure a fair outcome, if the proceedings are allowed to continue before this panel as presently constituted. It seems that fairness and the interests of justice demand that the proceedings should not be allowed to continue in the light of the questionable accuracy of the notes of proceedings; the fact that irrelevant and highly prejudicial evidence was allowed to be admitted, and the ultimate finding that there are elements of unfairness in the proceedings.

[103] I am not prepared to accept that the action of the Committee would raise questions of bias as Miss Davis had contended. I accept that the Committee may have been trying to balance the interest of the appellant, the interest of Mr Duncan and the public interest in the efficient and proper administration of justice in disciplinary proceedings. The Committee, however, did not go far enough to consider all the ramifications of the decision they had taken in all the circumstances that confronted

them. They failed to demonstrate that they had taken all relevant considerations into account before taking the drastic measure of proceeding in the absence of the appellant who was absent due to illness.

[104] I am mindful that the commencement of the matter *de novo* will be rather inconvenient, in particular for Mr Duncan, and such a course is, indeed, regretted but it is the just thing to do, as it is often said that "it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

Disposal of the appeal

[105] I would therefore make the following orders:

(i) The appeal against the decision of the panel of the Disciplinary Committee of the General Legal Council, comprising Mrs Pamela Benka-Coker QC, Mr Charles Piper QC and Mrs Gloria Langrin, contained in an order made on 28 November 2015 in Complaint No 45/2014; **Gregory Duncan v Jade Hollis**, is allowed.

(ii) The said order of the Disciplinary Committee of the General Legal Council, refusing the adjournment and conducting the hearing in the absence of the appellant is set aside. The hearings conducted on 28 November 2015 and 5 December 2015 are null and void.

(iii) The hearing of Complaint No 45/2014 is to commence *de novo* before a differently constituted panel of the Disciplinary Committee of the General Legal Council, that is, a panel that does not comprise any of the members named at paragraph (i) above.

(iv) Costs of the appeal and the application for stay of execution heard on 21 January 2016 to the appellant to be agreed or taxed.

P WILLIAMS JA (AG)

[106] I too have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

(i) The appeal against the decision of the panel of the Disciplinary Committee of the General Legal Council, comprising Mrs Pamela Benka-Coker QC, Mr Charles Piper QC and Mrs Gloria Langrin, contained in an order made on 28 November 2015 in complaint No 45/2014; **Gregory Duncan v Jade Hollis**, is allowed.

(ii) The said order of the Disciplinary Committee of the General Legal Council, refusing the adjournment and conducting the disciplinary hearing in the absence of the appellant is set aside. The hearings conducted on 28 November 2015 and 5 December 2015 are null and void.

(iii) The hearing of Complaint No 45/2014 is to commence *de novo* before a differently constituted panel of the Disciplinary Committee of the General Legal Council, that is, a panel that does not comprise any of the members named at paragraph (i) above.

(iv) Costs of the appeal and the application for stay of execution heard on 21 January 2016 to the appellant to be agreed or taxed.