[2021] JMCA App 27

JAMAICA

IN THE COURT OF APPEAL

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

MISCELLANEOUS APPEAL NO 1/2017

APPLICATION NOS 27, 219/2018 & COA2019APP00063

BETWEEN	**HAROLD BRADY**	**APPLICANT**
AND	**GENERAL LEGAL COUNCIL**	**RESPONDENT**

Paul Beswick, Miss Terri-Ann Guyah and Miss Toni-Ann Smith instructed by Ballantyne, Beswick & Company for the applicant

Mrs Denise Kitson QC, David K Ellis and Miss Anna-Kay Brown instructed by Grant, Stewart, Phillips & Co for the respondent

Miss Maliaca Wong and Miss Amanda Montague instructed by Myers, Fletcher & Gordon for the Factories Corporation of Jamaica Ltd

4 April, 28, 29, 30 May, 17, 19 July, 9 October 2019 and 5 November 2021

MCDONALD-BISHOP JA

Introduction

[1] These proceedings may best be described as an amalgam of several interrelated applications connected to an appeal filed in this court by Mr Harold Brady ('Mr Brady'), from decisions of a panel of the Disciplinary Committee of the General Legal Council ('the Committee'), made on 25 February 2017 ('the liability decision') and 4 March 2017 ('the sanctions decision). There are, in the main, four distinct applications that have been

brought for the consideration of the court, namely: (i) a renewed application for stay of execution of the decisions of the Committee; (ii) an application to strike out specified paragraphs of an affidavit filed by the chairman of the Committee, Mrs Daniella Gentles-Silvera; (iii) an application to adduce fresh evidence; and (iv) an application to add a ground of appeal. All these applications were heavily disputed and have been determined in this judgment. I am mindful that no excuse or measure of apology can remedy the inconvenience and anxiety that would have been caused by the delay in the delivery of the judgment. Still, I must, on behalf of the court, extend our sincerest apologies for the delay.

The background

[2] The background to the applications under consideration may briefly be stated as follows: In 2015, a complaint was made to the General Legal Council ('GLC') against Mr Brady in respect of various alleged breaches of the Legal Profession (Canons of Professional Ethics) Rules ('the Canons'). The complainant was Mr Brady's former client, the Factories Corporation of Jamaica Limited ('FCJ'), the interested party in these proceedings. The FCJ alleged that those breaches stemmed from Mr Brady's failure to account to it for monies he had received on its behalf, concerning the sale of property located on Marcus Garvey Drive in the parish of Saint Andrew, to one, Mr Neville Gallimore ('the Gallimore transaction'). The total purchase price for that property, which was paid in full to Mr Brady, was $140,000,000.00. However, despite numerous requests by the FCJ, Mr Brady had only accounted for $70,000,000.00.

[3] The FCJ's complaint to the GLC was subsequently amended in 2016 to include allegations that Mr Brady had engaged in efforts to mislead the FCJ regarding the outstanding amount; failed to deliver up the file relating to the Gallimore transaction with due expedition; and failed to register the agreement for sale pertaining to the same transaction within 30 days, which caused the FCJ to incur interest and penalties. As a result, at the date of the hearing before the GLC, the total sum allegedly owed to the FCJ was $111,380,364.62.

[4] A panel of the Committee, comprising Mrs Gentles-Silvera (chairman) and Messrs Trevor Ho-Lyn and John Graham, heard the complaint on 30 September 2016 and 17 January 2017. On 25 February 2017, the Committee ruled that Mr Brady was guilty of professional misconduct. Accordingly, on 4 March 2017, it ordered that he be struck from the Roll of Attorneys-at-Law entitled to practise in Jamaica. It also ordered that he make restitution of $111,380,364.62 to the FCJ with interest on the sum of $102,302,061.56, at a rate of 4½% per annum from 1 October 2016 until payment. The Committee further awarded costs to the FCJ of $50,000.00 and the GLC of $30,000.00.

The applications

[5] To strengthen the prospects of success of his appeal and secure a stay of execution of the Committee's decisions pending appeal, Mr Brady filed several notices of applications for the court's consideration. Accordingly, for a clearer understanding of the many and varied issues that the court has examined in these proceedings, it is necessary to offer an insight into the substance of Mr Brady's applications and identify the areas of dispute between the parties from the very outset.

[6] The first application filed by Mr Brady was a notice of application for stay of execution of the order of the Committee, filed on 27 April 2017 (Application No 78/2017). That application was eventually considered and refused by Straw JA (Ag) (as she then was) in judgment cited as [2017] JMCA App 25. However, in support of that application, Mr Brady had filed affidavits sworn to by himself, Mr James Chong ('Mr Chong') and Mr Joseph Giaimo ('Mr Giaimo'), in which he sought to advance evidence that was not before the Committee, alleging bias against Mrs Gentles-Silvera. The grounds on which the application for stay of execution was based involved assertions that were allegedly made by Mrs Gentles-Silvera, in her capacity as counsel for Mr Chong in an unrelated matter, and allegations concerning her treatment of Mr Brady's application for adjournment during the hearing. The affidavits were also presented to support Mr Brady's grounds of appeal in which he alleges bias against Mrs Gentles-Silvera.

[7] On 11 October 2017, the appeal was listed before the court for hearing. By way of a preliminary objection with supporting written submissions, the GLC strongly objected to the intended use of new evidence in the appeal without an application for leave from the court for the evidence to be adduced. The court (McDonald-Bishop and P Williams JJA and Straw JA (Ag)) upheld the preliminary objection of the GLC, above the vociferous objection of counsel for Mr Brady, Mr Paul Beswick. However, on 11 October 2017, the court ordered, among other things, that in light of the affidavits in response filed by the GLC, which gave rise to a serious dispute as to fact, Mr Brady was to file and serve a notice of application for court orders to permit fresh evidence to be adduced if he wished for the evidence to be considered in the appeal.

[8] Consequently, an application to adduce fresh evidence was filed on 2 February 2018 (Application No 27/2018). In that notice of application, Mr Brady sought to adduce the evidence in several affidavits from himself and Messrs Chong and Giaimo. That notice of application was eventually replaced by an amended notice of application filed on 4 March 2019. By that amended notice of application, Mr Brady extended his application to adduce fresh evidence as contained in an audit report named "Forensic Review of Transactions between Brady & Co. and Factories Corporation of Jamaica Limited" prepared by the firm of Accountants and Auditors, Crowe Horwath, and dated 25 August 2017 ('the Crowe Horwath Report' or 'the audit report').

[9] Mr Brady sought these orders on the amended application, among others:

> "1. The time for service of this application be abridged to the time of actual service thereof;
>
> 2. That leave be granted to the Applicant to adduce as fresh evidence on appeal, contained in the: -
>
> a. Affidavit of Joseph Giaimo filed on the 12th day of April, 2017;
>
> b. Affidavits of James Chong filed on the 12th April, 2017 and 5th October, 2017;

c. Affidavits of Harold Brady filed on the 27th April, 2017, [9th] May, 2017, 4th March, 2019 and 24 May, 2019; and in the

d. Affidavit of Everton Hanson filed on the 18th February, 2019 and 4th April, 2019.

3. That the Amended Notice of Application for Court Orders filed on the 4th March, 2019 be allowed to stand as properly filed;

4. That the Appellant's Further Submissions with Authorities filed by the Appellant on the 4th March, 2019 be allowed to stand as properly filed;

5. That the Appellant be granted leave to argue another ground of appeal 'That the findings of the Disciplinary Committee of the General Legal Council were palpably wrong and the subsequent orders were not in keeping with the evidence as contained in the *'Forensic Review of Transactions between Brady & Co. and Factories Corporation of Jamaica Limited'* prepared by the firm of Accountants and Auditors, Crowe Horwath and dated August 25, 2017 which the Appellant was prevented and/or stymied from presenting to the Committee which indicates beyond a shadow of a doubt that the Appellant owed no monies to the Factories Corporation of Jamaica Limited and to the contrary the said Complainant is indebted to the Appellant';..." (Underlined and italicised as in original)

[10] Without objection from the GLC, the court granted the orders to abridge the time for service of the application to the date of actual service and allow the amended notice of application for court orders and the further written submissions and authorities to stand as being properly filed. The application for orders granting permission to adduce fresh evidence in the affidavits and the Crowe Horwath Report and to add a new ground of appeal were vehemently opposed by the GLC and the FCJ.

[11] In response, the GLC adduced evidence from the Committee members, Mrs Gentles-Silvera and Messrs Ho-Lyn and Graham, and the FCJ's chief strategic officer, Mr Desmond Sicard. The FCJ also relied on the evidence of Mr Sicard in response to Messrs

Brady and Everton Hanson's affidavits regarding the contents of the Crowe Horwath Report.

[12] However, before the hearing of the application to adduce fresh evidence commenced, Mr Brady urged this court to consider two additional applications. The first application was filed on 3 October 2018, for the court to strike out various paragraphs of Mrs Gentles-Silvera's affidavit filed on 2 May 2017 (Application No 219/2018). The second was a renewed application for a stay of execution of the Committee's decisions, pending appeal, filed on 12 March 2019 (Application No COA2019APP00063). This renewed application is said to be based on "new evidence", which was not available during the hearing of the first application (Application No 78/2017). The "new evidence" came in the form of an audit report which Mr Brady said would prove that he was not indebted to the FCJ.

[13] The GLC opposed both applications. The FCJ joined in opposing the renewed application for the stay of execution of the Committee's decision. A consideration of the latter application was deferred until the determination of the fresh evidence application because the basis of this application is the audit report that Mr Brady is seeking permission to adduce as fresh evidence. Mr Brady and the FCJ gave undertakings to seek an adjournment of related matters in the Supreme Court, pending the determination of the applications in this court.

Application to strike out portions of Mrs Gentles-Silvera's affidavits (Application No 219/2018)

[14] Mr Brady's application was to strike paragraphs 5, 7, 8, 10-24, 26 and 29 from the affidavit of Mrs Gentles-Silvera filed on 2 May 2017, in response to the affidavits filed by him in which he alleged bias against Mrs Gentles-Silvera. He contended that the impugned paragraphs made "reference to matters, instructions and communications" from Mr Chong to Mrs Gentles-Silvera, in her capacity as his former attorney-at-law, and, therefore, violated legal professional privilege.

[15] Given the relevance of the outcome of that application to the hearing of the fresh evidence application, the court heard the parties on that application at the commencement of the proceedings. The court refused the application and awarded costs to the GLC to be taxed or agreed by order made on 28 May 2019. The court, therefore, permitted the affidavit to stand as filed and to be used entirely as part of the GLC's evidence in response to the application to adduce fresh evidence. The court promised then to reduce to writing its reasons for refusing the application to strike out in dealing with the application for fresh evidence with which it is inextricably bound. That promise will now be fulfilled.

The reasons for the decision of the court refusing the application to strike out

[16] In support of the application to strike out the impugned paragraphs of Mrs Gentles-Silvera's affidavit, Mr Chong deposed to an affidavit filed on 3 October 2018. He stated that he had not given any instructions or permission to Mrs Gentles-Silvera to use any document relating to him as a part of the exhibits to her affidavit or to refer to communication between them in responding to his affidavit filed in support of the fresh evidence application. Mr Chong claimed that Mrs Gentles-Silvera had disclosed the correspondence and documentation that passed between them without his consent. He also averred that the disclosure of communication and documentation between them did not fall within any exceptions to legal professional privilege.

[17] As a consequence, Mr Brady urged the court to strike out those paragraphs of Mrs Gentles-Silvera's affidavit for being in breach of legal professional privilege. Mr Brady contended that, undeniably, an attorney-client relationship existed between Mrs Gentles-Silvera and Mr Chong. Therefore, any communication and documentation shared between them were for the purpose of giving legal advice and were therefore privileged. Mr Chong contended that since he had not consented to this disclosure nor did it fall within any of the exceptions to legal professional privilege, the correspondence and documents referred to by Mrs Gentles-Silvera in her affidavit are privileged from disclosure. Therefore, the paragraphs in her affidavit, which referred to the privileged communication

and documentation, should be struck. Counsel for Mr Brady relied on the Supreme Court decision of **Virginia McGowan Simmonds v Jamaica Co-operative Credit Union League Limited** [2015] JMSC Civ 179, to advance the argument that "[t]he essence of privileged communication between attorney and client is that the communication exchanged between attorney and client stays between the attorney and client".

[18] In opposing the application, the GLC contended that Mrs Gentles-Silvera's affidavit should stand, as she acted within the bounds of the law to disclose communication and documentation between Mr Chong and her. The GLC maintained that in the face of allegations of wrongful conduct by Mrs Gentles-Silvera and misrepresentations made by Messrs Chong and Giaimo, which impugned her integrity, it was within her right to defend herself by disclosing any communication between them.

[19] The GLC relied on the 'self-defence exception' embodied in Canon IV(t) of the Canons, as well as the common law exception of waiver. Relying, additionally, on dicta from authorities such as **Qualcomm Inc v Broadcom Corp** 2008 WL 638108 (S.D. Cal.) ('**Qualcomm**'); **Kevin Hellard and Another v Irwin Mitchell** [2012] EWHC 2656 (Ch); and **Paragon Finance plc (formerly known as National Home Loans Corporation plc) and Others v Freshfields (a firm)** [1999] All ER (D) 251, Mrs Denise Kitson QC argued, on behalf of the GLC, that Mrs Gentles-Silvera was entitled to disclose all communications between Messrs Chong and Giaimo and her, which are relevant to defend herself and necessary to prevent any misunderstanding as a result of the partial disclosure made by Mr Chong in his affidavits.

[20] Queen's Counsel submitted that Mr James Chong should not be allowed "to cherry-pick" what communication he may disclose to assert wrongdoing on the part of his former attorney-at-law, without the attorney being able to disclose all the material necessary to answer the "unmeritorious allegations". In the circumstances, she argued, Mrs Gentles-Silvera ought to be afforded the right to answer the allegations made by subjecting the relevant communication to the court's scrutiny. She urged the court to hold that for all

the reasons put forward by the GLC, the application to strike out the impugned portions of Mrs Gentles-Silvera's affidavit should be dismissed.

[21] I agreed with my colleagues that the court should accept the submissions of the GLC and dismiss the application to strike out portions of the affidavit for reasons that I will now briefly outline.

[22] As a general rule, communication between an attorney and his client in the course of their professional relationship is, indeed, protected by legal professional privilege and, therefore, protected from disclosure in specified circumstances. There is no doubt that, in the instant case, the communication and documentation that had passed between Mrs Gentles-Silvera and Messrs Chong and Giaimo could have attracted legal professional privilege and so would not be disclosable without Mr Chong's consent. However, there are circumstances in which disclosure of privileged communication and documentation is permissible by law. The GLC has raised two relevant exceptions within the context of this case, which are self-defence and waiver. Therefore, the question we were tasked with deciding was whether any of those exceptions or both applied to the instant case, as asserted by the GLC, to justify Mrs Gentles-Silvera's disclosure of confidential communication and documentation between Messrs Chong and Giaimo and her.

[23] In considering the question that confronted us, I found that the GLC's reliance on Canon IV(t) was not misplaced. It reads:

> "(t) An Attorney shall not knowingly –
>
> (i) reveal a confidence or secret of his client, or
>
> (ii) use a confidence or secret of his client –
>
> (1) to the client's disadvantage; or
>
> (2) to his own advantage; or
>
> (3) to the advantage of any other person

> unless in any case it is done with the consent of the client after full disclosure.
>
> **Provided however, that an Attorney may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.**" (Emphasis supplied)

[24] As argued by the GLC, Canon IV(t) confers a right on an attorney-at-law to reveal the confidences or secrets of his client when it is necessary to defend himself against an accusation of wrongful conduct. The essence of the evidence of Messrs Chong and Giaimo was that Mrs Gentles-Silvera intensely disliked Mr Brady and, motivated by her ill-feelings for him, she made disparaging remarks regarding his suitability to be a member of the legal profession. Also, driven by her dislike of Mr Brady, she acted without instructions and tried to force Mr Chong to make a complaint against Mr Brady to the GLC. In so doing, she would have acted without the authority and consent of her client.

[25] Additionally, Mr Brady contends that Mrs Gentles-Silvera's dislike of him may have influenced the panel's decisions to refuse his requests for adjournments, its finding of guilt and, ultimately, the sanction that it imposed on him. In these circumstances, Mr Brady contends that he would not have received a fair hearing before any panel comprising Mrs Gentles-Silvera as she held a bias against him.

[26] The comments attributed to Mrs Gentles-Silvera and the resulting allegations of bias, in my view, have impugned Mrs Gentles-Silvera's integrity. They raised questions as to her capacity to display impartiality in any proceedings related to Mr Brady.

[27] In **Qualcomm**, relied on by the GLC, the United States of America District Court for the Southern District of California held, at page 3 of the judgment, that attorneys-at-law have a due process right to defend themselves against allegations of wrongful conduct made by clients. I share the views expressed by Queen's Counsel on the GLC's behalf that due process requires that in answering these allegations of impropriety on her part, Mrs Gentles-Silvera must be afforded the right to defend herself. This right to defend

herself involves an entitlement to present all relevant facts with her dealings with Messrs Chong and Giaimo to the fore for the court's assessment. This would be in keeping with the letter and spirit of the proviso to Canon IV(t). On this basis, I formed the view that it was proper for the court to hold that the privileged information could have been disclosed by virtue of the self-defence exception provided for by Canon IV(t). Accordingly, on that basis, I agreed that the court should dismiss the application to strike out the paragraphs in question.

[28] I went further, however, to consider the 'waiver defence' raised by the GLC. Having done so, I concluded that even if the self-defence exception could not have availed Mrs Gentles-Silvera, she could, nevertheless, have found refuge in the waiver exception recognised at common law.

[29] The express or implied waiver exception to legal professional privilege is well established. An important authority on this principle is **Paragon Finance**, which was prayed in aid by the GLC. Although the facts could prove highly instructive, they are not necessary for present purposes. What was of more relevance to our decision were the helpful pronouncements of Bingham CJ in explaining the decision of the court. His Lordship stated, in part:

> "**A client expressly waives his legal professional privilege when he elects to disclose communications which the privilege would entitle him not to disclose. Where the disclosure is partial, issues may arise on the scope of the waiver… But the law is clear. While there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result.**
>
> When a client sues a solicitor who has formerly acted for him, complaining that the solicitor has acted negligently, he invites the court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. **Since court proceedings are public the client**

> **brings that formerly confidential relationship into the public domain. He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just determination of his claim; or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound. This is an implication of law, the rationale of which is plain. A party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality. He cannot pick and choose, disclosing such incidents of the relationship as strengthen his claim for damages and concealing from forensic scrutiny such incidents as weaken it. He cannot attack his former solicitor and deny the solicitor the use of materials relevant to his defence. But, since the implied waiver applies to communications between client and solicitor, it will cover no communication to which the solicitor was not privy and so will disclose to the solicitor nothing of which he is not already aware**." (Emphasis supplied)

[30] The principles in **Paragon Finance** were applied in **Kevin Hellard**, another case cited by the GLC on this point. In that case, a firm of solicitors sought orders for disclosure of privileged information after being sued for professional negligence by former clients. Judge Purle QC accepted that once a suit had been filed against the solicitors, privilege was impliedly waived. However, in deciding as to which communication would be disclosed, his Lordship indicated that:

> "11. … **Once the privilege attaching to a privileged communication is waived, any available evidence may be called which proves or is relevantly connected to the particular communication. That communication has lost its confidentiality and its privileged character. The only limiting factor to the evidence that may be called then is, as is in the case of all other evidence, relevance. Once that is accepted then, in my judgment, the rule or presumption against cherry-picking applies not just to what is in the solicitors' file and mind, but to what is in anyone**

> **else's file and mind who was party or privy to the communication in question.** Privilege has been waived in relation to counsel's advice, and counsel can therefore be asked about it, including before the trial itself, by any party to the proceedings, and may give a witness statement to that party.
>
> 12. **Having waived privilege in relation to counsel's advice, the claimant cannot, in my judgment, pick and choose which bits of counsel's advice or deliberations can properly be withheld from the court. The waiver, as a matter of fairness, must extend to the entirety of counsel's recall - working papers and notes - and not just to the bits of it that the claimant may hereafter choose to reveal or the bits of it which he has already chosen to reveal by referring to counsel's advice in the pleadings**." (Emphasis supplied)

[31] In the light of the dicta extracted from these authorities, and in particular, the emphasised portions above, I was satisfied that where a client sues his attorney-at-law or brings some other aspect of their relationship into question, he impliedly waives the right to claim privilege on any communication that is necessary to determine the claim or to resolve the dispute fairly. Once privilege has been waived, the client cannot or ought not to be allowed to cherry-pick the aspects of counsel's advice, or deliberations that he believes should be withheld from the court. As a matter of fairness, the waiver must extend to the entirety of counsel's recollection, working papers, and any other document relevant to the claim, and not to the bits and pieces that the client considers necessary to reveal. This is necessary to ensure not only fairness but to prevent a misunderstanding from resulting.

[32] Mr Chong has chosen to disclose details of his interaction and communication with Mrs Gentles-Silvera during the course of their attorney-client relationship in an attempt to establish that she disliked Mr Brady and was biased against him, thereby depriving him of a fair hearing. Those allegations, as already indicated, impugn her integrity not only as counsel but as a member of the Committee. In my view, by his disclosure of Mrs Gentles-Silvera's communication with him during the course of her representation of him,

which involved giving him legal advice and initiating litigation proceedings on his behalf, Mr Chong had impliedly waived the right to claim legal professional privilege concerning any communication and documentation between them, that is necessary for the determination of the relevant issues relating to the allegation of bias.

[33] In my view, the communication and documentation disclosed by Mrs Gentles-Silvera in the impugned paragraphs of her affidavit were all relevant and necessary for a fair adjudication on the issues raised in the fresh evidence application and, by extension, the appeal. As such, the alternative waiver defence, raised by the GLC, would operate to deprive them of the protection of the privilege being asserted by Mr Chong. Therefore, on this basis, Mrs Gentles-Silvera would have been entitled to disclose the communication between Mr Chong and her regarding the matter in which Mr Brady was involved.

Conclusion

[34] In all these circumstances, I concluded that the self-defence exception to legal professional privilege was triggered when Messrs Chong, Giaimo and Brady sought to present evidence that would serve to cast aspersions on Mrs Gentles-Silvera's integrity as counsel and as a member of the Committee. Additionally, in support of the allegation of bias, the disclosure of communication between Mrs Gentles-Silvera and Messrs Chong and Giaimo necessitated the disclosure of information that may refute those allegations as a matter of fairness. Therefore, Mr Chong would have impliedly waived his right to insist that that information be kept confidential. Consequently, I found no merit in the application to strike paragraphs from Mrs Gentles-Silvera's affidavit, which made such necessary and relevant disclosures that could assist the court in determining the credibility of Messrs Chong and Giaimo's evidence.

[35] I will now consider the fresh evidence application, which has also given rise to several distinct issues; each of which will be examined in turn.

The fresh evidence application (Application No 27/2018)

[36] The evidence that is required to be adduced is considered under two discrete headings - evidence relating to bias (affidavits of Messrs Brady, Chong and Giaimo) and evidence relating to Mr Brady's indebtedness to the FCJ (the Crowe Horwath Report and affidavit evidence of Mr Brady's course of dealing with the FCJ).

[37] It should first be noted that although the application for permission to adduce fresh evidence was eventually filed by Mr Brady, pursuant to the order of the court, Mr Beswick was not satisfied that he ought to have been required to apply for permission to adduce fresh evidence. He vociferously argued that the permission of the court was not needed, and so the court is not entitled to apply the principles of law that are usually applied to fresh evidence applications. To place Mr Beswick's arguments within their proper context, it is considered apposite that the principles of law governing fresh evidence applications should first be established before addressing Mr Beswick's objection and the merits of the application.

The law

[38] The general principle expounded in rule 52.21(2)(b) (formerly rule 52.11(1)(b)) of the United Kingdom Civil Procedure Rules is that, unless it orders otherwise, the appeal court will not receive evidence that was not before the lower court. However, this express provision regarding the admission of fresh evidence on appeal in civil proceedings is absent from our Civil Procedure Rules 2002 ('CPR') and the Court of Appeal Rules ('CAR'). That notwithstanding, this court, by way of an established practice, which can be said to have been crystallised into law, has operated on the same principle in civil proceedings as the UK Court of Appeal. It does so by applying common law principles, most notably, the principles laid down in the well-known case of **Ladd v Marshall** [1954] 1 WLR 1489. This court has endorsed and applied those principles in many decisions, such as **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26 and **Russell Holdings Limited v L&W Enterprises Inc and Another** [2016] JMCA Civ 39, which the parties in these proceedings have cited. The principles extrapolated from **Ladd**

v Marshall cases ('the **Ladd v Marshall** principles') establish that the court will only exercise its discretion to receive fresh evidence where:

1. the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;
2. the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and
3. although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible.

[39] **Ladd v Marshall**, therefore, laid down the rule that where there had been a trial or a hearing on the merits, the decision should only be reversed by reference to new evidence if it can be shown that the conditions it has stipulated are satisfied.

[40] **Ladd v Marshall** remains good law in Jamaica and is usually the starting point in considering fresh evidence applications in civil proceedings, even though there is authority to suggest that the court is not bound in a straightjacket to apply these principles. The primary consideration, it is held, is that justice is done (see **Rose Hall Development Limited**). It should be noted, however, that although the CPR does not make express provision for fresh evidence applications, it is accepted that the **Ladd v Marshall** principles are not in conflict with the overriding objective of the CPR (see **Darrion Brown v The Attorney General of Jamaica and Others** [2013] JMCA App 17). Therefore, the **Ladd v Marshall** principles are consonant with the interests of justice in considering fresh evidence applications in civil cases. This is so, although civil appeals to this court are by way of rehearing. Indeed, the application of the principles of law relevant to the reception of fresh evidence in civil proceedings has been established in this court with no distinction drawn between appeal by way of rehearing or appeal by way of review.

[41] It is considered necessary to note further that disciplinary proceedings are classified as quasi-criminal, having regard to the standard of proof required to be met for liability to be established. Even though this is so, the court has applied the **Ladd v Marshall** principles as adopted in **Rose Hall Development Limited** to fresh evidence applications in such proceedings (see **Dwight Reece v General Legal Council (Ex parte Loleta Henry)** [2021] JMCA Misc 1). But it should be noted that even if it could be argued that because disciplinary proceedings are quasi-criminal and so principles applicable to criminal law should apply, the position would be the same. This is so because there are statutory provisions and established principles at common law that treat with the admissibility of fresh evidence on appeal in criminal cases.

[42] Insofar as the admission of fresh evidence in criminal proceedings goes, there is statutory authority for the proper exercise of the court's jurisdiction. This is provided for in section 28 of the Judicature (Appellate Jurisdiction) Act, which basically provides that the court, in criminal appeals from the Supreme and Parish Courts, may admit fresh evidence if it thinks "it necessary or expedient in the interest of justice" to do so. There is, of course, no mention in the section or elsewhere regarding the reception of fresh evidence in appeals from the GLC disciplinary hearings.

[43] However, what is worthy of note is that section 28 does not outline the principles that the court should apply in determining when it would be necessary or expedient in the interests of justice to admit fresh evidence on appeal. Thus, it is to the common law that one must resort to ascertain the applicable principles. Within this context, the most notable pronouncements on the conditions to be satisfied in criminal cases in which the statutory power is being exercised came from Lord Parker CJ in **R v Parks** [1961] 3 All ER 633 at page 634. Lord Parker summarised four conditions that must be satisfied for fresh evidence to be adduced on a criminal appeal. They are:

> "First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the

> sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

[44] It is established that an applicant seeking to adduce fresh evidence must satisfy the first three requirements above: See, for instance, **Brian Smythe v R** [2018] JMCA App 3 at para. [16].

[45] Furthermore, as Brooks JA (as he then was) reminded in **Brian Smythe**, the Judicial Committee of the Privy Council in the case of **Clifton Shaw and Others v R** [2002] UKPC 53, has approved the instructive pronouncements of Rose LJ in **R v Sales** [2000] 2 Cr App R 431 as being the correct approach to considering applications to adduce fresh evidence. Rose LJ stated, in part, at page 438:

> "...Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for [the] Court to hear the witness de bene esse in order to determine whether the evidence is capable of belief."

[46] It is quite evident from the preceding discussion that whether proceedings are civil or criminal, there are established principles by which the court ought to be guided in treating with the introduction of new evidence on appeal. Neither in criminal nor civil proceedings is there an unbridled right to a litigant to adduce evidence on appeal that was never presented in the court or tribunal below without the permission of the court.

Whether an application to adduce fresh evidence was required?

[47] Despite the well-settled state of the law regarding the admissibility of fresh evidence on appeal, Mr Beswick's primary contention was that Mr Brady has an

unrestricted right to adduce evidence on the appeal, without having to first obtain permission from the court to do so and having to satisfy the conditions laid down by the authorities (civil or criminal, it seems). Furthermore, he argued that the principles of law concerning the admissibility of fresh evidence do not apply to proceedings from an administrative tribunal, where the appeal is by way of a rehearing. Therefore, for that reason, Mr Brady would be entitled to bring any evidence he desires on the appeal, without the court's permission and without satisfying any condition laid down by law for the admissibility of that evidence, even though such evidence was not adduced below.

[48] In support of this viewpoint, counsel relied on section 16 of the Legal Profession Act ('LPA'), which provides that an appeal from the decision of the Committee is by way of rehearing. Based on that provision, Mr Beswick posited that given that it is a rehearing, the court is exercising original jurisdiction and, as such, is empowered to consider any material that was not before the Committee without an application for it to do so.

[49] In support of this position, Mr Beswick relied heavily on the Australian case of **Thompkins v South Australian Health Commission** [2001] SASC 147, in which the court gave an in-depth consideration as to what is meant by an appeal by way of rehearing. Mr Beswick emphasised, in particular, the following portion of the court's reasoning:

> "33. **When the legislature gives a court the power to review or hear an appeal against the decision of an administrative body, a presumption arises that the court is to exercise original jurisdiction:** *re Coldham & Ors Ex parte Brideson (No. 2)* (1990) 170 CLR 267 at 273. The principles by which this issue is to be determined and factors relevant to a determination were discussed by Mason J in *Builders Licensing Board of the Sperway Constructions (Syd.) Pty Ltd* (1976) 135 CLR 616. His Honour said (p 621-622):
>
> > 'Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will

> undertake a hearing de novo, although there is no absolute rule to this effect ...'
>
> ...
>
> 39. As mentioned, it follows from the conclusion that the appeal is an appeal *de novo* that the failure of the Commission to afford procedural fairness to the applicant is of little significance. **On the appeal, the parties will not be confined to the material presented to the Commission. The parties will be at liberty to call evidence to support their respective cases. The Court will be required to make its decision afresh** ..." (Counsel's emphasis as in written submissions)

[50] In challenging Mr Beswick's submissions, Mrs Kitson pointed to other aspects of the court's dicta in **Thompkins**, as well as other authorities, which in her view, rendered Mr Beswick's arguments unmeritorious. Queen's Counsel noted that **Thompkins** does not support the arguments advanced by Mr Beswick when the court's reasoning is considered as a whole. Additionally, she relied on **E I Dupont De Nemours & Co v S T Dupont** [2006] 1 WLR 2793; **Papps v Medical Board of South Australia** [2006] SASC 234; and **Ernest Davis v the General Legal Council**, in advancing convincing arguments that Mr Beswick's view that **Thompkins** supports his position is a misapplication of the relevant principles.

[51] Having examined **Thompkins** and the authorities cited by the GLC, it was palpably evident that Mr Beswick did not stand on good ground. To demonstrate how I have arrived at that conclusion, I will begin with a distillation of the relevant principles of law from the court's pronouncements in **Thompkins**, which were highlighted by counsel for the GLC in their helpful written submissions. For ease of reference, the main principles laid down in paras. 28 to 32 of the judgment of Martin J have been extracted and outlined below, hopefully, with no injustice done to his Lordships reasoning and intendment.

> 1) Three types of appeals may be created with respect to the decisions of judicial and administrative bodies. They are: (a) an appeal, "strictly so-called"; (b) an

appeal by way of rehearing; and (c) an appeal *de novo* in which the appeal court hears the matter afresh: **Wigg v Architects Board of South Australia** (1984) 36 SASR 111, per Cox J (para. 28). The distinguishing features are as follows. In the appeal "strictly so called", the question is whether the judgment complained of was right when given, and there is no issue of introducing fresh evidence in the appeal court. All that is to be decided is whether the court below came to the right decision on the material before it (para. 28).

2) The second type, the appeal by way of rehearing, is a rehearing on the documents, but with a special power reserved by the court to receive evidence on the appeal. The power to receive evidence is necessary because the question on a rehearing of this kind is whether the order of the court below ought to be affirmed or overturned in light of the intended material before the appeal court at the time it hears the appeal (para. 29).

3) In the third type, the appeal *de novo*, the appeal is conducted as an original cause, regardless of which party appeals and all the evidence is given afresh unless the parties agree to materials being used on the appeal. The court will determine the question upon the material presented before it and will not be limited by the decision made by the body appealed from (para. 30).

4) There, however, may be a hybrid of any of these three types of appeals. A statutory appeal's procedure will

not always fit easily into one or other of the three categories identified. It is open to a legislature to create any kind of appeal, including a hybrid that exhibits features of more than one of the traditional categories.

5) The type of appeal or a hybrid of any of the three that is given by any statute will depend upon the construction of that particular statute. **Therefore, the use of the word 'rehearing' will not be decisive because that is a word to which different meanings have been given. It is a matter of discerning Parliament's intention from an examination of the legislation as a whole** (paras. 31 and 32)

6) When the legislature gives a court the power to review or hear an appeal against the decision of an administrative body, a presumption arises that the court is to exercise original jurisdiction (para. 33)

[52] Following the guidance of Mason J in **Builders Licensing Board of the Sperway Constructions (Syd) Pty Ltd**, Martin J further pointed out the principles to be applied and the factors to be considered in determining the court's power on an appeal by way of rehearing. He noted, in summary:

1) A provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing *de novo*, although there is no absolute rule to this effect. There are sound reasons for thinking that, in many cases, an appeal to a court from an administrative authority will necessarily entail a hearing *de novo*.

2) The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. In all the following cases, there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing *de novo* where: (i) there is no provision for a hearing at first instance or for a record to be made of what takes place there; (ii) the authority may not be bound to apply the rules of evidence or the issues which may arise to be justiciable; and (iii) the authority may not be required to give reasons for its decision.

3) On the other hand, the character of the function undertaken by the administrative authority in arriving at its decision may be different from the cases noted above. The authority may be required to: determine justiciable issues formulated in advance; conduct a hearing at which the parties may be represented by legal representatives, involving the giving of oral evidence on oath which is subject to cross-examination; keep a transcript of the record; apply the rules of evidence; and give reasons for its decision. In such a case, a direction that the appeal is to be by way of rehearing may well assume different significance.

4) In the end, the answer will depend on an examination of the legislative provisions rather than upon an endeavour to classify the administrative authority as one entrusted with an executive or quasi-judicial function. It is primarily a question of elucidating the

> legislative intent. The mere fact that it is stated that the appeal is by way of rehearing does not greatly illuminate the answer to the question.

[53] In the light of this instructive guidance from **Thompkins**, it is safe to say that the mere fact that section 16 of the LPA states that an appeal lies from the Committee to this court by way of rehearing does not, without more, assist Mr Beswick in his contention. It is to the legislative provisions of the LPA to which attention must be directed to ascertain the true intent of Parliament.

[54] I accept Mrs Kitson's submissions that, with regard to section 17 of the LPA, the legislative scheme does not reveal an intention by Parliament to provide for a rehearing in the fullest sense of the word. That is, to say, for the court to exercise original jurisdiction by conducting a hearing *de novo*. I have arrived at this conclusion on two bases. The first is this: section 17 of the LPA provides that this court may dismiss the appeal and confirm the order made by the Committee; allow the appeal and set aside the order; vary the order; or **allow the appeal and direct that the application be reheard by the Committee**.

[55] In **Papps**, the court in speaking to an equivalent provision to sections 16 and 17 of the LPA in the UK Medical Practitioners Act, regarding appeals from the Practitioners Professional Conduct Tribunal, noted at para. 30 that:

> "… There would be no purpose in the power to remit a matter to the Tribunal pursuant to section 66(3)(b) if it was intended that appeals to this court were to be heard *de novo."*

[56] The same may be said of section 17. If Parliament had intended that the appeal should be a hearing *de novo*, there would have been no need for the court to be granted the power to remit the matter for re-hearing by the Committee.

[57] The second, and even more compelling, basis that led me to the conclusion that a hearing *de novo* is not necessarily intended in cases from the Committee lies in the

statutory functions of the Committee and the nature and conduct of the proceedings before it. Concerning the function of the Committee, the court in **Papps** relied on dicta from Lush J in **Freeman v Rabinov** [1981] VR 539, where he said:

> "To say that the court is "rehearing" cases may be difficult in view of the history of [the Australian Rules of the Supreme court 1906] O.58, r.1, but the issue may be one of terms."

The Supreme Court of South Australia in **Papps** went on to state persuasively at paras. 36-37 that:

> "36 **The decision under appeal is that of a specialist tribunal and involves consideration of matters of professional judgment about the appropriate conduct of the practice of medicine. As such, this Court should be careful not to intervene to substitute its own view unless a clear error in the Tribunal's decision can be demonstrated**.
>
> 37 In *T v Medical Board of South Australia* [(1992) 58 SASR 382] Olsson J reiterated difficulties associated with reviewing a decision of a specialist tribunal:
>
> > '[W]hilst the appellate court must make its own independent assessment of the impact of the evidentiary material, it must nonetheless bear firmly in mind the permanent position of disadvantage in which it stands – as against the primary Tribunal - on questions of credibility. It should only be disposed to interfere with such findings where it is abundantly satisfied that the conclusion reached was plainly inappropriate ...'" (Emphasis added)

[58] This viewpoint was reflected in the reasoning of Brooks JA in **Ernest Davis v GLC**. There, Brooks JA opined, at paras. [12] to [16] of his judgment, that where the decision below is by an arbiter with greater experience in such matters, deference should be given to that decision. It should only be disturbed where it is shown that there has been an

error in principle or on compelling material, which demonstrates that the exercise of that power resulted in an error.

[59] In the instant case, the appeal is from a 'specialist tribunal' entrusted with the function to uphold the standards of the legal profession and ensure the enforcement of the LPA and the Canons. Deference must, therefore, be given to its decisions. Thus, the court should exercise caution in commencing a hearing afresh with a view to interfere with its decision in the absence of error on its part or other compelling reason to do so.

[60] Furthermore, in looking at the cases in which a hearing *de novo* may not be required as identified in **Papps**, I found this to be one such case for the following reasons. The Committee was dealing with justiciable issues; the parties were represented by attorneys-at-law in the hearing; each party was able to call witnesses and to cross-examine the opposing parties' witnesses if they so desired; the Committee was obliged to keep a transcript of the proceedings as well as to give reasons for its decision. Therefore, the legislative scheme has provided for cases brought against attorneys-at-law to be fully ventilated before the Committee, including testing evidence by cross-examination.

[61] In **EI Dupont**, at para. 96, the court, in assessing whether an appeal was by way of rehearing or review under the specific UK Civil Procedure Rules and Trade Mark Act that were being considered, opined that in circumstances in which there was a hearing and procedure for consideration of evidence (as exists in the instant case), it is rare that the court, in the interests of justice, requires an appeal to be by way of rehearing in the fullest sense of the word.

[62] Against the background of all these circumstances, it seems to me that the legislative intent was not for the court to exercise original jurisdiction automatically and to hear cases from the Committee *de novo*.

[63] Therefore, parties ought not to be allowed to change their case on appeal as they so desire or on their whim and fancy. The leave of the court should first be obtained for

the court to consider new material not provided below. It follows that the court would then determine, after an application of the relevant law to the circumstances, whether a hearing *de novo* should be the appropriate course. This should only be when it is discovered that there was an error in the decision of the Committee or that other compelling circumstances exist that would warrant the taking of such an approach.

[64] Finally, it is noted that it is expressly provided in the UK Civil Procedure Rules that the same course of action necessary to adduce fresh evidence on an appeal is the same required for an appeal by way of review as it is for an appeal by way of rehearing. This was applied in **EI Dupont** (see paras. 96 and 97). The court noted, in part, at para. 97:

> " … **There is the possible gloss – which is of terminology, not substance – that the attribution of the label 'rehearing' is not, other than exceptionally, necessary to enable the court upon a hearing by way of review to make the evaluative judgments necessary to determine whether the decision under appeal was or was not wrong** … [I]t may occasionally be technically necessary to hold a rehearing to enable the court to consider interfering with the exercise of a discretion, rule 52.11(1)(b) gives the court power to do so. **But the court will not normally interfere with the exercise of a discretion unless the decision of the lower court was reached on wrong principles or was otherwise plainly wrong. And this can be done on a hearing by way of review."** (Emphasis added)

[65] It seems to me that, even though there is no express provision to this effect in our CAR, the principles applicable to fresh evidence should apply equally to an appeal by review and an appeal by rehearing. It would be safe to expressly endorse and adopt the English position, which makes eminently good sense.

[66] For these reasons, I would hold that there is no legal basis for Mr Brady to adduce fresh evidence without first obtaining the permission of the court to do so. This particularly applies to the application to adduce the auditor's report, which is purported evidence as to fact, which would go to the merit of the Committee's decision. He must

satisfy the court that a good reason exists for the fresh evidence he is presenting on appeal to be received.

[67] It means then that the principles applicable to the reception of fresh evidence on appeal are relevant to the application and will be given due consideration, to the extent necessary and as the circumstances warrant, in seeking to arrive at a just outcome. Accordingly, the application will now be considered within the framework of the applicable law, which would include having regard to what is required in the interests of justice.

[68] Admittedly, it was Mr Beswick's fall-back position that if the court does not accept his submissions regarding the application of the relevant principles of law to the application, it should, nevertheless, find that Mr Brady has satisfied the conditions stipulated in **Ladd v Marshall**. He also maintained that fairness and the broader principles of justice dictate that the new evidence regarding the Crowe Horwath Report should be allowed. He placed reliance on **Rose Hall Development Limited** and the Privy Council case of **Peter Michel v The Queen** [2009] UKPC 41. In his view, the failure of the Committee to allow Mr Brady to await the audit report has resulted in "significant injustice being done to Mr Brady with indelible consequences".

[69] Given what I would call the 'hybrid' nature of disciplinary proceedings before the GLC, I have reviewed Mr Brady's application to adduce fresh evidence on appeal by applying the relevant principles applicable to civil proceedings. At the same time, somewhat tangentially, I have also had regard to the criminal conditions for admissibility as laid down in **R v Parks**. I do so against the background that the proceedings are quasi-criminal and that there is not much difference between the stipulations of **Ladd v Marshall** and **R v Parks**. Having considered the application within this legal framework, I found the outcome to be the same, whichever applies. This finding will now be demonstrated by an examination of the merits of the application.

Fresh evidence relating to bias

[70] Mr Brady's application to adduce fresh evidence on the ground of bias relates to grounds of appeal (x), (xi) and (xii), which are to this effect:

> "(x) That the Chairman of the Panel, Mrs. [Daniella] Gentles-Silvera, [sic] actions against [Mr Brady] was bias [sic].
>
> (xi) That from the Affidavits of James Chong and Joseph Giaimo, both filed in this matter in this Court, it is apparent that the Chairman of the Panel, Mrs. [Daniella] Gentles-Silvera, had disliked the Appellant from far back as 2011.
>
> (xii) That based on the Affidavits of James Chong and Joseph Giaimo and Mrs. [Daniella] Gentles-Silvera's behaviour towards the Appellant, [Mr Brady] could do [sic] not have received a fair, unbiased and impartial hearing over which Mrs. [Daniella] Gentles-Silvera presided, with Mrs. [Daniella] Gentles-Silvera being the Chairman of the Panel."

[71] In seeking to establish these grounds of appeal, Mr Brady sought to adduce evidence contained, primarily, in the affidavits of Harold Brady filed 27 April, 9 May 2017 and 4 March 2019; affidavits of James Chong filed 12 April and 5 October 2017; and affidavit of Joseph Giaimo filed 12 April 2017.

Mr Brady's evidence

[72] Mr Brady deposed in his first affidavit, filed on 27 April 2017, that he did not receive a "fair, unbiased and impartial" hearing before the Committee, as Mrs Gentles-Silvera, who presided over the panel that heard his matter, harboured an intense "dislike" and held a "grudge" or "personal vendetta" against him. He said this is evidenced by comments she had made to and in the presence of Messrs Chong and Giaimo and her refusal to grant his requests for adjournments during the hearing.

[73] According to Mr Brady, he was perturbed by Mrs Gentles-Silvera's attitude towards him during the hearing. However, he could not think of any reason for what he described

as her "personal vendetta" against him. Nevertheless, he pointed to the affidavits of Messrs Chong and Giaimo as providing the basis for her attitude and substantiating his assertions regarding bias. He also stated that Mrs Gentles-Silvera's actions had caused significant prejudice to him and damaged his reputation and integrity in the legal profession. Her prejudicial actions, he said, have also affected his health.

[74] Mr Brady referenced selected paragraphs of the affidavits of Messrs Chong and Giaimo, which he exhibited to his affidavit. He deposed that those affidavits show that Mrs Gentles-Silvera had a vendetta against him, was biased towards him and that she had "a long standing disliked [sic] towards [him]". He alleges that because Mr Chong refused to report him to the GLC, Mrs Gentles- Silvera terminated the retainer agreement with Mr Chong.

[75] By these accusations against Mrs Gentles-Silvera, he, therefore, implies that Mrs Gentles-Silvera's "long-standing" dislike for him would have tainted the Committee's unanimous decision in refusing his adjournment requests; finding him guilty of professional misconduct; and imposing sanctions. For these reasons, he says, he did not receive a fair hearing from the Committee.

Evidence of Mr James Chong

[76] Mr Chong's evidence, in so far as is relevant, is predominantly taken from his affidavits filed on 12 April and 5 October 2017. It is to this effect. He is a businessman and the owner and chairman of Double Deuce. He and his business partner had retained Mr Brady to provide legal services in a business transaction. He later became embroiled in a contentious dispute with his partner. Mr Brady had been in discussions with his partner and him to settle that dispute. Allegations later arose that Mr Brady had made unauthorised disbursement of funds from the business. Although Mr Brady denied those allegations, he was unable to show proof, at the time, that he had obtained instructions from Mr Chong's business partner to make those disbursements. Mr Brady was later able to disprove the allegations made against him and absolve himself of any wrongdoing. Eventually, the matter was settled.

[77] However, before Mr Brady disproved those allegations of possible impropriety, Mr Chong had been introduced to Mrs Gentles-Silvera, as counsel in the firm, Livingston, Alexander & Levy, which he had approached for legal representation in his dispute with Mr Brady. She was assigned conduct of the matter. After outlining the allegations against Mr Brady to Mrs Gentles-Silvera at their very first meeting, Mrs Gentles-Silvera advised him to sue Mr Brady. She also "demanded" that Mr Brady be reported to the GLC as "Mr Brady is not the sort of person who should be a member of the profession". A retainer was prepared for Livingston, Alexander & Levy, through Mrs Gentles-Silvera, to provide "general advice and litigation services and in particular, instituting an action in the Supreme Court of Jamaica against Mr. Harold Brady to recover monies which were given to him for specific purposes and filing a complaint with the [GLC]". He signed the retainer, but he had never authorised Mrs Gentles-Silvera to file a complaint against Mr Brady to the GLC, as he was concerned about exposing himself to the risk of being sued should Mr Brady ultimately prove his innocence.

[78] Following those instructions, Mrs Gentles-Silvera filed a claim against Mr Brady. Once the claim was served on Mr Brady, a third party contacted him, and several meetings were convened to resolve the matter. Mr Giaimo, his attorney-at-law admitted to practice in New York in the United States, had represented him in legal matters arising in the United States in collaboration with attorneys-at-law in Jamaica. He was present during a number of these meetings.

[79] While a settlement was being negotiated, Mrs Gentles-Silvera "insisted" on him reporting Mr Brady to the GLC, and, "in fact, drafted complaint documents" for him to sign, which he refused to sign. Mrs Gentles-Silvera, he said, was "consistent and resolute" in her advice to him that his concerns should not preclude him from filing a complaint before the GLC. Her continuous insistence that he ought to report Mr Brady to the GLC, led him to discuss the issue with Mr Giaimo, who instructed him not to report Mr Brady to the GLC. Mr Giaimo then instructed Mrs Gentles-Silvera to refrain from filing a complaint against Mr Brady and to concentrate on the recovery of the funds they wanted to recover from Mr Brady.

[80] Mr Chong believed that Mrs Gentles-Silvera was displeased with his instructions, as evidenced in a letter dated 5 May 2011. Mrs Gentles-Silvera subsequently issued a letter terminating her firm's retainer with him. He believed that the subsequent termination of his retainer was a result of his refusal to initiate disciplinary proceedings against Mr Brady.

[81] Mr Chong deposed that he "found out through the media that the [GLC] disbarred Mr. Brady in March 2017" concerning an unrelated legal matter. He was later "advised and verily [believed]" that Mrs Gentles-Silvera was the chairman of the panel that presided over the disciplinary proceedings involving Mr Brady. In his opinion, Mrs Gentles-Silvera "should never have sat in judgment" of Mr Brady given her "expressed prejudicial feelings" and "constant negative comments" about him every time they met, as well as her insistence that Mr Brady should be disbarred, even when that issue did not arise on their discussions. It is clear that Mrs Gentles-Silvera was biased towards Mr Brady, and Mr Brady could not have received a fair and unbiased hearing. In his words: "To my mind, this was not fair to Mr Brady as she could not be impartial".

Evidence of Mr Joseph Giaimo

[82] Mr Giaimo, for his part, deposed as follows in his affidavit filed on 12 April 2017, in so far as is material for present purposes. While representing Mr Chong during several meetings with Mrs Gentles-Silvera, she had engaged in discussions and made comments that gave rise to his view that "she intensely disliked Mr. Brady and was bent on getting Mr. Brady disbarred even though there was absolutely no evidence that Mr. Brady had violated his duty to [Mr Chong]". When the matter with Mr Chong was settled, Mr Brady was "completely absolved" from any wrongdoing, and there was no indication he did anything wrong. However, due to Mrs Gentles-Silvera's dislike for Mr Brady, she insisted that Mr Chong take action against Mr Brady. Mr Chong never agreed or authorised Mrs Gentles-Silvera to bring an action against Mr Brady.

[83] Mr Giaimo further deposed that as a fair-minded and unbiased observer, having considered the facts and his "past experiences", he could not see how Mr Brady could have received "a real unbiased hearing with Mrs. Gentles-Silvera sitting on the panel".

The GLC's response

[84] The GLC stridently opposed the application for this evidence to be adduced. It relied on the affidavit evidence of Mrs Gentles-Silvera filed 2 and 10 May 2017, which exhibited email correspondence between her and Messrs Chong and Giaimo. Mrs Gentles-Silvera strenuously refuted the allegations that have been made against her in the affidavits filed by Mr Brady. She outlined the history of her engagement with Mr Chong and described her interaction with him, Mr Giaimo and Mr Brady. She exhibited documentary proof purportedly supporting her contention that, in all her dealings with Mr Chong, she gave her professional advice about his legal options, including making a report to the GLC. She denied having a personal vendetta or personal bias against Mr Brady.

Discussion

[85] The response of the GLC raised a serious dispute of fact, which called into question the credibility and reliability of the evidence Mr Brady is seeking to adduce to establish his allegation of bias and unfairness in the proceedings. Having regard to the principles enunciated in **R v Sales**, the court considered that the written evidence that Mr Brady sought to adduce was neither plainly incapable of belief nor plainly capable of belief on the face of it. Therefore, in such circumstances, it was necessary to hear the witnesses *de bene esse* to determine whether the evidence on which Mr Brady wishes to rely satisfies the conditions laid down by law, especially the question of its apparent credibility. I have focused primarily on the question of credibility in this aspect of our enquiry because the allegation relates to the issue of bias, and so the court has to view the question of bias rather seriously. This approach is adopted because even if a person is believed to be guilty, he is entitled to a fair hearing before an impartial tribunal established by law

because the right to a fair hearing is absolute (see **Randall v R** [2002] UKPC 19, para. 28).

[86] Therefore, the question of whether the evidence would have led to a different conclusion may not be as relevant in the face of such accusation of unfair hearing on the ground of bias. For this reason, the apparent credibility of the factual assertions being relied on by Mr Brady has taken centre stage in this aspect of my analysis. For if the evidence fails the credibility test, then there can be no basis in law to admit it on the hearing of the substantive appeal to impugn the decision of the Committee.

[87] I will, however, begin with an enquiry into the first condition to be satisfied, and that is, whether the evidence to be adduced was not available at the hearing or could not have been obtained with reasonable diligence. The knowledge on the part of Mr Brady of the circumstances that he is relying on to ground bias is relevant to how his allegation of bias is treated with in the ultimate consideration of the grounds of appeal. This focus is necessary because the GLC has raised the issue of waiver in challenging Mr Brady's allegation of bias.

Whether the evidence was available or could have been obtained with reasonable diligence at the time of the hearing

[88] From all indications, at the time of the hearing before the Committee, it would have been within Mr Brady's certain knowledge that Mrs-Gentles Silvera had represented Mr Chong and had dealt with him, Mr Brady, in her capacity as Mr Chong's legal representative. From the undisputed evidence, he would have known that Mrs Gentles-Silvera was involved in filing a claim against him in the Supreme Court and an intended filing of a complaint against him with the GLC connected to her representation of Mr Chong.

[89] The evidence of Mrs Gentles-Silvera's involvement in the previous proceedings relating to Mr Brady, including preparing a report against him to the GLC, while she represented Mr Chong, was available to Mr Brady at the time of the hearing because he knew of the intended complaint. Mrs Gentles-Silvera had personally advised him. This

evidence could have been put before the Committee at the time of the hearing by Mr Brady and an application made for the recusal of Mrs Gentles-Silvera if he believed that she was biased. Yet, Mr Brady did not ask Mrs Gentles Silvera to recuse herself on account of alleged bias, even when, according to him, she was hostile towards him.

[90] It seems evident that Mr Brady's allegation of bias does not emanate from the mere fact that Mrs Gentles-Silvera represented Mr Chong in a matter involving him. Mr Brady had gone further to state reasons for the alleged bias of Mrs Gentles-Silvera that, he said, were not within his knowledge at the time of the hearing. The crux of his case of bias in this regard concerns what he said Messrs Chong and Giaimo told him. In this regard, he stated that he did not know that Mrs Gentles-Silvera had expressed unfavourable views of him to Messrs Chong and Giaimo. He is relying on the alleged utterances of Mrs Gentles-Silvera to them to establish what he has viewed as being indicative of her dislike for him and resultant bias against him. In essence, then, Mr Brady is saying that the information that Mrs Gentles-Silvera had made adverse comments about him was not brought to his attention at the time of the hearing.

[91] Mr Chong claimed that he did not know that Mrs Gentles-Silvera was a member of the panel before whom Mr Brady had appeared until after the hearing. Therefore, on his explanation, he was not in a position to communicate with Mr Brady about Mrs Gentles-Silvera's attitude towards him and her views of him. The same sentiments, more or less, were expressed by Mr Giaimo.

[92] Against the background of the evidence that the fact that Mrs Gentles-Silvera was a member of the Committee that heard the matter was not in the knowledge of Mr Chong at the time of the hearing, it is fair to say that the evidence as to the alleged disparaging views expressed by Mrs Gentles-Silvera cannot be said to have been available to Mr Brady at the time of the hearing. In other words, even if such information was in the knowledge of Mr Chong, it was not in the knowledge of Mr Brady for use at the hearing, and there was nothing that would have put him on notice to go in search of such information.

[93] It seems safe to conclude that the evidence of Messrs Chong and Giaimo was not available to Mr Brady at the time of the hearing and could not be obtained with reasonable diligence at the time.

[94] The first limb of **Ladd v Marshall** would be satisfied for the fresh evidence to be adduced. Similarly, if the case should be treated as a criminal matter, then the first limb of Lord Parker's test laid down in **R v Parks** would also be satisfied. This now takes us to the critical consideration and, that is, whether the evidence is apparently credible or well capable of belief.

Is the evidence relevant and apparently credible or well capable of belief?

[95] There is no question that the evidence being sought to be adduced would be relevant because an allegation of bias must be taken seriously by the court, as it affects the dual right to due process and fair hearing. In determining whether the evidence is apparently credible, the court must focus its attention on the pith and substance of the evidence on which Mr Brady seeks to rely, which is that Mrs Gentles-Silvera had a longstanding dislike for him and a personal vendetta against him. Her feelings towards him, he posited, is evidenced, in part, by verbal utterances she made to Messrs Chong and Giaimo regarding his unsuitability as a member of the legal profession and her insistence that he be reported to the GLC without the authorisation and consent of Mr Chong, her client.

[96] The credibility and reliability of this evidence being advanced by Mr Brady assume critical importance in the light of the affidavits in response filed by the GLC. At this stage, the court must be satisfied that the evidence is apparently credible or well capable of belief. Therefore, in assessing the credibility quotient of the evidence to be received in the appeal, the court is entitled to evaluate the likely weight to be attached to that evidence in the light of the evidence filed by the GLC to the contrary. In the end, the evidence must be credible to assist Mr Brady in prosecuting his appeal.

[97] In treating with the evidence under this head of **Ladd v Marshall**, I have extracted the salient features of the evidence of Messrs Chong and Giaimo on which Mr Brady seeks to rely in alleging bias.

Analysis of Mr Chong's evidence

[98] Mr Chong claims in his affidavit evidence that in his first meeting with Mrs Gentles-Silvera, she stated that Mr Brady was not the sort of person who should be a member of the legal profession and that during their relationship, she insisted that he make a report to the GLC against Mr Brady. He indicated that he had never authorised her to report Mr Brady to the GLC and that she terminated the retainer by letter dated 5 May 2011 because he refused to make a complaint against Mr Brady to the GLC.

[99] Under cross-examination, Mr Chong maintained that Mrs Gentles-Silvera had orally stated that Mr Brady was unsuitable for the profession. However, his evidence regarding the intended report to the GLC and the reason for the termination of his retainer with Livingston, Alexander & Levy was remarkably modified upon cross-examination. Moreover, his evidence was further undermined not only by the evidence of Mrs Gentles-Silvera but, more so, by the undisputed documentary evidence of her communication with him on which she relies.

[100] The documentary evidence produced by the GLC revealed that when Mr Chong retained Livingston, Alexander & Levy in June 2010, the letter of engagement dated 22 June 2010 only stated that Mr Chong instructed Mrs Gentles-Silvera to file a claim in the Supreme Court against Mr Brady. However, three days later, by a signed statement dated 25 June 2010, given to Mrs Gentles-Silvera by Mr Chong, Mr Chong set out his grouse with Mr Brady, who he referred to as the "corporate lawyer for the company". In that statement, Mr Chong referred to the numerous opportunities he had given Mr Brady to settle the issue between them and ended his statement as follows:

> "If Mr Brady does not pay me some money within fourteen (14) days of a demand letter I want to sue him. **I will consider also filing a complaint against him with the**

> **General Legal Council after suit is filed**." (Emphasis added)

[101] In explaining the instructions to her, Mrs Gentles-Silvera accepted that the initial letter of engagement, signed by Mr Chong and exhibited to her affidavit, did not state that the firm was instructed to file a complaint against Mr Brady before the GLC. Instead, it noted that the scope of work was to "provide general advice and litigation services and in particular instituting an action in the Supreme Court of Jamaica against Mr. Harold Brady to recover monies which [Mr Chong gave to him] for specific purposes".

[102] She deposed that in her initial meeting with Mr Chong, she had advised him of all the available legal options in dealing with the matter with Mr Brady, which included filing a suit in the Supreme Court and lodging a complaint before the GLC against Mr Brady at the same time. This advice, she stated, was to maximise Mr Chong's chances of recovering the sums owed. Her advice, she said, was based on her "professional duty" as an attorney and not any "personal animosity" she allegedly held towards Mr Brady, whom she knew professionally but not personally. The advice and recommendations she gave were done objectively, she said, to pursue the best means of recovering monies that Mr Chong said were had paid to Mr Brady.

[103] However, when the letter of demand which had been sent to Mr Brady by Livingston, Alexander & Levy, on the instructions of Mr Chong, was not met with a favourable response, Mr Chong authored an email to her dated 2 July 2010, instructing her that:

> "Beryl [his sister who was also in dialogue with Mrs Gentles-Silvera] and I have discussed the Brady situation and have concluded **that we have no alternative but to proceed with the lawsuit as well as to file a complaint with the General Legal Council.**
>
> **Please prepare all necessary documents to proceed**." (Emphasis added)

[104] The correspondence from Mr Chong on 25 June 2010 and 2 July 2010, as counsel for the GLC submitted, shows that in initial instructions to Mrs Gentles-Silvera, Mr Chong had contemplated filing a complaint with the GLC and expressly authorised her to do so. Mr Chong, upon cross-examination, accepted that he gave the instructions to Mrs Gentles-Silvera to file a complaint with the GLC after attempts were made to recover monies from Mr Brady. He also agreed with Mrs Kitson, on cross-examination, that he did indicate to Mrs Gentles-Silvera that he wished for her to adopt a two-pronged approach towards the recovery of these funds from Mr Brady.

[105] So, even if the option of making a complaint to the GLC had emanated from Mrs Gentles-Silvera as part of her general advice to him, he had accepted the advice and voluntarily decided to act upon it. This is evidence of Mr Chong's conduct that has brought into question his assertion in his affidavit evidence that he never authorised Mrs Gentles-Silvera to file a complaint with the GLC.

[106] It should be noted too that pursuant to the instructions of Mr Chong to pursue both the civil proceedings and a complaint to the GLC, Mrs Gentles-Silvera prepared a claim form and particulars of claim, which Mr Chong signed to recover monies allegedly due from Mr Brady. However, nothing was done at the same time by Mrs Gentles-Silvera regarding the complaint to the GLC.

[107] As a result of her failure to file the complaint with the GLC at that time, Mr Chong, in an email dated 9 September 2010, asked Mrs Gentles-Silvera: "**[w]hat is the status on filing the complaint to the Legal Counsel** [sic]?" Mrs Gentles-Silvera responded by stating that she was "**under a little pressure since [her] return**" and had "**not gone across to the GLC to fill out the forms as yet**", but that she would "**try to do it by tomorrow**" (emphasis added). Mr Chong admittedly received that email. It was following that enquiry by Mr Chong and her promise to complete the process as directed that Mrs Gentles-Silvera prepared draft documents for the complaint to be filed at the GLC. She sent them by email to Mr Chong.

[108] There is nothing to suggest that up to that point, Mrs Gentles-Silvera was acting without instructions regarding the complaint to the GLC. This is seen from the email correspondence between Mrs Gentles-Silvera and Mr Chong up to September 2010, as detailed above, which reveals that Mr Chong accepted the advice given to him that a complaint be made to the GLC. From Mrs Gentles-Silvera's reply, emphasised above, it is clear that she was the one who had delayed the filing of the complaint, which resulted in what may be described as a "nudge" from Mr Chong to expedite the process. This was an express instruction from Mr Chong to Mrs Gentles-Silvera to proceed with the complaint to the GLC, and his repeated requests for her to do so, shows more an insistence on his part, rather than on the part of Mrs Gentles-Silvera, for the complaint to be made to the GLC.

[109] In the light of the preceding evidence, Mr Chong's assertions in his affidavit that at no time had he instructed Mrs Gentles-Silvera to report the matter to the GLC and that she was the one who insisted that he did, are not apparently credible or well capable of belief. However, the apparent incredulity of Mr Chong's evidence regarding Mrs Gentles-Silvera's approach concerning the proposed complaint to the GLC does not end there.

[110] Interestingly, Mrs Gentles-Silvera had advised Mr Brady of Mr Chong's instructions that she should file suit against him and report him to the GLC. Also, Mr Chong knew that Mrs Gentles-Silvera was in dialogue with Mr Brady before she made any attempt to file the complaint. This was disclosed in exhibited emails between Mrs Gentles-Silvera and Mr Chong on 23 to 26 August 2010. In responding to Mr Chong's query as to whether she had spoken to Mr Brady, Mrs Gentles-Silvera indicated that before she went on vacation, she had a discussion with Mr Brady and had agreed that she would send him the court documents rather than send a process server to serve him. According to her, she did so to avoid embarrassment to Mr Brady. She also stated that Mr Brady promised to file an acknowledgement of service as he would be defending the claim.

[111] Mrs Gentles-Silvera explained in her evidence that her approach towards Mr Brady regarding the court documents and the complaint to the GLC was taken out of

professional courtesy to Mr Brady. She deposed that she told Mr Brady about the intended complaint to the GLC to give him an opportunity to settle the matter. Mr Brady did not distinctly deny this upon cross-examination. He accepted that Mrs Gentles-Silvera was involved in settlement discussions regarding the matter. The totality of the evidence shows that Mrs Gentles-Silvera had approached Mr Brady with a view to settling the matter before advancing the claim in the Supreme Court or the complaint to the GLC. In so doing, there would have been no need to report him to the GLC if he had settled the matter. Mrs Gentles-Silvera's conduct towards Mr Brady is inconsistent with the evidence that she was interested in making the complaint to the GLC and insisted that it be made. As argued by counsel for the GLC, it does seem that had she been adamant that a complaint be made, she would not have informed Mr Brady about it and allowed him the opportunity to resolve the matter with Mr Chong. There would have been no need for her to advise Mr Brady of Mr Chong's instructions.

[112] The documentary evidence also reveals that Mr Brady confronted Mr Chong about his intention to report him to the GLC based on that disclosure to him by Mrs Gentles-Silvera. Interestingly, Mr Chong never denied to Mr Brady that he had instructed Mrs Gentles-Silvera to file a complaint with the GLC. Neither did he tell Mr Brady that it was all Mrs Gentles-Silvera's idea and insistence that he did so. The absence of such a denial from Mr Chong at that stage of his interaction with Mr Brady serves to cast serious doubt on what seems to now be a belated assertion that it was Mrs Gentles-Silvera who wanted to bring the complaint and was adamant that it be done.

[113] The undisputed documentary evidence further reveals that in or around November 2010, Mr Chong and Mr Brady were discussing a settlement, which eventually broke down. Mr Chong then wrote to Mrs Gentles-Silvera for her recommendation on how to proceed after the settlement talks broke down. It was Mr Chong who, again, sought Mrs Gentles-Silvera's professional advice. Up to then, Mrs Gentles-Silvera had done nothing to proceed with the complaint to the GLC, although Mr Chong had indicated to her to do so up to September 2010.

[114] In subsequent communication with Mr Brady, Mr Chong advised him that "any and all negotiations and correspondence should be directed to my attorney. Mrs. Gentles-Silvera will then update me accordingly". Mr Brady responded to Mr Chong, expressing, among other things, that Mr Chong's direction that all future discussions were to be made to his attorney was not in the "spirit" of the last discussions they had. Mr Chong stated, in response, that Mr Brady must have misunderstood their discussion, as everything would, in any event, be subject to the approval and advice of Mrs Gentles-Silvera. Mr Chong then wrote to Mrs Gentles-Silvera, forwarding the email correspondence between Mr Brady and him and asking, yet again, for her advice.

[115] It is seen from all this that Mr Chong was relying on Mrs Gentles-Silvera for her professional advice and guidance in the matter with Mr Brady. His stance up to then was not indicative of a situation where Mrs Gentles-Silvera was proceeding in a manner he did not approve of or authorise.

[116] Following all this, in accordance with Mr Chong's instructions that a complaint was to be filed with the GLC, a form of affidavit was prepared by Mrs Gentles-Silvera to be filed with the GLC at the instance of Mr Chong. Additionally, as Mr Brady had not filed a defence to the claim, a request for default judgment was also prepared for the Supreme Court. It is evident from these circumstances that Mrs Gentles-Silvera was taking the necessary steps to carry out the instructions of Mr Chong to proceed with the claim in the Supreme Court and the complaint to the GLC.

[117] However, though the affidavit for the GLC was emailed to Mr Chong for his review, a final affidavit was never sent to him for his signature. This is because on 24 November 2010, he instructed Mrs Gentles-Silvera, by email, "not to take any action including filing a summary judgment until [he has] had a chance to discuss this with [Mr Giaimo]". Mrs Gentles-Silvera complied with those instructions and did nothing further. Neither did she, in any correspondence, remind him about making a complaint to the GLC.

[118] Following Mr Chong's instructions to Mrs Gentles-Silvera to halt her actions, pending discussions with Mr Giaimo, an email thread of 4 to 10 April 2011 shows Mr Giaimo advising Mrs Gentles-Silvera to "push forward with the civil suit" but "hold off on professional charges against [Mr Brady] at the moment". This instruction proves that up to April 2011, it was in the contemplation and intention of Mr Chong to make a complaint to the GLC and had instructed Mrs Gentles-Silvera to do so. The instructions were now changing for the GLC complaint to be put on hold.

[119] Mrs Gentles-Silvera's evidence was that she did as was requested and proceeded with the civil suit. Her evidence is supported by undisputed documentary evidence. The documentary evidence shows that following Mr Chong's instructions to proceed with the civil proceedings and hold off on the GLC complaint, Mrs Gentles-Silvera prepared and filed a request for default judgment on 28 April 2011. She did nothing regarding the GLC complaint.

[120] On 4 May 2011, Mr Giaimo then asked Mrs Gentles-Silvera not to do any further work on the matter until he advised her further. Mrs Gentles-Silvera responded, indicating that that was "ok with [her]" and she would settle the bill. Later that day, she enquired of Mr Chong whether he wished for her to request in writing to the registrar of the Supreme Court for the default judgment not to be entered. Mr Chong then forwarded the email to Mr Giaimo, asking him to "[p]lease respond to Daniella]".

[121] There is nothing to show, up to this point, expressed insistence on the part of Mrs Gentles-Silvera that Mr Chong should proceed with the complaint to the GLC. Neither is there any evidence from which it could be inferred. Mrs Gentles-Silvera's conduct, in abiding by Mr Chong's instructions, as evidenced by the documentary evidence of communication between them, contradicts Mr Chong's evidence that she insisted that a report be made to the GLC contrary to his desire. What she was enquiring about was whether she should proceed to file the request for default judgment, which, she said, "in any event would not have been entered for months".

[122] Then came Mr Giaimo's response to that information in these words by email dated 5 May 2011:

> "[G]od damn it I will. I sent her an email today to stop. [T]his is going to fuck us up. Daniella, withdraw the judgment and certainly do not enter it. [W]e have reached an agreement, with Mr Brady. Any further movement will drag James into enormous legal fees and no source of funds for legal fees. We are quite satisfied with the confidential agreement made with him and we will forward to you a stipulation of discontinuance without prejudice. I will call you tomorrow."

Later that day, Mr Chong added in his correspondence to Mrs Gentles-Silvera that "[i]n the future, all direction will come from Joseph Giaimo, until [he says] otherwise", and that the parties were very close to an agreement.

[123] It was following that email from Mr Giaimo (which Mr Chong described in evidence before the court as being expressed "in a New York manner") and the instructions from Mr Chong that Mrs Gentles-Silvera moved to terminate the retainer by letter dated 5 May 2011. If it is this letter that Mr Chong says was written because Mrs Gentles-Silvera was upset with him for his refusal to report Mr Brady to the GLC, then the credibility of his evidence is brought into sharp question. Mrs Gentles-Silvera expressly indicated the reason for the termination in the letter. She attributed her decision to the constant changing of instructions to her and her refusal to take instructions from Mr Giaimo, whose last email she found particularly offensive. At no time did she state that it was due to the unwillingness of Mr Chong to report Mr Brady to the GLC why she was terminating their relationship. Additionally, such a conclusion would be difficult to draw from the course of the parties' dealings as revealed in the chain of correspondence and the contents of the email messages themselves.

[124] Indeed, Mr Chong was evidently quite mindful of the reason for the termination of the retainer being Mr Giaimo's letter. For, in separate emails dated 6 May 2011, following Mr Giaimo's "offensive" email, both Mr Chong and his sister, Miss Beryl Yap, apologised to Mrs Gentles-Silvera for Mr Giaimo's email. Mr Chong urged Mrs Gentles-Silvera to

"[p]lease accept [his] deepest apologies for the most recent correspondence - in both tone and language" and tried to explain it. Mr Chong, in his email, stated that "I truly appreciate all you have done and respect the professional manner in which you have handled everything". He indicated that his desperation for funds and the possibility that Mr Brady may repay some of the funds owing prompted his request to place a hold on the proceedings, and should those negotiations fail, he was prepared "to go full force ahead". Additionally, he had asked her to "proceed as per [Mr Giaimo's] instruction" in "an attempt to avoid confusion – going on the premise that one person should do the talking".

[125] Mr Chong's sister, in her email to Mrs Gentles-Silvera, also stated that there was "absolutely no excuse for the [language] used" in Mr Giaimo's email and that she "still [saw] a need" for Mrs Gentles-Silvera's services. Both Mr Chong and his sister asked her to reconsider her decision to terminate the retainer and continue to represent them.

[126] Interestingly, at no time did Mr Chong indicate to Mrs Gentles-Silvera that he was dissatisfied with her stance regarding Mr Brady and that she was acting contrary to his instructions. From the email correspondence detailed above, it is clear that Mr Chong knew that Mrs Gentles-Silvera was upset with Mr Giaimo's response in his letter and how instructions were being given to her. Mr Chong was asking her to remain as his attorney-at-law, and at no time was it ever mentioned by him or Mrs Gentles-Silvera that her reluctance to continue the retainer was due to his reluctance to report Mr Brady to the GLC. Again, such a motive on the part of Mrs Gentles-Silvera cannot be deduced from the terms of the correspondence between her and Mr Chong.

[127] From the contents and language of the exhibited pieces of email correspondence, it is clear that Messrs Chong and Giaimo's exclusive focus was on securing repayment from Mr Brady of even some of the funds they claimed he owed Mr Chong. Mr Chong had explicitly said that he requested that Mrs Gentles-Silvera place a hold on the proceedings (which is taken to mean the complaint to the GLC and the matter in the Supreme Court)

because of his desperation for funds and the possibility that Mr Brady would repay him some of the funds.

[128] This focus, on the part of Mr Chong, is evident from the fact that no further action was taken until 16 May 2011, when Mrs Gentles-Silvera received an email from him advising her to file a notice of discontinuance of the lawsuit as Mr Brady had certified a cheque payable to him. Mrs Gentles-Silvera prepared that notice without any objection. There is nothing to suggest that, up to then, she had reminded him of the need to make a report to the GLC, and that there was an insistence on her part that he did so.

[129] The expected payments were, however, not forthcoming. Mr Chong was not happy. Consequently, in or around April 2012, he contacted Mrs Gentles-Silvera and asked her to represent him once again, in the same matter, as it had not been settled. Mr Chong attached a summary of his case, drafted by Mr Giaimo, the last paragraph of which states that:

> "… Brady appears to me to be tortured by his clients and, I believe is in great fear of being sued for fraud for damages and delivery of the deed because of Mickey's fraud, and even **greater fear of being sued for breach of fiduciary duty and the Canon of Ethics and having a complaint filed with the Jamaican grievance committee**. (Joe, check for the correct name)." (Emphasis added)

[130] The reference to Mr Brady's fear of being sued for breach of fiduciary duty and having a complaint filed with the "Jamaican grievance committee", which would be the GLC, was coming from Messrs Giaimo and Chong with the knowledge of Mr Chong and not Mrs Gentles-Silvera. On cross-examination before us, Mr Chong accepted that the summary drafted by Mr Giaimo on his behalf intended for him to pursue both court action and the GLC complaint due to the failed settlement. He also admitted in cross-examination that the "re-approach" to Mrs Gentles-Silvera was to pursue those actions. On that basis, Mrs Gentles-Silvera, again, prepared a letter of engagement dated 24 July 2012. That letter indicated that Mr Chong wished to pursue both court action and a disciplinary complaint. She also prepared an amended form of affidavit for the GLC and

forwarded it to Mr Chong. However, again, he never signed these documents because on 19 September 2012, he informed Mrs Gentles-Silvera that the matter had been settled. She submitted a bill to him. That marked the termination of the retainer.

[131] There is nothing to suggest on the face of the correspondence (or even if one were to read between the lines) and on the evidence presented to the court, that up to that point when the retainer came to an end, Mrs Gentles-Silvera was insisting that disciplinary charges be brought against Mr Brady. There is also nothing to suggest that Mr Chong's refusal to file a complainant against Mr Brady caused the retainer to end in 2012.

[132] In the result, there is no apparently credible evidence adduced to suggest that the relationship ended because Mr Chong was "uncomfortable" with Mrs Gentles-Silvera's insistence on having Mr Brady reported to the GLC. Mr Chong's evidence in this regard is not capable of belief.

[133] In similar vein, the evidence of Mr Chong that Mrs Gentles-Silvera disliked Mr Brady also failed to reveal an apparently credible basis to qualify it for admission as fresh evidence. Mrs Gentles-Silvera's conduct towards Mr Brady, in dealing with Mr Chong's instructions to her, does not inspire confidence in such an assertion. She had advised Mr Brady of the proceedings to be brought against him at the Supreme Court. She extended courtesies to him regarding service of court documents on him to avoid embarrassment, she said. Also, she went as far as to inquire if he intended to defend the claim before proceeding to request that default judgment be entered against him. Despite Mr Brady's delay in contesting the claim, she filed no request for default judgment for a year or so. The indisputable evidence is that she entered into discussions with Mr Brady to settle the matter to avoid all the court proceedings.

[134] Mrs Gentles-Silvera also advised Mr Brady of Mr Chong's intention to make a report to the GLC. She could have easily made the report without Mr Brady knowing or before Mr Chong told her to hold off making the report. As the evidence shows, she had delayed

filing the complaint, and it was Mr Chong who prompted her to proceed with the complaint (see para. [133] above).

[135] It is clear that as late as July 2012, being two years after the initial retainer, Mr Chong was instructing Mrs Gentles-Silvera to pursue disciplinary proceedings against Mr Brady. This is contrary to his evidence that she was the one insisting that it be made. It was only upon the reported settlement of the matter that a notice of discontinuance was filed, and Mrs Gentles-Silvera ended her representation. Nothing further was mentioned by her of Mr Chong making a complaint to the GLC. On the totality of the evidence, it is seen that the veracity of Mr Chong's assertions regarding Mrs Gentles-Silvera's attitude towards Mr Brady and the complaint to the GLC has been called into question by incontrovertible documentary evidence of the parties' dealings.

[136] This finding of apparent unreliability and incredulity of Mr Chong's evidence regarding the complaint to the GLC has rendered equally dubious the credibility of his evidence that Mrs Gentles-Silvera stated in discussions with him that Mr Brady is not the sort of person that should be in the legal profession. His credibility has been seriously eroded in all material respects regarding his dealings with Mrs Gentles-Silvera concerning Mr Brady. Therefore, it would be an insurmountable challenge for Mr Brady to persuade this court to accept Mr Chong's evidence regarding oral utterances allegedly made by Mrs Gentles-Silvera if it were permitted to stand for consideration in the appeal. Those utterances do not square with the documentary evidence of her conduct towards Mr Brady and her management of the matter in her capacity as counsel for Mr Chong. There is nothing placed before the court by Mr Chong that could convincingly establish that she acted outside the scope of her retainer, his instructions and her professional duties.

[137] In the light of all the evidence - written and viva voce - I conclude that the allegation of bias against or dislike for Mr Brady on the part of Mrs Gentles-Silvera, as contained in the evidence of Mr Chong, is not apparently credible or well capable of belief. This evidence fails the third limb of the **Ladd v Marshall** principles, and if it is that the criminal test should be applied, it would also fail to satisfy the third pre-requisite laid

down in **R v Parks**. For all these reasons, I would deny the application for Mr Chong's affidavit to be accepted as evidence of bias in support of the relevant grounds of appeal.

Mr Giaimo's evidence

[138] Mr Giaimo's evidence can be dealt with relatively quickly. By the time of the hearing, he had passed on. His affidavit stood as part of the evidence to be adduced without any formal application to admit the evidence as hearsay. There was, however, no express objection from the GLC regarding the admissibility of it. Therefore, it has been examined in the interests of justice. Mr Giaimo's evidence in his single affidavit of 12 April 2017 was to the effect that from the discussions and comments made by Mrs Gentles-Silvera, while she represented Mr Chong, he formed the view that she intensely disliked Mr Brady and "was bent on getting [Mr Brady] disbarred even though there was absolutely no evidence that Mr Brady had violated his duty to [Mr Chong]".

[139] However, an impenetrable cloud of doubt overshadows these assertions of Mr Giaimo against the backdrop of the indisputable documentary evidence. The memo that Mr Giaimo prepared for Mr Chong that was sent to Mrs Gentles-Silvera in 2012 (para. [129] above] shows that to Mr Giaimo's certain knowledge, Mr Chong was displeased with Mr Brady's conduct. Mrs Gentles-Silvera was made aware of that because she was instructed to reinstitute proceedings against Mr Brady.

[140] Furthermore, the entire saga between Messrs Chong and Brady, in which Mrs Gentles-Silvera represented Mr Chong, revolved around an allegation that Mr Brady violated his professional duty to Mr Chong. The evidence adduced by the GLC shows that Mr Chong had provided correspondence between himself and Mr Brady, as far back as 28 August 2009, in which Mr Chong, in an email, was alleging misrepresentation on the part of Mr Brady and that he had sought independent legal advice. Another email of March 2010 showed Mr Chong complaining that Mr Brady had failed to provide documents upon request, and as a result, he believed that Mr Brady had lied to him and misled him. Mr Chong's statement to Mrs Gentles-Silvera in June 2010 and subsequent instructions demonstrate that Mr Chong believed that Mr Brady had breached his professional duty to

him. Mr Giaimo, as Mr Chong's attorney, knew all that because Mr Chong's evidence under cross-examination was that Mr Giaimo advised him to take action against Mr Brady. Therefore, for Mr Giaimo to say that Mrs Gentles-Silvera was adamant about reporting Mr Brady, when there was no breach of duty by Mr Brady, cannot withstand even the most cursory scrutiny.

[141] To make matters worse, Mr Giaimo could not have been cross-examined, which would have been necessary, given the divergent and countervailing evidence provided by the GLC. It would also have been necessary to test his evidence before the court because he explicitly stated in his affidavit that he had reviewed Mr Chong's affidavit (filed 12 May 2017), in which he had alleged bias against Mrs Gentles-Silvera. Therefore, Mr Giaimo would have had knowledge of the contents of Mr Chong's affidavit at the time he was preparing his own. In these circumstances, the fact that his evidence was untested by cross-examination would operate to detract materially from the weight to be attached to it.

[142] In my view, Mr Giaimo's evidence as it stands, untested by cross-examination and gravely undermined by undisputed documentary evidence, cannot be said to be apparently credible or capable of belief. It, too, has failed to satisfy the third limb of **Ladd v Marshall**. It would also fall on the third condition stipulated in **R v Parks**.

[143] Consequently, I would refuse the application to permit Mr Giaimo's affidavit to be considered as evidence in the appeal to establish the allegation of bias on the part of Mrs Gentles-Silvera.

Conclusion on the fresh evidence of bias

[144] The law has established that the requirements for fresh evidence to be adduced are cumulative. It means a failure to satisfy one condition means a failure to satisfy the court that the evidence should be permitted. It is also established that the **Ladd v Marshall** principles are not inconsistent with the overriding objective of the CPR. It means then that once Mr Brady has failed to bring his application within even one limb

of the **Ladd v Marshall** principles, the application must perforce fail, and that would not be in conflict with the overriding objective to deal with the case justly. Equally, if the principles applicable to criminal proceedings are to be applied, the evidence of bias proposed to be adduced must be disregarded. This is because it would not be expedient or necessary to admit it in the interests of justice, having regard to the principles laid down in **R v Parks**. Furthermore, and, in any event, even if these principles are not to be applied rigidly or at all because bias is alleged, the application cannot succeed because the evidence would falter on the critical issue of credibility.

[145] In my view, the credibility of the evidence sought to be adduced to establish that Mrs Gentles- Silvera disliked Mr Brady and had or seemed to have had a personal vendetta against him is seriously undermined. To permit it to stand for consideration on the appeal would not be consonant with the interests of justice, which stand on truth and fair procedures. Given this finding, it is no longer necessary for the court to consider what effect the evidence is likely to have on the outcome of the appeal.

[146] Accordingly, the application for evidence to be adduced from Messrs Brady, Chong and Giaimo, alleging bias on the part of Mrs Gentles-Silvera, for the reasons contained in those affidavits, is refused.

The ground of appeal alleging bias

[147] In disposing of this application relating to the allegation of bias, it is noted that the two significant grounds on which the application was brought, as expressed in the amended notice of application filed 4 March 2019, are that: (i) Mr Brady became aware of "the actual and apparent biases" held by Mrs Gentles-Silvera against him after the conclusion of the disciplinary hearing when "such biases were communicated to [him] by James Chong and Joseph Giaimo"; and (ii) that neither he nor his attorneys-at-law was aware of this actual and apparent bias until such was communicated to him and his attorneys-at-law after the conclusion of the disciplinary hearing.

[148] Essentially then, Mr Brady has not asserted that the basis for alleging bias in the appeal was the mere fact that Mrs Gentles-Silvera represented Mr Chong, who had instructed her to bring legal and disciplinary proceedings against him. That fact would have been within his knowledge before and at the time of the disciplinary hearing, but he would have failed to raise it in the proceedings below. Mr Brady has proffered no explanation for that failure. If Mr Brady is to proceed with his allegation of bias on the appeal, he cannot rely on the evidence of Messrs Chong and Giaimo, which I have found to be inadmissible. Furthermore, the issue of waiver looms large for consideration in the appeal as the GLC had raised it during the hearing of this application. However, it is not necessary for present purposes for that to issue be considered. These are matters that would involve an objective consideration by the court in the substantive appeal. For as Lord Hope opined in **Meerabux v The Attorney General of Belize** [2005] UKPC 12, by reference to the test laid down in **Porter v Magill** [2001] UKHL 67:

> "[25] The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that law on this issue has been settled, the appropriate way of doing this in a case such as this, where there is no suggestion that there was a personal or pecuniary interest, is to apply the *Porter v Magill* test. The question is what the fair-minded and informed observer would think…"

[149] The purpose of these proceedings is not to rule on whether or not there was bias or waiver. That question is to be resolved by the court in treating with the substantive appeal. Therefore, any other issue relating to the Committee's treatment of Mr Brady during the hearing in respect of which he has alleged bias is best reserved for consideration on the substantive appeal.

Fresh evidence relating to Mr Brady's indebtedness to the FCJ

[150] The second aspect of Mr Brady's application for fresh evidence relates to the finding of the Committee that he was indebted to the FCJ as alleged against him. The evidence that Mr Brady seeks to adduce is primarily contained in affidavits filed by him

on 27 April and, 2 March 2017 (before the GLC), 4 March and 24 May 2019 and Mr Everton Hanson filed on 18 February and 4 April 2019.

[151] Mr Brady's basic position regarding this evidence that he seeks to adduce is that the Committee acted prejudicially towards him by refusing to permit further adjournments so that the Crowe Horwath Report could have been tendered in evidence and deployed, in his defence, at the hearing. This audit report, he contends, is credible and would show that he is not indebted to the FCJ but instead that the FCJ is indebted to him. Accordingly, Mr Brady contends that the Committee erred in concluding that he is indebted to the FCJ, and so the court ought to permit the fresh evidence of the report to be adduced on appeal.

[152] The GLC and the FCJ do not agree with Mr Brady that the court should receive this evidence and they have presented affidavit evidence that contradicts the evidence put forward by Mr Brady. Consequently, the court would not have been in a position to accept that the evidence relating to the FCJ debt was either plainly incapable of belief to reject it or plainly capable of belief to permit it. Therefore, the witnesses for the parties were required to be cross-examined for the court to fully and effectively evaluate the credibility of the fresh evidence Mr Brady seeks to adduce regarding his alleged indebtedness to the FCJ.

[153] However, before discussing the merit of this application by reference to the applicable principles, it is necessary to provide a synopsis of the evidence that Mr Brady seeks to elicit.

Mr Brady's evidence

[154] In his third affidavit of 4 March 2019, Mr Brady highlighted at para. 5 that, of specific interest, are the findings on page 5 of the audit report, which detailed information regarding the Gallimore transaction (for which he was brought before the Committee) and what he describes as the "FCJ J$1.6 Billion Float". The audit report discloses that Mr Brady had remitted the sum of $102,945,300.00 to the FCJ, relating to Mr Gallimore's

transaction, which includes payments of US$673,000.00, $20,000,000.00 and $25,000,000.00. The balance owing to the FCJ was, therefore, $32,119,700.00 plus interest of $10,532,769.15. However, the report states that as Mr Brady was entitled to a payment of 3% of the $1.6 billion bond, amounting to $48,000,000.00, which was not paid to him, the FCJ was indebted to him for $5,347,530.85.

[155] In addition to those specific matters, Mr Brady, in para. 7 of the same affidavit, deposed to various transactions and his dealings with the FCJ, which he claims would ground the auditor's finding that the FCJ is indebted to him.

[156] In seeking to ground the credibility and reliability of the audit report, Mr Brady made numerous factual assertions by way of background to the audit report, which are summarised for the sake of expediency as follows. His firm, Brady & Co, was retained by the FCJ in 2009 until 7 July 2014 (when the retainer was terminated) to perform various legal services as one of the FCJ's approved attorneys-at-law. Sometime in July 2011, the FCJ gave its approval for his firm to finalise arrangements with Scotia DBG Investments Limited to raise $1.2 billion through a long-term bond issue ('the $1.2 billion bond'). The fee arrangement proposed and accepted by the FCJ for that endeavour was initially 1.5% of any consideration amount for any work done concerning the acquisitions and disposals of assets. Mr Brady also adduced evidence that also indicated that no fees were payable if the FCJ was unsuccessful in its attempts to raise money on the bond.

[157] However, in his affidavit filed 24 March 2019, Mr Brady contended that the FCJ had increased the bond issue from $1.2 billion to $1.6 billion, necessitating the preparation of new documents. Consequently, he proposed, and the FCJ accepted, an increase in his fees from 1.5% to "3% of the consideration amount for any work done concerning the acquisitions and disposal of assets".

[158] In support of that contention, Mr Brady relied on a news release from the Ministry of Industry, Investment & Commerce, dated 27 January 2010, which listed the bond to be $1.6 billion. However, in cross-examination, he agreed that the news release was a

year before the bond issue, which, in any event, was reduced a year later, as evidenced by the letter of 11 August 2011. He, therefore, accepted that he had no documentary proof of the purported increase in the bond issue and for payment of his fees connected to it.

[159] He also explained that his firm had a usual practice of submitting bills of costs to the FCJ for legal services rendered for the FCJ at various times after the services were provided. The arrangements between his firm and the FCJ, for 3% of any transaction dealt with by the firm, was accepted by the FCJ and numerous bills had been settled using this arrangement.

[160] He argued that the amount due to his firm on the bills of costs would be deducted from any proceeds that he held on the FCJ's behalf, and the balance remitted to the FCJ with the relevant accounting attached. There was no established timeframe for forwarding the relevant accounting to the FCJ. This is because the firm handled multiple matters for the FCJ concurrently, and the timeframe for the completion and accounting in respect of those matters varied. As a consequence, when his engagement with the FCJ was terminated, there were several bills of costs that the FCJ had not settled.

[161] At para. 14 of his affidavit of 4 March 2019, Mr Brady detailed seven items representing legal services his firm performed on behalf of the FCJ, which, he said, were referenced in his bills of costs. These bills of costs, he said, totalled $10,372,009.14. The bills of costs were prepared in 2018 and related to legal services rendered in 2010 and 2011, before the termination of his retainer with the FCJ.

[162] In essence, Mr Brady's contention is that he had performed various legal services in 2010 and 2011 for the FCJ, for which he has not received remuneration. The FCJ, he said, had advised him that it had referred the bills of costs for the outstanding items to the Solicitor General for her advice and that they would revert to him as soon as possible. However, those payments were never made.

[163] Although Mr Brady admitted that details regarding the bond issue and the payments stated in the audit report were available to him since, at least in 2011, he stated that he was not allowed to disclose this information to the GLC.

[164] He relied on the evidence of Mr Hanson to substantiate his assertions regarding the bond issue and his fee arrangements with the FCJ.

Evidence of Mr Hanson

[165] Mr Hanson, in his affidavits, gave evidence as follows, in so far as is immediately relevant. He was the director of finance at the FCJ from 2011 to 2013. He confirmed his letter dated 11 August 2011 to Mr Brady outlining the fee arrangement of 1.5% on the $1.2 billion bond and endorsed Mr Brady's evidence as to how fees were paid to his firm. However, upon receiving various documents and completing assessments and reviews, the bond was determined to be $1.6 billion, and Brady & Co had proposed fees of "3% of any consideration amount". He explained that the letter of 11 August 2011 was issued at the initial stages of the contract for services and would not have reflected the final arrangements between the FCJ and Brady & Co. He also stated that Brady & Co had successfully finalised arrangements for the $1.6 billion bond. However, after the December 2011 General Elections had ushered in a new government, a decision was taken not to execute the bond.

Analysis and findings

[166] The same principles of law that have been applied in treating with the evidence regarding bias have been engaged even more fully in this aspect of my deliberations. This is so because the application relates to an item of evidence that can more appropriately be described as fresh evidence than that alleging bias. Therefore, the application is considered within the guidelines of the **Ladd v Marshall** principles, and tangentially, for completeness, by reference to the criminal test for the reception of fresh evidence.

Was the evidence available at the time of the hearing, or could it have been obtained with reasonable due diligence at the time of the hearing?

[167] Before deciding whether the evidence cited by Mr Brady of the FCJ's indebtedness to him was available at the time of his hearing before the GLC, it bears repeating that the hearing before the Committee commenced on 30 September 2016. Under extensive cross-examination in this court, Mr Brady admitted that the details regarding the bond issue and the payments which he said are outstanding were available to him since, at least, 2011 and, definitely, at the time of the hearing. He indicated, without more, that he was forbidden from disclosing the same to the Committee. It is noted, however, that on the first date of the hearing before the Committee on 30 September 2016 (before the hearing had commenced), a letter was submitted to the Committee by Mr Brady from his auditor requesting 30 days within which to submit an audit report, which would "yield an amount in excess of the sums due and owing" to the FCJ. Yet, after the hearing was adjourned to 17 January 2017 (notice of proceedings having been served on 14 December 2016), and further to 25 February and 4 March 2017, that report was still not forthcoming. It was furnished almost one year later, on 25 August 2017, under seal, with instructions from Mr Brady's attorneys-at-law that the sealed envelope must not be opened until the appeal.

[168] Additionally, in cross-examination, Mr Brady agreed that the news release from the Ministry, upon which he had relied to say that the bond was $1.6 billion, was a year before the bond issue. In any event, the bond was reduced a year later, as evidenced by the letter of 11 August 2011 from Mr Hanson. So, facts relating to the bond issue would have been available to Mr Brady at the time of the hearing. This is evidenced by his affidavit dated 2 March 2017, which he filed at the GLC, after the liability decision was handed down. He presented it to the Committee during the sanctions hearing on 4 March 2017. In that affidavit, he provided much of the information regarding the bond issue that he now seeks to elicit and matters relating to the Gallimore transaction. Therefore, there is no fresh evidence being adduced regarding these matters, and as counsel for the

GLC contended, they ought properly not to be a part of this application to adduce fresh evidence.

[169] Similarly, the information relating to the seven bills of costs for the legal services purportedly rendered in 2010 and 2011, would also, undoubtedly, have been available or, at least, easily obtainable by Mr Brady with due diligence at the time of the hearing. He was most suited to give details about those matters which would have been within his knowledge. In all those circumstances, it is evident that Mr Brady was seized of all the information contained in the audit report that he now wishes to adduce. It is important to note that the audit report reveals that Mr Brady provided the information on which the review was conducted. It included a substantial portion of the evidence that he now seeks to elicit as fresh evidence.

[170] Therefore, the evidence he seeks to adduce by the audit report and his supporting affidavits would have been available to him or could have been obtained with reasonable diligence during the hearing before the Committee from 30 September 2016 to 4 March 2017. In the end, he had five months or so to provide the audit report to the Committee after the auditor had requested only 30 days to provide it. Despite several adjournments, no explanation was placed before the Committee for the failure of the auditor to provide the report within the time requested.

[171] In my view, the information contained in the audit report was available or, otherwise, could have been easily obtained with reasonable due diligence at the hearing, as this was information that was peculiarly within Mr Brady's knowledge. He had the time and opportunity to have placed that information before the Committee for its consideration. Therefore, his application to adduce this evidence on appeal must fail on the first limb of the **Ladd v Marshall** principles.

[172] Although my conclusion above would have been sufficient to dispose of the application relating to the issue of Mr Brady's indebtedness, it seems prudent to explore whether the evidence would have satisfied the other conditions laid down by the

authorities for the reception of fresh evidence. This is considered prudent because the ultimate aim of the court is to do justice, as submitted by Mr Beswick. Therefore, I have considered the likely effect this evidence would have had on the Committee if it were admitted at the hearing. This is the second condition of **Ladd v Marshall** to be satisfied. This enquiry, I find, overlaps with consideration of the third condition regarding the credibility of the proposed evidence. So, both pre-requisites have been examined for completeness.

Could the evidence have influenced the outcome of the hearing before the Committee?

[173] During the hearing before the Committee, Mr Brady unequivocally admitted twice that he was indebted to the FCJ. The admissions were in these circumstances. On 25 February 2017, before the Committee delivered its decision, Mr Brady indicated a desire to speak. The Committee inquired whether he wished to know their decision first, and if it were in the FCJ's favour, it would allow him a plea in mitigation. Mr Brady responded:

> "I am not going to waste your time. The money is owed and how it comes to be owed is in question. I'm not questioning that monies is [sic] owed. I want to apologize to all of you for what appears to be disrespect. I am not a disrespectful person. I'm not saying money is not owed. Why it is owed is another matter. I thought that this particular transaction was part of a larger transaction. I was told to put the money on fixed deposit and then the Board changed. I am not shifting or running from it. I am not saying it is not owed but [I] did not attend because of problem [sic]. I don't need an attorney to tell me that. Last week I wrote to the factories corporation and asked them to send me their account so I could deposit the money in, I took the steps the money is there it took a little time but it is there…"

[174] When the panel enquired whether Mr Brady had started to make the payments, he said:

> "I haven't started but I'm going to. I took steps to liquidate what I had to liquidate. I need more time to deal with the penalty on the stamping of the agreement but by Friday I will

know whether I will be able to. I think it is about 30 or 40 million dollars."

[175] The following was also said:

"Panel: You have anything else to say?

Brady: Yes just to beg you. I am so mindful, I haven't even renewed my practicing [sic] certificate. There are about 50 or 60 transactions that went smoothly. Do you recall they was [sic] to become an economic zone and I prepared this is [sic] a bond document and I did not charge. I put the money in an account. I did it. My accountant did something wrong and ran off and I have to clear it up. I explained to the chairman. The money is owed. I am simply saying the reason for it.

Panel: The last thing is not a plea in mitigation.

Brady: It is just the hypertension, it is just the way it is.

Panel: We are going to deliver the decision in the matter of Factories Corporation vs Harold Brady.

Decision delivered

Brady: I just want to ask for some time to pay back

Panel: We will hand down our decision on sanction next week."

[176] On 2 March 2017, Mr Brady filed an affidavit before the GLC indicating that he had paid US$673,000.00 to the FCJ. However, during the sanction hearing on 4 March 2017, when both Mr Brady and his counsel were present, he then admitted that that sum of US$673,000.00 was related to a different transaction and that his statement was made in error. After a series of exchanges, the following discourse took place between the Committee and Mr Brady:

"Panel: What I hear is, what you said last week, you said you owed the money?

Brady: Yes.

Panel: So you are confirming that you do owe the money?

Brady: Yes, I owe the money to the Factories Corporation."

[177] Mr Brady also stated that although he had arranged to make restitution to the FCJ, those plans had to be shelved based on his discovery that funds were being misappropriated from his account. When asked whether he had submitted documents to counsel for the FCJ, with the hope that his new proposal would be accepted, Mr Brady responded as follows:

> "Yes, and it is under those circumstances [My Lady] I am asking that the worst is not visited upon me. I am very, very sorry. I have apologized to the Chairman of the Factories Corporation. I will do everything necessary publicly in order not to bring the profession [into] disrepute. It was not my intention to deprive Factories Corporation of their funds as I said last week I have problems with my eyes. I still do and I am just begging you not to visit on me the worst.
>
> It means you have to … I will leave here and get it done. It was just that when I went to my bank and saw this I was so happy."

[178] In seeking to reduce the effect of those admissions, Mr Brady deposed in an affidavit filed 24 May 2019, which was placed before this court in response to Mr Sicard's affidavit, that he had made these admissions in these circumstances: he was unrepresented by counsel; he was not given an opportunity to consult his accountants; he was under duress and medically unfit; and he was without any record and files. However, as the transcript revealed, he had made repeated and multiple admissions, and he was unequivocal in doing so. He made offers, arrangements and promised to repay the outstanding amount. He repeatedly apologised to the Committee and the FCJ's chairman and indicated that he did not intend to bring the legal profession into disrepute. He also repeatedly asked for leniency.

[179] In the light of documentary evidence presented by the GLC from the FCJ (which is more closely discussed below under the issue of credibility); Mr Brady's unequivocal admissions that he was indebted to the FCJ; his acceptance that he erred when he referenced the payment of US$673,000.00 on the Gallimore transaction; his explanation that monies had been misappropriated from his account; his requests for leniency and opportunity to repay; the inability of the auditor to verify critical information provided by Mr Brady as well as Mr Brady's many apologies to the Committee, it is highly unlikely, or, indeed, nigh impossible, that the outcome would have been different had this evidence contained in the audit report, been placed before the Committee. His explanation for making the admissions cannot stand in the face of the evidence presented to the Committee and the nature and terms of his admissions on different occasions.

[180] I accept the submissions made on behalf of the GLC and FCJ that Mr Brady had admitted liability for the funds he held on trust for a particular purpose for the FCJ, and nothing in the audit report can alter that. The evidence contained in the audit report is not likely to have had an important effect on the outcome before the Committee.

[181] For these reasons, the second condition laid down in **Ladd v Marshall**, for the reception of the audit report and the affidavit evidence advanced by Mr Brady in support of it, would not have been satisfied. This finding is fortified by my conclusion regarding the credibility of the fresh evidence, which will be briefly alluded to in the final stage of the enquiry.

Is the evidence apparently credible?

[182] Given the finding above that the evidence has failed two limbs of the **Ladd v Marshall** principles (and by parity of reasoning, would have also failed the test applicable to criminal proceedings), I would not need to examine the final condition to be satisfied. However, my finding that the outcome of the hearing would not have changed had this proposed audit report been placed before the Committee is further bolstered when consideration is given to the issue of whether the evidence being adduced is apparently credible or well capable of belief.

[183] This stage of the enquiry necessitates a closer examination of the rebuttal evidence presented by the GLC concerning the FCJ transactions, which contradicted Mr Brady's proposed fresh evidence in material respects, namely, that the FCJ is indebted to him and so he ought not to have been held liable for the Gallimore transaction before the Committee.

The GLC/FCJ's evidence

[184] Mr Sicard, in his affidavits filed 6 and 22 May 2019 and in his oral testimony, refuted Mr Brady's allegations that the FCJ was indebted to him. Mr Sicard also deposed that the audit report, on which Mr Brady relied in support of that assertion, is "not accurate or credible". For convenience, his evidence relating to each aspect of Mr Brady's claim against the FCJ will be reviewed.

The Gallimore transaction

[185] Mr Sicard highlighted a portion of the audit report, which indicated that Mr Brady had paid $102,945,300.00 to the FCJ in respect of Mr Gallimore's transaction. The report refers to the payment of US$673,000.00 made in two tranches. However, Mr Sicard noted that when Mr Brady had appeared before the Committee on 4 March 2017, Mr Brady admitted that the payment of US$673,000.00 was related to a different transaction. Indeed, it is seen that in the transcript of proceedings on that day, Mr Brady explained that his claim that such a payment was made was based on a misapprehension, which arose because his accountant had misappropriated money belonging to him and fled to the United States. Additionally, letters attached to the affidavit of Kenneth Rowe filed 3 March 2017 before the GLC, which were exchanged between Brady & Co and the FCJ, indicated that the payment of US$673,000.00 related to the purchase of lots at Montego Freeport and was handled by a different counsel at Brady & Co. There was, therefore, cogent evidence before the Committee accounting for the sum of US$673,000.00 that had nothing to do with the Gallimore transaction in respect of which he was called upon to account.

[186] Notwithstanding that evidence, Mr Brady had deposed in his affidavit in response to Mr Sicard's affidavit before this court that upon further review of his records, he noted that US$673,000.00 had, indeed, been paid to the FCJ on account of the Gallimore transaction and was done pursuant to a letter he had written to the FCJ dated 14 March 2011. However, a perusal of that letter to which Mr Brady referred does not reveal any reference to there having been a payment of US$673,000.00.

[187] Additionally, in the face of documentary proof that the sum of US$673,000.00 had been paid on a different transaction, Mr Brady's subsequent averment in his affidavit relating to the US$673,000.00 in respect of the Gallimore transaction is not capable of belief. Interestingly, not only did he admit to the Committee that he had made an error regarding that sum as relating to the Gallimore transaction, but he also admitted in cross-examination during the hearing of this application that the payment of that sum did not relate to the Gallimore transaction. Accordingly, this evidence that the FCJ was paid US$673,000.00 in respect of the Gallimore transaction contained in the affidavit that is advanced as fresh evidence is not at all credible.

[188] The audit report also referred to a Real Time Gross Settlement ('RTGS') payment of $25,000,000.00 related to the Gallimore transaction. In support of this, Mr Brady exhibited to his affidavit filed 24 May 2019, a document claiming it to be an "RTGS Payment Voucher" from the Bank of Nova Scotia Jamaica Limited, dated 14 October 2014. The document indicated that $25,000,000.00 was wired to the National Commercial Bank Jamaica Limited, May Pen Branch, to Scott, Bhoorasingh & Bonnick. He claimed that this represented proceeds of sale from the Gallimore transaction.

[189] Mr Sicard stated that Mr Brady had mentioned this payment for the first time in his affidavit, and there was no evidence that it had even existed. The court noted that the RTGS payment voucher does not establish that the sum was actually transferred. The credibility of Mr Brady regarding this payment is rendered highly questionable. Accordingly, this aspect of his evidence cannot be said to be apparently credible or well capable of belief.

[190] It was Mr Sicard's further contention that, in any event, Mr Brady could not claim any outstanding legal fees on the Gallimore transaction as he had failed to complete the sale to Mr Gallimore. He had also caused the FCJ to incur 100% penalties by not stamping the sale agreement within 30 days (having admitted to receiving the sums to stamp the said agreement); delayed the transaction; exposed the FCJ to liability to the purchaser by failing to give a proper account and pay in full the proceeds of sale and accumulated interest; and caused the FCJ to incur expenses by retaining another attorney-at-law to take over conduct and completion of the matter and pursue the debt. Mr Brady has tried to diffuse the effect of Mr Sicard's evidence in this regard, but he has failed so to do. The fresh evidence that he seeks to elicit to establish that he did not owe the FCJ in respect of the Gallimore transaction, for which he was held liable by the Committee, is not capable of belief.

The $1.6 billion bond issue

[191] Mr Brady's claim that he is owed for fees connected to the $1.6 billion bond issue has also been undermined by his own evidence and that of Mr Sicard. Mr Sicard has highlighted the various contradictions between Mr Brady's own assertions and those contained in the audit report regarding whether there was a $1.2 billion or $1.6 billion bond and whether he was entitled to a 1.5% or 3% fee increase. Those internal inconsistencies highlighted by Mr Sicard have been duly noted. Furthermore, despite Mr Brady's strong representations regarding being entitled to fees relating to the $1.6 billion bond, he admitted upon cross-examination that he had no documentary proof of the purported increase in the bond issue and the 100% increase in his fees.

[192] Furthermore, the auditor, on whose report Mr Brady relies, also indicated that he had not seen any documents confirming that fee arrangement of 3%, although he had regard to meetings and discussions "contained in files". However, Mr Sicard deposed that his review of the minutes of board meetings and FCJ files had also not confirmed the fee arrangement of 3% of a $1.6 billion bond issue. Mr Sicard also noted that the 1.5% fee arrangement was contingent on the successful raising of the bond, which did not

materialise, as there was a change of government. Therefore, no fees were chargeable or owing to Mr Brady on account of that transaction.

[193] Indeed, when Mr Hanson was cross-examined on this issue by counsel for the GLC, he agreed that the evidence he had given regarding the bond issue was restricted to the one and a half years he had served the FCJ. He could not, therefore, speak to events that had transpired after his departure. Mr Hanson accepted that his assertions regarding the increased bond and Mr Brady's fees were made without consulting the FCJ's Board minutes or any other related documentation. Accordingly, he had no documentary proof supporting his claim that the bond had been increased to $1.6 billion and that the FCJ had ever accepted Mr Brady's 3% fee proposal. He also could not recall when this purported increase in the bond issue occurred. Mr Hanson also agreed that the bond issue had never been completed or accomplished.

[194] It is clear from all the evidence and, as underscored by Mr Sicard, that there was no evidence that Mr Brady had secured fees of 3% attached to a $1.6 billion bond. In any event, pursuant to the FCJ's letter to him dated 11 August 2011, his fees were to be charged at 1.5% on the $1.2 billion bond, and any fee arrangement would have been contingent on the successful raising of that bond, which did not materialise. Consequently, no fees were chargeable or could have been owing to Mr Brady on account of that transaction. Mr Sicard's evidence is plausible and serves to render Mr Brady's claim that the FCJ is indebted to him for fees relative to the $1.6 billion bond not at all capable of belief.

The seven bills of costs

[195] The same conclusion is arrived at regarding the bills of costs presented to the court in Mr Brady's affidavit filed 4 March 2019. Those bills of costs relate to the following matters: (i) termination of Carol Crooks; (ii) default judgment; (iii) ICT Building lease; (iv) Caymanas Economic Zone; (v) Double Deuce; (vi) Lot 2 Corletts Road-Merit Constructions Limited; and (vii) Lot 66 Corletts Road- Application for splinter titles. Mr Sicard rejected Mr Brady's assertion that the FCJ had failed to pay for legal services

performed with respect to the seven items enumerated in those bills of costs. He explained all of them. In effect, Mr Sicard's evidence is that Mr Brady has duplicated his bills in relation to some of the transactions (items (ii), (iii) and (iv)); is not entitled to payments for some because the work for which he is claiming fees was not done by his firm (items (v) and (vi)); and he had not submitted invoices to the FCJ for payment for the others, which would have been for work done over six to seven years ago (items (i) and (vii)) (that would be before the date of the affidavit in 2019).

[196] Interestingly, in an attempt to explain the problems highlighted in his bills of costs, Mr Brady testified in cross-examination that he was not the maker of the bills of costs, and neither had he checked and verified their contents. He was, therefore, relying on hearsay documents. That would not only have affected their admissibility to establish the truth of his assertions but, even if admissible, would have, more importantly, affected their weight in the face of overwhelming contradictory evidence from the FCJ. Furthermore, he has proffered no apparently credible explanation for failing to make a claim for legal services in respect of the matters for which he had submitted no invoices for over six years. All these matters he now seeks to invoke regarding monies owed to him by the FCJ would have been in his knowledge or would have been easy to ascertain when he was preparing his case before the GLC.

[197] Despite Mr Brady's evidence that he knew at the time of the hearing that the FCJ was indebted to him, he had never requested his alleged outstanding fees from the FCJ until after the Committee had sanctioned him. In response to a question from the court, he also admitted that he did not offer or make any suggestions to the FCJ in writing that the fees he was owed should be set off against what he owed to the FCJ. As late as March 2014, after Mr Brady would have performed the services for which he is now claiming, he indicated that interest had accrued on the balance he held on the FCJ's behalf. Thereafter, in a letter dated 22 April 2014, he requested banking information to transfer to the FCJ the funds he admitted he had on account for it. He never once indicated in those letters that he was withholding funds for outstanding fees in keeping with what he said was the established course of dealings. His failure to make requests for these

outstanding fees, despite the multiple opportunities presented to him, has rendered the veracity of his claim that the FCJ was indebted to him, instead of him being indebted to the FCJ, rather dubious, at best.

[198] Based on the material contradictions, admitted and proven inaccuracies and the absence of any admissible documentary proof in support of Mr Brady's numerous contentions that he is owed fees by the FCJ that relate to the Gallimore transaction, for which he was found liable, I am unable to conclude that the information contained in the audit report, is apparently credible or capable of belief, so as to be admitted to impeach the findings of the Committee.

[199] Accordingly, the third criterion for the reception of fresh evidence relating to the issue of Mr Brady's alleged indebtedness to the FCJ have not been satisfied, and this is so whether the civil or criminal test is applied.

Conclusion on the fresh evidence application

[200] The cogency of the evidence Mr Brady seeks to adduce on appeal to impeach the decision of the Committee has been seriously undermined. There is no reasonable basis upon which this court can justifiably grant permission for evidence contained in the audit report and all the affidavits filed by Mr Brady to be adduced as fresh evidence on appeal to establish bias in the Committee and that he was not indebted to the FCJ as found by the Committee. He has failed to satisfy all the requirements laid down by law for the court's reception of this evidence. In such circumstances, granting an order for the reception of the audit report as fresh evidence along with the supporting affidavits of Mr Brady and Mr Hanson would not further the overriding objective but, instead, would serve to undermine it.

[201] The interests of justice would not be served by granting permission for the reception of this evidence that is, at base, plainly incapable of belief. I am fortified in this viewpoint by the pronouncements of the Privy Council recently stated in a case from

Trinidad and Tobago, **Maharaj and Others v The State** [2021] UKPC 27, at para. 55, that:

> "It is well established and patently correct that it would be contrary to the interests of justice to admit evidence that is unreliable in source and/or content: see for example *R v Kassa* [2013] ONCA 140 at para 97. Fresh evidence that lacks cogency cannot possibly provide a viable ground of appeal."

Accordingly, the application for fresh evidence to be adduced on appeal is refused.

Application to amend the notice and grounds of appeal (Application No 27/2018)

[202] Mr Brady is seeking the permission of the court to argue another ground of appeal, which, essentially, is that the findings of the Committee "were palpably wrong" and the subsequent orders it made were not in keeping with the evidence contained in the audit report, "which indicates beyond a shadow of a doubt that [he] owed no monies to the [FCJ] and to the contrary the [FCJ] is indebted to [him]".

[203] It is well-established on the authorities that while the court has a wide discretion to amend a statement of the case, the court's jurisdiction to do so is governed by the overriding objective of the CPR, which is to deal with the case justly (see **Savings & Investment Bank Ltd (In Liquidation) v Kenneth Fincken** [2003] EWCA Civ 1630). However, in determining what the overriding objective requires, the court is entitled to consider various factors established by case law. It suffices to say, for present purposes, that one such principle, in so far as is relevant to this appeal, is the prospect of success of the proposed amendment or whether the amendment is properly arguable. The authorities are clear that the interests of justice would not be advanced by amendments that are bound to fail on the merits, and so the court will allow an amendment only if it has a reasonable prospect of success (see **Jamaica Redevelopment Foundation Inc v Clive Banton and Another** [2019] JMCA Civ 12 at para. [26] vii). Therefore, to permit an amendment to introduce a ground of appeal that is bound to fail would not be in keeping with the overriding objective and all that it entails.

[204] In this case, Mr Brady's application for permission to rely on the audit report and affidavit evidence of his course of dealings with the FCJ to establish this ground of appeal has been refused. It means that the evidence that would form the substratum of the ground of appeal does not exist. Therefore, in so far as the proposed ground of appeal will depend on the contents of the audit report and the affidavit evidence filed in relation to it, which have not been received, it has no real prospect of success.

[205] For the foregoing reasons, the application to permit Mr Brady to add a new ground of appeal in terms of the application must be refused.

Renewed application for stay of execution (Application No COA2019APP00063)

[206] The basis for this renewed application for a stay of execution was that, on 20 July 2017, Straw JA (Ag) had refused to grant a stay of execution of the Committee's decision on Application No 78/2017 that was filed on 27 April 2017. However, since then, new evidence emerged that was not available when that previous application was considered. This new evidence, Mr Brady contends, is contained in the Crowe Horwath Report in respect of which the fresh evidence application was made. The consideration of this application, as already indicated, was deferred with the parties' consent until the determination of the application for fresh evidence.

[207] Now that the fresh evidence application has been determined, it is to be noted that the basis on which the renewed application was made is invalidated. Straw JA (Ag) had refused to stay execution of the order of the Committee, and no application was made to discharge her order on the ground that she erred in law in refusing the stay. The sole basis for the application before us is the presumed credibility of the audit report and the evidence of Mr Brady's dealings with the FCJ. However, the evidence is found not to be presumptively credible or such that it would have made a difference to the Committee's findings. It does seem that with the conclusion of this court in refusing to permit the audit report to be admitted as fresh evidence, there would be no proper basis

to grant a stay of execution on the renewed application. The new evidence that was put forward to show a change of circumstances is rejected.

[208] It would follow logically, then, that the renewed application for stay of execution of the decision of the Committee until the determination of the appeal should be refused. It is considered that it would not be in keeping with the overriding objective to invite the parties to make further oral submissions on this application, given the singular basis on which it was advanced.

Disposal

[209] In light of the reasoning and conclusions above on all the applications considered by the court, which remained to be disposed of, I would propose these orders:

1. The application to adduce fresh evidence on appeal (Application No 27/2018) is refused.
2. The application to amend notice and grounds of appeal to add a new ground of appeal (Application No 27/2018) is refused.
3. The renewed application for stay of execution of the order of the Committee (Application No COA2019APP00063) is refused.
4. The question of the costs of the above applications is reserved for consideration following the determination of the appeal unless the parties (or any of them) are of a different view. In such circumstances, written submissions on costs are to be filed within 14 days of the date hereof for the court's consideration on paper.
5. The Registrar, after consultation with the parties, is to fix a date for the hearing of the appeal by this bench of judges as soon as is reasonably practicable.

P WILLIAMS JA

[210] I have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning, conclusion and proposed orders, and there is nothing I could usefully add.

FRASER JA (AG)

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

MCDONALD-BISHOP JA

ORDER

1. The application to adduce fresh evidence on appeal (Application No 27/2018) is refused.
2. The application to amend notice and grounds of appeal to add a new ground of appeal (Application No 27/2018) is refused.
3. The renewed application for stay of execution of the order of the Committee (Application No COA2019APP00063) is refused.
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5. The Registrar, after consultation with the parties, is to fix a date for the hearing of the appeal by this bench of judges as soon as is reasonably practicable.