JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO COA2019MSOOOO7

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**HOPETON KARL CLARKE**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Sean Osbourne for the appellant

Miss Carlene Larmond instructed by Patterson Mair Hamilton for the respondent

27, 28 July 2020 and 12 March 2021

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of Straw JA. I agree with her reasoning and conclusion and there is nothing that I could usefully add.

SINCLAIR-HAYNES JA

[2] I too have read the draft reasons for judgment of Straw JA and agree with her reasoning and conclusion.

STRAW JA

Background

[3] On 5 November 2019, Mr Hopeton Clarke ("the appellant") filed a notice of appeal challenging the decision of the Disciplinary Committee ("the committee) of the General Legal Council ("GLC"), taken on 26 October 2019, that, pursuant to section 12(4) of the Legal Profession Act ("LPA"), he be struck from the roll of attorneys-at-law entitled to practise law in Jamaica.

[4] Prior to that decision, the appellant was found guilty of professional misconduct on 23 February 2019, pursuant to section 12(4) of the LPA. The misconduct related to (i) the appellant's failure to file accountant's reports for 14 years (for the years 2000 and 2004 to 2016) in breach of regulations 16(1), 16(2) and 17 of the Legal Profession (Accounts and Records) Regulations ("the Regulations); (ii) the failure to apply and pay for practising certificates for five years (for the years 2012 to 2016) in breach of canon II(j) of the Legal Profession (Canons of Professional Ethics) Rules ("the Canons").

Preliminary matters

[5] On 27 July 2020, before the commencement of the hearing of the appeal, an application was made by Ms Larmond, counsel for the GLC, to adduce fresh evidence.

[6] Ms Larmond, stated that she wished to rely on the affidavit of Ms Hilary Reid, chairman of the accounts and records committee of the GLC filed 25 June 2020. Her affidavit ("the Reid affidavit") speaks to the compliance of the appellant, with the conditional orders made by a single judge of this court on 27 January 2020, when

granting the stay of execution of the orders of the committee. Ms Larmond submitted that evidence in relation to the appellant's compliance would be relevant in this court's consideration of whether the sanctions imposed by the committee should ultimately be varied, as this court did in **Audley Melhado v General Legal Council** [2014] JMCA Civ 41 and **Ian H Robins v The General Legal Council** [2019] JMCA Civ 30. She submitted that the material in the Reid affidavit would qualify as fresh evidence, as the evidence of the appellant's compliance would not have been available during the hearing by the committee.

[7] Counsel for the appellant, Mr Osbourne, submitted that the affidavit would not assist the GLC in relation to responding to the grounds of appeal. In relation to the issue of sanctions, it would be extrinsic material as to whether the appellant was in breach of the Regulations and whether the committee was correct in its findings. He contended that it was unfair for the GLC to do any review of the appellant's compliance and to state that it does not meet their standards. In essence, the grant of this application would be prejudicial and, in particular, he objected to paragraph 14 of the affidavit, which he submitted, did not constitute fresh evidence in any event.

[8] This court having heard the submissions, granted the application in the following terms:

> "1) The applicant (the General Legal Council) is permitted to adduce as fresh evidence in the appeal, the affidavit evidence of Hilary Reid filed on 28 February 2020 with the exclusion of paragraph 14.

2) The costs of the application to adduce the fresh evidence shall be costs in the appeal."

Although it did not form part of the order, for the avoidance of doubt, the parties were informed that they were permitted to rely on the fresh evidence, in any manner they saw fit in the hearing of the appeal. The appellant filed no affidavit in response to the Reid affidavit.

Chronology of events

[9] Ms Larmond, helpfully provided the court with a detailed chronology of events, which gave rise to the instant appeal. It has been reproduced below:

"

Date	**Event**
21 July 2017	Form of application against the appellant (dated 19 July 2017) supported by affidavits made to the committee
7 September 2017	Affidavit of the appellant (sworn 4 September 2017) delivered to the committee
19 December 2017	Notices by the committee to attorney and applicant issued informing of hearing date of 3 February 2018
2 February 2018	Committee receives letter from the appellant with medical report (dated 31 January 2018)
3 February 2018	Complaint comes up for hearing and is adjourned to 16 June 2018
27 February 2018	Second affidavits to amend the complaint and in support of the complaint (sworn 26 February 2018) filed with the committee

18 May 2018	Notices by the committee to attorney and applicant issued informing of hearing date of 16 June 2018.
16 June 2018	Hearing of complaints proceeds.
26 June 2018	Secretary of committee writes to the appellant advising that the hearing proceeded and judgment reserved.
8 February 2019	Notices of hearing issued to attorney and applicant advising that judgment to be delivered 23 February 2019.
23 February 2019	Hearing convened and judgment delivered finding appellant guilty of professional misconduct.
25 February 2019	Notices of hearing issued to appellant and applicant advising that hearing set for 6 April 2019 for submissions in mitigation in relation to any sanction that may be imposed.
7 March 2019	Secretary of committee writes to the appellant to provide a copy of the judgment and to again advise of the sanctions hearing date.
5 April 2019	Appellant writes to the committee indicating his inability to attend the hearing due to illness with sick leave certificate enclosed.
6 April 2019	Hearing convenes and adjourned to 25 May 2019.
11 April 2019	Notices of hearing issued to appellant and applicant advising of hearing date of 25 May 2019.
26 April 2019	Secretary of committee writes to the appellant to advise of adjournment and hearing date of 25 May 2019.
25 May 2019	Hearing convened. Appellant's attorney-at-law advised that the appellant is unwell and the matter adjourned to 15 June 2019.

15 June 2019	No record of proceeding.
17 June 2019	Notices of hearing issued to the appellant, his attorney-at-law and applicant advising of hearing date of 22 June 2019.
21 June 2019	Appellant's attorney-at-law advises of inability to attend the hearing as he is outside of the jurisdiction.
22 June 2019	Hearing convened and adjourned to 13 July 2019.
25 June 2019	Notices of hearing issued to the appellant, applicant and their attorneys-at-law advising of hearing date of 13 July 2019.
3 July 2019	Secretary of committee writes to the appellant to advise of adjournment and provide a copy of the corrected judgment (to state correct panel member)
13 July 2019	Hearing convened and mitigation submissions received.
22 October 2019	Notices of hearing issued to the appellant, his attorney-at-law and applicant advising that the sanctions phase of the judgment to be delivered on 26 October 2019.
26 October 2019	Hearing is convened and sanctioned delivered.
29 October 2019	Secretary of committee writes to the appellant to advise of delivery of sanction striking him from the roll of attorneys and provided a copy of the decision."

[10] Subsequent to the application for the stay of execution being filed on 5 November 2019, the appellant filed documents with the GLC on 2 December 2019. These were stated to be declarations for the years 2000, and 2004 to 2018. He also paid monies in relation to outstanding practising fees for the years 2012 to 2016.

[11] The appellant was granted a stay of the sanction by a single judge of appeal on 27 January 2020, pending the hearing of this appeal, subject to a number of conditions which included:

> "a) That the appellant pay to the General Legal Council the sums due for practising fees for the years 2012, 2013, 2014, 2015 and 2016.
>
> b) The exact amount due is to be communicated by letter or email by the secretary of the General Legal Council within seven (7) days of the date hereof; and the said payment is to be made within seven (7) days of delivery of the said letter or email.
>
> c) The [appellant] is further ordered to file all outstanding accountant's reports or declarations using the prescribed form within seven (7) days of the date hereof."

The appeal

[12] The grounds of appeal are set out below:

> "**3. <u>The Grounds of Appeal are:</u>**
>
> (a) The General Legal Council failed to properly consider all the material before it.
>
> (b) The treatment of the applicant's plea in mitigation regarding the sanction of the panel was unfair and unbalance [sic].
>
> (c) The sentence of the panel was not the appropriate sanction having regard to the circumstances of the case."

[13] Mr Osbourne indicated orally that the second ground (numbered 3(b)) was being abandoned. Ms Larmond did not object. Permission was granted for the appellant to abandon this ground and proceed on the other two grounds, which will be referred to as grounds (a) and (c), rather than 3(a) and 3(c). No confusion is intended.

[14] With respect to the formulation of ground (a), for precision, reference will be made to the committee rather than the GLC.

Ground (a): The [committee] failed to properly consider all the material before it

Submissions on behalf of the appellant

[15] The thrust of the submissions in respect of this ground was that the committee failed to accord sufficient weight to the fact that efforts were being made by the appellant to be compliant and that the breaches complained of were curable. Mr Osbourne submitted that the failure to consider this critical material was a sufficient ground of appeal. Reliance was placed on **C Dennis Morrison QC v Dorcas White ("Dorcas White")** Complaint No 110 of 2005, Disciplinary Committee decision delivered 29 July 2006.

[16] Specific issue was taken with the committee's finding at paragraph 17 of its judgment on sanctions, wherein the view was expressed that the breaches were neither addressed nor remedied by the appellant, notwithstanding that he would have had time to make the necessary filings and settle outstanding practising fees. Counsel complained that the committee made the observation that the various actions could have been done belatedly, over the several months which it took to deal with the complaint against the appellant.

[17] In particular, he submitted that there was no reference in the said judgment to the following as part of the deliberations, (i) the fact that the appellant was allowed to practise in 2017, insofar that a practising certificate was issued to him; (ii) the

appellant's efforts to pay the outstanding practising fees; and (iii) the declarations filed and the explanations provided by the appellant.

[18] It was submitted also that, on numerous occasions, the appellant discussed his position with the GLC (in particular, Mr Allan Wood QC who is a member of the respondent and the complainant) and made efforts to remedy the breaches. An explanation was proffered by the appellant to the GLC, that he was in dialogue with his accountant to produce the reports, but that his ill health prevented him from making good on his efforts within a reasonable time. Mr Osbourne contended that all these factors were not addressed in the committee's judgment. He also submitted that issuing the practising certificate in 2017, created a legitimate expectation that the GLC was allowing the appellant time to remedy the breaches.

Submissions on behalf of the respondent

[19] Ms Larmond, submitted that this ground was devoid of merit, as there could be no complaint of any failure by the committee to properly consider the material before it, having regard to the statutory framework. She reminded the court, that the finding of the committee was that the appellant, in breach of regulations 16(1) and (2), failed to file **either** accountant's reports or declarations.

[20] Further, Ms Larmond helpfully itemised the material which was actually before the committee for its consideration. These were:

i a complaint that stated that accountant's reports were not filed for 14 years and practising fees not paid for five years;

ii the appellant's affidavit in response that stated, "[m]y reason for not submitting an accountant's report is that I do not hold client's funds and therefore I am not required under regulation to file an accountant's report";

iii an admission to delinquency in failing to file declarations;

iv a compendious declaration for 14 years, rather than in the requisite form pursuant to regulation 16 of the Regulations of which the appellant was aware based on his evidence; and

v no response from the appellant to the allegation of practising as an attorney at law without paying the requisite practising fees.

[21] In the circumstances, she submitted that, where the committee had no response from the appellant concerning his failure to pay the requisite fees and secure a practising certificate for the years 2012 to 2016, it would have been satisfied on the evidence of the complainant (Mr Wood) that a case of failure to comply with canon II(j) had been made out.

[22] In oral submissions, Ms Larmond sought to respond to a number of arguments advanced on behalf of the appellant.

[23] Firstly, it was submitted that this court should reject the assertion that correspondence was exchanged between the appellant and the complainant, Mr Wood, on the basis that the record bears out that this would not have been material before the

committee. She referred the court to the affidavit of the appellant (dated 4 September 2017) which was before the committee and which set out his reasons for failing to file accountant's reports. Further, she submitted that Mr Osbourne clarified that this supposed correspondence (with Mr Wood) would have taken place after the charges were laid against the appellant.

[24] To the extent that there was any explanation preceding the charges, Ms Larmond made reference to a letter penned by the appellant (dated 28 March 2011) six years before the charge. In that letter, the appellant stated that he commenced practise in 1992, as a clerk of the courts, and entered into private practice in 2001, as a criminal defence attorney. He further stated that he did not receive trust money as defined by the Regulations and it would be impractical for him to deliver accountant's reports for the period 2001 to 2010. Nonetheless, he indicated that he retained an accountant with a view to delivering his "returns and declarations for these years in the format required by the General Legal Council". She stated that this letter was in response to a letter from the GLC's secretary (dated 17 February 2011) to the appellant, stating that the records indicated that he had never submitted accountant's reports or declarations. Ms Larmond submitted that the situation is that six years prior to the complaint, the appellant was informed of his non-compliance and that he indicated that he would have brought himself in compliance, but never followed through by filing accountant's reports or declarations.

[25] Ms Larmond reiterated that the correspondence alluded to by Mr Osbourne could not be treated as a factor which the committee failed to take into account, as it was not before it and the plain facts demonstrated that this argument was without merit.

[26] Secondly, with respect to the complaint that the committee did not consider the payment of outstanding practising fees, that declarations were filed and explanations provided, Ms Larmond similarly responded. She submitted that this was not before the committee for its consideration. She stated that reference was made by the committee to the single declaration the appellant purported to make in his affidavit. The court was referred to page 5 of the decision of the committee (dated 23 February 2019) wherein it was expressly stated:

> "The attorney then produced a compendious declaration that for the alleged years of his failure to comply with the Regulations there was no need for him to file accountant's reports as he did not handle trust money as defined by the regulations.
>
> The panel notes that the purported declaration does not comply with the requirements of the Regulations in that there should be a declaration for each financial year for the years he admitted that he did not file an accountant's report.
>
> Further, the Declaration is not in the Form designated in the First Schedule."

[27] Turning to the issuance of a practising certificate in 2017, Ms Larmond pointed out that there was no evidence in relation to the timing of this, but asked the court to take judicial notice of the fact, that practising certificates are generally issued at the beginning of the year. Further, she submitted that this would have preceded the July 2017 complaint and could not have given rise to any legitimate expectation on the

appellant's part. This was so for the following reasons; (1) in July 2017, there would have been no legislative basis for the GLC to withhold a practising certificate from an applicant attorney-at-law, once the fees were paid because it was in August 2017 that the Regulations were amended, which provided for the withholding of practising certificates where there is a failure to file accountant's reports or declarations; and (2) the appellant is unable to point to any positive assertion by any member of the GLC, that he would have been allowed time to remedy his breaches.

[28] Further, if the appellant alleged that the issuance of a practising certificate in 2017 created a legitimate expectation, then it does not follow that he took no active steps in remedying the breaches even up to the time of the sanction. In the circumstances, the committee was correct in its observation, at paragraph 17 of the decision on sanctions, that the breaches were not addressed or remedied.

[29] Ms Larmond submitted that the decision in **Dorcas White** did not assist the appellant and sought to distinguish it from the instant case. She stated that the attorney-at-law, in that case, filed the outstanding declarations separately before the hearing of the complaint, whereas the appellant filed a single declaration for all the outstanding years. She stated also that the reasons proffered were clearly different; that the attorney-at-law in **Dorcas White**, stated that she did not operate a law practice but practised on an ad hoc basis and that when she did practise, it was done on a pro bono basis or where fees were paid after her services were rendered. Ms Larmond submitted that it was against that background that her declarations were

accepted, as the committee found that fees rendered for services already paid and billed would not be trust money for which the attorney-at-law would have to account, and, therefore, no accountant's report would be necessary.

[30] In contrast, she submitted that the appellant has not spoken to when he has received monies or what he has received it for. He merely stated that he does not receive client funds because he practises in the area of criminal defence. Further, it was submitted that if one considers the appellant's 2011 letter, he had stated that he received retainers for court appearances, which Ms Larmond contended, is included in the definition of trust money.

[31] In essence, she submitted that there was no sufficient explanation before the committee for the failure to file accountant's reports and, even if the appellant was purporting to rely on the filing of declarations, this was not done in the proper form. On that basis, pursuant to regulation 17, this amounted to professional misconduct.

Discussion and analysis

[32] Ms Larmond, is correct that this court should only consider the evidence that was before the committee, in order to determine if they failed to properly consider critical material in reaching a conclusion in this matter. The fresh evidence (the Reid affidavit) is not relevant to this issue but rather to the question of whether the sanction imposed by the Committee should be varied in the light of the actions of the appellant subsequent to the sanction hearing, which include his conduct after the grant of the stay of execution by this court. The appellant has not sought to challenge that he failed

to do, what has been set out as constituting professional misconduct. It cannot be disputed that his failure to comply with the Regulations and Canon (referred to in paragraph [9]) constitutes professional misconduct for the purposes of section 12 of the LPA. The statute and Regulations clearly state that these breaches amount to professional misconduct (see section 12 of the LPA and regulation 17)

[33] The hearing by the committee took place on 16 June 2018, seven years after the appellant was first made aware of his alleged failures to file the relevant accountant's reports and/or declarations (the letter of 2011 referred to by Ms Larmond was attached to the Reid affidavit). The appellant, who was not present at the hearing, had been served with the relevant notices. However, he had filed an affidavit dated 4 September 2017, which was admitted into evidence and this is what would have been before the committee for its consideration. In that affidavit, the appellant stated that he was not required to file accountant's reports, as he did not hold client funds and admitted that he was delinquent in filing declarations for the years 2000, and 2004 to 2016. Also contained in this affidavit, at paragraphs 5 and 6, is a compendious declaration in the following terms:

> "5. THAT if it pleases this Honourable Council and the Secretary of [t]he General Legal Council, I hereby declare for the year 2000, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016.
>
> 'I being an attorney-at-law do solemnly and sincerely declare that I do not receive trust money by reason of my practice is in the criminal courts and it is unnecessary for me to deliver to the Council an accountant's report for the years mentioned above and I make this solemn declaration conscientiously

> believing the same to be true, and by virtue of the Voluntary Declarations Act.'
>
> 6. THAT I make this declaration relying on Regulation 4(1), 4(2), 4(3) and 9 of the Legal Profession (Accounts and Regulations [sic]) Regulations, 1999."

[34] The record of the transcript of the committee also contains evidence, through the amended affidavits of Mr Allan Wood and Ms Althea Richards (both sworn to on 26 February 2018), that an additional complaint was laid against the appellant; that he was in breach of canon II (j) of the Canons. Both these documents had been sent to the appellant prior to the hearing. This additional complaint related to the fact that he practised as a lawyer in the years 2012 to 2016 without having obtained a practising certificate in each of those years and having failed to pay the prescribed fee. No further affidavit of the appellant was filed with the GLC for consideration by the committee. There was no evidence on the record that he had been making efforts to remedy any of the breaches and was requesting some more time to do so.

[35] The committee found, and it is not disputed, that the purported declaration (contained in the affidavit) did not comply with the requirements of the Regulations that there should be a declaration for each financial year; further that the declaration was not in conformity with the prescribed form contained in the First Schedule of the Regulations (per regulation 16(2)).

[36] Essentially, up to the time of the sanction hearing on 13 July 2019, the appellant had failed to correct any of the breaches for which he was found guilty. The committee considered the "compendious declaration" filed by the appellant with the explanation

offered in his affidavit. There is no evidence, which was placed on record before the committee, that the appellant was in dialogue with his accountant to produce the necessary documents, or that ill-health prevented him from doing so within a reasonable time, as submitted by Mr Osbourne. As previously stated, the appellant filed the relevant declarations in the requisite form on 2 December 2019, subsequent to the filing of an application for a stay of execution.

[37] This would have been in stark contrast to the factual circumstances in the case of **Dorcas White**, as Ms Larmond has submitted. The attorney-at-law in that case failed to make the requisite filings within the time prescribed by regulation 16(1) for five years. In response to the complaint brought against her, the attorney-at-law filed an affidavit as well as statutory declarations. These filings took place within weeks of the complaint being laid and almost one year prior to the disciplinary hearing being held. Not only was there a rectification of the breach, but the committee was clearly satisfied that the attorney-at-law appreciated that it was incumbent on her to have filed either a statutory declaration or an accountant's report for each of the relevant years, and that she explained that her failure to do so was due to the pressure of work (see paragraph 18 of that decision).

[38] Further, based on the attorney-at-law's explanation of how she collected fees, that is, after her services were rendered, the committee was also satisfied that an accountant's report was unnecessary and ultimately did not challenge her statutory declarations. Interestingly, the committee expressly noted that "where fees are paid in

advance of services rendered by the attorney or in advance of a bill, such payment remains trust money and as a general rule, it would be incumbent on the attorney in such a case to file an accountant's report" (see paragraph 31 of that decision). Ultimately, the attorney-at-law received a reprimand and was ordered to pay the costs of the proceedings.

[39] At the sanction hearing in this matter (on 13 July 2019), Mr Osbourne, who appeared for the appellant, indicated to the committee that he did not know the appellant well and did not receive much information from him. It was noted that the panel had nothing presented to it, that may have influenced the exercise of its discretion in the way of mitigation and in deciding the appropriate sanction to impose.

[40] Mr Osbourne's submission that the committee also ignored the efforts by the appellant to pay his practising fees is not supported by the evidence. There was no affidavit and/or documentary evidence, as to what these efforts were and when they would have been made.

[41] Further, the fact that the appellant had been issued a practising certificate in 2017, could not have reasonably created a legitimate expectation that he would be given time to pay fees that would have been due for the years 2012 to 2016. Ms Larmond is correct in observing that before August 2017, the GLC had no jurisdiction to withhold a practising certificate for outstanding fees. Similarly, her submission that the appellant failed, in any event, to make any effort to rectify the breaches (apart from the compendious declaration contained in his affidavit) between July 2017, at the time the

complaint was laid, and the time of the sanction hearing (in July 2019) and even up to when the penalty of striking off was imposed (in October 2019), has merit.

[42] Therefore, the conduct of the appellant is somewhat incompatible with any genuine legitimate expectation, as he made no effort to rectify the breaches in relation to non-payment of practising fees until 31 January 2020. There was no discernible activity on the part of the appellant that would indicate that he harboured any such legitimate expectation. He stood before the committee without excuse and made no effort to redeem himself.

[43] I am of the view, therefore, that this ground of appeal is without merit.

Ground (c): The [sanction] of the panel was not the appropriate sanction having regard to the circumstances of the case

Submissions on behalf of the appellant

[44] Mr Osbourne submitted that an important principle of fairness is that punishments should be proportionate to the gravity of offences. Reliance was placed on **Ian H Robins v The General Legal Council** [2018] JMCA App 38.

[45] Learned counsel contended that the appropriate sanction would have been a reprimand and he commended to the court, again, the decision of the committee in **Dorcas White.** He emphasized that a reprimand was deemed sufficient in that case, for the attorney-at-law's failure to file the requisite statutory declarations within the time prescribed by regulation 16(1) for five years. He also stated that the appellant's practise was primarily criminal in nature and that he did not hold money on trust and as

such, there was no duty to file accountant's reports. In fairness, Mr Osbourne did concede that a distinction between the appeal at bar and the decision in **Dorcas White** was that, in the latter, the breach was accepted and remedied.

[46] Curiously under this ground, rather than focusing on the sanction, an argument was advanced that the committee erred in finding that the appellant's conduct amounted to professional misconduct, as this was merely administrative non-compliance. The argument continued that this was not a case in which the appellant made no effort to bring himself into compliance, and further that the defect was curable. In the round, it was contended that the sanction imposed was not appropriate, as striking off has been reserved for the most offensive cases, where the breach cannot be cured. Even more curiously, counsel submitted that had a warning/reprimand been given, then the appellant could have complied and would not have been guilty of professional misconduct.

[47] Reference was made to the continuous egregious conduct of the attorney-at-law in the case of **Chandra Soares v The General Legal Council** [2013] JMCA Civ 8, where the ultimate sanction was imposed. In particular, reliance was placed on paragraph [36] of that judgment.

Submissions on behalf of the respondent

[48] In treating with this ground, Ms Larmond urged the court to consider the egregious circumstances of the appellant's case. She contended that the exercise of the court's power, to set aside the sanction of striking off and imposing a lesser sanction

was not warranted. In support of this contention, she sought to distinguish the case at bar from three other cases involving attorneys-at-law who found themselves in similar circumstances, namely – **Audley Melhado v General Legal Council**, **Ian H Robins v The General Legal Council**, and **Allan Wood QC v Courtney Kazembe** Complaint No 139 of 2017, Disciplinary Committee decision delivered 15 September 2017.

[49] It was submitted that the appellant's startling lack of regard for the Regulations and the ruling of the committee is so egregious as to make his case markedly distinct from that of the above-mentioned cases. In particular, Ms Larmond highlighted that the appellant asserted in his September 2017 affidavit, that he held no client's funds and was therefore not required to file an accountant's report, yet the records showed that he filed accountant's reports for 2001, 2002 and 2003. Further, the appellant attempted to advance one declaration for many years into a single paragraph; and that the committee held (on 23 February 2019) that the form of declaration as required by the Regulations had not been utilised. The effect of this was that the appellant was put on notice as to that defect, yet in the five months leading up to the sanction hearing (on 13 July 2019) and the eight months leading up to the delivery of the ruling (on 26 October 2019), he never sought to file the declarations in the proper form.

[50] She submitted also that another distinguishing feature of the appellant's case was that he was practising without a practising certificate. There was no similar complaint in respect of **Audley Melhado**, **Ian H Robins** and **Courtney Kazembe**.

[51] In the circumstances, it was submitted that this court ought not to disturb the sanction imposed on the basis that it was harsh or excessive. In support of this contention, Ms Larmond urged the court to consider the following factors:

i. The appellant attended none of the hearings of the committee. While it was accepted that he advised that he was ill for three of the nine hearings, he was not present at any of the other hearings, nor was any explanation provided for his absence.

ii. The appellant was duly informed of the progress of the proceedings at every step of the way, including the defect in his omnibus declaration, which was not in keeping with the form in the First Schedule of the Regulations.

iii. The appellant made no attempt to rectify the breaches until the first week of December, after he had been struck from the roll.

iv. Of the 18 years that the Regulations have been in force, the appellant was in breach for 14 years.

v. He provided no explanation for five years of practising without applying and paying for a practising certificate.

[52] It was further contended that from the outset, the appellant acted with impunity. In most, if not all other cases, the attorneys-at-law rectified their breaches, whereas the appellant remains in breach. She referred the court to the Reid affidavit, which contains

evidence that the declarations filed by the appellant on 2 December 2019, were examined by the Accounts and Records Committee. This committee has concluded that based on previous statements made by the appellant, he ought properly to be filing accountant's reports rather than declarations for the relevant years. She submitted that whether this continuous breach is wilful or deliberate is unknown because the appellant has not provided an explanation.

[53] Ms Larmond reminded the court that section 18 of the LPA provides an avenue to attorneys-at-law to be restored to the Roll and as such, the appellant is not without recourse. She submitted that the proper administration of the GLC is permitted by the court ensuring that the committee's decision is not disturbed in circumstances where it is not warranted.

[54] The dictum of Sir Thomas Bingham MR from **Andrew John Bolton v The Law Society** [1993] EWCA Civ 32 was commended to the court as a reminder that the essential issue in cases of this nature is the need to maintain among members of the public, a well-founded confidence that any attorney-at-law whom they instruct, will be a person of unquestionable integrity, probity and trustworthiness.

[55] Ms Larmond concluded by submitting that the committee has a duty to uphold the Regulations and that this duty was properly discharged. The orders made were proportionate to the circumstances presented before the committee and no meritorious bases were placed before this court, for the decision of the committee to be disturbed. In the instant case, the appellant should, all the more, not be offered any relief where

there has been no remedy of the breach. Accordingly, the appeal ought to be dismissed with costs to the GLC.

Discussion and analysis

[56] The appropriateness of the sanction of striking off cannot be called into question in the circumstances of this case. This court has previously stated in **Audley Melhado** that the LPA and its various regulations must be taken seriously. Panton P, at paragraph [8], posited further that the "failure to file appropriate declarations and accounts is an indication of disrespect and attorneys who display such disrespect can expect that the committee may well order a 'striking off the roll' and the court is not sympathetic in situations such as those".

[57] The sanctions open to the committee, as set out at section 12 of the LPA, include this draconian step of striking off. There is no basis, therefore, for the submission, by Mr Osbourne, that if the breach is merely administrative non-compliance and curable, it ought not to constitute professional misconduct. He has cited no authority in support of this submission. In any event, as mentioned at paragraph [33] of this judgment, failure by an attorney-at-law to comply with any of the provisions of the Regulations, constitute professional misconduct for the purposes of section 12 of the LPA.

[58] Although the **Chandra Soares** case was one of misappropriation of clients' funds, the sanction of striking off has been consistently imposed in other circumstances. In both **Audley Melhado** and **Ian H Robins**, this sanction was imposed for similar breaches as in the case at bar.

[59] Further, this court has consistently given heed to the principle, which is well recognized, that the punitive element of the orders of professional regulatory bodies is to reflect the most fundamental purpose, which is to maintain the reputation of the profession and sustain public confidence in its integrity. In **Chandra Soares**, Dukharan JA referred to the principles from **Andrew John Bolton v The Law Society** at paragraph [31]:

> "[31] Mr Hylton quite rightly referred to the principles set out in **Bolton v Law Society** which this court has consistently applied in considering appeals against penalties imposed by the disciplinary committee. In that case the court disapproved the approach by the divisional court of merely substituting its own view on penalty for the tribunals [sic]. In this regard we refer to the words of Sir Thomas Bingham MR, at page 492:
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> > 'It is important that there should be a full understanding of the reasons why the tribunal make orders which might otherwise seem harsh. There is in some of these orders a punitive element … In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited purpose by an order of suspension, plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period and quite possibly indefinitely by an order of striking off. **The second purpose is the most fundamental of all to maintain the reputation of the solicitors** [sic] **profession as one in which every member of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is necessary that those guilty of**

> **serious lapses are not only expelled [but] denied re-admission**.'
>
> By way of reinforcing the point, the committee was well within its right to impose the penalty which it did because of the responsibility that it has. Moreover, these were more serious lapses than in **Bolton**. (Emphasis supplied)

This principle was reaffirmed in **Ian H Robins** (see paragraph [44]).

[60] The appellate court will also treat the penalty imposed by the committee with considerable respect, as that court will be "slow to set aside the professional body's decision on sentence, as the disciplinary committee are the best persons to weigh the seriousness of professional misconduct" (see paragraph [44] of **Ian H Robins**, which referred to the dictum of Dukharan JA at paragraph [32] in **Chandra Soares**, quoting the decision of the Privy Council in **McCoan v The General Medical Council** [1964] 3 All ER 143).

[61] In particular, it has been recognized by this court that rectification of breaches and explanation for default are factors which the committee usually considers in deciding whether to apply the ultimate sanction (see paragraph [51] of **Ian H Robins**).

[62] In **Courtney Kazembe** and **Dorcas White**, the conduct of the attorneys-at-law, in rectifying the breach before sanction was applied, resulted in lesser sanctions being imposed. In **Audley Melhado** and **Ian H Robins**, the ultimate sanction was imposed by the disciplinary committee as a result of the failure to do so.

[63] In the case at bar, the appellant made an inadequate attempt at rectification by way of an affidavit, in which he gave a composite declaration for the years 2000 and

2004 to 2016, however, this was not permitted by the Regulations. He would have been aware that, pursuant to the Regulations, a separate prescribed form (set out in the First Schedule) for each year ought to have been filed. At the very least, he would have been aware of this prior to the sanction hearing and did nothing to rectify this situation, even up to the date when the penalty was imposed on 26 October 2019.

[64] In relation to the payment of practising fees for the years 2012 to 2016, there was also no evidence from the appellant, relevant to any attempt at a payment plan presented to the committee. Nor did he provide any explanation for the default. These circumstances do not present any rational basis for a conclusion that the penalty of striking off, as imposed, was not appropriate.

[65] However, as demonstrated in both **Audley Melhado** and **Ian H Robins**, there may be circumstances, where this court could be persuaded to vary the penalty imposed, if there is evidence that shows effective compliance by an appellant with the Regulations that were breached. In this case, the Reid affidavit speaks to the appellant's actions following the conditions set out by the single judge of this court staying the decision of the committee.

[66] These conditions, as set out in paragraphs [10] above, required that the appellant file all outstanding accountant's reports and/or declarations using the prescribed form within seven days of the order. However, prior to the hearing of the application for a stay, he had already filed all the relevant declarations on 2 December 2019.

[67] In the Reid affidavit, Ms Reid sets out her findings and observations made in relation to these declarations filed. It is lengthy and will, therefore, be set out as taken directly from the affidavit:

> "10. The Appellant therefore did not file any accountant's reports and/or declarations after the grant of the stay on 27 January 2020 and in the exercise of its functions, the Accounts and Records Committee considered the declarations of the Appellant filed on 2 December 2019. The Accounts and Records Committee found the declarations unsatisfactory for the following reasons:
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> a. In response to notice of default dated 17 February 2011 to the Appellant from the Council, the Appellant advised the Council by letter dated 28 March 2011 that he practices as a criminal defense attorney since September 2001 and his income derived from '**taking retainer for court appearances'**. This information is inconsistent with the declarations filed by the appellant by which he declares he does not 'accept retainers or advances on account of fees for services not yet rendered or of disbursements not yet made'. Copies of the said notice of default dated 17 February 2011 and letter dated 28 March 2011 are included in Exhibit '**HR 1'**;
>
> A 'general retainer' is defined in the Accounting Regulations as being '*an amount paid by a client to an attorney undertaking for a specified or unspecified period to act as that client's attorney in unidentified legal matters.'* This is, in essence, 'trust money' which is further defined in the said Regulations as '*money received by an attorney that belongs in whole or in part to a client or that is held on a client's behalf or to his or another's direction or order, and includes money advanced to an attorney on account of fees for services not yet rendered or of disbursements not yet made; and 'money in trust' or 'funds in interest' has the same meaning.'*
>
> b. In the said letter dated 28 March 2011, the Appellant also indicated that '**it is impractical for me to deliver an Accountant's Report for the period 2001 to**

2010, however I have retained an Accountant, Mr Ken Holgate of Shop 22, May Pen Arcade to review my tax returns, *bank records and bookkeeping* with a view to my returns and declarations for these years in the format required by the General Legal Council.' [Emphasis supplied]. The Accounts and Records Committee is of the view that the statement is inconsistent with the Appellant's responses in his declarations that:

i. He does not maintain an account with a bank or other financial institution in connection with his practice; and

ii. He does not maintain the books, records and accounts referred to in Regulation 6 of the Legal Profession (Account and Records) Regulations, 1999.

c. The Accounts and Records Committee is also of the view that, when taken together, the Appellant's statement in his letter that he accepts retainers and has bank records, and his declaration of [sic] that he maintains no client trust account, raises questions as to whether he was or intermingling client funds with trust funds in his bank account. This would be in breach of the Regulations and an accountant's report is therefore required for a further review of the inconsistency that creates an understandable concern of Council.

11. The Accounts and Records Committee is therefore of the view that the Appellant has failed to satisfy the Council that it is impractical or unnecessary to file an accountant's report pursuant to Regulation 16(2) and he ought to file accountant's reports instead for the relevant years. This was reported to the Council at its meeting on 19 February 2020."

[68] It is evident, therefore, that the GLC has challenged the propriety of the declarations filed and the question as to whether the appellant has brought himself into compliance with the Regulations is still to be resolved. The appellant has not sought to challenge this evidence by way of any affidavit. It is difficult to conclude, therefore, that

he is no longer in breach of the Regulations relevant to the filing of accountant's reports and/or declarations.

[69] Another of the conditions imposed on the appellant required the payment of outstanding practising fees for the years 2012 to 2016, when he would have practised without obtaining a practising certificate. The Reid affidavit confirms that those fees have been paid since 31 January 2020. It was indicated that for the year 2011, the sum of $18,000.00 plus late fees of $20,000.00 are still outstanding. It is noted, however, that the appellant was not brought before the committee in relation to non-payment of practising fees for 2011, so this is not a relevant issue for consideration at this time. For the purposes of this appeal, the appellant has made rectification of his breach concerning the payments for the practising certificates for the period under review.

[70] At the end of the day, however, the breach of the filing of accountant's reports and/or statutory declarations for 14 years is still unsettled. This is considered to be a very serious default on the part of an attorney-at-law. The appellant has not provided any evidentiary basis for the conclusion that the sanction imposed should be varied and a less draconian sanction substituted. This ground of appeal fails.

[71] I would therefore dismiss the appeal and affirm the decision of the committee.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The decision of the Disciplinary Committee of the General Legal Council made on 26 October 2019 is affirmed.

3. The order for stay of execution granted on 27 January 2020 is discharged.

4. Costs of the appeal to the General Legal Council to be agreed or taxed.