[2012] JMCA Civ 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 5/1997

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**BARRINGTON EARL FRANKSON**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL (ex parte Basil Whitter at the instance of Monica Whitter)**	**RESPONDENT**

Earl Witter QC, Maurice Frankson and Miss Norma Ferron, instructed by Ballantyne Beswick and Company for the appellant

Dr Lloyd Barnett and Alan Wood instructed by Charles Piper and Company for the respondent

22, 23, 24, 25 March 2010 and 23 November 2012

HARRIS JA

[1] In this appeal, the appellant, an attorney-at-law, challenges the decision of the Disciplinary Committee of the General Legal Council ("the Committee"), made on 1 May 1999 wherein he was struck off the roll of attorneys-at-law

entitled to practise in the courts of Jamaica. The Committee also made the following orders:

> "(2) Further pursuant to Section 12(4) of the Legal Profession Act, the Committee also orders that the attorney-at-law Barrington Earl Frankston [sic] makes restitution to Monica Whiter [sic] of the Full sum of monies received representing the purchase price of her half share interest in the property known as 'Cromaty' [sic] less vendor's costs of sale and transfer.
>
> (3) After such deduction, the attorney is to pay interest on the balance at the rate of interest paid by the National Commercial Bank Harbour Street on savings accounts from 31st day of October, 1996 until present."

[2] In 1986, the complainant, Monica Whitter, variously referred to as Monica Samuels and Monica Longmore, retained the services of the appellant to represent her in pursuing a claim against her former husband, Slydie Joseph Whitter, to obtain a share in property known as "Cromarty", which had been acquired by the parties during their marriage as joint tenants and also to recover the sum of £10,000.00. It was agreed that the appellant would perform the task on a contingency basis. In a letter dated 2 November 1986 to Mrs Whitter, the contingency fee was fixed, by the appellant, at 25%. Mrs Whitter, in response, by letter dated 6 December 1986, agreed to the rate and sought confirmation from the appellant that no additional funds would be paid out by her during or after the conclusion of the case. In a letter dated 9 April 1987, the appellant assured her that the condition would be honoured.

[3] Following this agreement, the appellant commenced proceedings under the Married Women's Property Act in respect of the property. A decision was made in Mrs Whitter's favour. The court ordered that she was entitled to a one half interest in the property and that it should be partitioned and sold and the proceeds of sale divided between her husband and her equally. An appeal by Mr Whitter was dismissed, but this court, although affirming the order of the court below for the sale of the property and for the division of the proceeds of sale equally between the parties, varied it by stipulating that the division of the proceeds of sale should be less the deductions of "the assessed increase in the value of the property directly referable to any improvement effected by the Appellant subsequent to 13th June 1984". The taking of accounts was also ordered by the court.

[4] By a letter dated 30 April 1991, under the hand of WB Frankson QC of the firm of Gaynair and Fraser (by then, BE Frankson and Company, the name under which the appellant operated, had been incorporated under the name of Gaynair and Fraser) was sent to Messrs Crafton Miller and Company who were then acting for Mr Whitter. This letter states as follows:

> "It appears that we are not making any progress with our intention to resolve the issues in this suit amongst ourselves.
>
> It also appears that your client's plan to appeal to the Privy Council in England is now aborted.

> In the meantime, your client is enjoying the property and nothing is being done by either of us to give effect to the judgment of the Court of Appeal.
>
> In the circumstances, we now request that we take steps to:-
>
> a) appoint an accountant,
>
> b) appoint a valuator or a panel [sic] (2) valuators
>
> c) apply to the Registrar of the Supreme Court to take accounts in terms of the order of the Court of Appeal.
>
> We look forward to receiving your usual co-operative response and hope that with goodwill we can bring this matter to a satisfactory conclusion."

[5] On 30 April 1991, Mr WB Frankson QC also wrote to a company called Jamaica Estates Limited. The letter reads:

> "A suit brought by our Client, Mrs. Monica Whitter against her former husband, Slydie Basil Whitter was determined in the Court of Appeal by inter alia, the following orders:-
>
>> 'It is ………. ordered that the property be valued and sold and the proceeds thereof be divided equally between the parties after the deduction therefrom of the assessed increase in the value of the property directly referable to any improvement effected by the appellant (Mr. Slydie Whitter) subsequent to the 13th June, 1984.'
>
> We enquire whether you are prepared to act on behalf of Mrs. Whitter as valuator of the property as at the 13th June, 1984, and to furnish in particular the value of the property i.e. the increase in the value of the property which is referable to improvement effected to the property subsequent to the 13th June, 1984.

> Would you also please advise us of your estimate of the rental of the property from the 13th June, 1984, up to the present time.
>
> Your early reply is urgently awaited."

Mr Whitter did not appeal to the Privy Council.

[6] On 3 June 1991, Mrs Whitter wrote to the appellant terminating the retainer. Following this, on 9 July 1991, Mr WB Frankson QC wrote to Mrs Whitter stating as follows:

> "There does not appear to be any need to enter into any discussion relating to honour and decency and the like but we are constrained to remind you that you are obligated to us to the extend [sic] of twenty five percent (25%) of the value of the property which the Courts found was your share of the property jointly owned by you and your former husband Slydie Whitter.
>
> We were having the property evaluated in keeping with the Judgment of the Court when your letter arrived and we expect to have such evaluation very soon.
>
> There is vested in us a legal and equitable interest in twenty five percent (25%) of fifty percent (50%) share of the valuation made by the Real Estate Valuator whom we have hired.
>
> Just as soon as that sum is ascertained we shall charge the property with the amount due to us and we shall proceed to give effect to the Order of the Court viz. '………. that the property be valued and sold and the proceeds thereof be divided equally between the parties ……….'
>
> Arising out of that Judgment and Order and by reason of the Agreement between yourself and us twenty

> five percent (25%) of your half (½) share vested in us from the date of the Judgment and even if you wish to let your former husband have the property you may only do so after we have been paid our interest in full.
>
> We accordingly advise you that we shall be lodging a caveat against the title to the property and we shall thereafter commence proceedings against you with a view to having the property sold in keeping with the order of the Court and thereby recover all sums due to us with costs."

[7] On 15 August 1991, the appellant lodged a caveat against the property. In the affidavit supporting the request for the caveat, he stated that there was an agreement that the firm's fees would be 25% of half share of the property's market value, which had not been paid by Mrs Whitter. He averred also that the Supreme Court had made an order for the partition of the property on 25 June 1988, which had been confirmed on appeal on 9 March 1989. He further stated that it was his belief that Mrs Whitter no longer had an intention to partition that property and that the value of the property was $2,800,000.00 and the firm's interest therein was $350,000.00.

[8] On 20 September 1993, by claim CLF 141/1993 the appellant instituted proceedings against Mrs Whitter. The statement of claim reads:

> "The Plaintiff [sic] claim is against the Defendant to recover the sum of One Million Seven Hundred and Eighty Eight Thousand Seven Hundred and Seventy Dollars and Forty Seven Cents ($1,788,770.47) being monies due and owing pursuant to an agreement between the Plaintiff and Defendant and costs which amount remain unpaid despite the demands of the Plaintiff.

PARTICULARS

(1) 25% of all sums received on the property:-

(a) being 25% of her share of the appraised value of the property	$1,750,000.00
(b) being 25% of the appraised value of the rent payable to the Defendant from the 13.6.84 to 25.6.93 and continuing	38,069.47
	$1,788,069.47"

[9] On 10 June 1994, a judgment in default of appearance was entered against Mrs Whitter. The appellant then proceeded to make an application for the sale of the property. On 9 May 1996, an order was made for the sale of the property. On 5 September 1996, a further order for sale was made giving Mr Whitter the right to purchase Mrs Whitter's half share for the sum of $7,875,000.00. The sale having been completed on 27 September 1996, the sum of $7,875,000.00 was paid to Messrs Gaynair and Fraser. The default judgment was set aside on 4 January 1999 but by then the funds were already paid over to the appellant.

[10] On 11 November 1996, Mrs Whitter wrote to the appellant. The letter reads:

> "Mr BE Frankson
> Gaynair & Fraser
> 9-11 Church Street
> Kingston
> Jamaica
>
> Dear Mr Frankson

Re: Action against Joe Whitter

I am aware that you are holding my portion of the sale proceeds of 'Cromarty' in your firm's clients bank account.

Is it possible to release some of the money now or is the Court's permission required? I assume that the bank account is interest bearing and that I am entitled to an apportioned amount on distribution of the monies.

The Court's decision on your firm's professional fees is unlikely until sometime in the new year. I would therefore appreciate clarification on these points so that I know where I stand.

Please would you correspond with my son, Basil Whitter, as previously advised.

Yours sincerely"

[11] On the same date, Mrs Whitter penned the following:

"To Whom It may Concern

This is to authorize my son Basil Joseph Whitter of:

Village Green
Winsor Road, Lot 4
St. Ann

To act on my behalf in any transactions, meetings, discussions or anything else whatsoever concerning myself in the case against my former husband S.B.J. Whitter and myself."

[12] On 26 November 1996, Mr John Graham of Messrs Patterson Phillipson and Graham wrote to Messrs Gaynair and Fraser informing them that that firm

had been retained by Mrs Whitter to act for her in the matter and requested a meeting in order to discuss "the expeditious resolution" of the matters. Several other letters sent to the appellant remained unanswered.

[13] By letter of 3 January 1997, Mrs Whitter wrote to the General Legal Council advancing the following complaint:

> "I am writing to make a complaint against Attorney-at-Law Mr BE Frankson, Q.C.
>
> There is [sic] a number of issues that have caused me great distress all relating to Mr Frankson's conduct in a legal action against my former husband.
>
> Mr. Frankson's approach to the action was totally unprofessional and it forced me to terminate all communications with him. I subsequently issued my son, Basil Whitter, with a Power of Attorney to continue instructing on the proceedings. However, the matter continued to deteriorate and a new Attorney Mr. John G. Graham of Patterson Phillipson & Graham was instructed to protect my interest.
>
> An amount in access of 7 million Jamaican dollars is due to me following a court judgement against my former husband, Mr. Joe Whitter. I understand that the court must agree the legal fees payable in the action but I cannot obtain answers to some very simple questions such as:
>
> - The date of the court judgement
> - The total sum involved
> - The date of receipt of the judgement money and where it is held i.e an interest bearing account?
> - When I will receive the proceeds
>
> Mr. Frankson will not commit himself to paper and the enclosed copy letters from the new Attorney reiterates the problem.

> Mr. Graham is going through the proper channels to establish the position but, I felt compelled to voice my concerns by way of this complaint to you.
>
> I would appreciate your help in investigating the whereabouts of the funds and the circumstances surrounding it. You are at liberty to contact Mr. Graham or my son for additional information.
>
> I reside in London, and it would seem more convenient on both our parts if you were to correspond with my son at the following address:
>
> "Mr Basil Whitter
Lot 4
The Village Green
Windsor Road
St. Ann's Bay
St. Ann
Jamaica
>
> Yours faithfully,
>
> Mrs. M E Samuels (maiden name)"

A copy of the letter was sent to the appellant requesting his written comments within 14 days.

[14] An affidavit was filed by Basil Whitter on behalf of Mrs Whitter in support of the complaint to the General Legal Council. The affidavit reads:

> "Barrington E. Frankson knowingly conspire [sic] to defraud and conceal moneys and failed to give answers to the following questions.
>
> (1) Why had he collected all moneys on behalf of Monica E. Samuels when he knew that her son, Basil Joseph Whitter had powered [sic] of Attorney.

(2) Failure to give dates when moneys were received from Crafton Miller on behalf of Joe Whitter. Failure to give amount collected from Crafton Miller on behalf of Joe Whitter.

(3) Failure to notify M.E. Samuels or Basil Whitter of settlement.

(4) To cause the lost [sic] of interest and failure to disclose what bank or whose account the money was held.

(5) Failure to notify court of the continued contact with Basil Joseph Whitter.

(6) Conspire [sic] to have his legal fees settled as [sic] Taxation Court without giving copies of all the relevant documentations, valuation report, correspondence copy titles and court papers to our attorney John Graham of Patterson, Phillipson & Graham, which would put him in a position to properly assess the bill of cost [sic] which had been laid for taxation.

The complaint I make against the Attorney-at-Law is that he (i)

(1) He has charged me fees that are not fair and reasonable.

(4) He has not provided me with all information as to the progress of my business with due expedition, although I have reasonably required him to do so.

(5) He has not dealt with my business with all due expedition.

(6) He has acted with inexcusable or deplorable negligence in the performance of his duties.

> (7) He has not accounted to me for all moneys in the hands for my account or credit, although I have reasonably required him to do so."

[15] The Committee's hearing commenced on 31 January 1998, on which date, Mr Graham sought and was granted an amendment to the affidavit of the complainant. The second paragraph was amended to add, after the word "Miller", the words "failure to give dates when moneys were received and failure to give amount to Monica Samuels."

[16] At the hearing, evidence was given by Basil Whitter. He stated that his mother, who was resident abroad, had requested him to obtain information from the appellant about her case. He met and spoke with the appellant in 1995, at which time, the appellant told him that he was suing Mrs Whitter for legal fees and that "he could not represent her but what he could do is use his case on her behalf by obtaining a judgment through his case. It would force my father to settle with him and also the case with my mother".

[17] Mr Whitter further stated that at a subsequent meeting in 1996 with the appellant, he, the appellant, told him that he had recommended another attorney-at-law to represent Mrs Whitter. As a consequence, he was introduced to Mr Michael Hylton, he having been taken to Mr Hylton's office by the appellant. By letter of 26 May 1996, Mr Hylton wrote to Mrs Whitter informing her of the terms of the engagement of his services. Mr Hylton was not retained,

he asserted, as his fees were too high, so Mr Earl Witter was recommended instead. However, Mr Witter did not act for Mrs Whitter.

[18] He also stated that in or about October 1996, he became aware that the property had been sold. He spoke to the appellant by telephone about it. The appellant invited him to his office at which time the appellant told him that he did not know the amount which was due to Mrs Whitter as the figures were with the accounts department. He also stated that he was informed by the appellant that there was a settlement but that he, the appellant, did not have any "information". However, the appellant promised to furnish him with the information. In a subsequent conversation with the appellant, he told him, Mr Whitter, that he would not put the money in an interest-bearing account in light of the conditions which existed in Jamaica. The appellant, he stated, also informed him that no money could be paid out until his fees were taxed. After making inquiries into the matter, he wrote to the appellant but received no response to his letters of 26 November and 10 December 1996. It was also his evidence that although he requested a statement of account from the appellant, none was ever received.

[19] In evidence, the appellant admitted that he entered into an agreement with Mrs Whitter to commence proceedings against her husband under the Married Women's Property Act and that he would receive 25% of the amount he recovered from the sale of the properties to which Mrs Whitter was entitled. He commenced two actions on behalf of Mrs Whitter, one under the Married

Women's Property Act and the other under the common law to recover £10,000.00. He retained Mr WB Frankson to appear in the property proceedings. The action under the Married Women's Property Act was successful in the court below and an order was made for the sale and division of the property. An appeal against that order was unsuccessful. In an effort to settle the matter without seeking the intervention of the Privy Council, he entered into negotiations with Mr Crafton Miller, Mr Slydie Joseph Whitter's attorney.

[20] He went on to state that at all times he advised the complainant of the status of her business but at one period she ceased communicating with him as she had gone to reside in the United States. He said Mrs Whitter was given details of the valuations together with a copy of the valuation report. Mrs Whitter, he asserted, having expressed her dissatisfaction in writing with that valuation, he believed that another valuation which he secured, was also sent to her. Subsequent to this, he received no communication from Mrs Whitter, nor her husband nor his attorney-at-law. In addition to furnishing Mrs Whitter with the valuation, he asserted, he had also, in writing, advised her to purchase her husband's half share of the property.

[21] Having filed suit CLF 141/1993, he said that the complainant was served with the writ of summons and statement of claim personally. No appearance having been entered, a default judgment was entered. Efforts to serve the complainant personally with the judgment were futile, he asserted. Upon an order being obtained for the sale of the property to recover the judgment debt,

the property was sold and a deposit of $2,000,000.00 received, which was placed in Messrs Gaynair and Fraser's clients' account.

[22] He also related that he had furnished Mr Basil Whitter with information about the complainant's business. He told him he could no longer represent Mrs Whitter as he had sued her and Mr Whitter rejected his recommendation of Mr Hylton to act for Mrs Whitter. Mr Earl Witter, he said, was recommended to act for Mrs Whitter in the suit to recover the £10,000.00.

[23] After the receipt of the proceeds of sale, it was paid over to Messrs Gaynair and Fraser subsequent to which, he said, he received calls from Mr Basil Whitter and Mr John Graham. Mr Graham informed him that he was acting for Mr Whitter. He also received two letters from Mr Graham to which he did not respond as there were ongoing discussions between Mr Whitter and Mr Hylton. On a visit by Mr Graham, to his office, inquiring about the letters sent to him and requesting that the proceeds of sale be paid over to him, he informed Mr Graham that he could not release the funds until a final account had been prepared and a bill of costs taxed. He said he also informed Mr Graham that costs were due to him from the common law suit.

[24] Sometime in 1991 he received a letter from Mrs Whitter terminating his service, after which Mr WB Frankson wrote to her informing her of the obligation to pay the 25% fees.

[25] In cross-examination he admitted that he was a trustee for the client's money which he held in his possession, that he should have kept proper accounts distinguishing funds received on behalf of each client from that of the partners and that he was under a duty to inform the client.

[26] A bundle of documents was tendered into evidence, which included correspondence passing between the various parties, cheques drawn on Gaynair and Fraser's account, the agreement for sale, vouchers, a statement of account to Monica Whitter and one to Slydie Joseph Whitter.

Findings of the Committee

[27] After engaging in a detailed and painstaking review of the evidence of the parties before it and the documentary evidence, the Committee accepted Mr Whitter's testimony and made findings of fact and law, principal among which are that:

(1) The appellant was not entitled to 25% of any sums recovered for or on the complainant's behalf as he failed to complete all the work agreed upon up to the time his retainer was terminated.

(2) He was not entitled to bring proceedings by way of suit CLF 141/1993.

(3) The appellant controlled the use and disbursement of the funds sent to Messrs Gaynair and Fraser and although he was a

judgment creditor under suit CLF 141/1993, he was a trustee of the proceeds of sale from the complainant's half interest in Cromarty.

(4) He did not have a right to pay fees to WB Frankson or to himself prior to the execution of the agreement for sale and the completion of the sale.

(5) The appellant did not have a common law lien over the proceeds of sale and even if he had, it would only have extended to that which was legally due to him.

(6) The appellant ought to have paid the complainant and not retain the proceeds of sale pending taxation of all alleged bill of costs.

(7) The appellant erred in not placing the funds in an interest bearing account as directed by the complainant.

(8) The appellant failed to account to the complainant for the monies held by him for the complainant.

(9) The appellant failed to discharge his professional duties with integrity, probity and trustworthiness and embarked on a deliberate course of conduct in which he misapplied the complainant's funds.

(10) The appellant "did not charge the complainant fees which were fair and reasonable", and after March 1989, he "acted with inexcusable or deplorable negligence in the performance of his duties".

[28] The Committee found that the appellant was in breach of Canons I(b) 1V(f), (r), (s), VI I(b)(ii) and VIII(b) of the Legal Profession (Canons of Professional Ethics) 1978 Rules.

Grounds of appeal

[29] On 4 May 1999, the appellant filed nine original grounds of appeal which are as follows:

> "1. The findings and/or conclusions of the Disciplinary Committee of the General Legal Council ('the Committee') which purported to adjudicate on the complaint herein, that the Appellant acted in breach of Canons I(b); IV(f), (r) and (s); VII(b)(ii) and VIII(b) of the Legal Profession (Canons of Professional Ethics) Rules, 1978 are unreasonable, unconscionable and/or in any event, unwarranted by the evidence adduced.
>
> 2. The Committee erred in law when it embarked upon the hearing of the said Complaint since the nominal complainant, Basil Whitter had no locus standi to institute and maintain the said Complaint. A fortiori, the Committee acted without or exceeded its jurisdiction in entertaining the Complaint.
>
> 3. That, as constituted, the Committee erred in law in embarking upon the hearing of the said

complaint since two members of the panel, namely the Chairman, Pamela Benka-Coker QC, and Margaret Macaulay shared a symbiotic relationship (Attorney-at-Law and client respectively) prior to and up to the conclusion of the hearing of the said Complaint, WHEREBY the hearings were rendered unfair and in breach of the principles and the rules of Natural Justice in that –

(a) the panel members aforesaid were captives of mutual undue and/or insidious influence.
(b) in the result justice does not manifestly appear to have been done; and
(c) the juridical integrity of the purported adjudication stands impugned.

4. The Committee erred in law when it embarked upon the hearing of the said Complaint while there was, to the knowledge of the said Committee, a related action pending in the Supreme Court of Judicature of Jamaica (Suit No. C. L. F141 of 1993).

The parties to the suit aforesaid were and are the Appellant and the virtual complainant Monica Whitter (sometimes Longmore and other times Samuels). In every essential respect the suit involved the said same issues of law and fact as raised in the hearings before the Committee.

The Committee, indurated by zealotry compounded the error by carrying on hearings into the said Complaint while there was, to the knowledge of the said Committee –

(i) an application by the said Monica Whitter pending before the Supreme Court, to set aside a Default Judgement in the suit, obtained by the Appellant against her, as well as

(ii) an Interlocutory appeal by the Appellant against a pertinent Order made by the Supreme Court. (Supreme Court Civil Appeal No. 90/98).

The matter is aggravated by the fact that long prior to the Committee's completion of [sic] hearings, the Supreme Court by Order set aside the Default Judgement aforesaid and Monica Whitter filed a Defence in time enlarged.

It is submitted that in so acting, the Committee pre-empted and/or purported to oust the jurisdiction of the Supreme Court and of the Court of Appeal, to the grave prejudice of the Appellant WHEREBY injustice has been caused to the Appellant.

4(A) The Committee in holding hearings as aforesaid;

(i) exceeded its competence in particular by comments contemptuous or otherwise disparaging of valid Orders regularly made by the Supreme Court of Judicature,

(ii) usurped the jurisdiction of the Supreme Court and of the Court of Appeal and

(iii) arrogated to itself and/or assumed powers of adjudication and purported to pronounce upon matters of law and of facts which go to the substratum of issues in litigation cognizable and determinable by the Supreme Court and the Court of Appeal.

all to the great prejudice of the Appellant and the pending proceedings, WHEREBY injustice has been caused.

4(B) In the particular circumstances of the case it was not competent for Monica Whitter or her supposed surrogate Basil Whitter to have invoked, simultaneously, the exercise of the jurisdiction of both the Supreme Court of Judicature and the Disciplinary Committee of the General Legal Council.

5. If, which is not conceded, the Disciplinary Committee of the General Legal Council had a discretion to embark upon a hearing of the said Complaint in the face of relevant proceedings pending in the Supreme Court of Judicature and the Court of Appeal, then manifestly, in the circumstances of the case, the Committee in carrying on its hearings into the Complaint herein and purporting to pronounce judgement before the conclusion of those relevant proceedings, wrongly exercised its discretion, WHEREFORE injustice has been caused to the Appellant.

6. The Committee erred in law and/or in fact when it held or found, expressly or impliedly, that the relationship of Attorney-at-law and client between the Appellant and Monica Whitter continued and/or was restored and/or was created by virtue of the fact that

   (i) the Appellant was a partner in the law firm of Messrs. Gaynair and Fraser and

   (ii) Messrs. Gaynair and Fraser had Carriage of Sale of the 'Cromarty' property (conferred, be it noted, by an Order for Sale of Realty made by the Supreme Court of Judicature of Jamaica on the 23rd day of June 1995.)

It is submitted that at all material times the relationship between the Appellant and Monica Whitter was that of Plaintiff and Defendant.

In the event, the Committee misdirected itself in law and hence, misapplied the relevant law to facts which it purported to find.

7. The Committee misdirected itself in purporting to hold that the Appellant was not in law permitted to sue Monica Whitter for the full gross percentage of any sum allegedly due to him under the contingency agreement as he had not completed the work he had agreed to do.

8. The Committee erred in fact and in law when it found and/or held that the Appellant did not charge fees which were reasonable in the circumstances, since he had not completed the work he had agreed to do.

9. The Committee erred in law when it ruled that the Appellant, although Judgement Creditor in Suit No. C.L.141 of 1993, brought by him against Monica Whitter, was, nevertheless, a Trustee of the entire proceeds of the said Monica Whitter's half-interest share in the sale of the property known as Cromarty which had come to his hands."

[30] On 5 February 2002 the following supplemental ground was filed:

" (1) Even if the evidence adduced before the committee amounted to professional misconduct within the meaning of the Legal Profession Act 1972 the draconian sanction of striking the name of the appellant off the roll was in all the circumstances of the case manifestly excessive and/or unwarranted;"

[31] A further supplemental ground was filed on 18 February 2002, namely:

"(2) In all the circumstances of the case the evidence adduced is not capable of amounting to professional misconduct in law. In the result

there was no basis upon which the Disciplinary Committee could lawfully have awarded the sanctions which it purported to do;"

On 21 May 2002 yet a further supplemental ground was filed. It states:

> "(3) That it was not open to the Disciplinary Committee to hold that the appellant had acted in breach of Canons I(b) and VII(b) of the Legal Profession (Canons of Professional Ethics) Rules (1978) since:
>
> (a) no such charge or charges had been preferred against him;
>
> (b) nor had he been required to answer any such;
>
> (c) nor had he been in any other way alerted that he stood in jeopardy of being condemned in respect of any such.
>
> The Committee therefore acted without or exceeded its jurisdiction in purporting to convict him of breaches of the said Canons."

[32] Additional grounds of appeal were filed on 5 January 2010 which are:-

> "1. The Disciplinary Committee found and acknowledged that the Complainant Monica Witter [sic] terminated the Appellant's retainer and/or the contingency agreement. The termination ended the relationship of attorney-at-law and client which pre-existed. Failing to appreciate the consequences and effect of the termination of that relationship, the Disciplinary Committee wholly misdirected itself in relying upon findings of fact and/ or mixed law and fact, arising on account of the adversarial relationship of Plaintiff and Defendant which supplanted that of attorney-at-law and client. This approach effectively undermined and vitiates the Disciplinary Committee's adjudication, its

findings of professional misconduct, judgment and orders.

2. (i) The commom law principle of disqualification by reason of being a Judge in one's own cause and of disqualification on the ground of apparent bias apply fully to the members of the Disciplinary Committee who were present when the decision was taken that the Complaint against the Appellant/Applicant proceed to trial. The members so present were Mrs. Pamela Benka-Coker, Q.C. and Mr. Andrew Rattray, who thereafter adjudicated on the complaint and entered judgment adverse to the Appellant. This is of especial significance since two of the members of the Committee who adjudicated namely Mrs. Pamela Benka-Coker, Q.C. and Mrs. Margarette [sic] Macaulay, had an Attorney-at-Law/Client relationship at the material time.

(ii) That the panel that heard the Complaint failed to disclose to the Appellant/Applicant that two of their members were present and participated in the decision to have the Complaint against the Appellant heard, thereby depriving the Appellant/Applicant of the opportunity to object to the said panel hearing and adjudicating on the said Complaint, to the great prejudice of the Appellant/Applicant. This is compounded by the fact that at the material time two members of the panel who heard the Complaint enjoyed an Attorney-at-Law/Client relationship. The failure to make these disclosures resulted in the Appellant not being afforded a fair hearing.

(iii) That in the circumstances the panel was automatically disqualified from hearing the Complaint, being effectively judges in their own cause, and/or tainted by apparent bias or a presumption of undue influence."

Appellant's submissions

[33] After making reference to the correspondence passing between the appellant and Mrs Whitter between 9 December 1987 and 9 August 1991, Mr Witter submitted that a review of the record established the appellant's commendable professional management of the complainant's business from the inception of the contingency contract until its termination by her in June 1991. The record, he argued, clearly demonstrates that the appellant satisfactorily relayed to the complainant all relevant information as to the progress of her business with due expedition and the complainant, inexplicably and presumably without reference to these circumstances, complained to the Disciplinary Committee that her matters were dealt with unprofessionally.

[34] It was further submitted by counsel that the Committee purportedly denounced the appellant for infringements of the canons with respect to the appellant's handling of the complainant's business, and keeping her informed before the retainer had been terminated. This, he contended, cannot be supported having regard to the evidence. The court's approach, he argued, should be to make a distinction between the appellant's professional work before and after the retainer was terminated. The termination of the retainer in unfinished circumstances effectively discontinued the attorney and client relationship, he contended. Thereafter, the relationship between the parties was that of plaintiff and defendant, he argued, and that relationship would be governed by the rules of court and not the canons.

[35] The appellant, he argued, at all material times adhered to the procedure demanded by the Civil Procedure Code and having testified that the complainant was minded to deprive him of his fees, it is understandable that he assiduously pursued his fees. However, the appellant's legal advisors, in framing the claim, erred in referring to it as a debt while, it may be, though it is not concluded, his advisors ought to have proceeded on a quantum meruit basis, he argued.

[36] It was further submitted by counsel that in striking off the appellant, the Committee's findings that the appellant failed to account and that he erred procedurally, were wrong. Counsel contended that an order for the sale of the land was made in the appellant's action against the complainant; even if he was wrong in not accounting to the registrar, he would have been required to have taxed the bill prior to rendering an account and as a consequence, it cannot be said that he had acted dishonestly or dishonourably for him to have been brought within the scope of canon VII(b)(ii). The appellant, he submitted, was the judgment creditor and was entitled to use the money in the manner in which he had done, as the time had not yet come for accounting.

[37] It was further argued by counsel that there could not have been an abuse of the process of the court by the appellant when the court had given judgment for a liquidated debt, and it was therefore not open to the Committee to have made a finding of an abuse of process. The Committee, he contended, misdirected itself in finding that section 22 of the Legal Profession Act (the Act) is applicable.

[38] It was not open to the Committee to have found the appellant to have been in breach of canons I(b) and VIII(b), counsel argued, as the complainant's affidavit contains no complaint in support of these canons, and there were no amendments of the complaint to include these breaches. The case of **Leslie Diggs-White v George Dawkins** (1976) 14 JLR 192 was cited in support of the submissions.

[39] Counsel also submitted that no confidential relationship was in existence between the appellant and the complainant as she had terminated the contract. All monies which came into the hands of the appellant, he argued, had been divested and the appellant was entitled to claim the 25% fees under the contingency agreement despite the Committee concluding that reasonable fees had not been charged. The Committee ousted the jurisdiction of the court in that it ought to have deferred to the Supreme Court's adjudication with respect to the fees as it was a matter for the court's determination and it should not have proceeded with the complaint, he argued.

[40] Subsequent to Mr Graham's entry of appearance and the order for payment in, there was due compliance by the appellant which shows that the appellant had put into practice that which the law required him to do and was therefore not acting dishonestly or misconducting himself, he argued. Counsel further submitted that there was no question of misconduct to justify the striking off of the appellant. Referring to **Georgette Scott v General Legal Council** SCCA No 118/2008 delivered on 30 July 2009, counsel stated that that case

warranted striking off for dishonesty but contended that the present case was not one of dishonesty on the appellant's part as he had given reasons for not disclosing the information in respect of the client's account. The cases of **Bolton v Law Society** [1994] 2 ALL ER 486 and **Salsbury v Law Society** [2009] 1 WLR 1286 were cited to bolster the submission. Referring to the facts earlier outlined in his submissions, principally those relating to the Committee's findings that the appellant failed to account, counsel submitted that a sanction of a suspension for five years would have been appropriate. For a period of five years prior to the hearing of the first appeal the Committee's order was in force and the five years would have been condign punishment, he argued. It was his contention that in addition to the five years, a severe reprimand would be adequate punishment.

[41] In the appellant's revised written submissions, he stated that:

> "24. The Committee was improperly constituted in that at all material times the Chairman was acting as Attorney-at-law for one of it's [sic] members which created an obvious risk in that, that member would not exercise her judgment independently of the Chairman or would be under the undue influence of the Chairman. Thus her adjudication is or may be impugned. Further, the other members of the panel along with the Chairman were present at the meeting and participated in the decision to proceed with the hearing of the complaint.
>
> 25. It is submitted that hearings before the Disciplinary Committee of the General legal council is subject to the standards of fairness, impartiality and justice no less than those to be expected in the conduct of proceedings in the Supreme Court.

26. The common law principle of automatic disqualification on the grounds of apparent bias applied as fully to the members of the panel who heard the complaint as they would apply to a Supreme Court Judge hearing proceedings in court.

27. In the instant appeal the issue of apparent bias having been raised should be thoroughly and carefully tested.

28. There is no suggestion that there was a personal or pecuniary interest as is the test applied in the case of **Porter vs**. **Magill 2 A.C 357**.

29. The real question is what the fair minded and informed observer would think - the man in the street. The observer would consider all the facts. They would consider the nature and composition of the panel, their qualification and the nature of the relationship between the members of the panel."

The appellant further submitted that:

" The submission is that it does not appear that they could sit as equals. The nature of the personal, professional and confidential relationship cannot be separated when they sit to independently consider the issues. There was an influential relationship in existence. Could the client disagree with her Attorney-at-law on legal matters especially in the determination of the complaint involving one of their colleagues? Against this background, there is the fact that after the complaint was laid and the Appellant responded to the complaint as he was required to do at a sitting of the Disciplinary Committee, two members of the panel who sat and heard the complaint namely the Chairman and Andrew Rattray were present when the complaint was considered and the decision taken to fix the complaint for hearing and they both sat and heard the complaint along with Mrs. Margaret McCauly [sic].

It is submitted that the test in the instant appeal is the reasonable apprehension or suspicion on the part of the fair minded and informed member of the public that the panel would not discharge its task impartially. The essence of the allegation of bias is based upon-:

a) The Solicitor and client relationship;

b) Two members sitting in the preliminary session and being a party to the decision taken to proceed with the hearing of the complaint.

There does not have to be any conscious or even unconscious bias. What is of concern is the appearance of the judicial process. If there is a potential for bias that is sufficient to disqualify the panel as is the instant case under appeal."

[42] The cases of **Re p (A Barrister)** [2005] 1 WLR 3019, **Meerabux v The Attorney General of Belize** [2005] UKPC 12, **Porter v Magill** [2002] 2 AC 357 and **Pelletier v The Attorney General of Canada et al** 2008 FC 803 among others were cited to bolster these submissions.

Respondent's submissions

[43] Dr Barnett submitted that the Committee appreciated the scope of its jurisdiction and was correct in its findings. Most of the findings of fact emanated from the appellant's admissions and uncontested allegations, he argued. He contended that this court, in 1989, made a decision confirming the declaration of the court below of Miss Whitter's proprietory interest in one half of the property, yet the appellant did nothing in implementing the court's order until 1991.

Although the balance purchase money was paid in 1996, it was not until 1999 that a sum of $1,700,000.00 was paid to the complainant and in January 2010, after the appeal had been listed for hearing, that a sum of $2,000,000.00 was paid, he argued. Remarkably, he submitted, in the letter of July 1999 the only deductions listed in the appellant's statement of account are the judgment and interest, which show that the appellant was not only paying himself a principal sum but also paying himself interest, although he stated that the money was not placed in an interest bearing account.

[44] Counsel further submitted that the complainant had the right to terminate the agreement and the best the appellant could have done was to endeavour to recover his fees on a quantum meruit basis found by McIntosh J and which finding had not been reversed by this court. The appellant failed to pursue the claim which he filed and all subsequent suits proceeded on the ground that he was a judgment creditor. Where due to an attorney's breach, a solicitor and client agreement is terminated, the client is not required to pay money, as shown in Halsbury's Laws of England Volume 41 page 117 paragraphs 5 and 6.

[45] The effect of McIntosh J's order, he argued, is that the appellant should have proceeded by way of quantum meruit and even if his fees came within the ambit of section 21 of the Act, the court retained jurisdiction to consider the matter. Section 21, he submitted, only excludes the application of section 22 in relation to "Fees payable under such agreement" and the agreement having

been rescinded, his fees would be governed by section 22. Consequently, there being no entitlement to the 25% under the contingency agreement, the appellant would have been required to base his case on a different ground, he argued.

[46] It was further submitted by him that the appellant, having had no contractual right to a contingency fee, would have been required to prove that he was entitled to retain that which was in effect "trust fund" and accordingly the Committee was correct in its conclusion that he had no lien on the proceeds of sale.

[47] In the orders for the sale of the realty, the court expressly recognized the interest of the defendant, Mrs Whitter, in the agreement for sale, in the projected transfer and the money. The money having been paid into the client's account as stated by the appellant, it became trust money thus imposing fiduciary duties on him for the period the money remained in the trust account and he ought to have retained a client's ledger for the client to see the state of the account, he argued.

[48] It was also counsel's submission that this is a case of performance of fiduciary responsibility on which the appellant had defaulted by failing to comply with his legal obligations. After making reference to the evidence as to the appellant's firm having the carriage of sale of the property, counsel submitted that, he, the appellant, being a judgment creditor ought not to have been

actively engaged in the sale of the property. It was also submitted by counsel that the sale was conducted by reason of a judgment, in which sale the appellant's firm must be treated as acting for all parties. He cited **Dalby v Pullen** 1 Russ and M 296 to buttress this submission. The appellant, he argued, had not sent a statement of account to the complainant, he did not place the money in an interest-bearing account, nor did he lay a bill of costs for taxation between 1987 and 1991. The portion of the proceeds of sale to which Mrs Whitter was entitled ought to have been paid into an interest-bearing account, counsel argued, and the interest earned must be paid to her.

[49] Counsel further argued that the amount recoverable by the appellant would have been the subject of a triable issue. Where property comes into the possession of a solicitor who is claiming as a judgment creditor, the solicitor's lien does not apply, he submitted. The contingency agreement, he submitted, was in respect of a percentage, consequently, the entitlement to receive any amount on the agreement would have only materialized on receipt of the funds despite the appellant's claim relating to prospective receipts which did not form the basis of the agreement and the Court of Appeal had not suggested that he was entitled to the contingency fee.

[50] Mr Wood submitted that on the issue of bias, or apparent bias, raised by the appellant, no reasonable jury or fair-minded, informed person would conclude that there is the possibility of bias on the part of the Committee. He made reference to **Scott v General Legal Council**, in which bias was raised,

and this court found, on the facts, that there was no evidence of bias. Counsel made reference to section 11 of the Act which governs the appointment of members of the Disciplinary Committee of the General Legal Council, and after recounting its provisions, submitted that the appellant's complaint of bias is preposterous, as the appellant, in his submissions stated that there was no suggestion of animosity or any question as to the Committee's integrity.

[51] In addressing the appellant's complaint as to a "symbiotic" connection between two members of the panel who heard the matter, Mr Wood, citing **McCalla v General Legal Council** (1994) 49 WIR 213, argued that those members were performing their statutory functions under the schedule to the Act. He submitted that in **McCalla v General Legal Council**, the court was of the opinion that participation in the process of setting down the matter for hearing or deciding on its dismissal is a limited process, directed by the statute, which could not be regarded as a ground for the disqualification of any member of the panel. Nor could there be any suggestion that any member of the Committee was acting in a prosecutorial role as the complaint was initiated by the client through her agent and the appellant had legal representation, he argued. The panel, acting in a judicial manner in accordance with the statute, scrupulously discharged its duties and there is no basis on which a fair-minded informed observer could conclude that the panel was apparently biased, he argued.

[52] It should be observed, he submitted, that the Committee's main concern in applying the sanction was the appellant's failure to account and this persisted up to the time of the hearing of the appeal. The appellant's conduct, he argued, left the panel only with an option of striking him off and this was clear from the appellant's admission that he allowed the complainant to have lost interest on the amount due to her.

[53] It was also counsel's submission that the cases of **Re p** (**A Barrister**), **Bolton v Law Society** and **Salsbury v Law Society**, cited by the appellant, do not offer him assistance. Counsel sought to distinguish these cases from the present case. Counsel also drew a distinction between the case under review and **Porter v Magill** and **Meerabux** to show that automatic disqualification would not apply in those cases.

Issues

[54] Before outlining the issues raised in the original and supplemental grounds of appeal and submissions, it is necessary to state that ground two of the original grounds was determined by the Privy Council in its decision of **General Legal Council v Frankson** [2006] UKPC 42, PCA No 8/2005 delivered on 27 July 2006, in which it was decided that Mr Basil Whitter had the locus standi to have properly sworn the affidavit in support of Mrs Whitter's complaint to the Committee. The following are the issues to be considered:

(1) Whether the findings and/or conclusions of the Committee were unreasonable having regard to the evidence.

(2) Whether the hearing by the Committee was tainted by bias in light of the relationship between two members of the panel.

(3) Whether the Committee erred in proceeding with a hearing while the suit initiated by the appellant against Mrs Whitter was pending.

(4) Whether the Committee erred in law or in fact in finding that an attorney and client relationship subsisted between the appellant and Mrs Whitter.

(5) Whether the Committee erred in holding that the appellant was not entitled to sue for the full gross percentage of the alleged amount due to him under the contingency agreement.

(6) Whether the Committee erred in law by holding that the appellant, despite being a judgment creditor in suit CLF 141/1993, was a trustee of Mrs Whitter's half interest in the gross proceeds of sale.

(7) Whether the striking off of the appellant is draconian.

Issue 1 - Unreasonable findings

[55] The fulcrum of the appellant's complaint is that the findings and conclusions of the Committee are unsupported by the evidence. This complaint, primarily revolves around the Committee's findings that he failed to account to the complainant and to inform her of the progress of her business expeditiously. It is a settled rule that an appellate court, being a court of review, is loathe to interfere with the findings of the court below unless that court is palpably wrong - see **Watt v Thomas** [1947] AC 484; **Industrial Chemicals Co (Jamaica) Limited v Ellis** (1986) 35 WIR 303, **Eldemire v Eldemire** (1990) 27 JLR 316

and **Campbell v Royes** [2007] PCA No 85/2006 delivered 3 December 2007. There can be no doubt that the foregoing principle is applicable to an order of a professional body from which an appeal has been made. As a consequence, an appellate court is slow to intervene in a tribunal's exercise of its discretion. This approach has been applied by the Judicial Committee of the Privy Council in respect of several of its decisions in appeals from disciplinary bodies. An appellate court, however, is not prevented, in its review, from setting aside the decision of a disciplinary tribunal if it is found to be plainly wrong.

[56] As a starting point, it would be prudent to make reference to such sections of the Act, and the rules and regulations made thereunder as are necessary for the purpose of this appeal. Section 11(1) of the Act empowers the General Legal Council to appoint a Disciplinary Committee comprising such number of persons as it thinks fit, not being less than 15. Section 12(1) makes provision for a person, who alleges to be aggrieved by an act of professional misconduct of an attorney-at-law to make a complaint to the Committee to be answered by the attorney. The section reads:

> "12(1) Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by an attorney, that is to say-

> (a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect);
>
> (b) any such criminal offence as may for the purposes of this provision be prescribed in rules made by the Council under this Part."

[57] Section 12(4) specifies the orders which the Committee may make. It provides:-

> "(4) On the hearing of any such application the Committee may as they think just make any such order as to –
>
> (a) striking off the Roll the name of the attorney to whom the application relates, or suspending him from practice on such conditions as they may determine, or imposing on him such fine as they may think proper, or subjecting him to a reprimand;
>
> (b) the payment by any party of costs or of such sum as they may consider a reasonable contribution towards costs;
>
> (c) the payment by the attorney of any such sum by way of restitution as they may consider reasonable."

[58] Section 21(1) permits an attorney-at-law to agree his fees in writing with his client. The section states:

> "21.–(1) An attorney may in writing agree with a client as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:

> Provided that if in any suit commenced for the recovery of such fees the agreement appears to the court to be unfair and unreasonable the court may reduce the amount agreed to be payable under the agreement."

Section 22 provides for the recovery of fees for work done after the service of a bill of costs on the party to be charged. It reads:-

> "22.- (1) An attorney shall not be entitled to commence any suit for the recovery of any fees for any legal business done by him until the expiration of one month after he has served on the party to be charged a bill of those fees, the bill either being signed by the attorney (or in the case of a partnership by any one of the partners either in his own name or in the name of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to the bill:
>
> Provided that if there is probable cause for believing that the party chargeable with the fees is about to leave Jamaica, or to become bankrupt, or compound with his creditors or to do any act which would tend to prevent or delay the attorney obtaining payment, the Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the attorney be at liberty to commence an action to recover his fees and may order those fees to be taxed.
>
> (2) Subject to the provisions of this Part, any party chargeable with an attorney's bill of fees may refer it to the taxing officer for taxation within one month after the date on which the bill was served on him.
>
> (3) If application is not made within the period of one month aforesaid a reference for taxation may be ordered by the Court either on the application of the attorney or on the application of the party chargeable with the fees, and may be ordered with such directions and subject to such conditions as the Court thinks fit.

> (4) An attorney may without making an application to the Court under subsection (3) have the bill of his fees taxed by the taxing master after notice to the party intended to be charged thereby and the provisions of this Part shall apply as if a reference for such taxation has been ordered by the Court."

[59] Money held by an attorney on behalf of his client is "trust money" defined in regulation 2(1) of the Legal Profession (Accounts and Records) Regulations 1999 as follows:

> " 'trust money' means 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 trust' has the same meaning."

[60] Regulations 3(1) requires the payment of trust money into a client's trust account: It states:

> "Every attorney who receives trust money (except money hereinafter in these Regulations expressly exempted from the operation of this rule) shall forthwith pay the money into an account at a bank to be designated as a clients' trust account and to be kept in the attorney's name or the joint names of the attorney and the client; and such an account is in these Regulations referred to as a clients trust account or trust account;"

[61] Regulation 17 specifies that failure to adhere to the regulations amounts to professional misconduct. It reads:

> "Failure by an attorney to comply with any of the provisions of these Regulations shall constitute misconduct in a professional respect for the purposes of section 12 of the principal Act."

[62] The canons made under the Legal Profession (Canons of Professional Ethics) Rules 1978, of which the Committee found the appellant to have been in breach read, as follows:

> VII(b) "An Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behavior which may tend to discredit the profession of which he is a member."
>
> IV(f) "The fees that an Attorney may charge shall be fair and reasonable and in determining the fairness and reasonableness of a fee any of the following factors may be taken into account:-
>
> (i) the time and labour required, the novelty and difficulty of the questions involved and the skill required to perform the legal service properly;
>
> (ii) the likelihood that the acceptance of the particular employment will preclude other employment by the Attorney;
>
> (iii) the fee customarily charged in the locality for similar legal services;
>
> (iv) the amount, if any, involved;
>
> (v) the time limitations imposed by the client or by the circumstances;
>
> (vi) the nature and length of the professional relationship with the client;
>
> (vii) the experience, reputation and ability of the Attorney concerned;
>
> (viii) whether the fee is fixed or contingent;

(ix) any scale of fees or recommended guide as to charges prescribed by the Incorporated Law Society of Jamaica, the Bar Association, the Northern Jamaica Law Society or any other body approved by the General Legal Council for the purpose of prescribing fees."

IV(r) "An attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with all information as to the progress of the client's business with due expedition."

IV(s) "In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."

VII(b) "An attorney shall-

(ii) account to his client for all monies in the hands of the Attorney for the account or credit of the client, whenever reasonably required to do so

and he shall for these purposes keep the said accounts in conformity with the regulations which may from time to time be prescribed by the General Legal Council."

VIII(b)"Where in any particular matter explicit ethical guidance does not exist, an Attorney shall determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

[63] The Committee in arriving at its conclusion said:-

"This Committee, after careful consideration of all the facts, careful perusal of the law, a careful consideration of all the circumstances has arrived at the conclusion that the conduct of the attorney is in breach of Canons, IV(f),(r),(s) and VII(b)(ii) of the Legal Profession (Canons of Professional Ethics) Rules of 1978, namely the attorney did not charge fees

which were fair and reasonable, he at one point in time did not deal with his client's business with all due expedition, and he did not provide his client with all information as to the progress of his clients [sic] business with all due expedition, he also acted with inexcusable or deplorable negligence or neglect in the performance of his duties.

The gravest breach of the 'attorney's' duties, and the one with the most far reaching consequences is his failure to account to the complainant for all the monies in the hands of the attorney for the account and credit of the complainant. We find the conduct of the attorney viewed as a whole, totally unacceptable. We do not understand what could have prompted him to conduct himself in the manner in which he did. We cannot understand what could have convinced him that he had a 'right' in law to use the funds of the complainant in the manner in which he did, and then not pay a single cent to the complainant representing any balance of the proceeds of sale due to her since October 1996. The proceeding interpretation is put in its most favourable light, but in our considered opinion, on the facts of this case, the attorney was not entitled to deduct or retain any fees, as he had failed to act pursuant to section 22 of the Legal Profession Act. We are of the view that the attorney has failed to maintain the honour and dignity of the Profession, and has acted in a manner which tends to discredit the profession. The attorney has conducted himself in a manner which does not promote confidence in the integrity of the administration of Justice and the integrity of the Legal Profession.

The conduct of the attorney is disgraceful and dishonourable and is also in breach of Canons I(b) and VII(b) of the Legal Profession (Canons of Professional Ethics) Rules. The attorney abused the process of the Courts in order to give legitimacy to proceedings that ought not to have been pursued, namely, the suit instituted by him against the complainant, suit No. C.L. F141 of 1993."

[64] Arising from the Committee's findings and the foregoing conclusions, the question now emerging is: was there sufficient evidence on which the Committee could have properly reached its decision? The brunt of Mr Witter's assault was with reference to the findings of the Committee on the disputed facts as to whether the appellant had informed the complainant and her son of the progress of her business, on the question of his failure to respond to correspondence sent to him, whether he had sent the complainant documents with respect to the taxation in suit CLF 141/1993 and whether the appellant had accounted to the complainant.

[65] There was no challenge to certain undisputed facts. Essentially, they are as follows:

(a) The joint tenancy in the property known as "Cromarty" was severed and a tenancy in common was substituted therefor with the complainant and her former husband sharing equally. The property should have been sold and accounts taken, as stipulated by this court's order.

(b) It was agreed that a contingency fee of 25% of all sums received in respect of the property would be the appellant's fees provided that no additional amount would be payable by the complainant. This agreement was terminated by the complainant.

(c) Messrs Gaynair and Fraser were appointed under the order of 9 May 1996 as the attorneys-at-law having the carriage of sale. On 27 September 1996 the sale was completed. The deposit of $2,000,000.00 was paid into Messrs Gaynair and Fraser's clients' account. A cheque for the balance purchase money together with the costs of transfer was lodged in Messrs Gaynair and Fraser's clients' account. Sums amounting to $2,271,687.50 were paid out, from the proceeds of sale, by the appellant to Mr WB Frankson and himself between 8 September 1996 and October 1996, as fees.

(d) Mrs Whitter did not receive the proceeds of sale from the property. Neither she nor her son, nor Mr Graham was given a statement of account, nor were they informed as to how the money was disbursed or where the money was held.

(e) It was the appellant's admission that he was a trustee for the money he held for the client, that he was under a duty to inform the client about the progress of her business, and that interest which would have been due to the complainant had been lost by his failure to have placed the money in an interest-bearing account.

(f) An order of Ellis J required the appellant to account for and pay into court all sums received by him in respect of the complainant's

interest in Cromarty. The full amount due and owing was not paid by the appellant in obedience to the order. Only $3,000.000.00 was paid.

[66] There was evidence disclosing that the appellant had been tardy in pursuing the complainant's matters. There was a delay on his part between 1989 and 1991 in executing the order of the Court of Appeal. He failed to furnish the complainant and her agent with information as to the status of the complainant's affairs, particularly giving an account of the funds received by him.

[67] Having received the proceeds of sale and having admitted that he was trustee for the funds which he had in his possession, he was obliged to have accounted to the complainant for it. His evidence clearly reveals that he had not done so. Mr Whitter disclosed that during his discussions with the appellant, he informed him that he could not pay over the funds until his fees were assessed by the court and that he had not placed it in an interest-bearing account due to the state of the country. It is of significance that the appellant asserted that payment to the complainant was subject to the taxation of his costs, yet disbursed the funds, from that which he had in hand, to Mr WB Frankson and himself within the space of approximately six weeks of the receipt of the money, but taxation of the costs had not been done.

[68] He agreed that an attorney-at-law ought not to keep clients' money for a very lengthy period unless specifically authorized so to do. However, he stated

that the retention of the complainant's funds was not for an unnecessarily long time. This statement contradicts the undisputed evidence disclosing that the appellant retained the money for approximately three years, depriving the complainant of the interest on it, and notably only paying into court a portion of the sum due to the complainant despite an order of the court.

[69] In arriving at its findings of fact and conclusions, the Committee would have made adequate use of the opportunity of hearing the witnesses and assessing their demeanour. It was for the panel to decide how the evidence before it affected the credibility of the witnesses. Its reasoning and findings are demonstrative of the fact that the Committee embarked on and carried out a detailed and critical assessment of the oral and documentary evidence. We are satisfied that there were no obvious improbabilities about Mr Whitter's evidence which was accepted by the Committee, nor was there any defect in the documentary evidence to create an impression that the Committee was wrong in its assessment. There is nothing to show that the Committee had misunderstood or disregarded any material fact or imported into the evidence any extraneous material in arriving at its findings and conclusions.

Issue 2 – Bias

[70] We will now direct our attention to the appellant's complaint of bias. It is a settled rule that, in the decision-making process, fairness is a requisite tool. There is a presumption that a decision-maker will act impartially. It follows that the decision maker should ensure that his or her decision is not in breach of the

duty of fairness. A party, raising the complaint of bias on the ground of unfairness, is saddled with the burden of showing that the decision-maker acted unreasonably, or unfairly. Where it is shown that there is in fact a breach of the duty as to procedural fairness, the decision will be set aside, in that, it will be apprehended that the decision maker is biased. In determining procedural fairness, the proceedings must be considered in its totality as stated by Lord Hope in **Meerabux**, speaking to the court's approach in examining the question of fairness, when, at paragraph 40 he said:

> "The question whether the proceedings are fair must be determined by looking at the proceedings as a whole."

[71] It is a well established fundamental principle of law that a man cannot be a party in his own cause - see **R v Gough** [1993] AC 646, [1993] 2 WLR 883; [1993] 2 All ER 724; **Dimes v Proprietors of Grand Junction Canal** (1852) 3 HL Cas 759 and **R v Bow Street Metropolitan Stipendiary Magistrate ex P Pinochet Ugarte (No 2)** [2001] 1 AC 119. Every member of a tribunal, engaged in judicial or quasi judicial proceedings, must act judicially. Any person who has a direct or indirect interest in the subject matter of an inquiry over which he or she presides is automatically disqualified from adjudicating on it. Disqualification also applies to a situation where a person's conduct, relationship or friendship with a party to the cause, or his or her belief, portrays apparent bias.

[72] In **Pinochet No 2**, Lord Hoffmann, speaking to the matter of automatic disqualification on the ground of apparent bias, said at page 142:

> "The fundamental principle is that a man may not be a judge in his cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."

[73] Over the years, various tests have been propounded with respect to the law of bias. The test was finally settled in **R v Gough** in which it was stated to be whether there was a "real danger of bias". The test was modified in **Porter v Magill** when Lord Hope said at page 494:

> "I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in

> Scotland. I would however delete from it the reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[74] This test was followed in several cases including **Pinochet No 2**; **Re Medicaments and Related Classes of Goods (No 2**) [2001] 1 WLR 700 and **Tibbetts v The Attorney General of the Cayman Islands (Cayman Islands)** 2010 UKPC 8 delivered on 24 March 2010. In **Tibbetts**, Lord Clarke depicted a fair minded observer in the following terms:

> "The fair minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious: R v Abdroikof [2007] UKHL 37, 2007 1 WLR 2679 per Lord Bingham at para 15."

[75] Bias may be conscious or unconscious. It is an objective test as to the view of a reasonable man knowing all the facts. The view of a reasonable man in the street that there may be real bias on the part of a decision-maker is paramount; "…public perception of the possibility of unconscious bias is key" (per Lord Hope in **Meerabux**). The public's apprehension of real bias is central to the issue of bias. However, there must be in existence reasonable evidence to show bias.

[76] Reasonable suspicion may amount to bias. However, surmise or conjecture is insufficient: see **R v Camborne Justices ex p Pearce** [1954] 2 All ER 850 and **R v Nailsworth Licensing Justices ex p Bird** [1953] 2 All ER 652. So too, is a vague suspicion or the mere possibility of bias on the part of an impulsive or irrational person - see **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451. There must be an appearance of a real likelihood that a reasonable, fair-minded person would think that an adjudicator is biased.

[77] The appellant prefaced his complaint on two limbs. The first is an attack on the constitution of the Committee at the hearing. The second relates to two members of the Committee participating in a preliminary decision to proceed with the hearing of the complaint against him.

[78] The first limb will now be addressed. The gravamen of the complaint is that an attorney and client relationship existed between two members of the panel who adjudicated on the matter against the appellant which was before the disciplinary body, these members being Mrs Pamela Benka Coker QC, the chairman of the Committee and Mrs Margaret McCaulay. The appellant's argument is that the presence of these two members on the Committee raises an apprehension of bias on their part. The question now arising is whether the fact that these persons enjoyed a client and attorney relationship, they, having sat on the Committee, would raise reasonable suspicion of bias in the eyes of an independent observer who is cognizant of all the facts.

[79] In ascertaining whether the appearance of bias would be obvious to a reasonable man, this court is guided by the approach enunciated in **Re Medicaments and Related Classes of Goods No 2**, where at page 727 that court said:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility,…or a real danger, the two being the same that the tribunal was biased."

[80] The connection between Mrs Benka Coker and Mrs McCaulay was born out of a professional relationship in which Mrs Benka Coker was retained to represent Mrs McCaulay in certain matrimonial proceedings unrelated to the matters giving rise to the complaint against the appellant and this, the appellant has acknowledged. Could it be said that the mere solicitor and client relationship would raise a reasonable suspicion or apprehension of bias on the part of Mrs Benka Coker and Mrs McCaulay in the circumstances of this case? In **Locabail**, the English Court of Appeal, although prefacing its observation that every case must be decided on its facts, espoused the view, inter alia, that a previous solicitor and client relationship could not give rise to disqualification in certain circumstances including where the solicitor or advocate is involved in the case being adjudicated upon. The court stated at page 480:

> "It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the

facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see K.F.T.C.I.C. v. Icori Estero S.p.A (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6,8/91). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case, or if, in a case where the credibility of an individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta) v. Kelly (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge,

> earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

[81] Although the court in **Locabail**, spoke to the fact that, generally, a previous solicitor and client relationship would not give rise to automatic disqualification in circumstances where they are adjudicators, this does not mean that the same principle could not be applied to a situation where the attorneys enjoy a solicitor and client relationship during the currency of their adjudication on a matter. This having been said, we are not unmindful of the appellant drawing our attention to **Re p** (**A Barrister**). In that case a barrister who was convicted by the Disciplinary Tribunal of the Council of the Inns of Court appealed to visitors to the Inn of Court. A lay representative who was a member of the Professional Conduct and Complaints Committee, which decided whether to prosecute and if appropriate, decided on the prosecution of a member of the English Bar against whom a complaint was made, was appointed to serve on the visitors panel. An objection that she was a member of the Professional Conduct and Complaints Committee and was automatically

disqualified from sitting on the visitors' panel as she would be a judge in her own cause, was successfully raised. The decision in that case turned on the application of article 6(1) of the European Convention as to the lack of independence by the lay person. Consequently, this case does not offer any support to the appellant in the present case. In **Meerabux** and **Porter v Magill** bias was not established. These cases, therefore, would also be of no assistance to the appellant.

[82] It has not been shown that the two members of the panel had a direct or indirect interest in the outcome of the hearing against the appellant. The reputation and integrity of these two members are unimpeachable. There is nothing to show that Mrs Benka Coker could or would have influenced Mrs McCaulay in making her decision. Mrs McCaulay is an attorney-at-law, not a lay person. She is fully conversant with the law. Mrs McCaulay is independent and would have her own view of the case. Accordingly, she would bring to bear her own assessment of the evidence and make her own decision. Additionally, there is no link between the proceedings in which Mrs Benka Coker was retained by Mrs McCaulay and the complaint against the appellant.

[83] Further, we were attracted to the observations of the respondent that there will be professional relationships between members of the legal profession in representing each other and that interaction between members of the profession in itself could not be a basis for disqualification unless such interaction is connected to the complaint to be determined. It was counsel's further

observation that the Act, having permitted members of the Committee to be drawn from members of the legal profession, there is a distinct possibility that attorneys who have shared a client and attorney relationship would sit on the Committee on the adjudication of cases.

[84] Mrs Benka Coker and Mrs McCaulay had no interest in the outcome of the case. It could not be said that their conduct could raise a suspicion of bias. They were simply a part of the tribunal appointed to hear the complaint against the appellant. They could not be regarded as acting as judges in their own cause. Consequently, a fair-minded observer being fully aware of the circumstances would not ascribe bias to them by their adjudication on the matter.

[85] We now turn to the second limb of the appellant's complaint. The appellant's objection in this regard is that Mr Andrew Rattray and Mrs Benka Coker were participants in the process when the decision was arrived at to pursue the hearing of the complaint and they also adjudicated on the hearing. Arising from this, he complained that their participation in the entire process was unfair, and that they, being tainted by bias, ought to be disqualified as they were judges in their own cause.

[86] The question arising is whether the involvement of the members of the panel in making the decision that the matter should proceed for hearing would make them judges in their own cause by their subsequent adjudication on the complaint against the appellant. This gives rise to the issue whether the ruling

that the complaint should be heard can be interpreted as meaning that a decision was taken by the Committee that there was reasonable ground to believe that the complaint was well founded. The resolution of the matter rests in the efficacy of rule 4 of the Fourth Schedule to the Act. By that rule, where the Committee is of the opinion that a prima facie case has not been made against an attorney, the Committee must dismiss the application against him. However, where in the opinion of the Committee a prima facie case is shown, the Committee is obliged to fix a hearing date.

[87] In **McCalla v General Legal Council**, this court, construed the term "prima facie", within the context of rule 4. In considering, among other things, the legal effect of rule 4, this court held that the term was a misnomer and that before fixing a hearing date, the Committee would be engaged in the process of eliminating unwarranted complaints. Rattray P at page 230 said:

> "In my view, all this rule provides is that before a date for hearing is fixed a decision must be taken by the Disciplinary Committee based, not on evidence (since none is before it at this stage), but upon the nature of the allegations as to whether this is a matter on which the committee should proceed. If the matter is trivial or frivolous there does not exist 'a prima facie case' for the committee to proceed to trial. Frivolous allegations may be made against attorneys at law, the frivolity of which is evident and this provides for the committee a process by which it can weed out insubstantial complaints and clear the list of matters unmeritorious.
>
> The provision is there for the protection of the attorney at law as well as the convenience of the

> committee and cannot provide a valid ground for a complaint by the appellant."

Wright JA speaking to the meaning of rule 4 placed it in this context:

> "Submissions on this aspect of the appeal proceeded on the basis that the lodging of the complaint is equivalent to lodging a criminal charge which requires that all the elements of the charge be established beyond a reasonable doubt. The fallacy of such a contention is obvious because, if prima facie meant proof beyond a reasonable doubt, then by necessary implication the charge against the attorney would be held to be proved even before he had been notified of the complaint. The context in which the term 'prima facie case' is used in rule 4 demonstrates that it is a misnomer. The stage at which it can be contended in adversarial proceedings that a prima facie case has been made is reached when the accusing side has presented a sufficiency of evidence in support of the charge that the opponent is required to answer. It would, indeed, be startling to hold that before there has been any response from the attorney, the Disciplinary Committee could, on the untested information supplied by the appellant, find that a prima facie case, as the term is generally understood, has been made out. It would follow that when the complainant's case is presented at a hearing in which the attorney participates it would not be open to him/her to submit that he/she should not be called upon to answer because a prima facie case had not been made out since that stage had been reached long before the hearing began. In my judgment, the provision in rule 4 for the dismissal of the complaint where no prima facie case is shown simply indicates the meaning in the rule which is a case serious enough to require a response from the attorney. It would be ridiculous to summon an attorney to answer charges which are frivolous or misconceived. In such cases the prima facie case required by the rule would not have been shown. My opinion, therefore, is that counsel's submission being predicated upon an error induced by the rule is misconceived."

[88] Proceedings before the Committee are inquisitorial, not adversarial. The filing of a complaint before the General Legal Council is not equivalent to a criminal charge as Wright JA clearly stated in **McCalla v General Legal Council**. As rightly submitted by the respondent, the role of the Committee is not prosecutorial, as contended for by the appellant. The mere fact that the panel, or a member of the panel makes a decision that a prima facie case has been shown does not make all or any member a judge in his own cause if he or she also participates in the subsequent proceedings determining the matter. The Committee at the initial stage of the proceedings would not have been obliged to ferret out information from the witnesses before them or to have evaluated and assessed the evidence before deciding that the complaint must be heard. In such circumstances, it could not be said that the Committee had performed the duty of a prosecutor in sending a complaint forward for hearing. If the legislators had intended that the Committee, in executing its duties, should do so in a prosecutorial context, they would have expressly so stated.

[89] A member of a panel which presides over a preliminary hearing arising from a complaint by an aggrieved party does not act as a judge in his own cause if he subsequently sits on the substantial hearing. We are supported in this view by the case of **Panton and Panton v Minister of Finance No 2** (2001) 59 WIR 418, [2001] UKPC 33. In that case, the president of the Court of Appeal was a member of the panel of judges who ruled in favour of the constitutionality

of the Financial Institutions Act. At the time of the enactment of the legislation, the president of the court was the Attorney General who had been the Government's principal legal advisor and had, prior to the enactment, executed a certificate that the bill was not unconstitutional. The board held that he had no interest in the outcome of the proceedings and the constitutionality of the legislation was not a cause to which he was a party, nor did the certification make him a "champion" of its constitutionality and that no appearance of bias on the part of the president, existed.

[90] It cannot be disputed that Mrs Benka Coker and Mr Rattray were members of the Committee at the time the decision was taken that the matter should be heard. Nor can it be denied that they presided over the hearing. No injustice or prejudice would have been suffered by the appellant, by reason of the members of the panel submitting the complaint for hearing and subsequently adjudicating on it. The proceedings were fairly and justly conducted. Consequently, the appellant has not established that a fair-minded observer, with knowledge of the facts, would ascribe bias on the part of the members of the panel despite his valiant effort to persuade us otherwise.

Issue 3 – Deferral of the hearing

[91] We will now advert our attention to the issue as to whether the Committee ought to have deferred the hearing pending the application made by

Mrs Whitter to set aside the judgment obtained by the appellant against her for the recovery of the contingency fee.

[92] At the commencement of the hearing by the Committee, Mr Maurice Frankson, brought to its attention, Mrs Whitter's application to set aside the default judgment in suit CLF 141/1993 and requested that the Committee decline to proceed with the hearing then. The Committee, treating Mr Frankson's request as an application for a stay, refused to accede to it and as a matter of law, proceeded with the hearing.

[93] The Committee is empowered to grant a stay of proceedings. However, in granting a stay, there must be evidence by the party applying for the stay, to show that a stay is warranted. The appellant, accordingly, would have been required to show that there was a duplication between the relief sought in suit CLF 141/1993 and the complaint before the Committee, that there would be oppression or abuse of process if the matter before the Committee proceeded and show the absence of any other consideration against the remedy sought, for example, unreasonable delay or acquiescence - see **Slough Estates Ltd v Slough Borough Council** [1968] Ch 299. None of these factors was established by the appellant.

[94] Mrs Whitter's application to set aside the appellant's judgment related to non-service of the writ of summon on her. Although the appellant contended that the matter before the court related to the contingency agreement and that

the Committee, having proceeded with the hearing, usurped the function of the court, it is clear that the proceedings in CLF 141/1993 were not identical to the issues before the Committee. The appellant could not have succeeded on his claim which the Committee rightly considered an abuse of the process of the court. In light of the finding of McIntosh J, he would have had to seek to be compensated by way of an action for quantum meruit. Therefore, he could not have recovered any amount by way of a suit for a liquidated sum. In these circumstances, the appellant has not shown that the Committee, in proceeding with the hearing has caused him any injustice.

[95] The Act having endowed the Committee with the right to hear and determine the complaint, the Committee, in proceeding with the application had not exceeded its jurisdiction.

Issue 4 - Whether client and attorney relationship continued

[96] We will now consider whether there was an error on the part of the Committee in finding that the relationship of client and attorney continued after the termination of the retainer by the complainant. On the determination of the retainer by Mrs Whitter, the appellant would have been under an obligation to return all files to her, subject to the payment of his fees incurred up to that time, but having received no payment for the work done, he ought to have taxed his bill of costs and collected his costs. Thereafter, the files should have been submitted to the complainant by the appellant. He did not do so. Further, Mrs

Whitter obtained new representation and he was informed of that fact. However, no undertaking, as would have been required, was given to him or, extracted by him for the payment of his fees. It is also of significance that he failed to acknowledge the complainant's new attorneys-at-law, respond to Mr Graham's enquiries or account to the complainant and pay over the amount due to her. Having regard to all these matters, it could not be said that he had not continued the attorney and client relationship.

[97] He procured an order in which his firm had the carriage of sale. By taking this step, he would be acting for the vendor as well as the complainant, as shown in **Dalby v Pullen**, cited by Dr Barnett. The proceeds of sale were paid into his firm's clients' account. He made payments out of the funds. The appellant, having continued to deal with the matter, despite the repudiation of the agreement by the complainant, it cannot be said that he could not be treated as still acting for Mrs Whitter up to the time of making payment to her. His receipt of the proceeds of sale and the fact that he actively dealt with the money show that the client and attorney relationship between Mrs Whitter and himself continued and therefore could not be correctly regarded as having ceased.

Issue 5 - Entitlement to contingency fee

[98] The question as to whether the appellant was entitled to charge the 25% contingency fee will now be addressed. It is permissible for an attorney to

recover fees on the success of his client. Such fees are recoverable by agreement or on taxation. As a rule, an attorney, when retained, undertakes to complete the transaction which forms the subject matter of the retainer - see **Warmingtons v McMurray** [1937] 1 All ER 562. As a consequence, a retainer is an entire contract in which the attorney is required to carry out and complete the transaction which he is engaged to do and on completion, receive remuneration.

[99] The contingency agreement between Mrs Whitter was evidenced in writing. It stipulates that, he, the appellant, would represent Mrs Whitter in recovering the value of her interest in "Cromarty" as well as a loan of £10,000.00 for a contingency fee of the amount received from the property. The payment to her would have been exclusive of 25% of such sum as received on completion of the business which he agreed to carry out. The agreement being an entire contract and there being no express term enabling one party to terminate it, the complainant having terminated the agreement, it would have been for the appellant to have sought to establish, by an order of the court, that the termination was a breach of contract. If, as counsel for the respondent has rightly stated, it is shown that the termination was due to his failure to perform the terms of the agreement, then he would not be entitled to fees. However, if it is established that the fault resided with the complainant, then he would be entitled to a sum on a quantum meruit basis. As correctly submitted by the respondent, the sum recovered may or may not be equivalent to the 25%

agreed on, bearing in mind that the appellant had not completed the work up to the time he had brought the suit to recover the 25%.

[100] It follows therefore that the appellant would not be entitled to claim a contingency fee. Further, in response to questions from the Committee, he admitted that he could have had a lien only on such amounts to which he was entitled. Although the Committee found that he would not have had a lien on the proceeds of sale, citing the case of **Miller v Atlee** (1849) 3 Exch 799, it went on to say that if he had a lien, it could only be attached to the precise amount due to him. It has not been shown that he could have had a lien for a sum commensurate with that which he could have obtained under the 25% contingency fee agreement.

[101] The appellant contends that section 21 of the Act applies in respect of the fees payable to him as they were payable under the agreement. Any fees to which he may be entitled would not be payable under that section. It is clear that the termination of the agreement rendered section 21 inapplicable. Fees under this section would only be recoverable if the appellant had performed the task which he was required to do under the agreement prior to its termination by the complainant. The appellant's remedy therefore, would be founded in section 22 of the Act. In keeping with the provisions of this section, his recourse would have been for him to have laid a bill of costs for taxation and to have it taxed.

[102] It cannot be disputed that the Committee made a finding that the appellant's fees were unreasonable. This finding was made under canon IV(f). The appellant was not entitled to have sought the recovery of his fees as a debt. This would have been sufficient evidence for the Committee to have made its finding that the fees were unreasonable despite the appellant's contention that that such a finding was wrong.

Issue 6 - The appellant a trustee, despite being a judgment creditor

[103] We will now address the issue as to whether the Committee was wrong in stating that the appellant was the complainant's trustee and also regarded him a judgment creditor. Although the appellant, was, on the face of it, a judgment creditor, the judgment obtained by him was not one which he should have enforced as he was not entitled to have brought the claim for a debt. What is of significance is the fact that the appellant sought and obtained an order giving his firm the carriage of sale for the property and maintained dominion over the funds received. This gives rise to a confidential relationship. He having made payments from the funds to Mr WB Frankson and himself, as the respondent rightly submitted, all obligations of an attorney and client relating to the sale existed and he owed a duty to account to the complainant. The money he held was trust money falling within the purview of regulation 2(1) of the Legal Profession (Accounts and Records) Regulations. The regulations, in expressly imposing the duties of a trustee upon him, required him to furnish a report to the complainant, and in these circumstances such report ought to contain

detailed information regarding the receipts and disbursements of the funds in his possession and should be in the proper form of a statement of account. A statement contained in a letter of 20 July 1999 shows the following:

"Sale Price		$7,875,000.00	
Less			
Transfer Tax	$590,625.00		
½ Cost Stamp Duty	$216,557.50		
½ Cost Registration fee	$19,687.50		
Bank Charges	$60.00		
½ Agreement for Sale	$5,000.00		
½ G.C.T. @ 15%	$750.00		
Attorneys-at-law Costs On Transfer	$236,250.00		
G.C.T. @ 15%	$35,437.50		
Judgment plus interest To 30/09/96	$2,035,760.35		
TOTAL		$3,140,127.85	
AMOUNT DUE			$4,734,872.15
AMOUNT PAID INTO COURT			$3,000,000.00
BALANCE DUE:			$1,734,872.15"

This attempt to furnish an account was inadequate and in any event, it was not provided until after the hearing before the Committee.

[104] The fact that the Committee found that he was a judgment creditor would not in any way affect or invalidate the finding that he had an obligation as a trustee to account to the complainant.

Issue 7- Sanction – Whether draconian

[105] We now move to the question whether the finding of professional misconduct justifies striking off. Mr Witter contends that the acts of the appellant were not in breach of the canons as to amount to misconduct. The tenor of his submissions seems to be that any misdeed on the appellant's part, though not admitted, could only have amounted to gross negligence, in which case striking off would not be appropriate. So then, were the acts of the appellant in dealing with Mrs Whitter's case sufficient to warrant a finding of professional misconduct? In **Re Cook** (1889) 5 TLR at pages 407 and 408 Lord Esher MR, speaking to the situation in which a disciplinary tribunal can properly employ its penal jurisdiction over an attorney, made the following observations:

> "But in order that the court should exercise its penal jurisdiction over a solicitor it was not sufficient to show that his conduct had been such as would support an action for negligence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable in his profession. A professional man, whether he were a solicitor or a barrister, was bound to act with the utmost honour and fairness with regard to his client. He was bound to use his utmost skill for his client. …If an attorney were to know the steps which were the right steps to take and were to take a multitude of wrong, futile, and unnecessary steps in order to multiply costs, then if there were both that knowledge and that intention and enormous bills of course resulted, the attorney would be acting dishonourably. A solicitor must do for his client what was best to his knowledge, and in the way which was best to his own knowledge, and if he failed in either of those particulars he was dishonourable."

[106] The foregoing would have afforded the Committee a platform from which it could judge the standards by which an attorney should act in light of the nature of the complaint against him. It would be for them to say whether his or her lapse or omission shows that he or she had discharged his or her duties in a manner bereft of probity and trustworthiness amounting to misconduct.

[107] In the case under review, although there was evidence that the appellant failed to account to the complainant, to her son and to Mr Graham that he had collected the proceeds of sale from Mrs Whitter's half share in "Cromarty", it seems to us that he was under the mistaken view that he was entitled to the contingency fee as agreed, he having been advised by very senior counsel that he was so entitled. The letter of 9 July 1991 from WB Frankson to the complainant supports the view that the appellant had received such advice.

[108] On examination of the material before the Committee, several matters were undoubtedly obvious. Essentially, the Committee's approach to the evidence cannot be said to be erroneous in law or on the facts. Having heard the appellant's evidence and his explanation for his dealing with the complainant's case, the Committee was entitled to conclude that his conduct fell below that which was required of an attorney executing his duties within the constraints of the relevant canons of the Legal Profession (Canons of Professional Ethics) Rules (1978). There was ample unchallenged evidence from the complainant's witnesses and the appellant's admissions for the Committee to have concluded

that the appellant had contravened canons I(b), IV(f), (r), (s), VII(b)(ii), and VIII(b) and was therefore guilty of misconduct.

[109] It cannot be denied that a disciplinary tribunal is best suited for assessing the seriousness of an attorney's contravention of the canons. The Committee, in imposing a sanction, may: strike off the name of the attorney from the roll, suspend him from practice, order the payment of a fine, or reprimand him, as provided for by section 12(4)(a) and (b) of the Legal Profession Act. Undoubtedly, the determination of an appropriate penalty is, indeed, an extremely difficult task which requires the balancing of the interest of the public against the interests of justice.

[110] In **Bolton v Law Society**, the appellant, a solicitor, received a sum which was advanced by a building society in respect of the sale of a house. The appellant disbursed the funds before completion of the sale instead of retaining it in the clients' account. The security documentation in the building society's favour was never executed. The solicitor was suspended from practising for two years. On appeal, fresh evidence of the appellant's good character was admitted. The court quashed the suspension and substituted a fine.

[111] Sir Thomas Bingham MR, in expressing his opinion on the matter, acknowledged the right of a disciplinary body to impose such penalty as befitting the transgressions of an attorney. He recognized that attorneys are required to discharge their professional duties with integrity, probity and complete

trustworthiness bearing in mind "the essential issue which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness". At page 518 he said:

> "If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking-off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension."

[112] In **McCoan v General Legal Council** cited by the respondent, a registered medical practitioner was found to have been involved in an improper association with a woman for a period of time and his name was struck from the register. An appeal against the sentence imposed by the Disciplinary Committee, was dismissed despite a finding that there was no abuse of his position nor was there any element of seduction or adultery. The sanction imposed on **McCoan** appears to be harsh in that the encounter between the woman and him seems to have been consensual. However, the tribunal could not have imposed any penalty other than the removal of his name from the register, as removal was the only sanction provided for by the English Medical Act 1956.

[113] In **Salsbury** the appellant was a solicitor and a partner in a firm. He agreed with the trustees of his old school to carry out professional work, as a clerk to the trustees, in his personal capacity. The appellant altered a cheque for £862.50 paid to him by the trustees to read £1,862.50. His explanation for increasing the amount was that he had done extra work for the trustees and was entitled to an additional sum but did not wish to have the trustees amend the cheque or to write a new one in order to avoid giving an explanation as to the increased amount being due to him. Criminal charges were brought against him and on conviction, he was sentenced to a conditional discharge of 12 months and ordered to pay £300.00 towards the prosecution's costs.

[114] At the hearing, the Solicitor's Disciplinary Tribunal, although accepting his explanation for altering the cheque that the money was due to him, found that he was convicted of dishonesty and as a consequence struck him off the Roll from practicing as a solicitor. On appeal, however, the tribunal's order was set aside and a suspension was substituted therefor. There were mitigating features which the court felt placed this case in a small residual category of cases of dishonesty in which striking off may not be appropriate.

[115] Although it is established that dishonesty is not a pre-requisite for striking off, nontheless there have been several recent authorities which have found that dishonesty notwithstanding, striking off was inappropriate and a period of suspension was substituted instead (see eg **Holy v Law Society** [2006] EWHC

1034 (Admin)). In **Salsbury**, Jackson, L J expressed the following opinion which was shared by Sir Mark Potter P and Arden L J:

> "… the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court, must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless, if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere".

[116] The Committee's findings that the acts of the appellant are so grave as to justify his name being removed from the Roll appears to be excessive and harsh. The most serious breach found was the appellant's failure to account to the complainant. This appears to have been the driving force in his being struck off. There being no evidence of any previous breach having been committed by the appellant, it is reasonable to conclude that his conduct is and has been otherwise within the constraints of the Legal Profession Act and the relevant rules and regulations attendant thereto. The case of **Scott v The General Legal Counsel** cited by the respondent involved proven acts of dishonesty and can easily be distinguished from the instant case which seems to us to warrant a different approach.

[117] After giving this matter anxious consideration, we feel that the sentence imposed by the Committee was inappropriate and that an appropriate sentence would be a period of suspension. We are fortified in that view by the words of

Sir Thomas Bingham in **Bolton v Law Society** quoted at paragraph [110] above to the effect that if there is no proven dishonesty, a lapse in the required standard of professional conduct, although still to be regarded as serious, may not necessarily result in a striking off order. In that vein, we find much significance in the fact that the Board saw fit to grant the appellant a stay of the striking off order.

[118] A factor to be considered in our determination that suspension is the appropriate sanction is the just and reasonable starting point for the period of suspension. There has been a lapse of 10 years since the tribunal's decision and the hearing of the appeal. In all the circumstances of this case, we are of the view that a period of suspension of six years is appropriate but that due to the effluxion of time, it may be considered oppressive to commence that period from the date of this decision. It seems to us therefore that it is entirely reasonable in the circumstances, that the period of suspension should run from 27 July 2006.

[119] Accordingly, we dismiss the appeal against the order that the appellant was guilty of misconduct and allow the appeal against sentence, in part, setting aside the tribunal's striking off order and substituting therefor a period of six years suspension commencing on 27 July 2006. All other orders in respect of the sentence remain.

ORDER

Appeal against the order that the appellant is guilty of professional misconduct is dismissed. Appeal against sentence is allowed in part. The sentence of striking off is set aside and a period of six years suspension commencing on 27 July 2006 is substituted therefor. All other orders in respect of the sentence remain.