[2022] JMCA App 12

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

MISCELLANEOUS APPEAL NO 3/2017

MOTION NO COA2021MT00005

BETWEEN	**THE GENERAL LEGAL COUNCIL**	**APPLICANT**
AND	**MICHAEL LORNE**	**RESPONDENT**

Mrs Sandra Minott-Phillips QC, Jahmar Clarke and Litrow Hickson instructed by Myers Fletcher & Gordon for the applicant

Miss Bianca Samuels instructed by Knight Junor & Samuels for the respondent

26 July 2021 and 8 April 2022

MCDONALD-BISHOP JA

[1] This is an application by the General Legal Council ('the GLC') for leave to appeal to Her Majesty in Council ('the Privy Council') from the decision of this court made on 26 March 2021 and embodied in the written judgment cited as **Michael Lorne v The General Legal Council (Ex parte Olive C Blake)** [2021] JMCA Civ 17 ('the judgment').

[2] A comprehensive background to these proceedings is set out in the judgment and, for expediency's sake, I will adopt the salient facts rehearsed by F Williams JA. They are as follows: By way of a written complaint dated 8 October 2012, Ms Olive Blake ('the complainant') reported to the GLC that attorney-at-law, Mr Michael Lorne ('the respondent'), was retained to sell a property which she was entitled to as a beneficiary. However, the respondent had failed to account to her concerning her proceeds from the sale. The complainant contended that she was entitled to half the proceeds of sale on

the basis that she and her brother had been devised the premises in equal shares by their father, now deceased. She alleged that she and her brother were the co-executors and sole beneficiaries under their father's will. The Disciplinary Committee of the GLC ('the disciplinary committee') found that the property was transferred on 22 November 2011 and, therefore, the complainant had not been paid any part of the proceeds of sale for almost a year. The one-year period would have been from the time the transfer was made to the vendor to when the complainant made her complaint to the GLC.

[3] The respondent contended that he was instructed by the complainant's brother to give the proceeds of sale to him rather than to the complainant because the complainant had used other funds from the estate, which exceeded her half interest in the proceeds of sale from the property. The respondent stated that, on those instructions, he had forwarded all proceeds of the sale to the complainant's brother. However, the respondent eventually agreed that he ought to have divided and paid in equal shares the net proceeds from the sale of the property to the complainant and her brother.

[4] The disciplinary committee found the respondent guilty of professional misconduct in breach of canon VII(b)(ii) of the Legal Profession (Canons of Professional Ethics) Rules ('the Canons'). By way of sanction, it ordered that the respondent be struck from the Roll of attorneys-at-law entitled to practise in Jamaica ('the Roll') and make payments in restitution to the complainant.

[5] The respondent appealed against the decision and orders of the disciplinary committee.

[6] Upon determination of the appeal, the court, while affirming the judgments of the disciplinary committee dated 2 March 2017 and 26 April 2017, varied the orders in the sanctions judgment dated 24 June 2017. In varying the sanction orders, the court set aside the order that the appellant be struck from the Roll and substituted these orders:

"(a) That the appellant be suspended from practicing as an attorney-at-law for a period of five years, commencing from 24 June 2017.

(b) Before being restored to the Roll of attorneys-at-law entitled to practise in Jamaica, the appellant shall successfully attain 10 credits in continuing legal professional development courses, approved by the GLC's Accreditation Committee, relating to the areas of client welfare, and business management with an emphasis on conflict of interest, in addition to any other usual requirement imposed on all attorneys-at-law entitled to practice in Jamaica.

(c) There shall be liberty to apply with respect to this part of the court's orders."

The sanctions judgment was affirmed in all other respects.

[7] The GLC has advanced four grounds supporting the application for conditional leave to appeal, which are reinforced by the affidavit evidence of the GLC's chairman, Mr Allan Wood QC, sworn to on 12 April 2021. The grounds on which the application is being pursued are:

"1. The decision is a final one in a disciplinary proceeding conducted under the Legal Profession Act involving a question as to the interpretation of the Constitution of Jamaica.

2. Alternatively, the appeal involves questions that, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, namely:

a. Was the sanction of striking off the Respondent from the Roll of attorneys-at-law entitled to practice law in Jamaica imposed by the Applicant unquestionably an error of law, or plainly inappropriate, so as to warrant the intervention of the Court of Appeal, its setting aside of the Applicant's striking off order, and its imposition of lesser sanctions?

b. Does section 16 of the Constitution (referenced by the Court of Appeal in its decision) in any way alter the approach that is to be taken by the Applicant in balancing private and public interests when imposing sanctions on attorneys-at-law for professional misconduct?

c. Is this decision of the Court of Appeal likely to curtail the Applicant's ability to strike an attorney-at-law from the Roll for professional misconduct in circumstances where it has made no finding of dishonesty?

d. In the circumstances of this case ought not the Court of Appeal to have deferred to the decision of the Applicant as an expert and informed tribunal particularly well placed to access what measures were required to deal with the defaulting attorney-at-law and to protect the public interest?

e. Is it in the public interest to allow the Respondent to continue practicing as an attorney-at-law and thereby have the opportunity to repeat his lapse of the required standards of integrity, probity and trustworthiness?

3. Section 110(1)(c) of the Constitution of Jamaica provides that an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in final decisions that fall within ground 1 above.

4. Section 110(2)(a) of the Constitution of Jamaica provides that an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court where, in its opinion, the question involved in the appeal falls within ground 2 above."

[8] From the grounds for the application and the supporting evidence, I have distilled the following issues:

(1) Whether the final decision of the court involves a question as to the interpretation of the Constitution so that an appeal shall lie to the Privy Council as of right, pursuant to section 110(1)(c) of the Constitution (grounds 1 and 3).

(2) Whether the criterion of "great general or public importance or otherwise" has been established by the GLC, so that conditional leave to appeal to the Privy Council may be granted by the court, pursuant to section 110(2)(a) of the Constitution (grounds 2 and 4).

Issue 1: Whether the final decision of the court involves a question as to the interpretation of the Constitution so that an appeal shall lie to the Privy Council as of right, pursuant to section 110(1)(c) of the Constitution (grounds 1 and 3)

[9] Section 110(1)(c) of the Constitution provides that an appeal shall lie to the Privy Council as of right from final decisions of this court on questions involving the interpretation of the Constitution. The provision reads:

> "110. – (1) An appeal shall lie from decisions of the Court of Appeal to her Majesty in Council as of right in the following cases–
>
> …
>
> (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; …"

[10] The basis of the contention on the part of the GLC emanates from the following paragraphs of the judgment, where the court stated that:

> "[27] It is true that the position with respect to appellate courts being loath to interfere with sanctions of disciplinary tribunals, is as reflected in such cases as **In Re a Solicitor**.

Similar guidance as to the approach of courts to these matters might also be seen in the case of **Bolton v The Law Society**.

[28] A perusal of later cases, however, does convey the impression that the modern-day approach is somewhat less hidebound than it originally was. For example, in the case of **The Law Society v Brendan John Salsbury** [2008] EWCA Civ 1285, it was observed by the English Court of Appeal, at paragraph [30] of the report, as follows:

> 'From this review of authority I conclude that the statements of principle set out by the Master of the Rolls in *Bolton* remain good law, subject to this qualification. In applying the *Bolton* principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under articles 6 and 8 of the Convention. It is now an overstatement to say that 'a very strong case' is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere. It should also be noted that an appeal from the Solicitors Disciplinary Tribunal to the High Court normally proceeds by way of review; see CPR rule 52.11(1)'

[29] The reference to 'the Convention' has to do with the European Convention on Human Rights, from which the Human Rights Act of 1998 originates. The reference to article 6 (the same in both documents) relates to the right to a fair and public trial; whereas the reference to article 8 relates to the right to protection of one's family and private life. The latter article is, of course, not relevant here. However, article

> 6 has its approximate equivalent in section 16 of the Jamaican Charter of Fundamental Rights and Freedoms. Reference to the provisions in the Convention and the Human Rights Act just seems to us to call for a greater awareness on the part of disciplinary tribunals of the rights of persons appearing before them and to try as much as possible to ensure that the requirements of due process are followed." (Underlining as in the original)

[11] On behalf of the GLC, Mrs Minott-Phillips QC submitted that, in arriving at its decision that the sanction imposed by the disciplinary committee was inappropriate, the court had interpreted and applied section 16 of the Constitution. Queen's Counsel argued that the court's reference to section 16 of the Constitution and to disciplinary tribunals needing to be more aware of "the rights of persons appearing before them and to try as much as possible to ensure that the requirements of due process are followed" (para. [29] of the judgment) meant that the court interpreted the striking-off sanction as a denial of the respondent's constitutional right to due process under section 16 of the Constitution.

[12] Queen's Counsel contended that the court had made it clear from the outset that in rendering its decision in relation to what was fair, it was focusing on whether the sanction of striking-off was appropriate or harsh in the circumstances of this case. She submitted that the court could only have been making reference to section 16 of the Constitution in order to determine the harshness of the sanction. She contended that the court introduced and applied section 16 of the Constitution and that the basis for doing so could only have been to interpret it.

[13] Mrs Minott-Phillips further submitted that the decision of the court being a final one meant that the GLC may, as of right, appeal to the Privy Council under section 110(1)(c) of the Constitution.

[14] In response, on behalf of the respondent, Miss Samuels submitted that the court's reference to section 16 of the Constitution "was a mere peripheral one, made in passing".

Counsel argued that in the context of the reasoning in which it was engaged at the time, the court referred to section 16 of the Constitution only because its equivalent had appeared in a non-essential portion of the paragraph, which it had cited and which had made a qualification to the principles set out in **Bolton v Law Society** [1994] 2 All ER 486 ('**Bolton**').

[15] Counsel also referred to the case of **Eric Frater v The Queen** [1981] 1 WLR 1468 ('**Eric Frater**') in submitting that to satisfy the requirements of section 110(1)(c) of the Constitution, the GLC must show that the decision of the court involves a "genuinely disputable question of interpretation of the Constitution".

[16] In **Eric Frater**, Lord Diplock, at page 1470, stated that:

> "In *Harrikissoon v. Attorney-General of Trinidad and Tobago* [1980] A.C. 265 this Board had occasion to point out the danger of allowing the value of the right to apply to the High Court for redress for contravention of his fundamental rights and freedoms which is conferred upon the individual by section 6 of the Constitution of Trinidad and Tobago (of which the corresponding section in the Constitution of Jamaica is section 25) to become debased by lack of vigilance on the part of the courts to dispose summarily of applications that are plainly frivolous or vexatious or are otherwise an abuse of process of the court. In their Lordships' view **similar vigilance should be observed to see that claims made by appellants to be entitled to appeal as of right under section 110(1)(c) are not granted unless they do involve a genuinely disputable question of interpretation of the Constitution** and not one which has merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right." (Emphasis added)

[17] Accordingly, for this court to find that the GLC may appeal to the Privy Council as of right from the decision of the court pursuant to section 110(1)(c) of the Constitution, the GLC must establish that the decision of the court involves "a genuinely disputable question of interpretation of the Constitution".

[18] Having examined the judgment, I find that the court was not concerned with the issue of the right to a fair hearing under section 16 of the Constitution. Rather, it was concerned only with the "contended harshness of the sanction of striking off". The court expressed this at paras. [16] to [18] of the judgment where it stated, in part:

> "[16] …The appellant's admission to having had a duty to pay half the proceeds of sale for the property to the complainant and of failing to do so, makes it difficult, if not impossible, to understand the logic of challenging the fairness of the hearing or any other aspect of the process leading to the finding of guilt of professional misconduct...
>
> [17] …At the end of the day, the issue of the right to a fair hearing aside, it is only the contended harshness of the sanction of striking off that is being questioned.
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> [18] In the light of this, **the decision to focus on the sanction of striking off that was imposed (and less on those grounds of appeal challenging the fairness of the process) was, we find, a judicious one** … **the approach that it is recommended to be taken in this analysis is to focus on the sanction of striking off itself in the circumstances of this case: it will either be found to be appropriate or harsh. Therefore, an analysis of any possible motive or other cause for the contended harshness of the sanction, would, in this approach, be wholly unnecessary**." (Emphasis added)

[19] It is clear that the court's focus was on the sanction of striking-off, which arose from ground of appeal d. The issue was whether the sanction was manifestly excessive. It was whilst analysing this ground, particularly the principles governing the appellate court's intervention in matters of sanctions imposed by the disciplinary tribunal, that the court cited para. [30] of the case of **The Law Society v Brendan John Salsbury** [2008] EWCA Civ 1285 ('**Salsbury**'), which contains a reference to article 6 of the European Convention on Human Rights ('the Convention'). On this premise, the court observed that "article 6 has its approximate equivalent in section 16 of the [Constitution]". The court went no further than this in its reference to section 16 of the Constitution and simply concluded in para. [30] of the judgment that:

> "[30] Accordingly, the intervention of the appellate court in matters of sentencing, imposed by the disciplinary tribunal ought to be limited to cases where errors of law exist or where the sentence is demonstrated to be clearly inappropriate."

[20] This conclusion demonstrates that the court's focus was not on an interpretation or analysis of section 16 of the Constitution, but solely on the appropriateness of the sanction imposed and the principles governing the appellate court's standard of review of the disciplinary committee's decision. At no stage did the court embark on any analysis, interpretation or application of section 16 of the Constitution regarding whether there was a denial of the respondent's constitutional right to due process, or in arriving at its decision that the sanction imposed by the disciplinary committee was inappropriate. I am, therefore, in complete agreement with Miss Samuels that the court's reference to section 16 of the Constitution "was a mere peripheral one, made in passing".

[21] Accordingly, I do not find that the final decision of the court involves any "genuinely disputable question of interpretation" of the Constitution to trigger an appeal to the Privy Council as of right, pursuant to section 110(1)(c) of the Constitution. Therefore, the application for leave to appeal to the Privy Council cannot be granted as of right.

Issue 2: Whether the criterion of "great general or public importance or otherwise" has been established by the GLC so that conditional leave to appeal to the Privy Council may be granted by the court, pursuant to section 110(2)(a) of the Constitution (grounds 2 and 4)

[22] Section 110(2)(a) of the Constitution states:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases–
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her

> Majesty in Council, decisions in any civil proceedings; …"

[23] In **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16, this court provided a synopsis of the relevant principles concerning applications under section 110(2)(a), as distilled from previously decided cases of this court. At para. [27] of that judgment, the court stated:

> "[27] The principles distilled from the relevant authorities may be summarised thus:
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> i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
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> ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.
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> iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.
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> iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.
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> v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.
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> vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.

viii. Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. …"

[24] In **Shawn Campbell and others v R** [2020] JMCA App 41, Brooks JA (as he then was) added two more principles to those eight. At paras. [47] and [48], he stated that:

> "[47] Two more principles should be added to those eight. The first of which, was recognised by the Court of Appeal of the Commonwealth of the Bahamas in **Nyahuma Bastian v The Government of the USA and others** (unreported), Court of Appeal, Bahamas, SCCrApp & CAIS No 199 of 2017, judgment delivered 23 January 2020 (see paragraph 20). It is that the court should not refer a question to the Privy Council if the Board has previously given its opinion on that question. This principle expands on principle iii. above, for if the issue has been previously decided by the Board, in respect of materially similar circumstances, then it cannot be regarded as being open to serious debate. This is similar to the point made by Pollard J at paragraph [89] of **Mitchell Lewis v R**, cited above.
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> [48] The second additional principle is one pointed out by Mr Taylor. That principle was stressed by their Lordships in **Michael Gayle v The Queen** [1996] UKPC 18; (1996) 48 WIR 287. Lord Griffiths, in delivering the judgment of the Board, said, in part, at page 289 of the report of the case:
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> > 'Furthermore, it is not the function of the Judicial Committee to act as a second Court of Criminal Appeal.'"

[25] Alternatively, if the question cannot be said to be of great general or public importance, it can nevertheless be submitted for consideration by the Privy Council if the question is such that it ought 'otherwise' to be submitted. In this regard, in **Emanuel**

Olasemo v Barnett Limited (1995) 51 WIR 191, Wolfe JA (as he then was) stated at page 201:

> "Is the question involved in this appeal one of great general or public importance *or otherwise?* The matter of a contract between private citizens cannot be regarded as one of great general or public importance. **If [the applicant] is to bring himself within the ambit of section 110(2)(a) he must therefore do so under the rubric 'or otherwise'. Clearly the addition of the phrase 'or otherwise' was added by the legislature to enlarge the discretion of the court to include matters which are not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the highest judicial authority of the land. The phrase 'or otherwise' does not *per se* refer to interlocutory matters. The phrase 'or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to their lordships' Board for guidance on the law**…" (Emphasis added)

[26] The respondent has set out the following questions that it says raise questions of great general or public importance or otherwise for submission to the Privy Council:

> "a. Was the sanction of striking off the Respondent from the Roll of attorneys-at-law entitled to practice law in Jamaica imposed by the Applicant unquestionably an error of law, or plainly inappropriate, so as to warrant the intervention of the Court of Appeal, its setting aside of the Applicant's striking off order, and its imposition of lesser sanctions?
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> b. Does section 16 of the Constitution (referenced by the Court of Appeal in its decision [at para. 29 of the judgment]) in any way alter the approach that is to be taken by the Applicant in balancing private and public interests when imposing sanctions on attorneys-at-law for professional misconduct?
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> c. Is this decision of the Court of Appeal likely to curtail the Applicant's ability to strike an attorney-at-law from the Roll for professional misconduct in circumstances where it has made no finding of dishonesty?

d. In the circumstances of this case ought not the Court of Appeal to have deferred to the decision of the Applicant as an expert and informed tribunal particularly well placed to access what measures were required to deal with the defaulting attorney-at-law and to protect the public interest?

e. Is it in the public interest to allow the Respondent to continue practicing as an attorney-at-law and thereby have the opportunity to repeat his lapse of the required standards of integrity, probity and trustworthiness?"

[27] Each of these questions will be examined in turn against the background of the relevant aspects of the court's decision.

Question a. – "Was the sanction of striking off the Respondent from the Roll of attorneys-at-law entitled to practice law in Jamaica, unquestionably an error of law, or plainly inappropriate, so as to warrant the intervention of the Court of Appeal, its setting aside of the [disciplinary committee's] striking off order, and its imposition of lesser sanctions?"

[28] It was contended on behalf of the GLC that the striking off order was not inappropriate or emanated from an error of law as the circumstances of the case concerned serious ethical lapses on the part of the respondent, including his failure to honour an undertaking he gave to his client.

[29] The respondent took issue with the GLC's contention that he failed "to honour an undertaking" to his client. In his affidavit sworn to on 29 April 2021, the respondent deposed that he is unaware of the undertaking to which the GLC refers and that the GLC had failed to make reference to the record or exhibit the alleged undertaking.

[30] In oral submissions, Mrs Minott-Phillips indicated to the court that the undertaking referred to by the GLC was based on the findings of the disciplinary committee, which were stated in the judgment of the disciplinary committee dated 2 March 2017 as follows:

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

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

…

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

[31] I do not find the disputed issue between the parties of whether the respondent had given an undertaking to the complainant to be a relevant consideration. The issue did not arise on the appeal and, therefore, was not an issue determined by the court in coming to its decision on sanctions. Furthermore, the disciplinary committee did not demonstrably establish that its decisions were influenced by any undertaking the respondent had given to the complainant. Finally, it must also be remembered that the respondent was never charged for breaching any undertaking in contravention of the Canons. Therefore, in challenging the court's decision, the GLC must fail in this attempt to rely on what it alleges to be the respondent's failure to honour an undertaking to his client.

[32] Of more substance and persuasive value is the contention of the GLC that a decision of the disciplinary committee in which it found professional misconduct by an attorney-at-law and imposed consequential sanctions is inherently of great public importance. Relying on dicta from **Bolton**, Queen's Counsel Mrs Minott-Phillips, submitted that the order of the disciplinary committee is primarily directed to one or other or both of two purposes: (1) to be sure that the offender does not have the opportunity to repeat the offence; and (2) to maintain the reputation of the profession and sustain public confidence in the integrity of the profession. She argued that it follows, inescapably, that the substitution of the striking off order with an order of suspension is a matter of great public importance.

[33] In response, Miss Samuels submitted that this question raised by the GLC does not seek to have the Privy Council pronounce on an area of law that is obscure and in

need of clarification. Instead, she argued, the question asks for an opinion from the Privy Council as to whether, based on the facts of the current case, there was an error of law or whether the sanction imposed on the respondent by the disciplinary committee was inappropriate. All this, counsel submitted, relates specifically to the facts of this case and importantly to the "narrow context of the parties". It thus fails to meet the criterion set out in section 110(2)(a) of the Constitution as one which goes beyond the rights of the parties as it does not raise an issue, the resolution of which is apt to bind and guide others in their dealings or relations.

[34] The standard of review employed by this court was settled by reference to principles derived, primarily, from the English Court of Appeal pronouncements in **Salsbury**.

[35] The **Salsbury** approach to decisions of disciplinary tribunals represented a break from the previous perspective, which was established in cases such as **In re A Solicitor** [1960] 2 QB 212, **Colin Kenneth McCoan v General Medical Council** [1964] 1 WLR 1107 ('**McCoan**'), and **Bolton**. In **McCoan**, the Board, in referencing **In re A Solicitor**, stated at page 1113 that:

> "Their Lordships are of opinion that Lord Parker C.J. may have gone too far in *In re a Solicitor* [[1960] 2 Q.B. 212] when he said that the appellate court would never differ from sentence in cases of professional misconduct, but their Lordships agree with Lord Goddard C.J. in *In re a Solicitor* [[1956] 1 WLR 1312] when he said that **it would require a very strong case to interfere with sentence in such a case, because the Disciplinary Committee are the best possible people for weighing the seriousness of the professional misconduct**." (Emphasis added)

[36] In **Bolton**, the Court of Appeal endorsed the Privy Council's statement of principle in **McCoan** regarding the requirement for there to be "a very strong case" for the appellate court to interfere with the sentence of the tribunal. However, this approach, which had been followed for decades, was to undergo gradual modification over time. In this regard, the Privy Council was not left behind. In **Ghosh v General Medical Council**

[2001] 1 WLR 1915 ('**Ghosh**'), their Lordships emphasised that the powers to disturb the decisions of disciplinary tribunals are not as limited as may be suggested by some of the observations which have been made in the past. Their Lordships noted at para. 34 of the judgment:

> "34 It is true that the Board's powers of intervention may be circumscribed by the circumstances in which they are invoked, particularly in the case of appeals against sentence. But their Lordships wish to emphasise that their powers are not as limited as may be suggested by some of the observations which have been made in the past... For these reasons the Board will accord an appropriate measure of respect to the judgment of the committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the committee's judgment more than is warranted by the circumstances. **The council conceded, and their Lordships accept, that it is open to them to consider all the matters raised by Dr Ghosh in her appeal; to decide whether the sanction of erasure was appropriate and necessary in the public interest or was excessive and disproportionate; and in the latter event either to substitute some other penalty or to remit the case to the committee for reconsideration**." (Emphasis added)

[37] Later, in **Preiss v General Dental Council** [2001] 1 WLR 1926 ('**Preiss**'), Lord Cooke of Thorndon, in delivering the opinion of the Board, said, in part, at para. 27:

> "27 Since the coming into operation of the Human Rights Act 1998, with its adjuration in section 3 to read and give effect to legislation, so far as it is possible to do so, in a way compatible with the Convention rights, any tendency to read down rights of appeal in disciplinary cases is to be resisted. In *Ghosh v General Medical Council* [2001] 1 WLR 1915, 1923 F – H the Board has recently emphasised that the powers are not as limited as may be suggested by some of the observations which have been made in the past. An instance, on which some reliance was placed for the General Dental Council in the

> argument of the present appeal, is the observation in *Libman v General Medical Council* [1972] AC 217, 221, suggesting that findings of a professional disciplinary committee should not be disturbed unless sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence was misread. **That observation has been applied from time to time in the past, but in their Lordships' view it can no longer be taken as definitive. This does not mean that respect will not be accorded to the opinion of a professional tribunal on technical matters. But, as indicated in *Ghosh*, the appropriate degree of deference will depend on the circumstances**…" (Emphasis added)

[38] The statements of principle by the Privy Council in **Ghosh** seem to be that the question for determination is whether the sanction imposed by the Committee was appropriate and necessary in the public interest or was excessive and disproportionate. Further, as highlighted in **Preiss**, the "appropriate degree of deference" will depend on the circumstances of the case.

[39] Later, in **Salsbury**, the English Court of Appeal, in the wake of the Convention and the pronouncements in **Ghosh** and **Preiss**, explicitly cast doubt on the appropriateness of the requirement for "a very strong case to interfere" as propounded in **McCoan** and followed in **Bolton**. After a review of the earlier authorities, including **Bolton**, the court in **Salsbury** stated that:

> "30 From this review of authority I conclude that the statements of principle set out by Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512 remain good law, **subject to this qualification. In applying the *Bolton* principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under articles 6 and 8 of the Convention. …<u>It is now an overstatement to say that 'a very strong case' is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal</u>**. The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed

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

[40] This court, in its judgment in the instant case, having applied **Salsbury**, concluded that it did "not consider that the imposition of the ultimate sanction of striking off was appropriate in this case".

[41] In considering the appropriateness of the sanction of striking off, the court stated that:

> "[35] …There can be no doubt that a panel of the disciplinary committee of the GLC is authorised to strike attorneys-at-law off the Roll. However, such a sanction, being the most draconian of those provided, must be appropriate to the circumstances of the particular case…
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> [36] One matter that is of great concern is the panel's reference, as the last matter in its discussion of **Bolton v Law Society**, to the following:
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> > 'The legal reasoning in this case has been adopted in many disciplinary cases against attorneys in Jamaica and <u>these attorneys have been struck from the Roll of Attorneys-at-law entitled to practise in Jamaica for dishonestly handling monies belonging to clients or to third parties.</u> These decisions by the Disciplinary Committee have been upheld by the Court of Appeal.' (Emphasis added)
>
> [37] It is not unreasonable to conclude that, implicit in this reference to striking dishonest lawyers from the Roll and then proceeding immediately thereafter to impose the said sanction, is the presumption that the appellant also handled clients' money dishonestly. However, of its 58 findings in the

> complaint brought against the appellant, none related to dishonesty in the strict or usual sense…
>
> …
>
> [39] **Although this court gives every deference to the panel in its finding of guilt of the complaint alleged, the actions of the appellant in relation to the complainant strike us as being more in the nature of professional naïveté bordering on, if not directly amounting to, gross negligence. It seems that the appellant's conduct in this case and in relation to this complainant could very well have come about due to a lack of familiarity with the law and practice in the area of conveyancing and probate of wills and the interplay of those two areas of law and practice. In the circumstances of this case, the appellant's conduct, though wholly unacceptable and a flagrant departure from acceptable professional standards, could not reasonably be regarded as giving rise to dishonesty**." (Emphasis added)

[42] The court did not speak explicitly of any error of law on the part of the Committee. However, implicit in its reasoning was a clear finding that the disciplinary committee was wrong to have treated the conduct of the respondent as involving dishonesty. In its view, the conduct of the respondent in relation to the complainant had struck it "as being more in the nature of professional naïveté bordering on, if not directly amounting to, gross negligence". The court found, as "one matter that is of great concern", the panel's reference to the statement of principle in **Bolton** regarding the treatment of attorneys who handle client's money dishonestly. It is not far-fetched to conclude, as the GLC has done, that the court had formed the view that the striking-off sanction was not appropriate, primarily, because there was no dishonesty on the part of the respondent.

[43] Against the background of the evolving standard of review required of appellate courts, in treating with the decisions of specialist disciplinary tribunals, the burning question is: Did the court fail to give the appropriate degree of deference to the views of the disciplinary committee regarding the appropriate sanction, as contended by the GLC? Given the role of the GLC as a public body, established to maintain the standards of the

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

[44] Additionally, the Board's determination of the question of whether the threshold was reached for the interference by the court with the decision of the Committee is one that is capable of guiding the court in its future deliberations, especially in cases not involving dishonesty but where the disciplinary committee imposes the sanction of striking off. Counsel for the GLC cited the case of **The Law Society (Solicitors Regulation Authority) v Ambrose Emeana and others** [2013] EWHC 2130 (Admin) ('**Emeana**') concerning the sanction of striking off for offences that do not involve dishonesty. This is a decision of the High Court of England and Wales. In the instant case, the court, in its judgment, relied on **Bolton**, a decision of the Court of Appeal. I have not come across any cases from this jurisdiction where the issue regarding the appropriateness of a striking-off sanction in cases not involving dishonesty has been considered by the Privy Council which would stand as a binding precedent. For these reasons, I do not accept the contention of Miss Samuels that it is a question that raises an issue that only affects the parties and so ought not to be submitted to the Privy Council.

[45] I conclude that the question of whether the striking-off sanction imposed by the Committee in the circumstances of this case was clearly inappropriate, unnecessary in the public interest, disproportionate or excessive, thereby warranting the intervention of the court, arises from the decision of the court and, to my mind, is a controversial one of great general or public importance that should be submitted to the Privy Council for final consideration.

[46] Even if I am wrong that this question has satisfied the criterion of it being of great general or public importance, I firmly believe it should be submitted for the consideration

of the Privy Council within the ambit of the 'or otherwise' rubric provided for by the same section 110(2)(a) of the Constitution. It is in the public interest for the Privy Council to decide whether this court was correct to interfere with the decision of the disciplinary committee and to permit the respondent to continue in practice upon the expiration of his period of suspension that the court had substituted.

[47] Accordingly, I would hold that question a. could be submitted for the consideration of the Privy Council under section 110(2)(a) of the Constitution.

Question b. – "Does section 16 of the Constitution (referenced by the Court of Appeal in its decision) in any way alter the approach that is to be taken by the [GLC] in balancing private and public interests when imposing sanctions on attorneys-at-law for professional misconduct?"

[48] I do not need to say much about this question. I have already concluded that the court's reference to section 16 of the Constitution was in passing and peripheral to the question it had to decide regarding the striking-off sanction. As such, the decision did not involve any analysis, interpretation or application of this provision and thus did not form part of the court's decision or arise from it. Furthermore, this is not a question that would be determinative of the appeal. This question is not capable of serious debate or requires debate before the Privy Council. Indeed, the Board was clear in **Preiss** that disciplinary proceedings are subject to the application of human rights legislation, which is similar to our Charter of Fundamental Rights and Freedoms.

[49] Accordingly, the question fails to satisfy the criterion under section 110(2)(a) of the Constitution for submission to the Privy Council.

Question c. – "Is this decision of the Court of Appeal likely to curtail the [GLC's] ability to strike an attorney-at-law from the Roll for professional misconduct in circumstances where it has made no finding of dishonesty?"

[50] Mrs Minott-Phillips relied on paras. 25 and 26 of **Emeana** and paras. 37 and 38 of **Salsbury** in making the point that the sanction of striking-off is not reserved for offences of dishonesty. Therefore, the question, Queen's Counsel says, arises as to whether the

decision of the court is likely to curtail the GLC's ability to strike an attorney-at-law from the Roll for professional misconduct in circumstances where it has made no finding of dishonesty.

[51] Miss Samuels countered that this question was not fairly posed as the absence of a finding of dishonesty was not the sole basis on which the court decided to set aside the striking-off order. Counsel also submitted that the court's decision was based on the specific and unique facts before it, and thus, it is clear that the decision was not meant to be a blanket application to all cases from now on. On this basis, she contended that the question is not one of serious debate.

[52] It is an unequivocal finding of the court that, in choosing to make a striking-off order, the disciplinary committee acted on the presumption that the respondent acted dishonestly. That presumption, according to the court, factored in the disciplinary committee's imposition of the ultimate sanction of striking-off. The court, having found that "of its 58 findings in the complaint brought against the appellant, none related to dishonesty in the strict or usual sense", concluded that the disciplinary committee's imposition of the striking-off order based on dishonesty, was flawed. This decision by the court did not give rise to an issue, generally, regarding the GLC's ability to strike an attorney-at-law from the Roll for professional misconduct in circumstances where it has made no finding of dishonesty. The court's analysis was specific to the facts of the case and what it regarded as the disciplinary committee's presumption that the respondent had handled clients' money dishonestly.

[53] Additionally, the court explicitly recognised that there is authority from this court where a striking-off order by the disciplinary committee was upheld in circumstances where there was no finding of dishonesty. It cited, as an example in this regard, **Hopeton Karl Clarke v The General Legal Council** [2021] JMCA Civ 13. Accordingly, the court was mindful that the absence of a finding of dishonesty is not a bar to a striking-off order.

[54] In my opinion, this question, as formulated by the GLC, does not meet the criterion under section 110(2)(a) of the Constitution for referral to the Privy Council. What the question seems to raise is an issue that could be subsumed within the consideration of question a. The question for consideration is whether the court was correct to conclude that in this case, which it opined involved no dishonesty but rather "professional naïveté bordering on, if not directly amounting to, gross negligence", striking-off was clearly inappropriate. The GLC could deploy arguments on question a. regarding the potential effect of the court's reasoning and conclusion in advancing its case that the court's decision should not be allowed to stand. For these reasons, I would not endorse question c. as a separate and distinct question for submission to the Privy Council. It could form part of the submissions to be deployed relative to the issues raised for discussion on question a. as well as question d., which will now be examined.

Question d. – "In the circumstances of this case, ought not the Court of Appeal to have deferred to the decision of the [disciplinary committee] as an expert and informed tribunal particularly well placed to access what measures were required to deal with the defaulting attorney-at-law and to protect the public interest?"

[55] Regarding this question, the GLC argues that the disciplinary committee is an expert and informed tribunal particularly well placed to assess what measures were required to deal with the respondent and to protect the public interest. Therefore, the court should have deferred to the disciplinary committee's decision. The fact that it did not, raises a question of great general or public importance or otherwise that should be submitted to the Privy Council.

[56] Miss Samuels, in response, submitted that the words "[i]n the circumstances of this case", which is part of the formulation of the question posed by the GLC, immediately reveal that the question is specific to the circumstances of the case and, therefore, does not go beyond the rights of the parties. According to counsel, the question fails to trigger the exercise of the discretion of the court under section 110(2)(a) of the Constitution. Counsel also argued that the GLC has failed to demonstrate that this question is one of

serious debate as it is seeking to raise an issue before the Privy Council simply to see if their Lordships will agree with the decision of the court.

[57] I find that this question is closely connected to question a. The court, in its judgment, at para. [30] made it clear that it was mindful of the standard of review and, more particularly, that appellate courts are loath to interfere with sanctions of disciplinary tribunals. However, the question of whether the court erred in its finding that the sentence was inappropriate will depend on the circumstances of the case, and so, the fact that the circumstances are specific to the GLC and the respondent, as argued by Miss Samuels, does not necessarily mean that the case is not suitable for submission to the Privy Council. When combined with question a., the question raises issues of great general or public importance regarding this court's treatment of the sanction decisions of the Committee. For the reasons discussed in detail in the examination of question a., I believe this closely related question could form the subject of enquiry by the highest court of the land in the public interest. Like question a., it raises the issue of whether the court had given the appropriate degree of deference to the disciplinary committee's decision. This question, essentially, raises an important question of law that arises from the decision of the court and which requires debate before the Privy Council.

Question e. – "Is it in the public interest to allow the respondent to continue practising as an attorney-at-law and thereby have the opportunity to repeat his lapse of the required standards of integrity, probity and trustworthiness?"

[58] Mr Wood, in his affidavit sworn to on 12 April 2021 on behalf of the GLC, averred that the setting aside of the striking-off order by the court gives the respondent an opportunity to repeat lapses of integrity, probity and complete trustworthiness that resulted in the finding of professional misconduct and thereby put the public at risk. Mr Wood further averred that the return of the respondent to practise law at the end of his suspension period would undermine the reputation of the legal profession as one in which every member, of whatever standing, may be trusted to the ends of the earth.

[59] Miss Samuels submitted that this question is purely one of fact which does not give rise to any important question of law involving a matter of public interest sufficient to warrant submission to the Privy Council. Counsel also argued that the question merely asks about the effects of allowing the respondent, specifically, to practise law and thus is not one that may set guidelines and bind others.

[60] Miss Samuels' argument that this question does not warrant the attention of the Privy Council is attractive. Additionally, guidance concerning this question has already been provided in **Bolton**, where Sir Thomas Bingham MR, at pages 491 and 492, opined:

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors… **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**." (Emphasis added)

[61] It is clear from the extract above that if an attorney-at-law is not shown to have acted dishonestly but is shown to have fallen below the required standards of integrity, probity and trustworthiness, a striking-off order will not necessarily follow (albeit that it may well do). According to Sir Thomas Bingham MR, an order for suspension could be

appropriate in such a case. Therefore, the law already contemplates that an attorney-at-law, suspended from practice, may, at some point, return to practice without his reinstatement being adverse to the public interest. A suspension from practice is recognised as an appropriate sanction where there is, on the part of an attorney-at-law, "a lapse of the required standards of integrity, probity and trustworthiness".

[62] Therefore, this question posed by the GLC does not raise any important question of law worthy of debate before the Privy Council. In any event, even if it can be said to be an important one, it has not raised any separate and distinct issue that cannot be addressed by a consideration of questions a. and d. in relation to which, I believe, the guidance of the Privy Council would be required.

Conclusion

[63] In concluding, I believe that the court's final decision does not involve any genuinely disputable question of interpretation of the Constitution to entitle the GLC to appeal to the Privy Council as of right, pursuant to section 110(1)(c) of the Constitution.

[64] However, the GLC has satisfied me that there is at least one question that meets the criterion laid down under section 110(2)(a) of the Constitution for conditional leave to be granted. The core question is whether the sanction imposed by the disciplinary committee was clearly inappropriate, unnecessary in the public interest, disproportionate or excessive to justify the intervention of the court. The opinion of the Privy Council on such an important matter can only be of significant benefit to the administration of justice, in general, and the GLC's regulation of the legal profession, in particular.

[65] Therefore, I am of the view that the GLC has satisfied the criterion for an appeal to be brought to the Privy Council, pursuant to section 110(2)(a) in relation to the following questions, which are slightly modified versions of questions a. and d. presented by the GLC:

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

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

[66] Consequently, I would refuse to grant the motion brought by the GLC for conditional leave to appeal to the Privy Council as of right pursuant to section 110(1)(c) of the Constitution. However, I would grant conditional leave to appeal pursuant to section 110(2)(a).

HARRIS JA

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

DUNBAR-GREEN JA (AG)

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

MCDONALD-BISHOP JA

ORDER

1. The motion for conditional leave to appeal to Her Majesty in Council as of right from the decision of this court made on 26 March 2021, pursuant to section 110(1)(c) of the Constitution, is refused.

2. Conditional leave to appeal to Her Majesty in Council from the decision of this court made on 26 March 2021 is granted, pursuant to section 110(2)(a) of the Constitution, in respect of the following questions:

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

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

3. Leave to appeal is granted on the following conditions:

    a) The GLC shall, within 30 days of the date of this order, enter into good and sufficient security in the sum of $1000.00 for the due prosecution of the appeal and

payment of all such costs as may become payable by the GLC in the event of their application for final leave to appeal not being granted, or of the appeal being dismissed for want of prosecution, or of the Judicial Committee ordering the GLC to pay costs of the appeal; and

b) The GLC shall, within 90 days of the date of this order, take the necessary steps to procure the preparation of the record and the dispatch thereof to England.

4. The costs of the motion for conditional leave to appeal shall be costs in the appeal to Her Majesty in Council.