JAMAICA

IN THE COURT OF APPEAL

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

MISCELLANEOUS APPEAL NO COA2021MS00011

BETWEEN	**DONALD GITTENS**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Seymour Stewart for the appellant

Ms Sidia Smith instructed by Bennett Cooper Smith for the respondent

20, 21 March 2024 and 11 April 2025

Disciplinary proceedings – Professional misconduct by attorney-at-law – Whether the findings of fact made by the Disciplinary Committee of the General Legal Council supported by evidence – Natural justice – Constitutional right to a fair hearing – Whether Disciplinary Committee's findings of professional misconduct were made in breach of the rules of natural justice and the constitutional right to a fair hearing – Costs orders – Proper approach of Disciplinary Committee to costs orders – Whether costs order was made in breach of natural justice, unreasonable and excessive – Canons IV(r) & IV(s) of the Legal Profession (Canons of Professional Ethics) Rules – Rules 3, 4 and 17, Legal Profession (Disciplinary Proceedings) Rules – Section 12(4)(f) of the Legal Profession Act – s 16(2) of the Constitution of Jamaica

MCDONALD-BISHOP JA

[1] On 31 March 2021, the Disciplinary Committee of the General Legal Council ('the Committee') found the appellant, Donald Gittens, guilty of professional misconduct. The Committee found that the appellant breached Canons IV(r) and IV(s) of the Legal Profession (Canons of Professional Ethics) Rules 1978 ('the Canons'). Canons IV(r) and IV(s) read as follows:

> "(r) An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by his client provide him with all information as to the progress of the client's business with due expedition.
>
> (s) In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."

[2] As a sanction for the breaches, the Committee, on 28 June 2021, ordered the appellant to pay costs in the sum of $75,000.00 to the respondent, the General Legal Council ('GLC').

[3] The appellant now appeals against the Committee's findings of professional misconduct and the sanction it imposed contending, in summary, that the Committee's findings of professional misconduct were unreasonable and breached his right to natural justice and constitutional right to a fair hearing; and that the costs sanction imposed is unreasonable and excessive and breaches the constitutional and natural justice principles of impartiality and fairness.

Background

[4] The proceedings before the Committee were commenced by a complaint made by the appellant's client, Salome Kerr ('the complainant'). The circumstances giving rise to the complaint are that in 2007, the complainant sustained a broken arm when a motorcar taxi in which she was travelling ('the taxi') collided with a motor truck ('the motor truck' or 'the truck').

[5] The complainant approached the appellant for legal representation in June 2007 and paid $3,000.00 for a consultation, evidenced by a receipt dated 10 July 2007. The complainant provided the appellant with an initial medical report from the Mandeville Public Hospital outlining her injuries. The appellant, however, advised the complainant that due to the nature of her injuries and her reported lingering effects, an expert report was required from a consultant bone specialist. The appellant informed the complainant that she would be required to pay for the consultant's report. However, the complainant refused to pay for the report, stating that she did not want to spend that money because

she was unemployed and unsure that her case would have been successful. On that basis, the complainant requested that the appellant cover the cost of the report. He refused, advising her to find another lawyer who would cover the cost of the report.

[6] On 9 September 2008, the appellant wrote to an orthopaedic consultant, requesting the report. There is no evidence, however, that up to the date of the hearings before the Committee, the complainant had paid for and obtained the report.

[7] The appellant had taken no steps to progress the matter until November 2012, when the appellant and complainant resumed contact and the appellant filed a claim on the complainant's behalf against the owner and driver of the motor truck. The claim was filed before it became statute-barred in May 2013.

[8] The defendants named in the claim were the owner and driver of the motor truck. It was uncontroversial that the claim was served on both of them. The owner of the motor truck filed a defence to the claim in August 2013. The driver of the motor truck filed no acknowledgement of service or defence, and the appellant was unable to secure proof of service due to issues with receiving the requisite information from the bailiff who reportedly effected service on him

[9] Up to November 2019, no further progress had been made in bringing the claim to a conclusion.

The complaint to the Committee

[10] Unhappy with the lack of progress in her matter, the complainant, in November 2019, filed an application to the Committee, accompanied by an affidavit in support, pursuant to section 12(4) of the Legal Profession Act ('the LPA'), alleging professional misconduct against the appellant. The application and affidavit are together referred to as 'the complaint'. No specific Canons were mentioned in the complaint. The complainant, however, broadly alleged that:

> "(1) [The appellant] has not provided me with information on my file;

(2) [The appellant] has not dealt with my business properly; and

(3) [The appellant] has acted [with] inexcusable and deplorable negligence."

[11] The particulars of the complaint were set out in the affidavit, and are, in summary, that:

(1) The complainant employed the appellant as her attorney in June 2007. At that time, the appellant requested that the complainant obtain a medical report from a "bone specialist" at a cost of $20,000.00.

(2) The complainant indicated that she could not afford to pay for the medical report and asked the appellant to foot the bill. He refused.

(3) The complainant refused to take out a loan to cover the costs because she was not sure what the outcome of the case would be.

(4) The complainant attempted to meet and contact the appellant on several occasions over several years in an attempt to get updates on her case. The appellant would, however, either not communicate with her or not contact the complainant unless she contacted him first.

(5) At some point, the appellant told the complainant to collect her file from him and advised her to seek alternative counsel.

(6) The complainant attempted to but could not find another lawyer to take her case.

(7) In 2018, the complainant indicated that she wanted the appellant to remain her counsel in the claim. However, she did not hear from the appellant again up to the date of filing the complaint.

The appellant's response to the complaint

[12] The appellant filed an affidavit in response. His main assertions were that following the consultation in 2007 and having received an initial medical report from the complainant, the complainant agreed to provide a medical report from a specialist setting out her permanent partial disability. The report was required to assist the appellant with determining what should be included in the claim, and whether the claim should be filed in the Supreme Court or the Parish Court.

[13] The complainant failed to provide the medical report for several years because she could not afford it, and the appellant refused to assist her with the money to procure it upon her request. The appellant encouraged the complainant to find another lawyer to represent her who might be willing to assist with the payment for the report. He regularly called the complainant to find out if she had found another lawyer, but she had not done so. The situation remained the same until 2018, when the complainant made contact with the appellant. The appellant again refused to continue to represent the complainant in the matter. In 2019, the appellant reconsidered the possibility of representing the complainant and attempted to re-engage with her, but this was unsuccessful.

The Committee's decision

[14] The Committee heard evidence and submissions from the complainant and the appellant and issued its decision on the appellant's liability for professional misconduct on 31 March 2021 ('the decision'). The Committee made 16 findings of fact which are detailed in para. 27 of its decision. Given the grounds of appeal and the arguments advanced relative to them, it is necessary to reproduce those findings of fact in full:

> "(a) the [appellant] was retained by the Complainant in 2007 on a contingency basis to represent her in a personal injury claim;
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> (b) the only sums paid to the [appellant] were the Consultation Fee of $3000.00;

(c) That between 2007 and 2008 the [appellant] wrote to try to secure Medical Reports from the Mandeville Public Hospital and Dr. Steve Mullings, Consultant Orthopaedic Surgeon;

(d) The issue of the consultant report arose following receipt of the Medical report dated 21 November 2007 and the instructions of the Complainant that was having malingering effects following the course of treatment prescribed;

(e) That a claim was commenced on Ms. Kerr's behalf against only the driver and the owner of the motor truck and not the vehicle in which the Complainant was a passenger on 10 November 2012;

(f) Whilst there is evidence that the [appellant] requested that the Complainant sign a Contingency Fee [Agreement], there is no evidence of the Complainant being asked to sign an Indemnity or Waiver;

(g) The [appellant] applied the sum of $3,000.00 to the costs of effecting the stamping and filing of the claim;

(h) That Ms. Kerr was called in to collect the claim documents for service on or around 1 February 2013;

(i) The accident having taken place on 1 June 2007, the claim became statute barred on 30 May 2013;

(j) The Affidavit of Service was not dispatched until 5 June 2013 after the matter had become statute barred but while the claim form was still valid;

(k) The Defence of the owner was served on the [appellant] on 14 August 2013;

(l) The claim form became invalid on 9 November 2013;

(m) The claim has not proceeded to mediation and no further work has been done since 2013;

(n) There is no evidence that the [appellant] collected any money in respect of the Complainant's case;

(o) The relationship between the Complainant and the Appellant broke down in 2018 when she accused him of taking her money; and

> (p) The [appellant] has remained on the Record as the Attorney for the Complainant."

[15] Having made its findings of fact, the Committee stated that the "main complaint" in this matter was that the appellant had acted with inexcusable and deplorable negligence in breach of Canon IV(s) (para. 28 of the decision). Following a summary of the applicable legal principles on inexcusable or deplorable negligence or neglect, the Committee's brief application of the law to the facts was this:

> "32. In this matter the [appellant] has not only failed to protect the Complainant's interest by filing a claim against the vehicle in which she was a passenger, but also failed to ensure that there was adequate time afforded to effect service on the driver of the vehicle that was sued. In the circumstances, the Panel is of the view from the evidence that the Complainant has met the threshold required.
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> 33. In relation to the complaint regarding the failure to provide information on the matter, the Panel also finds for the Complainant in this regard as no evidence was presented in relation to updates. Instead, the position of the [appellant] appears to be that he was of the view that having filed the claim he was discharged of any further obligations as the Complainant was either looking for a replacement attorney or to provide a medical report from Dr. Mullings."

[16] On the basis of its reasoning in paras. 32 and 33, the Committee concluded that the evidence presented by the complainant established beyond a reasonable doubt that the appellant had breached Canons IV(r) and IV(s). The Committee did not specifically state which of its conclusions in paras. 32 and 33 grounded the breaches of the respective Canons. However, it seems logical that the Committee's findings in para. 32 relate to the breach of Canon IV(s) (which pertains to inexcusable or deplorable negligence or neglect) and those in para. 33 relate to Canon IV(r) (which pertains to conducting the client's business with due expedition and providing updates to the client when required).

[17] As a sanction for the breaches, the Committee, on 28 June 2021, ordered that- "(a) The Attorney Donald Alexander Gittens is to pay costs in the sum of $75,000.00 to the General Legal Council on or before 31st July [2021]".

[18] The Committee did not provide the details of its reasoning in arriving at its sanction decision. However, the formal order dated 28 June 2021 discloses that the following matters were taken into account in arriving at the sanction imposed - (i) the sworn and documentary evidence and submissions of both the complainant and the appellant; (ii) the appellant's submissions in mitigation; (iii) that the appellant tendered an apology which was acceptable to the complainant; and (iv) that the parties "enter[ed] into an arrangement" the proof of which was presented to the Committee.

The appeal

[19] Dissatisfied with the Committee's findings of professional misconduct and the sanction imposed, the appellant filed a notice of appeal, accompanied by 11 grounds of appeal. The grounds of appeal are regrettably prolix and overlapping. With no disrespect meant to the appellant's effort, but in the interest of greater judicial efficiency, I will not reproduce them verbatim. However, it should be stated that notwithstanding the decision not to restate the grounds of appeal, the substance of the appellant's main grievances with the Committee's decision, embodied in them, is sufficiently identified and addressed during the course of the analysis of the issues.

[20] With that said, having considered the grounds of appeal, four dispositive issues are distilled from them, namely:

(1) whether the Committee was wrong to make certain findings of fact relating to the appellant's conduct of the matter with the complainant (grounds of appeal (1), (4) and (5));

(2) whether the Committee's conclusion that the appellant was guilty of breaching Canon IV(r) was made in breach of the rules of natural justice, section 16(2) of the Constitution and is unsustainable on the evidence (grounds of appeal (2), (3), (6), (7), and (8));

(3) whether the Committee's conclusion that the appellant was guilty of breaching Canon IV(s) was unsustainable on the evidence and therefore plainly wrong (ground of appeal (7A); and

(4) whether the sanction by way of an award of costs to the GLC is unreasonable, in breach of natural justice, unconstitutional and excessive (grounds of appeal (9) and (10)).

[21] Before addressing the issues for resolution, a brief discussion of the legal framework and the applicable standards of review for their resolution is deemed necessary.

The applicable legal framework and standards of review

[22] This court has traditionally been guided by the following pronouncement of the court in **Re A Solicitor** [1974] 3 All ER 853, at pages 859 to 860, as to its role in determining appeals from the Committee:

> "It has been laid down over and over again that the decision as to what is professional misconduct is primarily a matter for the profession expressed through its own channels, including the disciplinary Committee. I do not, therefore, for one moment question that if a properly constituted disciplinary committee says that this is the standard now required of solicitors that this court ought to accept that that is so and not endeavour to substitute any views of its own on the subject."

A similar rule has been applied in relation to appeals against sanctions imposed by the Committee (see **Michael Lorne v General Legal Council** [2021] JMCA Civ 17 at para. [25] applying **Bolton v The Law Society** [1994] 2 All ER 486).

[23] In **General Legal Council v Michael Lorne** [2024] UKPC 12 ('**GLC v Lorne**'), a recently decided appeal to the Privy Council from this court, the Privy Council affirmed this court's approach to determinations of appeals from the Committee and gave further guidance on the nature of this court's powers in an appeal from the Committee. In its judgment, the Privy Council analysed sections 16 and 17 and other sections of the LPA,

this court's decisions, and decisions from the courts of England and Wales ('the UK'), and set out the standard of review for this court in treating with cases from the Committee. Although the Privy Council's exposition of the principles was in the context of an appeal from a sanction imposed by the Committee, it provides useful general guidance on the standard of review and the role of the court in appeals involving a challenge to findings of professional misconduct, such as the instant appeal.

[24] The applicable principles were set out in paras. 38 – 56 of the Privy Council's judgment. In sum, the principles are that an appeal from the decision of the Committee is by way of rehearing, and so the court may substitute its own decision for that of the Committee in appropriate cases. However, the court is required to approach the findings of professional misconduct and the sanctions imposed by the Committee with some diffidence, given the Committee's expertise in determining the types of conduct which ought to attract disapproval and the appropriate sanctions to be applied. This does not mean that the court is to be blindly deferential to the Committee's findings and sanctions. It instead means that the court may intervene in a decision of the Committee, both regarding liability for professional misconduct and the sanction, where there is an error of law or principle. Importantly, this court's jurisdiction on a rehearing is not restricted to overturning the Committee's findings where there is an error of law or principle. In the absence of such errors, the court must exercise caution before overturning a decision of the Committee, and mere disagreement with the decision of the Committee is insufficient. The appellate court is permitted to disturb a sanction of the Committee which it finds to be excessive or inappropriate. In all cases, however, the court must be guided by the principles which govern the appellate jurisdiction in cases where there is an appeal from a discretionary and/or evaluative judgment.

[25] The issues identified for resolution in this appeal have been considered with these statements of principles firmly rooted in mind.

[26] The standard of review applicable to treating with challenges to the findings of fact of a first instance court or quasi-judicial tribunal is also considered and applied to the

assessment of the impugned aspects of the Committee's decision regarding matters of fact. Guidance is obtained from the pronouncements of the Privy Council in the now oft-cited case of **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, an appeal from Trinidad and Tobago. Their Lordships, after reviewing older cases, including the renowned case of **Watt (Thomas) v Thomas** [1947] AC 484, provided the standard of review applicable to appellate review of a first instance court's findings of fact. This is essentially captured in para. 12 of the Board's judgment, where their Lordships stated:

> "…It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'…This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…".

[27] Therefore, for this court to interfere with the Committee's factual findings and conclusions based on them, it has to identify a mistake in the Committee's evaluation of the evidence that is sufficiently material to undermine its conclusions. The court cannot disturb the Committee's findings merely because it would have reached a different decision based on the proven facts and inferences drawn from them.

[28] Accordingly, to succeed, the appellant must persuade this court to the viewpoint that the challenged findings of fact of the Committee, on which the decision on liability for professional misconduct is based, are such as to warrant the interference of this court as a matter of law.

Analysis and findings

Issue (1) – whether the Committee was wrong to make certain findings of fact relating to the appellant's conduct of the complainant's matter (grounds of appeal (1), (4) and (5))

[29] The appeal challenges, among other things, four findings of fact made by the Committee, that:

(1) the appellant was retained on a contingency basis (para. 27(a) of the decision);

(2) the appellant commenced a claim on the complainant's behalf against the driver and the owner of the motor truck and not the driver and owner of the taxi (para. 27(e) of the decision);

(3) there is no evidence of the complainant being asked to sign an indemnity or waiver (para. 27(f) of the decision); and

(4) the complainant was called in to collect the claim documents for service on or around 1 February 2013 (para. 27(h) of the decision).

[30] Counsel for the GLC, Ms Sidia Smith, however, pointed out that the Committee did not rely on the findings of fact made in relation to the contingency agreement (para. 27(a)), the signed waiver or indemnity (para. 27(f)) and the collection of the claim form for service (para. 27(h)) (enumerated as (1), (3) and (4) above, respectively) as bases for finding the appellant guilty of professional misconduct. I agree with these submissions.

[31] The Committee based its findings of professional misconduct on three analytical conclusions expressed in paras. 32 and 33 of the decision, which are:

i) the appellant failed to protect the complainant's interest by filing a claim against the vehicle in which she was a passenger (para. 32);

ii) the appellant failed to protect the complainant's interest by failing to ensure that there was adequate time afforded to effect service on the driver of the motor truck (para. 32); and

iii) there was no evidence of updates to the complainant (para. 33).

[32] The Committee's conclusions at paras. 32 and 33 were made against the general backdrop of its enumerated findings of fact contained in para. 27. However, in arriving at its conclusions, the Committee did not expressly rely on its findings of fact in paras. 27(a), 27(f) and 27(h) to find the appellant guilty of professional misconduct. Furthermore, I cannot discern any impact which those impugned findings of fact could reasonably have on the Committee's overall findings of professional misconduct. Therefore, even if these findings were erroneous, the error would have had no impact on the Committee's ultimate finding that the appellant breached Canons IV(r) and IV(s). Therefore, these impugned factual findings in paras. 27(a), 27(f) and 27(h) do not warrant investigation by the court as they are not such as to undermine the ultimate decision of the Committee as to justify the court's interference with the decision.

[33] Having examined the record of the proceedings before the Committee, it was the appellant's evidence that he filed a claim against the owner and driver of the motor truck. There is no evidence of a claim having been filed against the owner and driver of the taxi. Therefore, the Committee was correct in making that statement in para. 27(e) of its decision and, therefore, did not err in that aspect of its findings of fact.

[34] However, the finding that no claim was filed against the driver and owner of the taxi evidently informed the Committee's ultimate finding that the appellant failed to protect the complainant's interests (para. 32 of the decision). That finding of fact in para. 27(e), therefore, does not fall to be treated in the same manner as the previously discussed findings at paras. 27(a), 27(f) and 27(h), because the fact that no claim was filed against the driver and owner of the taxi bears a direct connection to the Committee's ultimate finding of professional misconduct against the appellant.

[35] Therefore, the appellant's more fundamental and pivotal challenge relating to para. 27(e) is that the Committee utilised that fact regarding his failure to sue the driver and owner of the taxi, to his detriment, without first giving him an opportunity to respond in breach of the rules of natural justice and his constitutional right to a fair hearing. This complaint is the subject of consideration under issue (2), to which attention is now turned.

Issue (2) – whether the Committee's conclusion that the appellant was guilty of breaching Canon IV(r) was made in breach of the rules of natural justice, section 16(2) of the Constitution and is unsustainable on the evidence (grounds of appeal (2), (3), (6), (7), and (8))

[36] The appellant's grounds of appeal, which are subsumed under issue (2), challenge the Committee's conclusions in paras. 32 of its decision, which formed the basis of one aspect of the Committee's findings of professional misconduct. These conclusions are that the appellant failed to protect the Complainant's interest by (a) failing to file a claim against the owner and driver of the taxi; and (b) failing to ensure that adequate time was afforded to effect service on the driver of the motor truck who was sued. The submissions advanced in respect of each of these conclusions will now be addressed.

The parties' submissions

(1) The appellants' submissions

[37] The appellant complained that the Committee erred in its conclusion at para. 32 of the decision that the appellant failed to protect the interest of the complainant by bringing a claim only against the driver and owner of the motor truck and not against the owner and driver of the taxi. The appellant, through his counsel, Mr Seymour Stewart, submitted that these findings were reached in breach of the appellant's common law and constitutional rights to a fair hearing, as the issue of a claim against the owner or driver of the taxi was not raised by the complainant or the Committee during the hearing. As a consequence, the appellant had no chance to address that issue or specifically to use his instructions (or lack thereof) to explain, defend or justify his decision to proceed with a claim only against the driver and owner of the motor truck. Consequently, Mr Stewart contended that the conclusion that the appellant failed to protect the complainant's

interests by not filing a claim against the owner and driver of the taxi is unreasonable and constitutes a miscarriage of justice.

[38] The appellant further complained and submitted through his counsel that the Committee also erred in law in its finding that the appellant failed to ensure adequate time to effect service on the driver of the motor truck who was sued (para.32 of the decision). Mr Stewart submitted that there was no evidence that the driver had not been served. To the contrary, he said, the evidence was that the claim was served on the driver of the motor truck, but the process server had advised that the affidavit of service was returned by mail to the appellant. However, the appellant did not receive it. Further, the fact that the acknowledgement of service was filed only on behalf of the owner was not a sufficient or reasonable basis for any inference to be drawn by the Committee that the driver had not been served, especially since the draft affidavit of service sent to the bailiff had not been successfully returned to the appellant.

[39] Mr Stewart also contended that the Committee's finding in this regard breached the constitutional and common law right of the appellant to a fair hearing because the specific issue of the expiry of the time for service against the driver of the motor truck was not raised by the complainant and was not specifically raised by the Committee as part of the charges during the hearing. Consequently, the appellant had no chance to address that specific issue. Therefore, the conclusion is unreasonable and constitutes a miscarriage of justice.

(2) The GLC's submissions

[40] Ms Smith, for the GLC, however, contended that it was open to the Committee to reach the conclusions it did on the basis that the defence filed by the owner of the motor truck blamed the collision on the taxi driver and that the appellant did not provide any explanation for failing to file a claim against that driver. Counsel further contended that the issue of the expiration of the limitation period was a live one. With the defence of the truck driver placing blame on the taxi driver, and with the general thrust of the complaint being that the appellant acted with inexcusable and deplorable negligence, the appellant

had a duty to put evidence before the panel to explain his reasons for not filing a claim against the owner and driver of the taxi. Having failed to do so, the Committee was free to reach the conclusion it did that the appellant failed to protect the complainant's interests.

[41] Relying on the transcript of the proceedings before the Committee, Ms Smith, also submitted that it was clear that the appellant had no evidence upon which he could rely to say that the driver of the motor truck was served with the claim. The failure of the appellant to prove service, she said, meant that the complainant could not apply for or obtain default judgment against the truck driver. The fact that the limitation period had expired also meant that no further attempts could have been made to serve the driver. Therefore, it was reasonable for the Committee to find that the appellant failed to ensure there was adequate time to effect service on the truck driver. Further, there was no infringement of the appellant's right to a fair hearing.

Analysis and findings on issue (2)

[42] I have considered the respective submissions of both parties and find favour with the submissions advanced by the appellant for reasons that will now be stated.

(1) The applicable principles

[43] The appropriate starting point for my analysis is a focus on the rules of natural justice, as embodied in case law; the statutory provisions that regulate the filing and ventilation of complaints before the Committee; and the appellant's constitutional right to a fair hearing, as embodied in section 16(2) of the Constitution.

(i) The applicability of the rules of natural justice

[44] As a matter of general principle, the common law rules of natural justice, or procedural fairness, require that a person before a tribunal or other decision-making body ought to know and be permitted to respond to the charges against them. The discussion of the House of Lords in **Ridge v Baldwin** [1964] AC 40 is of significant relevance. At pages 113–114 of the law report, Lord Morris of Borth-y-Gest explained:

> "It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: see Kanda v. Government of Malaya [1962] A.C. 322, 337. My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case."

[45] In similar stead, Lord Reid, in the same case (at page 115), described as "fundamental" the rights "to have accorded to [the person condemned] a reasonable opportunity of learning what is alleged against him and putting forward his own case in answer to it".

[46] The right to be heard is, however, flexible and not absolute, and its dictates will depend on (i) the circumstances of the case; (ii) the nature of the enquiry; (iii) the rules under which the tribunal is acting; and (iv) the subject matter that is being dealt with (see **Rees v Crane** [1994] 2 AC 173 at 191 – 192 and **Russell v Duke of Norfolk** [1949] 1 All ER 109 at 117 – 118).

[47] There is no doubt that the rules of procedural fairness and natural justice apply to proceedings before the Committee (**Owen Clunie v The General Legal Council** [2014] JMCA Civ 31 at para. [56] and **GLC v Lorne** at para. 40).

(ii) The applicability of the statutory regime of the LPA

[48] In fact, the requirements of natural justice in disciplinary proceedings before the Committee have been given statutory authority by the LPA and the Legal Profession (Disciplinary Proceedings) Rules ('the LPA Rules'), which regulate the making of complaints to the Committee. Section 12 of the LPA provides for the making of a complaint before the Committee. Such complaints are made by way of application to the Committee to require the attorney to answer allegations. Section 12(1) reads, in part, as follows:

> "(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**…". (Emphasis added)

[49] The nature and form of the application are explained and specified in rule 3 of the LPA Rules, which states:

> "**An application to the Committee to require an attorney to answer allegations contained in an affidavit** shall be in writing under the hand of the applicant in Form 1 of the Schedule to these Rules and shall be sent to the secretary, **together with an affidavit by the applicant in Form 2 of the Schedule to these Rules stating the matters of fact on which he relies in support of his application**." (Emphasis supplied)

[50] In **Laurel Washington-Turner v The Disciplinary Committee of the General Legal Council** [2020] JMCA Civ 61 ('**Laurel Washington-Turner**'), F Williams JA, in delivering the court's decision, accurately described the impact of these two provisions on the bringing of a complaint. At para. [30] of the judgment, he stated:

> "[30] The essence of these two provisions is **that the allegations an attorney is called upon to answer ought to be contained in an affidavit in the prescribed form**. Further, the affidavit in question ought to state the facts being relied upon to ground the allegations." (Emphasis added)

[51] Similar reasoning would have formed the basis of the Privy Council's statement in **General Legal Council ex parte Basil Whitter v Barrington Frankson** ('**GLC v Frankson**) [2006] UKPC 42, describing the affidavit in support of an application made under section 12 as "in the nature of a pleading" which "has to contain the allegations which the attorney must answer but no more".

[52] If other matters are identified by the Committee which warrant an answer from the attorney, then in that case, the LPA Rules permit the Committee to require an applicant to provide further information concerning the complaint and permit the attorney to give an answer to the additional information. The Committee may do so pursuant to

rule 4 of the LPA Rules, prior to fixing a day for hearing the application. That rule provides, in part, as follows:

> "(1) Before fixing a day for the hearing of any application under rule 3, the Committee –
>
> > (a) may require the applicant to supply such further documents or information relating to the allegations as the Committee thinks fit; and
> >
> > (b) shall serve on the attorney against whom the application is made a copy of the application and the affidavit in support thereof, together with all other relevant documents and information.
>
> (2) An attorney who is served under paragraph (1)(b) shall, within forty-two days of such service, respond, in the form of an affidavit, to the application."

[53] Rule 17 of the LPA Rules also permits the Committee, upon the hearing of a complaint, to require the applicant to amend or add to the allegations contained in the affidavit to include any matter that is outside the scope of the original affidavit, and to permit the attorney an opportunity to respond to the amended or additional allegations. Rule 17 provides:

> "17. If upon the hearing it appears to the Committee that the allegations in the affidavit require to be amended or added to, the Committee may permit such amendment or addition, and may require the same to be embodied in a further affidavit, if in the judgment of the Committee such amendment or addition is not within the scope of the original affidavit, so, however, that if such amendment or addition be such as to take the attorney by surprise or prejudice the conduct of his case, the Committee shall grant an adjournment of the hearing upon such terms as to costs or otherwise as to the Committee may appear just."

[54] The foregoing provisions of the LPA and the LPA Rules, and the reasoning in **Laurel Washington-Turner** and **GLC v Frankson**, all make it clear that an application under section 12(1) of the LPA, alleging professional misconduct on the part of the attorney, requires an attorney to answer allegations which are set out in the affidavit in

support of the application. The affidavit in support should contain all the factual matters upon which a complainant will rely when advancing his application against the attorney. If there are additional matters of concern to which an attorney ought to respond, the Committee is required to engage either rule 4 (before the hearing) or rule 17 (upon the hearing) to request further information or further particulars from the complainant, and to give the attorney an opportunity to respond. Furthermore, it stands to reason that the allegations to which an attorney is required to respond are those contained in a complainant's affidavit in support of an application; an attorney is not required to answer any allegation that falls outside the scope of the affidavit.

(iii) The applicability of the constitutional right to a fair hearing

[55] Finally, on this issue, the Judicial Committee of the Privy Council in **GLC v Lorne** made it indisputable that the right to a fair hearing embodied in section 16(2) of the Constitution is engaged in disciplinary proceedings before the Committee. At para. 40 of the judgment, their Lordships stated:

> "As the Court of Appeal has recognised in this case, an appellate court in exercising its jurisdiction to rehear a case must have regard to the appellant's rights under section 16(2) of the Constitution as amended in 2011. This section contains the relevant provision of the Charter, conferring on the appellant the right to a fair hearing within a reasonable time by an independent and impartial court or authority established by law…".

(2) Application of the relevant principles to the complaint and evidence

[56] In the light of the preceding discussion, this court is obliged to pay due regard to the rules of natural justice, the statutory provisions and the rules of procedure within the statutory regime established by the LPA, which, singly and cumulatively, confer on the appellant the right to be heard in the proceedings brought against him. The common law and statutory right to be heard is also enshrined in the appellant's constitutional right to a fair hearing before the Committee by virtue of section 16(2) of the Constitution. These considerations that touch and concern the appellant's right to due process are brought

to bear heavily on the review of the Committee's approach in considering the complaint against him and his challenge to the Committee's treatment of the complaint.

(i) The appellant's failure to sue the driver and owner of the taxi

[57] I have carefully read the complainant's affidavit in support. The affidavit reveals that the complainant's concerns related to the lack of communication from the appellant regarding the progress of her case and the delay in completing the matter. Nothing in the affidavit can be construed as expressly or impliedly raising an allegation relating to the appellant's failure to file a claim against the owner and driver of the taxi. Although the complaint was grounded, in part, in allegations that the appellant "has not dealt with my business properly" and had "acted with inexcusable and deplorable negligence", there were no particulars advanced in the affidavit to even suggest that this specific complaint about the parties to the claim was ever a part of the complainant's allegations against the appellant. Therefore, this issue was, in the words of rule 17 of the LPA rules, "not within the scope of the original affidavit", and did not fall to be responded to by the appellant in accordance with the provisions of the LPA and the LPA Rules.

[58] In the circumstances, because the issue regarding the omission to sue other persons was outside the scope of the complainant's affidavit, the Committee ought to have engaged rule 17 and required the complainant to amend her allegations by filing a further affidavit once it had determined that there was an issue surrounding the proper parties to be sued. Upon the amendment, the appellant would have been required to be notified of the new allegations and provided with an opportunity to respond. The Committee, however, failed to adhere to the statutorily prescribed procedure, which itself embodies the requirements of natural justice.

[59] I have also examined the evidence given orally before the Committee. I have observed that the complainant's evidence is largely consistent in terms and scope with the allegations she made in her affidavit. At no time in giving her oral evidence did she raise a concern relating to the persons who were sued or not sued as defendants in the claim. Even more importantly, the complainant's evidence regarding the taxi in which she

was a passenger did not raise an issue of liability or culpability on the part of the driver. At page 44 of the record, the complainant told the Committee the reason she went to the appellant. This was the dialogue which ensued:

> "Panel: Why did you go to see him?
>
> [Complainant]: Because I met in an accident on the 1st June 2007.
>
> Panel: Where was this accident?
>
> [Complainant]: In St. Elizabeth, Junction Alpart.
>
> Panel: You went to see him?
>
> [Complainant]: I sustained a broken arm.
>
> Panel: You went to see him to do what?
>
> **[Complainant]:** Represent me I was a passenger in a taxi. I sustained a broken arm. **A white leeland truck skidded across the road and hit the taxi.**
>
> **Panel:** **So you told Mr Gittens about the accident and that you need legal representations.**
>
> **[Complainant]:** **Yes sir.**" (Emphasis added)

[60] It can be reasonably inferred from the complainant's own evidence and the fact that no claim was brought against the taxi driver, that the instructions she gave Mr Gittens was that the driver of the motor truck was responsible for the accident, having left his side of the road onto the path of the taxi. Nothing in the complainant's account pointed to the accident being due to the fault of the driver of the taxi. It is also significant that the complainant, who was not represented by counsel in the proceedings, questioned the appellant herself, and questions were also asked of him by the members of the Committee, but neither the complainant nor the Committee asked the appellant any questions regarding his decision or failure to file a claim against the taxi driver.

[61] The unfortunate consequence of the foregoing circumstances is that the appellant had no notice, prior to the issuance of the Committee's decision, that there was a grievance against him on this issue, which he ought to have defended. Remarkably, the

appellant was not given any reasonable opportunity to mount any evidence (written or oral) or any submissions to explain his decision or omission to file a claim against the other driver or to present evidence of any instructions he had received from the complainant or advice he gave on the issue. Contrary to the contention of Ms Smith, he cannot be faulted for failing to provide an explanation for not filing a claim against the driver and owner of the taxi because he would have had no notice that such an allegation formed part of the case against him.

[62] In all the circumstances, it was unfair, and in breach of the rules of natural justice, the statutory regime of the LPA, and the appellant's constitutional right to a fair hearing for the Committee to find that he, on account of his failure to file a claim against the taxi driver, acted with inexcusable and deplorable negligence in breach of Canon IV(s). Therefore, for the preceding reasons, the Committee should not have relied on the fact that the appellant had failed to file a claim against the driver and owner of the taxi in concluding that he was guilty of professional misconduct.

[63] In addition to the foregoing reasoning, I also accept the appellant's further contention that there was no factual basis for the Committee's finding that he failed to protect the complainant's interests by not filing a claim against the owner and driver of the taxi. The Committee's finding is apparently premised on the assumption that a claim against the owner and driver of the taxi was required or prudent in the circumstances. The Committee was obviously influenced by the owner's denial of liability in his defence. That defence, however, was contradicted by the complainant's account of how the accident occurred, and there was no evidence from the complainant that she wished to make a claim against the taxi driver.

[64] As the appellant contended, had the Committee given him an opportunity to be heard, he would have been able to explain his reason for adopting the course of action he did in filing a claim only against the persons connected to the motor truck. The appellant drew the court's attention to the police report that was referred to in the particulars of claim, and which he said he had emailed to the complainant. The police

report, dated 3 March 2008, formed part of the record of appeal on the permission of the court given at the case management conference of the appeal. The report indicated that the accident was investigated by a named police officer who reported that it was the motor truck that "developed a skid, went onto the right side of the road and collided with the [taxi] travelling on the opposite side of the road". It disclosed that the driver of the motor truck was warned for intended prosecution for careless driving. Therefore, apart from the mere say-so of the driver of the motor truck in his pleaded defence, which would have post-dated the filing of the claim, the Committee had no objective basis to conclude that a viable claim apparently existed against the driver and owner of the taxi at the time the claim was filed.

[65] In short, there is nothing to even remotely suggest that, at the time the claim was filed, there would have been a viable claim against anyone associated with the taxi. The Committee's adverse finding of inexcusable and deplorable negligence against the appellant on the basis of failing to protect the complainant's interest because the driver and owner of the taxi was not sued was, with respect, insupportable on the evidence.

[66] Accordingly, in concluding that the appellant was guilty of professional misconduct for failing to sue the taxi driver and owner, the Committee did so without a proper evidentiary basis. It failed to take into account the complainant's evidence of how the accident occurred and to hear from the appellant regarding his reasons for pursuing the claim as he did. On the face of it, the appellant's decision was reasonably informed by the police report of how the accident occurred, which accords with the complainant's account.

[67] In all the circumstances, I am impelled to conclude that the Committee erred in fact and law when it found that the appellant was guilty of professional misconduct due to his failure to join the driver and owner of the taxi as defendants to the claim.

(ii) Inadequate time to effect service of the claim on the driver of the truck

[68] In relation to the Committee's finding that there was inadequate time to effect service on the driver of the motor truck, I have considered counsel's submissions against the background of all the evidence before the Committee. I am again compelled to agree with the position advanced by the appellant that the Committee erred in its approach and conclusion for the reasons briefly outlined below.

[69] Nowhere in the complainant's affidavit is it even remotely suggested that failure to serve the driver of the motor truck was part of her complaint against the appellant. The issue was, therefore, outside the scope of the complainant's affidavit in the terms of rule 17. However, it has not escaped attention that the service issue featured somewhat in the complainant's oral evidence before the Committee during the course of her examination-in-chief.

[70] The complainant provided evidence that the driver of the motor truck was served; however, the affidavit of service, which should have been prepared by the process server to evidence service, was allegedly lost in the mail. In this regard, the record at page 51 reveals the oral evidence of the complainant that she gave the papers over to the process server (she said she gave it to the police, but the evidence shows it to have been the bailiff for the Clarendon Parish Court) to be served. She said she subsequently "called [the appellant] and told him that the truck driver was served. When she spoke to him again, he told her that "whatever the Bailiff was supposed to sign. The affidavit seems [sic] to get lost in the mail…". Her evidence, in response to a question from the Committee, was that the claim was served in 2015. However, that time frame could not have been correct in light of more reliable evidence accepted by the Committee.

[71] Following the close of the complainant's case, the Committee frontally raised the issue of service of the claim with the appellant while he was giving evidence. The exchange between the Committee and the appellant on that issue was as follows:

> "Panel: There were two defendants that were named, and the defence is filed by the 1st Defendant what is the position regarding the 2nd Defendant?

[Appellant]: The Affidavit of Service that was sent to the Bailiff, a Proforma Affidavit of Service he said he sent it back to us, but we did not receive it. He eventually suggested that it was lost in the mail. I tried to get details from him to create a separate Affidavit of Service for the driver, but he could not find the date, he had not made any notes. I tried using acknowledgment of service to assist him, but it only had the month and year that service was acknowledged. It did not have the date in the month and so the matter remains without any proof of service of the driver.

Panel: And at the time when you were trying to get the Affidavit of Service the statute of limitation had expired?

[Appellant]: Yes, ma'am it could not have been reserved [sic].

Panel: Not reserved [sic]? It is, the statute of limitation I am talking about not the validity of the claim.

[Appellant]: Yes, ma'am the statute of limitation had already been expired because when I spoke to the Complainant in September 2012 there was about 6 months to go. I was about 9 or 10 months to go but it was fast running out so by the time we filed it would have been about 6 or 7 months to go."

[72] Although the Committee, in its questions to the appellant, adverted to the issue surrounding the service of the claim on the driver of the truck, it cannot be said that the questions it put to the appellant were sufficient and effectual to place him on notice that they had a concern about the matter so much so that it had elevated to be a grievance against him on which professional misconduct could have been found. There was nothing to put the appellant on notice that he was required to respond to such a grievance against him in order to resist a finding of professional misconduct on that basis.

[73] In the circumstances, the appellant was not given notice that he was required to respond to a complaint regarding the service of the claim on the driver of the motor truck. The failure of the Committee to engage rule 17 of the LPA Rules to give the appellant

proper notice and a reasonable opportunity to respond to what it evidently treated, of its own volition, as a part of the charges, is, at the very least, in breach of natural justice.

[74] Even more crucially, given the complainant's indication that she was the one who handed over the documents to be served and the subsequent information she received from the bailiff that the papers were served, there can, strictly speaking, be no issue as to the adequacy of time for serving the driver of the motor truck. The Committee had before it confirmation by the complainant that she was the one who told the appellant that the driver had been served. Therefore, the sole issue regarding service that properly arose on the evidence would have been the failure or inability to obtain proof of service from the bailiff. This was not strictly an issue of timing for service, but rather, on the account of both the appellant and the complainant, a matter of receiving an affidavit of service from the bailiff to prove that he had effected service on the driver as he had reported.

[75] No issue was taken either by the complainant or the Committee during the hearing that the missing affidavit of service was due to the fault of the appellant. Therefore, it seems that the Committee's finding regarding the failure to leave adequate time for service essentially laid the blame for issues surrounding proof of service at the appellant's feet. I believe doing so is arguably unfair because the Committee never expressly stated that this issue was a grievance in its questions to the appellant.

[76] I find, too, that the Committee's conclusion that the appellant failed to protect the complainant's interests by ensuring adequate time to effect service on the driver of the motor truck was unreasonable for another reason. It is observed that when the documents for service were dispatched in February 2013 to the complainant, roughly 10 months would have been left for service before the claim form expired. There was no explanation solicited as to the reason for the two-month lapse (following the filing of the claim) before the complainant collected the documents for service. The Committee's finding of fact that she was called on 1 February 2013 to collect the claim for service is not supported by the evidence. The evidence shows that she attended the appellant's

office on 1 February 2013, the date of the letter she endorsed as having received. As the appellant rightly contended, there is no evidence about when she was called to pick up the letter.

[77] In any event, time was adequate for service on the owner of the truck, who filed his defence. In light of the evidence of both the complainant and the appellant (who could only act on the word of the bailiff) and by any objective measure, time would also have been adequate for service on the driver of the truck when the claim was issued since he was said to have been served. For all the preceding reasons, the Committee would have been erroneous in its conclusion that the appellant did not afford adequate time for service on the driver, thereby failing to protect the complainant's interest.

[78] Ultimately, the Committee's conclusion that the appellant failed to protect the complainant's interests by not ensuring adequate time for serving the claim on the truck driver was made in breach of Rule 17 of the LPA Rules, the principles of natural justice, and the appellant's constitutional right to a fair hearing. This renders the decision susceptible to interference by this court. However, and, in any event, the conclusion is also insupportable on the evidence. Accordingly, the finding of professional misconduct on the basis that the appellant did not allow adequate time for the driver of the truck to be served with the claim cannot stand for these reasons.

Conclusion on issue (2)

[79] With the core bases for the Committee's finding found to be unsustainable, what remained before the Committee to form the basis for its adverse finding of professional misconduct under Canon IV(s) would have been the terms of the complainant's complaint and her *viva voce* evidence, which were unclear regarding timelines. One thing that is clear, however, is that a large part of the delay in the progress of the matter resulted from the impasse that ensued between the appellant and the complainant regarding the payment for the consultant report, which the appellant considered necessary for the filing of the claim but for which the complainant refused to pay. There was also a period when the complainant was seeking alternative legal representation at the appellant's advice,

which was unsuccessful. The slow progress of the complainant's business was partly due to her own acts or omissions, which cannot be ignored.

[80] The authorities have established that conduct that would amount to professional misconduct on the grounds of inexcusable and deplorable negligence or neglect would be (i) advice, acts or omissions in the course of the lawyer's professional work that no member of the profession who was reasonably well-informed and competent would have given, done or omitted to do (see **Saif Ali v Sydney Mitchell & Co** [1980] AC 198 at pages 218 and 220); and (ii) conduct that is inexcusable and such as to be regarded as deplorable by fellow solicitors (see **Re A Solicitor** [1972] 1 WLR 869). Nothing in the complaint and supporting evidence that the complainant placed before the Committee had reached this high threshold required to ground liability for professional misconduct on the basis of inexcusable and deplorable negligence within the scope of Canon IV(s). The Committee was wrong to have concluded otherwise.

[81] The appellant, therefore, succeeds on the grounds relating to the Committee's finding of liability for professional misconduct on the basis of inexcusable and deplorable negligence.

Issue (3) – whether the Committee's conclusion that the appellant was guilty of breaching Canon IV(s) was unsustainable on the evidence (ground of appeal (7A)

[82] The appellant further contended in his grounds of appeal that the Committee erred in law in its finding that he failed to provide updates to the complainant concerning her case (para. 33 of the decision). Mr Stewart submitted in support of these grounds that the finding cannot be supported, having regard to the weight of the evidence, most of which was led by the complainant herself, regarding the various discussions between them, and the various interactions between his staff and her. Furthermore, on the standard of proof required, the Committee's finding was unjustifiable in the absence of evidence that the complainant had made any specific request for information and that such a request was not satisfied by him.

[83] The GLC contended that the Committee's conclusion was supported by the evidence. Ms Smith made specific reference to the complainant's oral evidence that she made several unsuccessful attempts over several years to obtain information from the appellant about her case.

Analysis and findings on issue (3)

[84] In its decision, the Committee did not specify the period within which it considered the appellant ought to have provided the complainant with updates on her case. However, it is obvious to me that between 2007, when the complainant approached the appellant, and 2013, when they were in touch regarding the service of the claim, there could have been no reasonable expectation of updates on the matter. This is so because, as already indicated above, on the complainant's case, the appellant had told her that the claim could not proceed without the requisite specialist medical report. Therefore, the matter would have been at a standstill. Additionally, there was a time when the complainant sought to retain another legal representative but was unsuccessful in doing so. Therefore, the only relevant period for consideration regarding necessary updates would be from 2013, after the discourse regarding the service of the claim, and 2019, when the complainant filed her complaint against the appellant.

[85] This latter period seems to be the period with which the Committee was concerned, given its specific findings of fact in para. 27(m) that the claim had not proceeded to mediation and no further work had been done since 2013.

[86] In concluding that the appellant had not provided any proof of updates to the complainant, the Committee, regrettably, did not make any specific finding of any requests that the complainant had made for updates. It is somewhat concerning that the Committee's conclusions, which underpin the findings of professional misconduct, are largely divorced from the findings of fact it has expressed. The facts found from the evidence must establish professional misconduct as a matter of fact and law. There must, therefore, be that necessary correlation or nexus between findings of fact, findings of law, and the conclusion arrived at regarding professional misconduct. However, having

borne in mind the standard of review pertinent to the fact-finding of a first-instance tribunal, I have examined the evidence to see if the conclusion in para. 33 was open to the Committee on the evidence.

[87] The starting point is a consideration of the appellant's lawful duty to the complainant regarding the provision of information. Canon IV(r) imposed a duty on the appellant to carry out the complainant's business with due expedition and to provide the complainant with **all** information regarding the progress of the matter when she reasonably required him to do so.

[88] The Committee also relied on the Canadian case of **Tiffin Holdings Ltd v Millican** (1965) 49 DLR (2d) 216 which sets out the duty of a lawyer in so far as the provision of information is concerned. The duty is to advise his client on all matters relevant to his retainer, so far as may be reasonably necessary and to keep his client informed to such extent as may be reasonably necessary (see para. 28 of the Committee's decision). For the court to determine whether the appellant failed in his duty towards the complainant to provide information when required, it must closely examine the communication between them relating to the progress of the matter.

[89] An examination of the evidence reveals that the timeline provided by the complainant was inconsistent with the chronology of events presented by the appellant, as well as the documentary evidence indicating the filing of the claim in 2012 up to the filing of the defence of the truck owner in 2013. In particular, the evidence that she received the documents for service from the appellant in 2014-2015 is contradicted by other reliable evidence and was clearly not accepted by the Committee, which found 2013 to be the year when work ceased on her case.

[90] Despite the complainant's unreliable evidence in some regard, what remained clear is that after the efforts were made to obtain the affidavit of service from the bailiff, the appellant did nothing to formally remove his name from the court's record as the attorney with conduct of the matter. Therefore, he remained the complainant's attorney who

would have been responsible for advancing the claim he filed on her behalf until he was replaced.

[91] The complainant's evidence regarding the time frame from the situation with the bailiff, which I accept to have been in 2013, on more reliable evidence, was that she heard nothing about her case from the appellant for years. According to her, he had not "gotten in touch" with her. She said she would call him, and he would not answer his phone; she did not hear from him "even for years". She said she called him on 16 August 2018, and she contacted him again "via WhatsApp" **and asked him about her case**. **He did not remember her, and he could not brief her on her file**. He also told her in 2018 that she "stressed him out" (page 24 of the record). Up to 2019, when she filed the complaint with the Committee, he had not provided her with information on her file.

[92] In her *viva voce* evidence at page 88 of the record, the complainant also explained that the appellant did not keep in touch with her and that it had been "13 years and some months". **She was not getting any information from him**. When she called, he would tell her to follow up with a text, and when she did so, it was only once that he replied to her.

[93] In his written statement in response to the complaint, the appellant explained that he and the complainant were unable to resolve the issue regarding payment for the consultant's report. Consequently, he advised her to seek the services of another lawyer. He would call her regularly to find out if she got a lawyer, but she reported she could not find one, and she asked him to continue representing her. He told her he did not wish to. The situation remained until sometime in 2018 when she contacted him by WhatsApp and asked him to continue; he refused. In late 2019, he attempted to contact her to discuss the matter, with the intention of taking back the case, but the calls were answered by her daughter, who eventually provided him with another number for the complainant. After many attempts to call the complainant, she eventually answered once, and he invited her to speak with him. She was very reserved in the discussion, and though she

agreed to speak with him again to discuss the way forward, she never answered his calls after that, which he "found quite strange" (see page 27 of the record).

[94] At the hearing, the Committee asked the appellant at the start of his case whether he had answered the complaint made by the complainant that he did not provide her with information, among other things. He explained that he called her to discuss the way forward because his state of mind at the time was that she should give him an indemnity or sign a document that if the matter went to court and, she should get less than what she thought her injuries deserved, she would not take any action against him if the specialist report was not a part of the case. That is what he was considering and wanted to discuss with her further in 2019. However, the complainant never answered any of his calls and he surmised that by then, she had already made the complaint (see page 91 of the record).

[95] The appellant was cross-examined by the complainant, and the following evidence was elicited (see page 93 of the record):

> "[Complainant]: Do [you] remember in 2018 I contacted you by WhatsApp?
>
> **[Appellant]:** We had many exchanges of text messages, WhatsApp's and otherwise. In fact, I would say we communicated that way more than by telephone or by conference in person **so I would not dispute that there were WhatsApp exchanges in 2018**.
>
> **[Complainant]: I asked you what was happening in my case**.
>
> [Appellant]: I don't remember any specific question. We had many discussions and where it was and that I still wanted you to get someone to take it over, because I would not try it without the specialist report because almost every time we spoke you complained that your injury was still affecting you.
>
> **[Complainant]: Do you remember how long before 2018, we corresponded?**

[Appellant]: **I don't recall specifically the dates when we corresponded**, but we corresponded frequently. The client was not the one not to be in touch she was in touch very frequently and that is why I was surprised when I did not hear from her for a while…

[Complainant]: **Do you remember me telling you that you hardly call me to update me on anything that is happening in the case?**

[Appellant]: **I don't remember**." (Emphasis added)

[96] The evidence reveals that the appellant was unable to definitively refute the complainant's claim that she had requested updates or information regarding the progress of her case in 2018, and he provided her with none. He could not remember any conversation he had with the complainant when she raised the issue of his failure to provide updates. The appellant himself stated that he could not recall the specificity of any questions she asked. The appellant, unable to recall those conversations or their specificity, provided no evidence that he had given any update to the complainant when she said she had definitely asked him for such in 2018, not having spoken to him for years. He gave evidence that his primary consideration in late 2019 was to discuss the issue of a waiver or indemnity with the complainant. Furthermore, despite the appellant saying that he told the complainant "where it had reached," he did not say what he told her or the period in which he would have provided all information about the progress of her case. His response regarding what updates he gave her about the case was vague and imprecise. He also told the complainant to seek other lawyers, but he never formally terminated his representation of her. As the Committee found as a fact, he maintained his name on the court record as her attorney.

[97] The complainant, having averred that he failed to provide her with the requested information in 2018 and up to the filing of her complaint, the appellant had not presented any cogent evidence to rebut the complainant's evidence. The appellant's inability to remember critical aspects of his conversation with the complainant that touch and concern the provision of information about her case and his failure to show he had

advanced the case beyond where it was in 2013, is fatal to his case. His duty was to provide her with all information about the progress of her case, and there is no clear and compelling evidence that he did so. Therefore, the complainant's evidence stood unrefuted on this issue, and it was open to the Committee, as the tribunal of fact, to accept her evidence as true and reliable and found the allegation proved against the appellant beyond a reasonable doubt.

[98] The absence of updates for years after the claim was filed, as stated by the complainant, suggests that there is evidence to support the legal requirement that the appellant failed to provide the complainant with all information about the progress of her case with due expedition when reasonably required to do so. It would also have been open to the Committee to find that he failed to conduct the complainant's business with due expedition after the filing of the claim. For the preceding reasons, the Committee's conclusion in para. 33 that there was no evidence of updates, thereby rendering the appellant guilty of professional misconduct by virtue of Canon IV(r), cannot be said to be plainly wrong.

Conclusion on issue (3)

[99] I find that the Committee's conclusion in para. 33 of its decision that the appellant failed to provide the complainant with updates cannot be said to be erroneous. Also, its conclusion in para. 34 that, having considered the oral and affidavit evidence of both the complainant and the appellant together with the exhibits, the appellant breached Canon VI (r) is not unreasonable or wrong in principle. These findings were reasonably open to the Committee on the evidence.

[100] Accordingly, this court cannot justifiably disturb the Committee's finding of professional misconduct on the basis of Canon VI(r). This aspect of the appeal fails.

Whether there are other bases of liability for professional misconduct

[101] During the hearing before this court, counsel Ms Smith argued that there were other bases upon which the Committee's findings of professional misconduct could be

sustained. Counsel contended that a broader consideration of the evidence could support the conclusion that the appellant was guilty of professional misconduct and that the appeal should be dismissed on that basis.

[102] However, the challenge faced by counsel in advancing this position is that the GLC did not file a counter-notice of appeal pursuant to rule 2.3(3) of the Court of Appeal Rules 2002 seeking to have this court uphold the Committee's decisions on bases other than those on which the Committee relied. Such a notice would have been required as a matter of fairness to the appellant. In our view, the failure to file a counter-notice foreclosed the GLC's opportunity to advance additional arguments orally for the appeal to be dismissed. Therefore, we refused to permit counsel to argue additional bases for upholding the Committee's decision on any ground not considered by the Committee.

[103] In the premises, I am content to hold that the liability of the appellant for professional misconduct on the evidence considered by the Committee properly rests on a breach of Canon IV(r) and nothing else.

[104] The issue of the appropriateness of the sanction imposed will now be addressed.

Issue (4) – whether the sanction by way of an award of costs to the GLC is unreasonable, in breach of natural justice, unconstitutional and excessive (grounds (9) and (10))

[105] The appellant challenges the costs order on three bases, that the order: breached the constitutional and natural justice principles of impartiality and fairness (ground (9)); was made without legislative underpinning (ground (9); was made without giving the appellant an opportunity to be heard in breach of the rules of natural justice and the appellant's constitutional right to be heard (ground (9)); and was excessive and unreasonable (ground (10)).

[106] These challenges bring into focus the Committee's statutory powers and discretion to order costs for breach of the Canons. Therefore, it is necessary to briefly examine and

discuss the relevant statutory provisions which grant the Committee the power to make such an order.

The GLC's statutory powers to order costs

[107] The Committee expressly stated that its costs order was made under section 12(4), which is taken to mean subsection 12(4)(f). Section 12(4) of the LPA states, in full, that:

> "(4) On the hearing of any such application the Committee may, as it thinks just, make one or more of the following orders as to –
>
> (a) striking off the Roll the name of the attorney to whom the application relates;
>
> (b) suspending the attorney from practice on such conditions as it may determine;
>
> (c) the imposition on the attorney of such fine as the Committee thinks proper;
>
> (d) subjecting the attorney to a reprimand;
>
> (e) the attendance by the attorney at prescribed courses of training in order to meet the requirements for continuing legal professional development.
>
> **(f) the payment by any party of costs of such sum as the Committee considers a reasonable contribution towards costs**; and
>
> (g) the payment by the attorney of such sum by way of restitution as it may consider reasonable,
>
> so, however, that orders under paragraphs (a) and (b) shall not be made together." (Emphasis added)

[108] The Committee's power to impose sanctions as set out in section 12(4) is underscored by Canon VIII(d), which provides that breach by an attorney of the Canons mentioned therein (including Canons IV(r) and IV(s)) "shall constitute misconduct in a professional respect and an Attorney who commits such a breach shall be subject to any of the orders contained in section 12(4) of the [Legal Profession] Act".

[109] Section 12(4) imposes two requirements for the imposition of an order for costs. The first is that the Committee considers it "just" to make such an order pursuant to section 12(4). The second is that the Committee must award only such costs as it considers to be "a reasonable contribution" to costs. The terms "just" and "reasonable" import the yardstick of fairness. This would naturally mean that there must be some evidential basis upon which the Committee, objectively and fairly, determined what would be a reasonable contribution towards such costs in the proceedings before it.

[110] Attention is now turned to the bases of the challenges asserted in relation to the Committee's costs order.

(1) Breach of the constitutional and natural justice principles of impartiality and unfairness

[111] The first aspect of the appellant's challenge to the sanction imposed by the Committee is that the "respondent", by awarding costs to itself and in the quantum it did, is unreasonable and breaches the constitutional and natural justice principles of impartiality and fairness in a quasi-judicial tribunal. The submission in support of this complaint is that, among other things, the Committee acted in breach of natural justice principles that require a fair hearing and against bias by awarding cost "to itself", without affording the other parties, and especially the appellant, any opportunity to make submissions on the matter of such an award.

[112] A fundamental flaw in this aspect of the appellant's contention is that the GLC awarded costs to itself. The Committee is the body that awarded the costs as the quasi-judicial tribunal. The GLC did not. It was long ago established, on strong judicial authority, that the GLC and the Committee are two separate and distinct entities, performing separate and distinct statutory functions (see **R v Disciplinary Committee of the General Legal Council ex parte Winston Churchill Waters McCalla** (unreported), Court of Appeal, Jamaica, Miscellaneous Suit No M 75/1992, judgment delivered 30 April 1993. Therefore, this contention that the GLC awarded costs to itself is without factual and legal basis and is incorrect. Accordingly, the issue of the order being in breach of

natural justice on account of bias, because the tribunal awarded costs to itself, does not arise for consideration.

(2) The absence of legislative authority to award costs to the GLC

[113] The next aspect of the appellant's challenge to the costs order is that the Committee did not have the express or implied legislative authority to award costs to the GLC. In answer to this challenge, it is noted firstly that the language of section 12(4)(f) does not state whether the Committee's power to award costs as a sanction for breaches of the Canons includes costs to the GLC. The broad framing of section 12(4)(f), therefore, suggests that no limitation has been placed on the Committee's power to award costs to the GLC, where such an award is just and represents a reasonable contribution to costs.

[114] Secondly, no authorities from this court have been brought to our attention (or located through our own research) which specifically explain whether the Committee may award costs to the GLC under section 12(4)(f). Therefore, recourse has been had to case law emanating from the UK, which is persuasive given the similarities between the statutory regime that regulates disciplinary proceedings against solicitors, and the LPA.

[115] In the case of **Paul Baxendale Walker v The Law Society** [2007] EWCA Civ 233, section 47(2)(i) of the Solicitors Act, which is in identical terms to our section 12(4)(f), was under review. In that case, an order was made against the Law Society to pay a part of the costs of the solicitor who partially succeeded in the proceedings brought against him. In so far as is relevant to the instant ground under review, the court, on appeal, held that the statutory provision "undoubtedly vests" the Solicitors Disciplinary Tribunal with a wide discretion to order costs so much so that an order that the Law Society should pay the costs of another party to disciplinary proceedings is neither prohibited nor expressly prohibited by the section. However, the award of costs against the Law Society must be confined within proper limits given the special role it plays as the regulatory body for the legal profession. In the same breath, the court recognised that the costs incurred by the Law Society in relation to a successful pursuit of disciplinary proceedings were recoverable.

[116] In our jurisdiction, the Committee would serve as the equivalent of the Solicitors Disciplinary Tribunal, and the GLC would be akin to the Law Society. Having been guided by the wording of our statute and the authorities and guidelines dealing with similar provisions within the jurisprudence of the UK, I am inclined to the view that the Committee has wide powers to order the payment of costs as a disciplinary sanction under section 12(4)(f), which includes costs in favour of the GLC. Therefore, the Committee would have had the jurisdiction to order costs against the appellant in favour of the GLC if the circumstances reasonably warranted such an order, and it considered it just to do so.

[117] Therefore, the critical issue, as I see it, is not one that goes to the statutory jurisdiction or authority of the Committee to make a costs order in favour of the GLC but rather whether it was reasonable and proportionate for the Committee to make such an order in the circumstances of this case. It is, accordingly, convenient at this juncture to address the appellant's argument that the Committee's costs order was excessive and unreasonable.

(3) Whether the costs order was excessive and unreasonable

[118] In determining the appropriateness of the costs order, I observe now, as I did in **Minett Lawrence v The General Legal Council** [2022] JMCA Misc 1 ('**Minett Lawrence v GLC**'), that there is no formal guidance emanating from the GLC or the Committee, which standardises its approach to imposing sanctions for disciplinary offences. In my view, the time has come for the Committee to settle and formalise its approach, practice, and procedure relating to the imposition of costs orders, so that the appropriateness and reasonableness of such orders can be objectively evaluated and appreciated by the parties, the public, and this court. In the absence of such guidance, I have followed my reasoning in **Minett Lawrence v GLC** at paras. [106] to [114]. Of particular note for present purposes is that in determining the appropriate sanction, the case of **Fuglers LLP and others v Solicitors Regulatory Authority** [2014] EWHC 79 (Admin) ('**Fuglers LLP**') and Solicitors Disciplinary Tribunal Guidance Note on Sanctions,

('the Guidance Note') (9th edition at the time) can be of high persuasive value to us in this jurisdiction for the principles they helpfully expound. I, again, recommend using the Guidance Note in this jurisdiction (including its later editions), given the absence of formal guidance for the Committee and the need for uniformity in approach and, above all, to ensure fairness in these proceedings.

[119] Based on my exposition of the relevant case law and guiding principles detailed in **Minett Lawrence v GLC**, the Committee ought to have taken the following steps in arriving at an appropriate sanction(s) to be imposed:

(1) Assess the seriousness of the misconduct. This would involve an assessment of:

(i) The attorney's culpability for the misconduct in question.

(ii) The harm caused by the misconduct, which is not measured wholly, or even, primarily by financial loss caused to any individual or entity. A factor of the greatest importance will be the impact of the misconduct upon the standing and reputation of the profession as a whole. Moreover, the seriousness of the misconduct may lie in the risk of harm to which the misconduct gives rise.

(iii) Any aggravating factors, for example, the results of previous disciplinary proceedings.

(iv) Any mitigating factors, for example, mitigation at an early stage or making good any loss.

(2) Bear in mind the purposes for which sanctions are imposed by the Committee, which are (a) punishment; (b) personal and general deterrence; (c) removal of the risk of re-offending; and most fundamentally

of all (d) maintaining the reputation of and public confidence and trust in the legal profession.

(3) Choose the sanction that most appropriately fulfils that purpose for the seriousness of the offence.

(4) Ensure that the sanction imposed is proportional, by weighing the interests of the public with those of the practitioner and ensuring that the interference with the attorney's right to practise must be no more than necessary to achieve the Committee's purpose in imposing sanctions.

[120] Understandably, there was no demonstration of such a process in the instant case because the Committee's decision predated **Minett Lawrence v GLC**. That notwithstanding, the Committee's sanction order is not, at all, helpful to this court as there is no demonstration of the considerations that informed the decision to impose a costs order in the terms and quantum stated.

[121] Once again, the Guidance Note has provided an insight into the Solicitors Disciplinary Tribunal's approach to costs orders, which is not evident in the Committee's approach in this case and others. In the 11th edition of the Guidance Note, like previous editions, it is explained that costs referred to under section 47(2) (our 12(4)(f)) "are those arising from or ancillary to proceedings before the Tribunal". I accept and adopt this qualification as being the logical and reasonable limitation on the Committee's power to order costs under section 12(4)(f).

[122] This would mean that, for the Committee to make an order for any party to make a "contribution" to costs, there should be some indication that costs arising from or ancillary to proceedings before it had been incurred by the party to whom it is considering awarding costs. In this case, the record shows that the parties to the proceedings were the complainant and the appellant, who were both unrepresented. The involvement of the GLC, to the extent that it would have incurred costs arising from or ancillary to the proceedings, is not borne out on the record, and the Committee, in the absence of such

an indication, has not stated or demonstrated its reasons for ordering costs to the GLC under the subsection.

[123] The record is, therefore, devoid of a factual basis on which it may be said that the GLC incurred costs and the amount of those costs, so incurred, against which the award can be objectively measured and found to be a reasonable contribution toward costs. As such, the legal and factual basis for a costs order to be made under section 12(4)(f), in favour of the GLC in the fixed sum of $75,000.00 is not, at all, apparent on the face of the reasoning of the Committee or the record.

[124] Accordingly, the Committee has left me with no option but to state, in the absence of reasons for the costs order it made in favour of the GLC, that the order is bereft of a factual and legal underpinning. As such, this court is not placed in a comfortable position to conclude that the Committee was correct in opining that the sum of $75,000.00 it ordered the appellant to pay is a reasonable contribution to the costs of the GLC incurred from or are ancillary to the conduct of the proceedings. The appellant's complaint that the order is unreasonable is not shown to be unmeritorious.

[125] In any event, the fact that the Committee had seen it fit to impose the costs order after finding the appellant guilty of professional misconduct on two bases means that the order would now be rendered excessive or disproportionate for the breach of Canon IV(r), the sole breach for which he should have been sanctioned. Undoubtedly, the motivation for the costs order in that sum was the finding that the appellant was guilty of inexcusable and deplorable negligence, which would have rendered the offending more egregious. Therefore, with that finding ruled unsustainable, it is only fair that the sanction be changed.

[126] Accordingly, the costs order made in favour of the GLC should be set aside as excessive and, therefore, inappropriate on this basis. This is sufficient to dispose of this aspect of the appeal concerning the sanction. There is, therefore, no need to investigate

the remaining aspect of the appellant's challenge alleging breaches of natural justice and his constitutional right to be heard.

Conclusion on issue (4)

[127] In imposing the costs orders under section 12(4)(f), the Committee was required to give reasons for making that order as in the case of every other sanction it considers appropriate to impose for professional misconduct. In the absence of reasons for imposing costs in the fixed sum specified in favour of the GLC, this court cannot say the order was reasonably made. In any event, the order is rendered excessive and disproportionate, given that the Committee's finding of professional misconduct based on a breach of Canon IV(s) has been set aside as erroneous.

[128] Accordingly, the appeal also succeeds on this issue for the foregoing reasons.

What is the appropriate sanction to be imposed?

[129] The question remaining for determination at this juncture is, what is the most appropriate sanction the Committee should have imposed? Given the court's power on a rehearing, and the standard of review that must be deployed, it is for this court to determine what would have been a reasonable and proportionate sanction in the circumstances and make the order that, in its view, the Committee should have made.

[130] I have instructed myself on the principles governing sanctions as garnered from the relevant case law, including previous decisions of the Committee itself and the various editions of the highly persuasive Guidance Notes on Sanctions (UK). Against that background, I have considered the gamut of the orders that can be made under section 12(4) of the LPA; the appellant's apology to the complainant and Committee; the terms of the parties' written agreement dated 25 June 2021, which discloses some critical undertakings by the appellant, which include continuing in the claim as counsel for the complainant and to partly meet the costs of the outstanding report; the fact that no identifiable harm was caused or is likely to be caused to the complainant and the public interest in the preservation of the integrity, probity and professional standards of

members of the legal profession. The Committee had not indicated that it had taken into account any prior infraction of the appellant and so this court would not be in a position to reasonably do so in the absence of any indication on the record of the proceedings regarding his antecedents before the Committee.

[131] Having had regard to the applicable law, the circumstances of the offending and personal circumstances of the appellant, as disclosed on the record, I form the view that a reprimand is a just and appropriate sanction to mark the Committee's disapproval of the appellant's conduct in failing to provide the complainant with all information about the progress of her case with due expedition in breach of Canon IV(r). It is also appreciated that the Committee itself did not conclude that any of the more serious penalties, including a fine, was warranted.

[132] Further, given the unique features of this case, including the complainant's own attitude toward the proper prosecution of her case, which affected its progress, a reprimand would be sufficient to protect the public interest and maintain public trust and confidence in the legal profession.

[133] I would, therefore, order that the appellant be subject to a reprimand pursuant to section 12(4)(d).

[134] In the absence of any factual basis on the record for the award of costs to the GLC or complainant, I would make no such order as to costs under section 12(4)(f) relative to the proceedings before the Committee.

Disposition of the appeal

[135] The Committee hinged its findings that the appellant was liable for professional misconduct on two conclusions that are plainly wrong in fact and in law. For the reasons articulated above, the Committee's conclusions that the appellant failed to protect the complainant's interest by filing a claim against the owner and driver of the taxi, and by failing to leave adequate time for service of the claim on the driver of the motor truck, were made in breach of rule 17 of the LPA Rules, the rules of natural justice and the

appellant's constitutional right to a fair hearing. The conclusions were also unreasonable, given the evidence before the Committee. Accordingly, the finding of professional misconduct on the basis of a breach of Canon IV(s) was erroneous and cannot stand.

[136] The Committee's third conclusion that there was no evidence of updates and so the appellant failed to provide information to the complainant in breach of Canon IV(r) cannot be disturbed as it cannot be said to be plainly wrong in light of all the evidence. The Committee's conclusion that the appellant is guilty of professional misconduct for breaching Canon IV(r) is unassailable and, therefore, permitted to stand.

[137] Lastly, the Committee's decision to order costs to the GLC as a sanction pursuant to section 12(4)(f) was not shown to be justifiable in the absence of a demonstrated factual or legal basis for such an award to have been made. In any event, the costs order in the sum awarded was unsustainable as it was based, in part, on the erroneous finding that the appellant was guilty of breaching Canons IV(s), which would have been the more serious breach.

[138] As a result, I would allow the appeal in part, set aside the costs sanction that was imposed in the sum of $75,000.00 in favour of the GLC and order in its stead that the appellant be subject to a reprimand pursuant to section 12(4)(d).

[139] Given the outcome of the appeal and the issues on which the appellant has succeeded, I would order, provisionally, that each party bear its own costs unless representations are made for a different order to be made.

P WILLIAMS JA

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

G FRASER JA (AG)

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

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed, in part.

2. The decision of the Disciplinary Committee of the General Legal Council made on 31 March 2021, that the appellant is guilty of professional misconduct in breach of Canon IV(r), is affirmed. The decision that the appellant is guilty of professional misconduct in breach of Canon IV(s) is set aside, and a verdict of not guilty is entered.

3. The sanction imposed by the Disciplinary Committee of the General Legal Council on 28 June 2021 is set aside and substituted therefor is an order that the appellant be subject to a reprimand pursuant to section 12(4)(d) of the Legal Profession Act.

4. Each party is to bear its own costs of the appeal unless a party is of the view that a different order should be made, in which case, that party is to file and serve written submissions on costs within 14 days of this order. Any written submissions in response, are to be filed and served within 14 days after service of the initial submissions.