JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

MISCELLANEOUS APPEAL NO COA2022MS00014

BETWEEN	**LISAMAE GORDON**	**APPELLANT**
AND	**GENERAL LEGAL COUNCIL**	**RESPONDENT**

Ms Stephanie Williams instructed by Henlin Gibson Henlin for the appellant

Patrick Foster KC and Mark-Paul Cowan instructed by Nunes Scholefield DeLeon & Co for the respondent

3 May 2023 and 28 March 2025

Legal profession – Professional misconduct and negligence – Alleged breaches of Canons 1(b) and IV (s) of the Legal Profession (Canons of Professional Ethics) Rules –Circumstances in which an attorney-at-law owes a duty of care to a third party – Whether alleged conduct of attorney-at-law meets the professional standard of inexcusable or deplorable negligence or neglect – Sanction – Whether the sanction is disproportionate and excessive

F WILLIAMS JA

[1] I have read, in draft, the judgment of Dunbar-Green JA. I agree with her reasoning and conclusion and have nothing further to add.

V HARRIS JA

[2] I too have read the draft judgment of Dunbar-Green JA and agree with her reasoning and conclusion.

DUNBAR GREEN JA

Introduction

[3] On 14 August 2018, the General Legal Council ('GLC') commenced disciplinary proceedings against attorney-at-law Lisamae Gordon ('the appellant'), arising from a complaint by Mrs Charmaine Barnett and Mr Baron Barnett ('the complainants'). They alleged that the appellant breached her contractual duty to them, as purchasers, in a sale transaction ('the transaction') in which she also represented the purported vendor ('the vendor').

[4] The basis of the complaint is set out in a supporting affidavit sworn on 6 August 2018. In summary, the complainants averred that it was agreed that the appellant would "serve as their legal representative in facilitating the purchase" of a parcel of land in the parish of Trelawny. It was also understood that she would conduct a title search to ensure there was no encumbrance on the title.

[5] The complainants paid over US$35,000.00 towards the purchase price of the land only to later discover, after several unsuccessful attempts to contact both the appellant and the vendor, that an injunction was recorded against the title by the Administrator General of Jamaica ('the Administrator General') who asserted an interest in the said land.

[6] The complainants accused the appellant of, among other things, failing to conduct a title search, and acting with inexcusable and deplorable negligence in the performance of her duties, thereby breaching Canons 1(b) and 1V(s) of the Legal Profession (Canons of Professional Ethics) Rules, 1978 ('the Canons').

[7] In her affidavit in reply, sworn on 22 October 2019, the appellant averred, among other things, that she had only represented the vendor in the transaction and was neither retained by the complainants nor received any money from them to undertake a title search or do any of the things alleged. She also stated that she had not assumed any responsibility to the complainants as purchasers or otherwise. Therefore, she owed them no duty of care.

[8] Following a hearing on liability ('the liability hearing') on 22 February 2020, the Disciplinary Committee of the GLC ('the Disciplinary Committee'/ 'the Panel') determined that the appellant was guilty of professional misconduct and inexcusable and deplorable negligence, having breached Canons 1(b) and IV(s) respectively. On 19 November 2022, the panel ordered that the appellant be suspended from practice for a period of six months, effective 19 November 2022. She was also ordered to pay a fine of US$35,000.00, within six months of the date of the order, with costs to the GLC and the complainants.

Governing legal framework

[9] Section 12(1) of the Legal Profession Act ('the LPA') empowers the Disciplinary Committee to hear complaints from "**[a]ny person** alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney" (emphasis added) in accordance with rules of procedure made under section 14. This provision clearly applies to persons who are not necessarily clients.

[10] Section 12(4) sets out the sanctions that the Disciplinary Committee may impose "as it thinks just". The sanctions are imposed for non-compliance with Canons that are made pursuant to powers conferred on the GLC by section 12(7) of the LPA.

[11] Canons I(b) and IV(s), which are relevant to this appeal, state as follows:

> Canon I
>
> "(b) An Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member"
>
> Canon IV
>
> "(s) In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."

[12] Sections 16(1) and 17 of the LPA govern appeals from decisions of the Disciplinary Committee.

[13] A rehearing is done by this court, which has the power to dismiss the appeal and confirm the order; allow the appeal and set aside the order; vary the order; allow the appeal and direct that the application be reheard by the Disciplinary Committee; and make such order as to costs before the Disciplinary Committee and this court, as the court may think proper.

[14] In **General Legal Council v Michael Lorne** [2024] UKPC 12, the Privy Council elaborated on the powers of this court. It stated that the Court of Appeal operates with full appellate jurisdiction, which allows it to review the legality of decisions made by the GLC and, in appropriate cases, conduct a rehearing and arrive at its own decision. The Privy Council also emphasised that the power is not an unfettered one and it must be exercised cautiously when there is no error of law or principle.

Factual background

[15] I adopt, with limited modification, the helpful summary of facts in paras. 11-16 of the Disciplinary Committee's decision on liability. The more crucial aspects are as follows.

[16] Mr Barnett, who owned land in Orange Grove, Trelawny, met Mr Howard Jobson ('Mr Jobson'), who was also in possession of land in Orange Grove. They struck a bargain for Mr Barnett to purchase part of the land, which was in the possession of Mr Jobson. Mr Jobson gave instructions to his attorney-at-law, the appellant, for the preparation of the first sale agreement between the complainants and the purported owner of the land, Ms Kathleen Robinson.

[17] In the first sale agreement, dated 20 November 2014, the complainants were to purchase part of Orange Grove Estate comprising two parcels of land, one being approximately 1883 square metres and the other approximately 6150 square metres ('the property'). The purchase price was $8,000,000.00, which was to be paid in tranches, viz: (a) an initial deposit of US$15,000.00 or $1,680,000.00 was to be paid to the vendor's

attorney (the appellant), as stakeholder, on the execution of the agreement, (b) an additional sum of US$3,000.00 was to be paid within six months of the deposit, and (c) the balance and costs were to be paid on or before 11 November 2017, the scheduled closing date. Full payment of the monies was in exchange for the duplicate certificate of title for the property, duly endorsed with a transfer in the names of the purchasers and/or their nominees. The appellant's firm of Malcolm Gordon ("at the attention of Ms Lisamae Gordon") was to have carriage of sale, and as a special condition, the vendor's attorney was to stamp the agreement with stamp duty and transfer tax from the deposit paid by the complainants.

[18] The first sale agreement was signed by the complainants and the vendor, and a deposit of US$10,000.00 was paid to the appellant. That payment was by a manager's cheque, dated 19 November 2014, payable to Malcolm Gordon. The cheque, along with a signed copy of the first sale agreement, was handed to Mr Jobson by Mrs Barnett on the basis that the complainants were mainly dealing with Mr Jobson.

[19] It was not in issue that the appellant received the deposit and paid it over to Mr Jobson. This was purportedly done at the behest of the complainants. However, Mrs Barnett gave evidence that she and the appellant never had any conversation about that, and she gave no such instruction. There was no evidence as to exactly when the appellant paid over that sum to Mr Jobson.

[20] Following the signing of the first sale agreement, the complainants made additional payments, amounting to US$25,000.00, directly to the vendor by way of manager's cheques. Those payments did not pass through the hands of the appellant. It appears that the payments were made on the assumption that they were needed to pay the Parish Council in connection with the cutting of an access road to the property.

[21] Sometime during the transaction, the complainants became concerned about its progress and retained an attorney ('Mr Warren Richmond') to review it. He advised them that the property could not be sold as a clear title could not be obtained. This was due

to an injunction, noted on the original certificate of title in 2014, prohibiting the sale of the property, and that the Administrator General was endorsed as proprietor. When the complainants contacted Mr Jobson, he purportedly denied that the information was accurate.

[22] Subsequently, the appellant was instructed to prepare a second sale agreement. It was purportedly drafted in 2016 but remained unsigned. It, along with a third sale agreement, was tendered in evidence. The third sale agreement was also undated except for the year "2017". It reflected, among other things, an additional cost for extra land, a total purchase price of $15,000,000.00, and a deposit of US$35,000.00 payable to "**the Vendor's Attorney-at-law for his own use**" (emphasis added). One other notable difference between the first sale agreement and the third sale agreement was the inclusion in the third sale agreement of "Howard Jobson" as one of the vendors. However, there is no evidence that he had any proprietary interest in the property or had signed the third sale agreement.

[23] There was a factual dispute as to whether the third sale agreement was signed by the complainants. Mrs Barnett insisted that she signed only the first sale agreement (with the sale price of $8,000,000.00) in 2014. Mr Barnett's evidence was that the signature on the third sale agreement looked like his, but he had remembered signing only one document.

[24] There was no dispute that all three sale agreements were prepared by the appellant.

[25] After the preparation of the third sale agreement, communication broke down among the complainants, Mr Jobson and the appellant. The complainants then sought the assistance of another attorney, Ms Debby Ann Samuels, to file a civil suit against the vendor for the refund of their payments. That suit did not progress due to the inability of the complainants to serve the vendor with the claim.

Summary of proceedings before the Disciplinary Committee

Hearings on liability

[26] The Disciplinary Committee held hearings on 11 January and 8 February 2020 and delivered its decision on 22 February 2020. It relied on affidavit and oral evidence, as well as several exhibits, summarised as follows.

Mr Barnett's evidence

[27] Mr Barnett's affidavits (dated 6 August 2018, 27 December 2019 and 30 December 2019) stood as his evidence in chief. He averred that the appellant represented him, Mrs Barnett and the vendor in the transaction. This was by way of "a verbal agreement between [him], Mr Howard Jobson and [the appellant]". Further to that agreement, all conversations about the property were among them by telephone.

[28] In cross-examination, Mr Barnett stated that the appellant told him that he and Mr Jobson would "split the cost" of legal representation. Other than the deposit, he said the appellant told him to "start giving the money to Mr Jobson". Notably, his later evidence contradicted that position. He said further that the additional payments amounting to US$25,000.00 were given to the vendor directly for Mr Jobson to build the access road. He also said that Mr Jobson collected all the payments, including the cheque made out to the appellant's firm. He agreed that the third sale agreement was to have acknowledged, among other things, the total payments amounting to US$35,000.00.

[29] Mr Barnett also told the panel that he was not sure whether any sums were paid in the transaction after he realised that there was a defect in title.

Mrs Barnett's evidence

[30] Mrs Barnett's affidavits (dated 6 August 2018 and 26 November 2019 and a third which was undated) stood as her evidence in chief. Much of it reflected what was already set out in the background, which I do not consider necessary to repeat. The salient points were that she was not present when the purported verbal agreement was made with the

appellant but understood it to involve a title search. She stated that she received the second sale agreement by email, on 27 October 2016, but it did not reflect what she and Mr Barnett had agreed with Mr Jobson, so they did not sign it. A third sale agreement was emailed to her, on 10 January 2017, which also was not signed by them. She stated that she had previously purchased real estate and that an attorney had represented both the purchaser and vendor. She said that she had never spoken to the appellant and only corresponded with her by email.

The appellant's evidence

[31] The appellant's affidavit, dated 22 October 2019, was ordered to stand as her evidence in chief. She admitted to being contacted by Mr Barnett and Mr Jobson, by phone, advising of their interest in the transaction. She was requested to prepare the first sale agreement and subsequently amended it to reflect changes which Mrs Barnett recommended, specifically to include a deposit of US$35,000.00 (the initial deposit of $10,000.00 plus the additional payments of $25,000.00) payable to the vendor's attorney "to be put to the vendor's own use". Evidently, this is a mistake as the relevant clause in the third sale agreement (which itself is problematic) reads: "… **payable by the Purchasers to the Vendor's Attorneys-at-law for his own use**" (emphasis added).

[32] After that amendment was made, the parties mostly communicated among themselves without reference to her.

[33] The appellant indicated that, in the initial stage of the transaction, Mr Jobson presented her with a title which revealed no encumbrances. It was different from the one exhibited in the matter. She explained that surveys of the land were conducted by Messrs Jobson and Barnett, and at no point during that process was the Administrator General identified as a party. The appellant also stated that her firm received US$10,000.00 (the initial deposit) from the complainants, which she "was asked to give to Mr Jobson for the vendor's own use". No other monies came to her firm, and she was not aware of any additional sums being paid.

[34] She was unable to explain why the third sale agreement included Mr Jobson as one of the vendors.

[35] The appellant maintained that the complainants were not her clients and there was no payment of a retainer or any retainer contract with them. She denied having any legal responsibility to them, including to refund monies paid towards the purchase price. The monies, she maintained, were paid by the complainants directly to the vendor except for the deposit, which she "paid to the vendor for his own use" as authorised by Mr Barrett via telephone. The appellant insisted that that instruction was also represented in the third sale agreement as "…the monies would be to the use of Mr Jobson". She stated further that the initial deposit was paid over after the third sale agreement was signed, but she was unable to say when exactly.

[36] It was not in issue that the appellant had never met the complainants in person and communicated with them only by email and phone. The appellant stated that since receiving the complaint, she tried unsuccessfully to contact the persons involved.

Summary of findings on liability by the Disciplinary Committee

[37] In arriving at its decision on liability, the Disciplinary Committee imposed a tortious duty of care on the appellant based on her conduct, primarily the failure to honour the obligations as the attorney with carriage of sale. Significantly, it found that the appellant's failure to conduct a title search and to ensure the safety of the deposit facilitated the unjust enrichment of the vendor to the complainants' detriment. Further, the evidence of negligence was so egregious that there was no need to consider whether the appellant had a contractual duty to the complainants.

[38] The central findings are summarised as follows.

> (a) Pursuant to the first sale agreement, (i) the appellant had carriage of sale, (ii) the deposit was paid to the appellant and received by her as a stakeholder, and (iii) the appellant was permitted to stamp the agreement from the deposit.

(b) The second sale agreement revealed an alteration to the description of the property and purchase price, among other things.

(c) After the second sale agreement was sent to the complainants by email, Mrs Barnett requested certain changes, including that Mr Jobson be added as a vendor due to a perceived problem among the family members of the vendor. This resulted in a third sale agreement being drafted. The third sale agreement added the name 'Howard Jobson' as a vendor, along with Kathleen Robinson.

(d) Additional parcels were added to the description of the land. The purchase price was listed as US$15,000,000.00 with a deposit of US$35,000.00 payable to "**the Vendor's Attorneys-at-law for his own use**" (emphasis added). A further $2,400,000.00 was to be paid six months after the deposit. An additional sum was payable before the end of 2017, and the balance and costs before 11 November 2018. This third sale agreement was signed by Kathleen Robinson and the complainants. Mr Jobson did not sign, and there was no space on the document for his signature.

(d) The appellant prepared all three agreements based on instructions from the vendor and requests by the complainants.

(e) There was no dispute that the terms of the sale agreements were not complied with. Although the first sale agreement stated that the deposit was to be held by the appellant as a stakeholder, it was paid to a person (Mr Jobson)

who was not a party to the sale agreements without written instructions of the complainants. Neither were the signed sale agreements stamped from the deposit or submitted to the Stamp Commissioner for assessment within the required 14 days of signing or at all.

(f) As to the third sale agreement, which stated that the US$35,000.00 was to be paid to "the Vendor's Attorney-at-law for his own use", the appellant clearly acknowledged responsibility for the deposit ($35,000.00) since it was coming to her.

(g) The appellant, having had carriage of sale, meant that she was responsible for ensuring that title could pass before the preparation of any agreement. The appellant's response that the title she was shown indicated no endorsement, was evidence that she had failed to do a proper title search before preparing any of the agreements. Further, she failed to consider the responsibilities that are placed on an attorney-at-law who has carriage of sale, such as "the duty to ensure that the title can pass and does not have any encumbrances that will interfere with that process… [and] a responsibility to protect the money involved in the transaction".

(h) If the money was to be paid to the vendor, the appellant should have secured the complainants' consent and ensured that if the transaction failed, it could be refunded, if necessary. The consequences of this failure to act in the manner required by an attorney with the carriage of sale resulted in the vendor receiving substantial amounts of funds but failing to give title to the purchasers.

(i)There was no evidence of any subdivision approval as was customary when large parcels of land are being divided into smaller portions for sale. None of the agreements reflected this requirement. Also, the provision for transfer tax to be borne by both parties was not consistent with the terms of the Transfer Tax Act, and there was no evidence that this unusual term had been brought to the attention of the complainants.

(j) In the circumstances, the appellant had acted in a manner contrary to the interest of the complainants and inevitably to their detriment, while at the same time facilitating the vendor to be unjustly enriched. She was in breach of Canons 1(b) and IV(s) and is, therefore, guilty of professional misconduct.

The sanction hearings

[39] The sanction hearings were conducted on divers' days between 28 January 2022 and 25 February 2022. On 19 November 2022, the Disciplinary Committee ordered that:

"1. The Attorney is suspended from practice for Six (6) months from the date of this decision.

2. The Attorney is in accordance with section 12(4) (c) of the Legal Profession Act fined the sum of Thirty Five Thousand Dollars ($35,000.00) (US) in United States currency to be paid to the General Legal Council within six months of the date of this decision. In accordance with section 12(5) (a) of the Legal Professional Act the fine shall be paid over to the Complainants in full satisfaction of the damage caused.

3. It is a condition precedent for the reinstatement of the Attorney to practice that the fine is paid.

4. In addition, the Attorney is to pay the sum of Two Hundred Thousand Dollars ($200,000) as costs. These costs are to be divided equally between the Complainant and the General

> Legal Council being One Hundred Thousand Dollars ($100,000) to each."

The specific sanction remarks, by the Disciplinary Committee, will be referred to as the circumstances necessitate.

The appeal

[40] On 14 December 2022, the appellant filed this appeal, challenging the decision and orders of the Disciplinary Committee. The grounds are:

> "a. That the Respondent erred as a matter of fact and/or law in finding that the Appellant acted with inexcusable and deplorable negligence in the performance of her duties in the circumstances of this case and therefore was guilty of professional misconduct.
>
> b. That the Respondent erred as a matter of fact and/or law in imposing a sanction of suspension for six months as well as a fine of US$35,000.00 which in the circumstances of the case was excessive and/or disproportionate.
>
> c. That the Respondent erred as a matter of fact and/or law in awarding compensation of US$35,000.00 to the Complainants having regard to the circumstances of this case including that the Appellant did not derive any financial benefit from the payment of these sums by the Complainant."

Ground (a) - the respondent erred as a matter of fact and/or law in finding that the appellant acted with inexcusable and deplorable negligence in the performance of her duties in the circumstances of the case and was therefore guilty of professional misconduct.

Summary of submissions

For the appellant

[41] Ms Williams submitted that the Disciplinary Committee's findings of the alleged conduct did not rise to the level of wrongdoing or culpability required for professional misconduct and were inconsistent with previous rulings on inexcusable or deplorable negligence or neglect. In particular, there was no finding that the appellant had colluded or conspired with her client and/or the vendor. The evidence was that she relied on a

duplicate certificate of title provided by Mr Jobson. So, in the absence of any apparent irregularities or defect in title, it could not be said that she was negligent in not conducting an online title search.

[42] Ms Williams also submitted that the appellant acted on the complainants' instructions to pay over the deposit to Mr Jobson, and the authorities are quite clear that mere carelessness or recklessness is insufficient to ground a finding of inexcusable or deplorable negligence or neglect. She cited **Earl Witter v Roy Forbes** (1989) 26 JLR 129 and **Norman Samuels v General Legal Council** [2021] JMCA Civ 15).

[43] Ms Williams further submitted that the Disciplinary Committee's imposition of a duty of care on the appellant was inconsistent with the principle that, in normal conveyancing transactions, the solicitor acting for the seller does not owe a buyer a duty of care when answering queries before contract. The long-established practice in conveyancing matters, she argued, is that it is the purchaser's duty to investigate title, so imposing that duty on the appellant runs counter to the authorities.

[44] Counsel argued that it is only in exceptional circumstances that a duty of care could be imposed on an attorney for the opposite party, such as when that attorney steps outside of his role as an attorney for the vendor and accepts direct responsibility to the purchaser. By deduction, counsel argued, to fix the appellant with liability, there must first be an assessment and finding that, by her word or conduct, she had assumed responsibility to the purchasers. The Disciplinary Committee had, therefore, fallen into error by ascribing negligence to the appellant without first undertaking such an exercise.

[45] Counsel emphasised that the law will not ascribe liability unless there is an assumption of responsibility by the attorney. Counsel relied on **P&P Property Ltd v Owen White & Catlin LLP and another** [2018] EWCA Civ 1082 ('**P&P Property Ltd'**), and **Gran Gelato Ltd v Richcliff (Group) Ltd and others** [1992] Ch 560 ('**Gran Gelato**').

[46] Another contention by Ms Williams was that clause 10 of the sale agreements negated an implied duty on the appellant, as it provides a means by which any defect in title could be addressed. The purchasers were entitled to make enquiries, which they failed to do, even after they had consulted with an attorney who told them that there appeared to be a defect in title. Rather than invoking clause 10, the purchasers proceeded with the transaction and requested further amendments to the first sale agreement. In those circumstances, they undertook the risk of the sale.

[47] Counsel also contended that, in any event, the appellant would not have been able to disclose any defect in title to the purchasers as this would have breached the privity of contract rule. **Taylor v Blacklow** 3 Bing (NC) 236 was cited in support.

[48] Ms Williams also challenged the Disciplinary Committee's findings that subdivision approval was required, and there was need for evidence from the appellant that the transfer obligation clause, which was an unusual term in the sale agreements, was agreed. Counsel said these findings were without any disclosed legal basis. She added that there had been no assertion that the transfer obligation clause in the sale agreements was inconsistent with the complainants' instructions. Moreover, the findings were not the basis of the complaint before the GLC, and the appellant had not been given any opportunity to address them.

[49] As to the Disciplinary Committee's finding that the appellant had failed in her duty to protect the deposit, Ms Williams argued that the funds had to be dealt with as the parties agreed. Pursuant to their agreement, the appellant was instructed to pay over the initial deposit to the vendor. The Disciplinary Committee, therefore, erred in ascribing liability to the appellant, as the complainants' loss was not consequential on her conduct or the lack thereof.

[50] In further submissions, Ms Williams argued that the purchasers did not put the appellant in a position to complete her duties as attorney with carriage of sale because (a) on their instruction, the initial deposit was to be paid to the vendor; and (b) she had

received no additional payments. Counsel also argued that the duty of an attorney with carriage of sale is derived from the sale agreement, which, in this case, did not require the appellant to conduct a title search. In any event, counsel urged, it was the vendor who was required to have passed title and not the appellant. The Disciplinary Committee, therefore, erred in its reasoning that, as the attorney with carriage of sale, the appellant had failed to do a title search and protect the deposit.

[51] Finally, counsel submitted that having found no need to decide whether the appellant acted for the complainants, it was not open to the Disciplinary Committee to find that the appellant owed any duty of care to them.

For the GLC

[52] King's Counsel, Mr Foster, agreed that an attorney who acts for a seller has no general duty of care to a buyer in relation to title or other issues arising under a contract. However, he asserted that a duty may arise where the circumstances justify responsibility, on the principle that persons exercising a particular skill or profession may owe a duty of care to people who, it can be foreseen, will be injured if due skill and care are not exercised, and if injury or damage can be shown to have been caused by the lack of care.

[53] Further, King's Counsel argued, professional negligence is not necessarily contingent upon a contractual or client/customer relationship. The law in this area has evolved, and attorneys can be fixed with liability to third parties in certain circumstances, depending on the nature and proximity of the relationship between the attorney and the third party, as well as where the attorney assumes responsibility to the third party.

[54] However, the examples are not exhaustive, King's Counsel submitted, as there can be any range of circumstances to find an attorney liable to a third party. For example, the attorney may owe a duty to a purchaser if, given the nature of the circumstances, it would be unfair not to impose such a duty. Such situations will include (a) where the purchaser reposed trust in the attorney; (b) where the attorney carried out functions to

assist the purchaser irrespective of whether this was a normal function; and (c) where the third party is unrepresented and vulnerable.

[55] The duty owed to the complainants, King's Counsel argued, was based on clear evidence that established a sufficient relationship of proximity with the appellant. In seeking to formalise the first sale agreement, there was direct communication between Mr Barnett and the appellant, proving that this was not a case of a distant purchaser communicating with the appellant indirectly. Emphasis was also placed by King's Counsel on the emailed interaction between the appellant and Mrs Barnett, which, he submitted, indicated the nature of their relationship as it developed, and how the appellant approached the matter and gave the complainants an assurance of a legitimate transaction, in a context where there was no indication by the appellant that they should seek independent advice. The complainants, throughout, relied on the appellant's expertise, reposing trust in her to protect their interest and to handle matters on their behalf, he argued. It was because of such factors, and the nature of the transaction, that the complainants handed over their money.

[56] The appellant, King's Counsel further submitted, abdicated her professional responsibility when she took the title (given to her by a non-owner) at face value, relied on it and went on to accept a deposit which she remitted to the vendor without checking, as an elementary step, whether the vendor had the capacity to sell. King's Counsel emphasised that, although the Disciplinary Committee avoided the nuances in the law, its analysis focused on the evidence that the complainants were not represented, the transaction was not carried out according to its terms, and the complainants had placed reliance on the appellant to their detriment.

[57] Notwithstanding the Disciplinary Committee's decision being wrapped up in the carriage of sale, King's Counsel further submitted that it was based on negligence. Accordingly, the Disciplinary Committee looked at specific acts and the nature of the relationship and concluded that a duty of care was owed and breached, and foreseeable loss resulted. The appellant had conversed with the complainants for over two years,

prepared three sale agreements, and did not try to ensure that the transaction could proceed as intended. In addition to her failure to conduct a title search, the appellant made no effort to stamp the sale agreements as required by law or to put the transaction in a state of readiness. Instead, she lulled the complainants into believing that a genuine transaction was proceeding as intended when this was not the case.

[58] Further, King's Counsel submitted, she facilitated the payment of US$35,000.00 by the complainants, in what they would have assumed to be the secure knowledge that this was a legitimate transaction and there should be no harm in paying monies directly to the vendor. Therefore, all tenets of the test in **Caparo Industries PLC v Dickman** [1990] 2 AC 605 ('**Caparo Industries Plc**') (proximity of relationship, foreseeability of damage, and fairness) were satisfied.

[59] It was acknowledged by King's Counsel that the Disciplinary Committee did not look at the "assumption of responsibility" test, but, nevertheless, he urged that this was an alternative consideration for this court based on the mutual and detailed interaction between the parties, including the exchanges in emails and the handing over of the title to the appellant, by Mr Jobson, with the awareness of Mr Barnett.

[60] Finally, King's Counsel submitted that no reasonably competent lawyer would have conducted herself as the appellant did in the transaction. King's Counsel relied primarily on **Tracy vs Atkins** [1979] CanLll 760 (BC CA), **Dean v Allin & Watts (a firm)** [2001] EWCA Civ 758 and the Bermudian Court of Appeal case of **A Barrister v Bermuda Bar Council** [2015] CA (Bda) 16 Civil ('**A Barrister**'), arguing that the conduct in the instant case, where there was an inability to sell, was more egregious than in **A Barrister** where the attorney was found liable, to the unrepresented purchaser, for a misdescription of the property.

[61] Turning to the authorities cited by Ms Williams, King's Counsel sought to distinguish them on the following bases.

(a) The Conveyancing Act does not apply to registered land.

(b) **Taylor v Blacklow** is irrelevant since Mrs Barnett did not claim to be an expert conveyancer. When that issue was put to her, at page 782 of the record, she said she was not an attorney. There was no evidence projecting the complainants as experienced persons who did not need an attorney.

(c) Clause 10 of the sale agreements was not important in the context of reliance having been placed on the appellant to deal with matters on the complainants' behalf.

(d) In **P&P Property Ltd**, both parties had their own solicitor. It was, therefore, difficult in that setting to mount an argument that the solicitor for one was liable to the other. The imposition of the duty would have flowed from what fell within their engagement and/or what they were retained to do. The solicitors did not assume responsibility to the purchaser in relation to the adequacy of due diligence regarding title. Therefore, although the principles in **P&P Property Ltd** can apply with adaptations, they were not comparable to the instant case.

(e) **Gran Gelato** was about a normal transaction, where both parties were represented by solicitors, so there was no imbalance or reliance by one party on the solicitor of the other, as in the instant case.

[62] In reply to learned King's Counsel's submissions on the authorities, Ms Williams made further submissions as follows.

(a) In **Tracy v Atkins**, the court did not set out any general principles of application. The documents which would usually be prepared by the mortgagee's attorney were to

be prepared by the mortgagor's attorney. The plaintiffs were found to be elderly, with limited education and understanding of real estate affairs, unlike the instant circumstances. Also, the effect of the attorney's conduct resulted in a mortgage being registered in priority to that of the plaintiffs without any confirmation of these instructions from the mortgagees. The court was deliberate in its reasoning and limited the circumstances in which it would impose a duty on the attorney (citing para. 10 of the judgment).

(b) The court in **Dean v Allin and Watts (a firm) and others** routinely referred to the special relationship and circumstances. The relationship of proximity arose from the transaction itself and not the consequences of the transaction. The court considered that the lender was an unsophisticated individual, and the facts grounding the findings were that there was an assumption of responsibility. In contrast, no such circumstances arise in the instant case. Accordingly, **Dean v Allin and Watts (a firm) and others**, being of limited application, ought not to be extended to the instant case (citing paras. 65 and 66).

(c) **A Barrister** considered a specific provision in the Barrister's Code of Professional Conduct, which is not analogous to the provisions in this jurisdiction.

Discussion

Bases for this court's intervention in a decision by the Disciplinary Committee

[63] This court will only disturb the Disciplinary Committee's decision if the findings were unsupported by the evidence adduced, or it failed to take into account relevant issues, or had taken into account irrelevant issues, or was misdirected in the application of the law, or was unmistakeably or palpably wrong (see **Norman Samuels v General Legal Council**, **Jade Hollis v The Disciplinary Committee of the General Legal Council** [2017] JMCA Civ 11, and **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042).

Issues raised in this appeal

[64] This appeal raises three main issues. First, on the evidence adduced, was there a sufficient basis for the Disciplinary Committee to find that the appellant owed a tortious duty of care to the complainants? Second, if a duty of care arose, were the conditions satisfied for inexcusable or deplorable negligence? Third, was the sanction imposed by the Disciplinary Committee disproportionate and, therefore, excessive?

[65] The first two issues arise on ground (a) of the appeal, which focuses on the liability decision, while the latter concerns grounds (b) and (c) about the appropriateness of the sanction. It is convenient to deal with them in that order.

[66] Before undertaking an analysis of the central issues, however, it is necessary to dispose of three sub-issues that deserve attention, albeit they arose under the appellant's stated challenges to facts and law and in oral submissions but were not the subject of specific grounds of appeal.

Sub-issue 1: whether the Disciplinary Committee was plainly wrong in not determining if a contract existed between the complainants and the appellant

[67] It is common ground that there was no written retainer. Therefore, would "an objective consideration of the circumstances" have led to a "fair and proper" imputation of an agreement by the parties? (see para. 22 of **Dean v Allin and Watt (a firm) and**

others). The Disciplinary Committee did not deal with this point as it determined that the appellant's negligent conduct made it unnecessary to determine whether she represented the complainants. Were the decision otherwise, I believe it would not have changed the outcome of the case for the reasons which follow.

[68] It was Mr Barnett who told Mrs Barnett that there was such an agreement, but there was no confirmation or reference to it in any of their correspondence with the appellant, even when the complainants found out about the defective title. The record shows that the complainants became aware of the title defect from about 7 October 2016. They did not inform the appellant, but, instead, requested unrelated amendments to the sale agreements in emails dated 28 October 2016 and 6 January 2017. In fact, based on the evidence adduced, it appears the appellant was unaware of the title issue until the complainants were unable to serve the vendor in the matter they had intended to pursue against her.

[69] During cross-examination, by the appellant on that specific point, Mrs Barnett explained her conduct thus: "My concerns went to Mr Jobson as he was my first point of contact. Mr Jobson relay [sic] that to you and you were able to respond to me via email". This concerned a serious legal issue which had been brought to the complainants' attention by an attorney. It went to the heart of the parties' agreement. In my view, it is, therefore, not a convincing proposition that the complainants would not have raised their concern directly with their purported attorney, the appellant, especially as Mr Jobson had dismissed it as being based on unfounded information.

[70] In addition, the evidence reveals that the complainants retained Ms Samuels on 13 March 2017, after Mr Jobson stopped communicating with them. However, no emails were sent to the appellant about this breakdown in communication. Mrs Barnett said she tried to telephone the appellant after Mr Jobson stopped communicating with her, but this was some three months after the complainants were notified by Mr Richmond about the restrictions on the title.

[71] In my view, the conduct of the complainants was inconsistent with their assertion that the appellant was contractually obligated to them. I am, therefore, satisfied that there was no compelling evidence of a contract between the complainants and the appellant. That said, the Disciplinary Committee was not plainly wrong in opting not to make any factual determination on that issue, and its reluctance to do so did not result in any unfairness to the appellant.

Sub-issue 2: whether negligence was raised in the complaint

[72] The specifics of the complaint against the appellant were said to have arisen under a verbal agreement, but the complainants also specifically alleged discreditable conduct and negligence in their affidavit. Notably, that:

> "The complaint we make against the Attorney-at-law is that:
>
> 1) She is in breach of Canon (1b) which states that, ''An Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which she is a member.
>
> 2) She has acted with inexcusable or deplorable negligence in the performance of her duties."

[73] The Disciplinary Committee was, therefore, entitled to consider whether any tortious duty of care was owed by the appellant, whether any such duty was breached by her, and if any foreseeable and consequential loss was suffered.

Sub-issue 3: whether the Disciplinary Committee enlarged its remit to matters not properly ventilated before it

[74] The appellant argued that the Disciplinary Committee enlarged its remit to matters which were not properly ventilated, as she was not given the opportunity to address the panel on its findings that subdivision approval was required, and the "transfer obligation" clause was an unusual term, when there had been no assertion that the latter was not agreed.

[75] The specific finding of the Disciplinary Committee about the requirement of subdivision approval is recorded at para. 18 of the liability decision, thus:

> "The Panel were also not presented with any evidence of the necessary subdivision approvals necessary when large parcels of land are being cut into smaller parcels. The Panel therefore has difficulty in understanding the basis upon which the various agreements were prepared without this condition as none of them reflect the requirement for subdivision approval yet the parcels being sold were smaller sections of a larger parcel."

[76] In my view, the Disciplinary Committee went beyond its lawful remit, as circumscribed by rule 3 of the Fourth Schedule of the Legal Profession (Disciplinary Proceedings) Rules, in relation to the sub-division and transfer obligation points, as there was no evidence before it in relation to those matters. The Disciplinary Committee could have exercised its powers under rule 17 of the said rules which provides for the amendment and/or addition of allegations, but this was not done.

[77] The sub-division question could properly have been raised as a point which bears on whether the appellant demonstrated due professional care for a satisfactory completion of the transaction, but it was not. Ms Williams was therefore correct that this was not a relevant consideration for the Disciplinary Committee.

[78] The Disciplinary Committee treated with the transfer obligation clause, in para. 19 of its liability decision, thus:

> "The Panel also noted that the responsibility concerning the payment of Transfer Tax was under the heading '**Transfer Obligations**' which states that it is to be borne by both parties which is not consistent with the requirements of the Transfer Tax Act. The Panel was not presented with any evidence as to this unusual term being brought to the attention of the Purchasers."(Emphasis added)

[79] There was no assertion by the complainants that this "unusual term" had not been agreed. It was not raised by them in the complaint nor as an issue in the case at any point.

[80] The right to a fair hearing includes giving each party an opportunity to make submissions on matters which could influence a tribunal's decision. As a matter of fairness, therefore, the appellant should have had an opportunity to provide an explanation (see **Owen K Clunie v The General Legal Council** [2014] JMCA Civ 31). Notwithstanding, any prejudice to the appellant was inconsequential, given that the findings pertaining to sub-division and the transfer obligation were only two of several failings that the Disciplinary Committee identified. The ultimate decision on liability would, therefore, not have been affected by these points.

[81] I now turn to the two central issues raised in ground (a) of this appeal.

Issue 1: imposition of a duty of care on an attorney in relation to a third party

[82] I have considered the general principle in **Gran Gelato** that an attorney in a conveyancing transaction does not normally owe a duty of care to anyone but his own client. In that case, the plaintiff's solicitors sent inquiries to the second defendant's solicitor concerning any rights affecting a superior lease which would inhibit the enjoyment of an underlease. The solicitors responded: "Not to the lessor's knowledge". But, in fact, the headlease contained break clauses which, if exercised, would cause the underlease to determine after five years. In ignorance of the break clause, the plaintiff proceeded to completion of the underlease. After three years, the plaintiff ceased trading but was unable to sell the underlease because of the break clause in the headlease. Five years after the granting of the underlease, the head lessor invoked the break clause and successfully recovered possession of the premises.

[83] The court held, among other things, that the vendor was liable for damages in negligence but that "in normal conveyancing transactions", the solicitors "did not owe a

separate duty of care to the purchaser…" (see pages 568-571). The court adopted the approach in **Caparo Industries Plc** where, at page 569, the House of Lords stated:

> "For there to be a duty of care there must be foreseeability of damage and a close and direct relationship which has come to bear the label of 'proximity'. In addition…the situation must be one in which the court considers it 'fair, just and reasonable' that the law should impose a duty of a given scope upon the one party for the benefit of the other."

[84] Three factors weighed with the court in **Gran Gelato**. One was the context in which the representations were made. It was a contract for sale of an interest in land wherein the buyer was formally seeking information from the seller about the land and his title to it. The answers given by the solicitors were on behalf of the seller, and the buyer would have relied upon the answers in that context, with an expectation that the law would provide him with a remedy against the seller if the answers were given without due care. Secondly, the seller himself owed a duty of care to the buyer, and he would be as much liable for any carelessness of his solicitors as he would for his own personal carelessness. This is so because the solicitors had implied authority from the seller to answer, on his behalf, to such inquiries. Thirdly, in general, where the principal himself owed a duty of care to the third party, the existence of a further duty of care by the agent to the third party was not necessary for the reasonable protection of the latter.

[85] In **P&P Property Ltd**, the property was purportedly sold by someone who impersonated the owner. The purchaser, who had independent legal representation, contended that the vendor's solicitors held themselves out as having the authority of the true owner to conclude the sale of the property. It was also argued that the vendor's solicitors were negligent for failing to carry out adequate checks to establish the identity of their client, and they had no authority to disburse the purchase monies to their client other than on the completion of a genuine sale. In response, the vendor's solicitors argued, among other things, that they were not guarantors of the vendor's identity to the purchasers. The court affirmed the general principle that there must be special circumstances to cause a duty of care to be imposed on the other party's solicitor, "the

concept of an assumption of responsibility" being "the foundation of liability in negligence" in these kinds of cases (referring to **Steel v NRAM Ltd** [2018] UKSC 13).

[86] The court, however, noted that "actual, conscious and voluntary assumption of responsibility" by a solicitor will likely be rare. The assessment of whether this is so requires the court "to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair" (para. 76). The appeal was dismissed on the basis that the case was not of the type in which it would be fair and reasonable to treat the solicitors as having assumed responsibility to the purchasers for the adequacy of the due diligence performed in relation to their client's identity. Lord Justice Patten, at para. 74, provided helpful guidance as follows:

> "**The imposition of liability** in negligence towards a third party who is not the solicitor's client clearly **requires something more than it being foreseeable by the solicitor that loss will be caused to the third party by a lack of care on the solicitor's part in carrying out whatever is the relevant task. Nor is it sufficient that the test of proximity is satisfied** whether by an actual assumption of responsibility or by the existence of a direct interest on the part of the third party (as in Dean v Allin & Watts) in the product of the solicitors' instructions. **The incremental approach approved in Caparo requires all these and any other relevant factors to be taken into account and globally assessed including any relevant policy considerations.** In deciding whether it is just or reasonable to recognise a duty of care, the approach enshrined in the **case law requires the Court to take account of the contractual framework and any other factors bearing on liability**. In *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse No. 2* [1998] PNLR 564 at page 582 Neill LJ said:
>
> > 'The threefold test and the assumption of responsibility test indicate the criteria which have to be satisfied if liability is to attach. But the authorities also provide some guidance as to the factors which are to be taken into account

in deciding whether these criteria are met. These factors will include:

(a) the precise relationship between (to use convenient terms) the adviser and the advisee. This may be a general relationship or a special relationship which has come into existence for the purpose of a particular transaction. But in my opinion counsel for Overseas was correct when he submitted that there may be an important difference between the cases where the adviser and the advisee are dealing at arm's length and cases where they are acting 'on the same side of the fence.'

(b) the precise circumstances in which the advice or information or other material came into existence. Any contract or other relationship with a third party will be relevant.

(c) the precise circumstances in which the advice or information or other material was communicated to the advisee, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It will be necessary to consider the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee, and the reliance in fact placed on it.

(d) the presence or absence of other advisers on whom the advisee would or could rely. This factor is analogous to the likelihood of intermediate examination in product liability cases.

(e) the opportunity, if any, given to the adviser to issue a disclaimer." (Emphasis added)

[87] I have considered the following cases where the general rule did not apply. In **Allied Finance and Investments Ltd v Haddow & Co** [1983] NZLR 22, the solicitors were taken to have assumed direct responsibility to the third party by stepping out of their role as solicitors for their client. This was also the situation in **Dean v Allin & Watts (a firm) and others**. The appellant agreed to make a series of loans to the borrowers on the condition that he would secure a charge on a leasehold flat owned by the registered proprietors. The borrowers instructed the respondent's firm to handle the transactions. The solicitor assigned to the case advised that the deposition of the deed was sufficient. The borrowers defaulted in repaying the loans, and the registered proprietors' demand for the title's return was successful because no valid charge had been granted. The appellant having lost money, sued the respondent solicitor.

[88] Although the appellant, in that case, had his own solicitor, he succeeded against the solicitor who was instructed by the borrowers to handle the transaction. Clearly, there was no contractual relationship or any direct relationship between the appellant and the solicitor, but the solicitor had undertaken to handle the transactions, and the appellant placed reliance on that and reposed trust in the solicitor to do so. The instructions that the solicitor received were to the benefit of his client and the third party.

[89] Lightman J opined that a duty of care was imposed on the solicitor "in respect of the provision of an effective security, the benefit of which to his knowledge the Borrowers wished to confer on [the appellant] and which was fundamental to the loan transactions" (para. 40). In those circumstances, there was "the necessary foreseeability of damage and the necessary relationship of proximity for the law to impose such a duty of care" (para. 40).

[90] In **Tracy v Atkins**, the plaintiffs (alternatively, 'the vendors') entered into an interim agreement with the purchaser, who retained the defendant ('the solicitor') to prepare the mortgage, the deed and a statement of adjustment. The purchaser then advised the solicitor that the deal had fallen through due to lack of financing. He later presented the solicitor with a letter purportedly signed by the vendors indicating, among

other things, an extension of time for the purchaser to complete, that the deed should be registered, their mortgage should be registered subsequent to another mortgage that the purchaser was placing on the property, and the proceeds of the mortgage be used to pay the down payment and the balance paid over to the purchaser.

[91] Without confirming the content of the letter with the vendors, the solicitor proceeded to give it effect as a mere change in the interim agreement. The solicitor also prepared a statement of adjustment which did not disclose that there were two mortgages on the property or that the vendor's mortgage was subject to the first mortgage. Upon being presented with the deed and statement of adjustment by the purchaser, the vendor signed, and the purchaser returned them to the solicitor. Upon the mortgages being registered, the proceeds of the first mortgage were paid to the purchaser, who then left the jurisdiction. As it turned out, the vendor denied reading or signing the letter on which the solicitor had acted.

[92] Nemetz CJ, in delivering the judgment of the court, found that the solicitor had undertaken to carry out "all" the conveyancing work and, by so doing, "placed himself in a sufficient relationship of proximity". His duty of care arose when he received the letter and should have enquired of the vendor about it. He found that the solicitor owed a duty of care to the unrepresented vendor in the particular transaction as there was sufficient proximity of relationship, and it was fair and reasonable to do so. The court observed that the abnormality of instructions to pay over the mortgage monies to the purchaser should have suggested to the most inexperienced practitioner "that something unusual was occurring". Foreseeability of damages arose as a direct consequence of the solicitor's careless failure to inquire. The duty also arose from the 'special position' of an attorney, consequent on his unique skills. That 'special position' may trump contractual relations, as Lord Morris of Borth-Y-Gest observed in **Hedley Byrne & Co v Heller and Partners** [1963] 2 All ER 575, page 594, when "a solicitor…knows that he is acting for both parties, or is the only solicitor involved…".

[93] Those cases adopted the 'proximity of relationship test' outlined by Lord Bridge of Harwich in **Caparo Industries Plc**, at pages 617-618, as follows:

> "What emerges is that, in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

This court expressly adopted that test in the recent case of **Lascelles Sales v Aldean McBean** [2023] JMCA Civ 13.

[94] By contrast, in **A Barrister**, there was no conscious assumption of responsibility. The Court of Appeal of Bermuda found that the duty arose from the nature of the transaction and the obligations of the attorney embedded in it.

[95] In that case, an attorney who acted for the vendor was suspended from practice on the basis that he had failed to be competent, diligent and efficient in his professional conduct regarding a conveyance transaction. He was found to have breached rule 6(iv) of the Barristers' Code of Professional Conduct, 1981, by:

> "(a) failing to take adequate steps to ensure that the Complainant knew that she was acquiring an extremely unusual legal interest by purchasing not an apartment but a one half interest in a house consisting of two apartments, one of which she would be able to occupy; and
>
> (b) failing to appreciate adequately or at all the basic duties of a conveyancing attorney as illustrated by, inter alia
>
> > (i) the misconceived insistence that at all material times the (Appellant's) only 'client' was the vendor, and

> (ii) the incoherence of the closing statement and the admitted basic error in over-charging the Complainant."

[96] In dismissing the attorney's appeal, the court found a material difference between the legal interest conveyed to the unrepresented purchaser and the property described in the agreement. As the attorney with carriage of sale, the attorney had an obligation to ensure that the agreement contained what the parties had agreed. In the circumstances, it was deemed just and reasonable to find there had been a breach of the duty of care owed to the purchaser as "[a] competent and diligent conveyancing lawyer would realise the mere act of drafting a deed of conveyance gives rise to a legal and ethical obligation to ensure that the purchaser acquires the legal interest they contracted to acquire" (para. 16).

[97] In the instant case, the Disciplinary Committee found the following salient facts to be established beyond reasonable doubt:

> (a) The appellant prepared all three sale agreements on the instructions of the vendor and at the request of the complainants.
>
> (b) The first agreement stated that the deposit was to be held by the appellant as stakeholder, but it was paid to a person who was not a party to any of the sale agreements. The subsequent sale agreements stated that the deposit was to be paid to the vendor's attorney-at-law for her own use.
>
> (c) Whereas the sale agreements specifically imposed the duty to pay stamp duty on the appellant from the deposit, no sums were reserved for such payment.
>
> (d) Neither of the signed agreements was stamped or presented for assessment as required by law.

(d) None of the sale agreements reflected any subdivision approval, which is customary when large parcels of land are being divided for sale.

(e) The appellant had the carriage of sale.

(f) The appellant did not do a title search.

[98] It is clear from the Disciplinary Committee's analysis that the duty of care arose from the nature of the transaction and the appellant's obligations under the sale agreements. The Disciplinary Committee reasoned that the appellant had certain obligations under the sale agreements, the performance of which was necessary for the satisfactory completion of the transaction. As was clear from its findings, its focus was on specific obligations pertinent to the appellant as the attorney with the carriage of sale.

[99] There was no authority cited to us, but it is well established in conveyancing practice that, ordinarily, the duty of the attorney with carriage of sale is derived from the terms of the sale agreement. In the instant case, the appellant was to stamp the sale agreement in accordance with the law, pay all outgoings from the deposit, including the stamp duty, and assist the parties in carrying into effect the agreement they had arrived at. The Disciplinary Committee's finding, with which I concur, is that she failed to discharge those obligations. Although no specific term indicated that a title search be done, it was consequential on those obligations.

[100] This was not normal conveyancing, in the sense of an arm's length transaction in which each party had separate legal representation. The appellant took all material instructions either from Mr Jobson, a non-owner, or the complainants. Her conversations about the transaction were exclusively with Mr Jobson and the complainants. There was no evidence of any conversation with the vendor by either the complainants or the appellant. It was also not proved what "title" the appellant relied on since the title she claimed to have been given by Mr Jobson was not exhibited. The third sale agreement carried Mr Jobson's name as "vendor", yet an examination of the copy title exhibited does

not indicate that he had any proprietary interest in the property. There was also no proof that Mr Jobson acted as the vendor's agent. Mr Jobson's name was added to the third sale agreement at the direction of Mrs Barnett.

[101] It seems an elementary step, therefore, as learned King's Counsel put it, that in drafting the sale agreements, the appellant would have acquired a current title report. This would have ensured that the sale was not restricted, and it would not have conflicted with her duty to the vendor (see **White v Jones** [1995] 2 AC 207). Further, in my view, any competent attorney would have needed to be satisfied, at the very least, about the ownership of the property, more so in circumstances where he or she was supposedly handed a copy title by a non-owner of property intended for sale. Based on the evidence adduced, the Disciplinary Committee was, therefore, not palpably wrong, given the circumstances, in concluding that, in failing to conduct a title search, the appellant had failed in her duties.

[102] As found by the Disciplinary Committee also, the failure to carry out a title search was compounded by the failure to protect the deposit. By the first sale agreement (the only one not in dispute), the appellant had undertaken the responsibility to hold the deposit as a stakeholder. Contrary to the terms of that sale agreement, she took no steps to protect it. Passing the deposit to Mr Jobson was outside the terms of the sale agreement and was not authorised otherwise. The finding by the Disciplinary Committee that it was not open to the appellant to pay over the deposit to anyone, let alone someone who was not a party to the transaction, was, therefore, supported by the evidence.

[103] The appellant sought to use a corrupted version of the reference in the third sale agreement that US$35,000.00 was to be paid to "**the Vendor's Attorney-at-law for his own use**" (emphasis added) as authorisation for passing on the initial deposit to Mr Jobson. But this is fraught with difficulty. First, Mr Jobson was not the vendor. Second, the appellant sought to justify giving the money to Mr Jobson by suggesting that the vendor had given a power of attorney to him to act as her agent, but no mention of this was made in the appellant's affidavit in response to the complaint, and no such document

was exhibited at the hearings. This explanation seems to have appeared in her evidence as an afterthought. Even so, a power of attorney would not have corrected the error for obvious reasons, not least of which was that the relevant sale agreement would have authorised the payment of the monies to "the Vendor's Attorney for his own use", and not to the vendor or her agent. So, the appellant's conduct would still have been faulted.

[104] I make the further observation that the appellant failed to support her evidence that the US$10,000.00 was paid over to Mr Jobson after the third sale agreement in 2017 (which states that she could put the deposit to her own use). Further, there was no documentary evidence as to when that sum was paid over to Mr Jobson or any precise date given by the appellant in oral evidence. Neither was there any documentation showing that the complainants agreed to pay that sum to the vendor or any purported agent, given that the third sale agreement on which the appellant relied did not support it.

[105] The appellant's action of paying over the deposit to Mr Jobson was not just a breach of her role under the sale agreements but, as the Disciplinary Committee found, facilitated the unjust enrichment of the vendor. By passing the deposit to Mr Jobson, the appellant had also failed to discharge her obligation to stamp the sale agreement from the deposit, which was time sensitive. Neither of the signed sale agreements was stamped. That evidence supports the Disciplinary Committee's conclusion that as the attorney with carriage of sale, the appellant had failed in her duty to ensure that the taxes were paid. Even though the non-payment did not directly lead to the loss sustained by the complainants, it conveyed the appellant's overall unacceptable conduct in the transaction.

[106] The Disciplinary Committee did not decide the matter on the 'proximity of relationship' basis. However, there is merit in King's Counsel's submission that there was a sufficient relationship of proximity that would have likely caused the complainants to have the assurance that the transaction was legitimate and would be satisfactorily concluded. Based on the evidence adduced before the Disciplinary Committee, the

appellant and the complainants had multiple exchanges regarding the terms of the sale agreements, which set the stage for the trust that the complainants came to repose in the appellant over time. Their reliance on the appellant, which they understood to be a 'client/attorney' one, can be understood from the way the transaction started and how it progressed, including the initial conversation among the appellant, Mr Barnett and Mr Jobson.

[107] It is true that the complainants did not instruct the appellant in the legal sense, but they and the appellant were in active communication about specific terms that were to be included in the last two sale agreements and where amendments should be made. That was evident from the disclosed email communication between Mrs Barnett and the appellant. Based on the interaction about the settling of the terms of the sale agreements, the appellant could reasonably be deemed to have assumed responsibility to the complainants to ensure that they were contracting with the owner of the property.

[108] Although the appellant stated, in her evidence, that Mrs Barnett told her that she had experience in conveyancing and would represent herself, this was denied. As the transaction progressed, the appellant communicated with the complainants directly by email and through Mr Jobson on important aspects of the transaction. The appellant also stated that she had had discussions with Mr Barnett and Mr Jobson about the property. Those discussions and obligations were undertaken by the appellant with full knowledge that the complainants were relying on her expertise as an attorney to the exclusion of any other attorney. That meant, at the very least, seeing to it that the contract was performed in accordance with its terms. Two such terms, as found by the Disciplinary Committee, were for the appellant to receive the deposit as stakeholder and stamp the sale agreement from it.

[109] The relationship, expectations arising therefrom, and the obligations are sometimes rarely expressed, as was observed by Lord Justice Patten in **P & P Property Ltd**. The trust reposed in the appellant would have extended to the requirement for her to competently carry out the legal functions which arose under the sale agreements in

circumstances where the complainants were known by the appellant to be unrepresented and vulnerable. The absence of representation by itself did not fix the appellant with responsibility towards the complainants, but, as was observed by King's Counsel, it could be seen as providing the setting for the relationship of trust between the appellant and them to develop.

[110] Applying the authorities to the facts, as found by the Disciplinary Committee, there is merit in King Counsel's submission that the tenets of proximity of relationship, foreseeability of damage and fairness were satisfied in the sense that (a) the relationship was sufficiently proximate to have found a duty; (b) there was a breach of that duty; (c) it was foreseeable that if the transaction failed, the appellant would have had no funds to return to the complainants; and (d) the complainants lost their deposit. Further, this case would seem to fall in the category of cases in which it would be considered just, fair and reasonable to impose a duty of care on the appellant for the benefit of the complainants, arising from the transaction itself and how it unfolded.

[111] That said, it could be asked whether the appellant's duty to the complainants was in any way diminished because the complainants consulted another attorney about the transaction. This point was not addressed by the Disciplinary Committee, but **Dean v Allin Watts (a firm)** supports the proposition that even in circumstances where the attorney knows that the third party consulted another attorney, it may nonetheless be fair, just and reasonable to impose a duty of care if, as occurred on the facts of that case, the attorney could not and did not reasonably believe that the reliance on him had ended.

[112] In the circumstances, I have found no support for the appellant's assertion that the Disciplinary Committee erred in imposing a tortious duty of care on the appellant.

[113] Finally, Ms Williams' argument about the complainants' failure to invoke clause 10 of the sale agreements misses the point of the complaint - that the appellant was the complainants' attorneys, they had relied on her expertise, and she had acted negligently and to their detriment.

Issue 2: Inexcusable or deplorable negligence or neglect

[114] The next question which arises from ground (a) is whether the appellant demonstrated inexcusable or deplorable negligence or neglect in the performance of her duties.

[115] Although the complainants alleged inexcusable or deplorable negligence or neglect, there were no specific allegations in support of it. However, the Disciplinary Committee's finding of inexcusable and deplorable negligence was predicated on multiple failings of the appellant during the sale transaction. Particularly relevant to the decision, as indicated earlier, were the: (a) failure to do a title search in preparation for drafting the sale agreements; (b) paying over of the deposit to a third party contrary to the provisions of the signed sale agreements and without the written instructions of the complainants; and (c) failure to stamp the sale agreement or present it for assessment. There was also the absence of a provision in the sale agreements for subdivision approval and no evidence that the unusual "transfer obligation" was explained to the complainants. The latter two criticisms have already been discounted.

[116] Except for the handing over of the deposit to Mr Jobson, these acts were not refuted. They were found by the Disciplinary Committee to be egregious. That is to say, these were not "slips in a busy practice", "inadvertence or carelessness", but acts and omissions that went "beyond what is expected of a reasonably competent lawyer", such that the profession regarded them as "deplorable" (see **Earl Witter v Roy Forbes**; **Norman Samuels v General Legal Council**, at para. [85]; **In re A Solicitor** [1972] 1 WLR 869; and **Saif Ali and Another & Sydney Mitchell & Co (A Firm) and Others** [1980] AC 198 at page 218).

[117] Singularly, the appellant's treatment of the initial deposit would, in my opinion, suffice for the purposes of this finding. The conduct bears close resemblance to that in **Elsie Taylor v The General Legal Council (Ex parte Frederick Scott**) (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 8/2004, judgment delivered 30 July 2009, where the attorney paid over the purchaser's money to the vendor before an

agreement of sale was executed. There was no challenge to the finding of inexcusable or deplorable negligence arising from the premature payment of the client's deposit to the vendor in that case. In my view, the inexcusable and deplorable conduct in that case is comparable to paying over the deposit to a third party without (a) the complainants' written consent; (b) paying the stamp duty; and (c) any verification that there was an unencumbered title to be transferred.

[118] Similarly, **Cherril Lam and Fitzroy McLeish v Debayo Adedipe** Complaint No 82 of 2010, Disciplinary Committee decision delivered on 8 October 2011, concerned the failure of the respondent to identify the lands subject to the sale agreement, and the critical error involved the paying over of the client's money without following proper procedure. It was considered not a mere error of judgment but conduct unbecoming of a reasonably well-informed and competent attorney.

[119] As Carey JA pointed out in **Earl Witter**, at pages 132-133, it is for the Disciplinary Committee to determine whether the attorney had gone beyond an acceptable level of negligence or neglect into the realm of what is "inexcusable and deplorable". Further, the Disciplinary Committee is a professional body, comprised of experienced attorneys-at-law, and therefore, it is a reasonable presumption that the panel will not weigh the professional standards in too fine a scale.

[120] The following interchange, recorded at pages 818-821 of the record, is instructive. It bears out the Disciplinary Committee's finding that the appellant was an attorney whose conduct did not display a level of expertise which would satisfy the standards of the profession and repose public confidence in it.

> "Panel: You had said that in Mr Jobson's presence Mr Barnett told you to pay over all of the initial deposit to Mr Jobson, did you put that in writing in any way?
>
> Gordon: Yes, I did in the initial Agreement.
>
> Panel: No, the initial deposit.

Gordon: I modified the agreement to say that the money is to be put to the party's own use because---

Panel: I am not asking you how you modified the agreement. You indicated that in your presence Mr Barnett told you to pay over the money to Mr Jobson, $10,000.00 US.

Gordon: That's correct.

Panel: Did you have that in writing or signed off by Mr Barnett at that point in time?

Gordon: No, I have never met Mr Barnett, but I did say-

Panel: You said he told you in presence of Mr Jobson-

Gordon: Mr Barnett was in the presence of Mr Jobson but I told them I would give it to Mr Jobson if it is that they signed an amended agreement to say that the monies would be to the use of Mr Jobson.

Panel: We want to understand what you mean when you say '*Mr Barnett told me in the presence of Mr Jobson'*

Gordon: In the presence of Mr Jobson, not my presence I was on the phone and I said to them-

Panel: So, it was a phone call?

Gordon: It was a phone call

Panel: And this was by a person you have never met?

Gordon: No, I have never met him, but I am saying the only way I am going to do that is if I modify the Sale Agreement to say that I can do it.

Panel: So how do you know it was Mr Barnett?

Gordon: How did I know that it was Mr Barnett?

Panel: Bonafidely-

Gordon: I would not. I have never met him, I know his signature, he indicates that to me and then the signed Sale Agreement.

Panel: How do you know that the instruction you must pay over the money to Mr Jobson is actually coming from Mr Barnett?

Gordon: The signed sale agreement. What I am saying to you Panellist is that the modification of the sale agreement---

Panel: You are not understanding the question. Did you pay out the monies before or after this new amended sale agreement?

Gordon: After.

Panel: This is now the next signed agreement. You paid the money out after this second signed agreement?

Gordon: After they signed the agreement because I am not going to do that unless you tell me that I can give it to this man for his own use.

Panel: Do you see why the question asked by Mrs Barnett earlier in relation to proof of payment is important? When you [sic] asked you the question earlier, you scoffed, the question I am asking now is do you appreciate the significance of a--- instrument which would have signalled the transfer of the funds or the movement of the funds from your account to Mr Jobson's?

Gordon: Mr Jobson---

Panel: Do you understand why it is important?

Gordon: Yes, but Mr Barnett knows Mr Johnson got the money.

Panel: You cannot give that evidence

Gordon: I cannot, but he gave it. Mr Barnett gave that evidence, it is not coming from me.

Panel: To be fair, he did, but what he did not say was when it was that the monies would have been paid over to Mr Jobson. Are you understanding the distinction?

No response

Panel: Do you understand the distinction?

Gordon: I would like some time to think about it. Yes, I understand.

Panel: You are aware that there were actually two purchasers?

Gordon: No. Initially it was Mr Barnett and then---

Panel: One minute. When the money was received by you it was coming from how many persons?

Gordon: It was coming from Mr Barnett. I got a manager's cheques in the name of Malcolm Gordon. The receipt that I got at that point in time when we just started there was no Mrs Barnett in the picture.

Panel: Was the deposit paid pursuant to the initial first agreement?

Gordon: The deposit was paid pursuant to the agreement.

Panel: The initial first agreement?

Gordon: Yes.

Panel: And that initial first agreement---

Gordon: Mrs Barnett was on it

Panel: Right

Gordon: I cannot say it was coming from both of them

Panel: So, you cannot say because the Agreement was in two names, that the money was coming from both?

Gordon: No, I cannot.

Panel: So apparently that would have caused you not to have considered that Mrs Barnett might have a say in payment out of the deposit?

Gordon: That is correct because—

Panel: I just want to understand because she never seems to have been involved in any information to you about paying out of the deposit.

Gordon: No, she was not because---

Panel: I understand what you are saying. I just want---It is pursuant to an agreement that has two parties on it, and you are saying you do not assume that it is coming from both and further because you do not assume that therefore instructions from one is sufficient to [sic] you to act on. That is what you are saying?

Gordon: That is not what I am saying but I did not speak to. I do not know Mrs Barnett, nothing at all. It is Mr Barnett who is in Trelawny cutting down trees with Mr Johnson that I am speaking with [sic].

Panel: So let me understand something, the last agreement does not have Mr Jobson's name on it-

Gordon: I am not sure how that went Chairman. I honestly do not recall.

Panel: So, the agreement is in the name of Kathleen Robinson?

Gordon: Yes, it is.

Panel: So, how is it that the instructions to pay over to Mr Jobson would have been permitted by you and not Kathleen Robinson who is the vendor.

Gordon: Because Mr Jobson is---

Panel: He is not a party to this agreement.

Gordon: But he is Kathleen's son.

Panel: I am not interested in that. I am interested in what is on the agreement is that, according to you, Mr Jobson's name is not on the agreement. This is the final agreement that you prepared that accounts for all the money. We are only dealing with the payment over of the money that you held and how is it that instructions take place that you act on to pay to

> somebody who is not a party to the agreement? He is not a party to the Agreement; his name is not on it.
>
> Gordon: I think I know why. There is a power of attorney by Kathleen
>
> Panel: Where is that?
>
> Gordon: There is a power of attorney.
>
> Panel: There is no evidence of that. It is not a part of your affidavit.
>
> Barnett: You said you do not have the file. A copy of the title should be in that file as well.
>
> Panel: So, when you said you could not assume that it was coming from two people why did you write a receipt like that?
>
> Gordon: I had to take responsibility for it. I did not write it but I have to take responsibility for it.″

[121] The Disciplinary Committee, therefore, would not have been plainly wrong in concluding that the appellant's conduct raised serious questions about her competence (or lack thereof) in the execution of her obligations under the sale agreements, and, in the circumstances of this transaction, she owed a duty of care to the complainants. Further, on my review of the evidence and law, I have found no error to justify the impeachment of the Disciplinary Committee's conclusion that the professional misconduct met the threshold of being inexcusable and deplorable.

[122] It is convenient to note that although none of the grounds of appeal specifically addressed Canon 1(b), the Disciplinary Committee was entitled to find that the appellant's conduct would have discredited or tended to discredit the legal profession in the eyes of the complainants and the public at large.

[123] For these reasons, ground (a) fails.

[124] I turn next to grounds (b) and (c). They are closely related and will be dealt with together.

Ground (b) - that the respondent erred as a matter of fact and/or law in imposing a sanction of suspension for six months as well as a fine of US$35,000.00 which in the circumstances of the case was excessive and/or disproportionate.

Ground (c) - that the respondent erred as a matter of fact and/or law in awarding compensation of US$35,000.00 to the complainants having regard to the circumstances of this case including that the appellant did not derive any financial benefit from the payment of these sums by the complainant.

[125] It is helpful to set out the specific findings of the Disciplinary Committee that are being challenged in the sanction decision:

> "i. …in so drafting the agreement the Attorney legitimized the payments which were done outside of her office [para. 17].
>
> j. The inevitable conclusion to be drawn from the above is that the culpability of the misconduct of the Attorney falls into the category of egregious in that the agreements did not comply with the applicable laws. Acts were done by the Attorney outside of the terms of the agreement and the end result of all of this is that the Attorney created a set of circumstances which facilitated the purchasers being deprived of their money to their detriment [para. 19].
>
> k. In the present case the misconduct is such as to severely erode the public confidence in the legal profession. Based on the approach of the Attorney, members of the public can expect that in conveyancing matters, notwithstanding that the Attorney has carriage of sale to see the conveyancing through to its conclusion, once the Attorney is not retained to act for you then the Attorney has no responsibility to you and if the matter ends to your detriment, then it is your fault. Clearly this approach does not promote the honour and dignity of the profession. Although the Attorney did not perpetrate the fraud herself, she clearly facilitated its commission especially in a case where the property in question was subject to a Court Order forbidding dealing with the property [para. 21].
>
> l. The response of the Attorney to the complaint has no mitigating elements. She has maintained that since the Complainants are not her clients she has no responsibilities towards them. She has for the most part caused several delays in the completion of the matter. The conclusion to be

> drawn from this behaviour is that she does not consider that any consequences that happened to the Complainants were her responsibility and she does not think that her actions should therefore be scrutinized [para. 22].
>
> m. The Attorney having been found guilty of inexcusable and/or deplorable negligence the nature of which was to allow her client to be unjustly enriched at the expense of the complainants in a case where the property was not capable of being transferred was so serious in its effect on the public at large and the reputation of the profession that the only appropriate sanction was one of suspension. This was further reinforced by the attitude of the Attorney in the dismissive treatment of the Complainants solely on the basis that they were not her clients therefore she had no responsibility to them [para. 26].
>
> n. The further question is how long this suspension should continue. As noted before there are no mitigating elements in the behaviour of the Attorney in this case. Absolutely no attempt was made to reduce the loss to the Complainants which she caused/facilitated. Accordingly, the Attorney needs some time to reflect on her behaviour… [para. 27]
>
> o. In addition, the panel notes that past decisions relating to being in breach of the Canons by inexcusable and/or deplorable negligence have had an element of compensation to the Complainant of the loss suffered. Accordingly, the view of the Panel is that in this case the Attorney should be fined the sum of Thirty Five Thousand Dollars ($35,000.00) (US) in United States currency to be paid to the General Legal Council within six months of the date of this decision. In accordance with section 12(5) (a) of the Legal Profession Act the fine shall be paid over to the Complainants in full satisfaction of the damage caused [para. 28]."

Summary of Submissions

For the appellant

[126] In Ms Williams' submissions, the appellant has challenged the sanction on several bases, the most significant being:

(a) The imposition of a fine based on the total payments amounted to an order for restitution, which is inappropriate in the circumstances. Restitution is typically a remedy for breach of contract.

(b) A fine is inappropriate, there being no personal or financial benefit to the appellant.

(c) The imposition of a fine and a suspension together is disproportionate and excessive there being no finding of fraud or dishonesty on the part of the appellant and having regard to the dictum in **Minett Lawrence v The General Legal Council (Ex parte Kaon Northover)** [2022] JMCA Misc 1 ('**Minett Lawrence**').

(d) The Disciplinary Committee failed to consider the appellant's antecedents, including the fact that she was called to the Bar in 2001 and up to the date of the decision she had not been the subject of any other bad complaints.

(e) The sentencing approach is inconsistent with that in **Ian H Robins v The General Legal Council** [2018] JMCA App 38.

[127] Ms Williams further submitted that if the Disciplinary Committee's finding of professional misconduct were upheld, then a reprimand would be appropriate. In this context, she drew the court's attention to the decisions in **Ian Robins v the General Legal Council**, and **Minett Lawrence.**

For the respondent

[128] King's Counsel's main argument was that the appellant's lack of contrition, and her unwillingness to acknowledge her failings underscored the seriousness of her conduct

and the necessity for a strong penalty. He submitted that this court had upheld 'striking off' in circumstances where an attorney's conduct was egregious and that although the appellant's conduct did not rise to the level of dishonesty, it facilitated the commission of fraud upon the complainants. King's Counsel also contended that the LPA gives the Disciplinary Committee authority to impose a fine in any amount it deems suitable. Accordingly, he submitted that the fine imposed was justified by the appellant's negligence, which led to the loss suffered by the complainants. He, too, placed reliance on the decision in **Minett Lawrence**.

Discussion

[129] **Bolton v Law Society** [1994] 1 WLR 512 ('**Bolton**') outlines the fundamental purpose of imposing a sanction in these matters. This purpose is to maintain the reputation, public confidence and trust in the legal profession. The Disciplinary Committee took note of this dictum, at para. 25 of its sanction decision, as follows:

> "It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention… In most cases the order of the tribunal will be primarily directed to one or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order for suspension; plainly it is hoped that experience of suspension will make the offender more meticulous in his future compliance with the required standards…The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth…A profession's most valuable asset is its collective reputation and the confidence which that inspires. Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect

> on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases…"

[130] In formulating its approach, the Disciplinary Committee also considered **The Law Society (Solicitors Regulation Authority) v Ambrose Emeana and Others** [2013] EWHC 2130 (Admin) in which Moses LJ said this, at para. 25:

> "…uniformity is not possible. The sentences imposed are not designed as precedents…The profession of solicitor requires complete integrity, probity and trustworthiness. Lapses less serious than dishonesty may nonetheless require striking-off, if the reputation of the solicitors' profession 'to be trusted to the ends of the earth' is to be maintained."

[131] Having considered those authorities and the principles to be applied in determining sanctions, the Disciplinary Committee adopted the approach in **Minett Lawrence** and considered as relevant to the determination of an appropriate sanction (a) the seriousness of the misconduct; (b) the purpose for which sanctions were to be imposed; and (c) the sanction that most appropriately fulfilled that purpose.

[132] With respect to the seriousness of the misconduct, the Disciplinary Committee looked at the level of culpability, the harm caused by the misconduct, the aggravating features of the case, and whether there were mitigating factors. It found no mitigating value in the appellant's position that she owed no responsibility to the complainants and the absence of any attempt to reduce the loss to the complainants, remarking thus at para. 22 of the sanction decision:

> "The conclusion to be drawn from this behaviour is that she does not consider that any consequences that happened to the Complainants were her responsibility, and she does not think that her actions should therefore be scrutinized."

[133] Drawing on what it said were similarities, the Disciplinary Committee applied **Phipps v Clough** Complaint No 186 of 2007, decision delivered on 29 May 2018. That was a case in which a sanction of suspension was imposed on an attorney for allowing a

law student to hold himself out as a qualified member of the profession with similar elements to the instant case.

[134] Against this background, I now deal with each contention advanced by the appellant.

Was the fine "in the nature of restitution", and if so, was it appropriate (contentions i and ii)?

[135] Under section 12(4) of the LPA, the Disciplinary Committee may, among other sanctions, suspend an attorney from practice on such conditions as it may determine, **impose on the attorney such fine as the Disciplinary Committee thinks proper**, subject the attorney to a reprimand, or require the payment by the attorney of such sum by way of restitution as it may consider reasonable. It can combine these sanctions, except that orders for striking off and suspension cannot be made together. Section 12(5) provides that the fine imposed or part thereof may be paid to the complainant in full or partial satisfaction of any damage caused.

[136] The Disciplinary Committee imposed a fine equivalent to the direct payments made by the complainants under the sale agreements. However, this does not make it necessarily restitutive since the Disciplinary Committee is given the power, under the LPA, to impose a fine that it considers proper, and, at its discretion, to order that, all or only a part of the fine be paid to the complainant in full or partial satisfaction of any damage caused (sections 12(4) and 12(5)).

[137] Unlike a fine, a restitution order would only be appropriate in circumstances of unjust enrichment (see **Minett Lawrence**, para. [134]). However, the conditions were not met by the facts of this case. As McDonald Bishop JA (as she then was) pointed out in **Minett Lawrence**, citing **Dargamo Holdings Ltd and another v Avonwick Holdings Ltd and others** [2021] EWCA Civ 1149, para. 55, "[c]ourts and commentators have broken down the conceptual structure of a claim in unjust enrichment into four elements: i) Has the defendant been enriched? ii) Was the enrichment at the claimant's

expense? iii) Was the enrichment unjust? iv) Are there any defences? (see Goff & Jones at 1-09)".

[138] Considering the guidance in **Minett Lawrence**, a restitution order would not have been appropriate, and no such order was made. There was no evidence that the appellant received any personal benefit or was unjustly enriched, nor did the Disciplinary Committee make any finding that accords with the criteria for imposing such sanction.

[139] The primary concerns under this heading, therefore, are whether, in principle, a fine was appropriate in the circumstances of this case, and, if so, whether it was disproportionate or excessive. I will deal, firstly, with whether, in principle, a fine was appropriate.

[140] In **Minett Lawrence**, at para. [153], this court referenced, with approval, the SDT Guidance Note, which states:

> "26. A fine will be imposed where the Tribunal has determined that the seriousness of the misconduct is such that a Reprimand will not be a sufficient sanction, but neither the protection of the public nor the protection of the reputation of the legal profession justifies Suspension or Strike off."

The court went on to say, at para. [154], that "[t]he Committee…is duty bound to pay regard to the principle of proportionality, having weighed the public's interest against that of the appellant".

[141] The Disciplinary Committee did not expressly consider a reprimand, but it clearly did not think that would be an appropriate sanction, given the determination of culpability at the level of being egregious. Among the evidence it considered were that: (i) the deposit of US$15,000.00 was to be paid over to the appellant as stakeholder; (ii) a receipt was exhibited, which confirmed a deposit of US$10,000.00 to the appellant on 19 November 2014; and (iii) the appellant gave that deposit to a third party without the

written consent of the complainants and in contravention of the terms of the sale agreement.

[142] Further, as regards the amount of the fine, the Disciplinary Committee took into consideration the deposit of $10,000.00 which was paid to the appellant, and the additional payments to the vendor, through Mr Jobson. The Disciplinary Committee was also mindful that the third sale agreement, which was drafted by the appellant, purportedly in 2017, had indicated that the total payments, including the additional payments, were to be made payable to her. This despite the evidence that the additional payments were made in 2015, directly to the vendor by the complainants. The relevant clause stated that, "**A Deposit of Thirty-Five Thousand United States Dollars (USD35,000.00) be payable by the Purchasers to the Vendor's Attorneys-at-law for his own use**" (emphasis added).

[143] The record disclosed that at the time the appellant drafted that provision she knew the purported additional payments had already been made to Mr Jobson. Her cross-examination of Mr Barnett, at pages 795 to 796 of the record, bears this out:

> "Gordon: So, you had requested a second Agreement [based on the exhibits this would have been the third sale agreement] in 2017 to reflect the additional parcels that you needed from Mr Jobson?
>
> B Barnett: Correct
>
> Gordon: And that [sic] Agreement also, you wanted the Agreement to acknowledge the fact that you had paid over the $35,000.00 to Mr Jobson?
>
> B Barnett: I paid $35,000.00 to Mr Jobson?
>
> Gordon: Yes
>
> B Barnett: I did not pay $35,000.00 to Mr Jobson
>
> Gordon: But you wanted to acknowledge receipt of the monies that had been paid in the transaction so far?

B Barnett: Whatever the total is, yes. I do not know…it is there."

[144] The Disciplinary Committee's reasoning was that, by acknowledging that the full amount was to be paid to her, after it had already been paid, the appellant thereby took responsibility for the additional payments as well. Their reasoning also appears to be the cascading effect of the total payments having been made to the vendor in circumstances where title could not be passed due to the existence of the injunction, unbeknown to the unrepresented complainants, at the time they signed the first sale agreement.

[145] This court will not lightly disturb a decision to impose a fine for which the Disciplinary Committee gave adequate reasons (see **Christopher Dunkley v R** [2024] JMCA Crim 32). Further, based on the evidence, and the level of culpability the Disciplinary Committee found, I can find no basis on which to say that the Disciplinary Committee was plainly wrong in imposing a fine, the measure it used to determine the fine was inappropriate, or the fine imposed was disproportionate or excessive.

Was it disproportionate and excessive to impose suspension and a fine together? (contention iii)

[146] Relying on **Minett Lawrence**, Ms Williams urged that the imposition of both a fine and suspension was disproportionate and excessive because there was no evidence of dishonesty or fraud by the appellant. That case suggests that the combination of a fine and suspension is not necessarily disproportionate, particularly since the LPA authorises combination orders, with the exception of suspension and striking off. Rather, this court in that case was seeking to emphasise the proportionality principle in the sentencing exercise – that "the punishment must fit the crime".

[147] Along with that principle, the parity principle, which manifests as like cases being treated similarly, applies, bearing in mind, however, the exhortation to not necessarily treat previous sanctions as a binding constraint (see **The Law Society (Solicitors Regulation Authority) v Ambrose Emeana and Others**).

[148] It is noteworthy that in **Minett Lawrence,** orders for both restitution and striking off were upheld.

[149] In the instant case, the Disciplinary Committee ordered a fine and suspension for six months on the basis that a fine was an insufficient sanction for the protection of the public and the reputation of the legal profession. These factors are in keeping with dicta from **Bolton** as well as **Minett Lawrence**. The Disciplinary Committee arrived at this position having determined not only that the conduct of the appellant was of such a nature "as to severely erode public confidence in the legal profession" but that this was "reinforced by the attitude of the [appellant] in the dismissive treatment towards the complainants solely on the basis that they were not her clients [and] therefore she had no responsibility to them".

[150] The Disciplinary Committee was primarily concerned with how the appellant viewed her role as a professional and the consequences when an attorney demonstrates a lack of understanding about her professional responsibilities under the Canons. The ultimate question for the Disciplinary Committee was the effect of the conduct not only on the complainants, the hypothetical 'ordinary person', the society, and the profession but also whether the appellant would learn from the experience. In these circumstances, the conduct of the appellant was inclusive of her attitude towards the complainants, judged by the fact that it was known or ought to have been known that they were without legal representation and relied on her. The Disciplinary Committee was, therefore, justified in giving some weight to the appellant's attitude.

[151] In the circumstances, I cannot say that the Disciplinary Committee erred in finding that the appellant should be suspended and pay a fine. Each sanction was intended to address a different purpose, and the length of the suspension was considered in light of the absence of any steps to reduce the complainants' loss as well as the appellant's attitude. Both types of sanction were also within the Disciplinary Committee's remit (see sections 12(4) and 12(5) of the LPA) and justifiable based on the nature and level of misconduct found.

Whether the Disciplinary Committee erred in not having regard to the mitigating effect of the appellant's antecedents

[152] The appellant was admitted to practice in 2001. She stated that she had an unblemished record prior to the complaint regarding this matter. She called two witnesses to testify to her good character at the sanction hearing. The first witness, a member of the Jamaica Constabulary Force for over 32 years and himself an attorney of five years, gave evidence that the appellant was his mentor in law, and someone he trusted for guidance and leadership. He had never seen or heard of any complaint where the appellant had ever failed to perform her legal duties. The second witness, an attorney for over 25 years, gave evidence that he knew the appellant to be meticulous and honest. Beyond that, his testimony appeared irrelevant.

[153] The Disciplinary Committee focused on the absence of contrition by the appellant and considered it their foremost duty to protect the public and the general reputation of the profession. At para. 27 of the sanction decision, the panel said: "[a]s noted before there are no mitigating elements in the behaviour of the Attorney in this case… Accordingly, the attorney needs some time to reflect on her behaviour". It was focused on the appellant's future behaviour, influenced based on her conduct, including at the hearings.

[154] In the circumstances, although I accept Ms Williams' submission that the Disciplinary Committee ought to have expressly considered what, if any, mitigating value the appellant's unblemished record had on the sanction, I am not of the view that doing so would have likely made a difference to the sanction. The standard to which attorneys are held as professionals requires that they should not have blemished records, and if the appellant did, the appropriate sanction would likely have been greater.

Whether the decision on sanction is inconsistent with Ian Robins v The General Legal Council

[155] The case cited by counsel bears no relevance to the instant appeal as it dealt with an application for a stay of proceedings in this court. It seems the intention was to cite

the decision in the appeal, **Ian H Robins v The General Legal Council** ('**Ian H Robins**') [2019] JMCA Civ 30. Having said that, we are no further along because Ms Williams did not say in her submissions in what way the Disciplinary Committee's decision on sanction would have been inconsistent with that case.

[156] For completeness, I note that in **Ian H Robins**, the attorney was struck from the Roll because of a complaint that he failed to deliver accountant's reports to the General Legal Council's secretary for 12 years. He admitted to this failure in his affidavit. Unlike this case, the tribunal specifically addressed his good character.

[157] On appeal against sanction, the order for striking off was set aside and substituted with a six-month suspension and a fine. The glaring distinction between that case and this one is that there was contrition by the attorney. He admitted that he was guilty of professional misconduct and negligence. Nothing remotely similar exists in the instant case.

[158] Applying the reasoning in **Bolton** as to the purpose of the sanction, a six-month suspension and a fine together would not seem disproportionate or excessive.

[159] For the reasons above grounds (b) and (c) fail.

Conclusion

[160] I have found no merit in this appeal. It cannot reasonably be said that the Disciplinary Committee's finding of professional misconduct and inexcusable and deplorable negligence was unmistakeably or palpably wrong. Neither was the sanction imposed inappropriate or disproportionate and excessive in the circumstances.

Costs of the proceedings before the Disciplinary Committee

[161] The Disciplinary Committee awarded costs in the sum of $200,000.00. There has been no challenge to that order, so it should be affirmed.

Disposal of the appeal

[162] Accordingly, I would dismiss the appeal and affirm the decision of the Disciplinary Committee. There being no exceptional reasons shown to take this case outside the general rule - that costs follow the event - the GLC would be entitled to its costs, to be taxed, if not agreed.

F WILLIAMS JA

ORDER

1. The appeal is dismissed.

2. The decision of the Disciplinary Committee that the appellant breached Canons I(b) and IV(s) is affirmed.

3. The order that the appellant is suspended from practice for six months is affirmed.

4. The order that the appellant pay a fine of US$35,000.00 is affirmed.

5. The order that it is a condition precedent for the reinstatement of the appellant to practice that the fine is paid is affirmed.

6. The order that the appellant pay costs of $200,000.00 in the proceedings before the Disciplinary Committee is affirmed.

7. Cost of the appeal is awarded to the GLC, to be taxed, if not agreed.