[2020] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 2/2013

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**HUMPHREY LEE MCPHERSON**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL (Ex parte Iela Joyce Stuart)**	**RESPONDENT**

Written submissions filed by Humphrey Lee McPherson

Written submissions filed by Myers, Fletcher and Gordon for the respondent

4 May 2020

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

F WILLIAMS JA

[1] By notice of appeal filed on 26 April 2013, the appellant herein seeks to appeal against the finding of the Disciplinary Committee ("the Committee") of the General Legal Council ("GLC") dated 18 April 2013, that a prima facie case was made out against him in complaint number 206/2002. Iela Joyce Stuart ("the complainant" who

died subsequent to the taking of her evidence) had accused the appellant of professional misconduct during the course of their lawyer-client relationship.

Proceedings before the Committee

[2] After several adjournments, due to the ill health of the complainant, who at times was unable to travel from Canada (where she then resided) to Jamaica, the complaint came up for hearing on 16 February 2013. The panel of the Committee that heard the matter (hereafter referred to as "the panel") gave a written decision at the completion of the hearing. That decision sets out, *inter alia*, the background to the complaint, the evidence considered by the panel and its rationale for arriving at the decision that a *prima facie* case had been established, as well as for disposing of the substantive complaint.

[3] In its said decision, the panel indicated that the complaint was initiated by form of application dated 13 May 2004 ("exhibit 2") and was supported by an affidavit ("exhibit 2a") also bearing the said date. Both documents were sworn to by the complainant. (These documents do not form a part of the record of appeal). The complainant raised nine grounds of complaint that will later be rehearsed.

[4] The complainant was represented by counsel, while the appellant was self-represented. Counsel for the complainant sought to rely on and exhibit, as the complainant's examination-in-chief, the complainant's affidavit sworn to on 5 July 2012. However, at the first hearing, due to certain procedural deficiencies identified in the affidavit by the panel, which made it difficult to relate certain exhibits to the

corresponding paragraphs, the matter was adjourned and thereafter resumed on 20 February 2013. At that time, the said affidavit, having been re-drafted and re-sworn on 18 February 2013, with no objections from the appellant, was permitted by the panel to stand as the complainant's examination-in-chief and labelled exhibit 1. The appellant thereafter cross-examined the complainant.

[5] On 18 April 2013, at the close of the complainant's case, the appellant submitted that no prima facie case requiring him to answer to the complaint had been made out. On the other hand, counsel for the complainant argued that a prima facie case had sufficiently been established. The panel thereafter considered the submissions and evidence then before it. At the end of its deliberations, the panel held (as contained in its said written decision) that:

> "1. The panel has given due consideration to the submissions made by the attorney that there is no prima facie case of professional misconduct. We have listened to the submissions made by counsel for the complainant.
>
> 2. The attorney bases his submissions on the alleged procedural, evidential and substantive deficiencies.
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> 3. The panel sees no merit in any of the submissions made by the attorney as to the alleged procedural deficiencies.
>
> 4. There is sufficient evidence as adduced on behalf of the complainant Mrs. Iela Stuart raising a prima facie case of professional misconduct against the attorney."

[6] The appellant, being dissatisfied with that ruling, filed the notice of appeal referred to at paragraph [1] herein. Accordingly, it is from the above-stated orders that this procedural appeal emanates.

[7] Subsequent to the filing of the appeal, the proceedings before the panel continued. However, the appellant declined to give *viva voce* evidence and called one witness in his defence. Both parties were then allowed an opportunity to present written and oral submissions to the panel. After a consideration of those submissions and the evidence placed before it, the panel found "beyond reasonable doubt" that the appellant had committed breaches of canons I(b), IV(f), IV(r), IV(s), IV(t)(i), IV(t)(ii)(1), (2) and (3) and VII(b)(ii), of the Legal Profession (Canons of Professional Ethics) Rules ("the Canons"). The matter was then adjourned and three notices given to the appellant (notice of adjourned hearing dated 27 November 2015; notice of change of hearing date, dated 2 December 2015; and notice of adjourned hearing dated 4 December 2015) to allow him an opportunity to make submissions in mitigation of the sanctions to be imposed. The appellant having failed to appear on any of those occasions, the panel proceeded to impose the following sanctions, dated 30 January 2016:

> "(1) The attorney Humphrey McPherson pay to the complainant's estate the sum of $1, 820,000.00 with interest at the rate of 6% from February 2004 the date of the statement of account sent by the attorney to the Complainant until payment.
>
> (2) The attorney be struck from the Rolls of Attorneys-at-law entitled to practise in Jamaica.

(3) The attorney pays costs of $750,000.00 to the attorneys-at-law for the complainant Bailey Terrelonge Allen."

[8] By way of Miscellaneous Appeal Number 2 of 2016 (filed on 14 March 2016), the appellant had sought to appeal against that finding of professional misconduct and the sanctions imposed. This court, however, on 9 June 2016, upheld the preliminary objection of counsel appearing for the GLC in application number 56/2016, that the notice of appeal that had been filed was a nullity, as it was filed outside the prescribed time, in circumstances where no extension of time to file it was sought or obtained. As such, the court struck out that notice of appeal. For the purposes of clarity, it bears repeating that there is now only one appeal before this court; and that this remaining procedural appeal relates to the panel's finding of a prima facie case.

The grounds of appeal

[9] The appellant filed 11 grounds of appeal. Those grounds were framed in the following manner:

1. "The tribunal breached its Minute Order [sic] dated September 15, 2012, by proceeding to hear the Respondent who ceased to be a Complainant and became a witness when she was substituted by her son Dean Stuart pursuant to said Minute Order, proposed by Respondent's Attorneys-at-Law and where Dean Stuart failed to file an Affidavit and refused to testify before the Tribunal resulting in a clear violation of Privy Council Appeal No. 8 of 2005, General Legal Council, ex parte Basil Whitter (at the instance of Monica Whitter vs. Barrington Earl Frankson)."

2. "The Tribunal breached its Minute Order dated January 30th, 2006, Bovell/Deacon, by proceeding to

hear the Complaint dated May 13th, 2004, which was not considered nor amended by the Committee rather than hearing the original complaint dated January 22nd, 2003, pursuant to said Minute Order, there being no amended Complaint except the illegal, defective null and void Amended Complaint filed by Patrick Bailey, Respondent's Attorney-at-Law to obstruct and pervert the course of public justice aided and abetted by the General Legal Council."

3. "None of the defective, illegal, null and void Affidavits sworn to by the Respondent does not substantiate the Complaint [of] the Appellant and justify the Tribunal dismissing the application and taking action against the Respondent and/or her Attorneys-at-Law."

4. "The Affidavit on which the Respondent was cross examined is illegal, defective, null and void as being short served and is not in support of valid Complaint and Respondent a Witness not a Complainant."

5. "The Tribunal is prejudiced and biased aided and abetted criminality and has obstructed and perverted the course of public justice."

6. "It breached its own Minute Order dated January 30th, 2006, by enforcing the Minute Order against the Appellant but exhibited a pattern of allowing the Respondent and/or her Attorneys-at-Law to act in Bad Faith in negotiating Appellant's fees and to aid false breach of undertaking fabricated costs and to further wrongs, criminality to obstruct and pervert the course of public justice."

7. "It refused to enforce the 2006 Order against Respondent and/or her Attorney-at-Law, Patrick Bailey, for failure to negotiate in good faith by fees owing me by Appellant."

8. "It conspired with Patrick Bailey to issue an Amended Complaint against Appellant causing the tribunal to issue a Witness Summons against Appellant for a purported breach of undertaking on the part of the Appellant when in fact there was no breach of any undertaking on the part of the Appellant and Patrick

Bailey is not the Complainant causing the appearance of impropriety in relation to a conflict of interest and an attempt to obstruct and pervert the course of public justice."

9. "It conspired with Patrick Bailey to have issued against Appellant a fabricated cost order in the sum of $38,690.00, on the grounds that Appellant was absent – and who was absent for good reasons. Respondent has been absent for more than 20 times but no cost order have [sic] ever been issued against her."

10. "It aids and abets the theft and attempted theft of Ms. Francis' unregistered and registered land and Respondent's children land at 2 Fernleigh Avenue, May Pen, Clarendon, by Respondent and/or her Attorneys-at-Law and refused to take action against them."

11. "The appellant was entitled to use his own judgment to refuse to aid and abet larceny and attempted larceny to benefit the Complainant and what the Appellant had done did not amount to misconduct. **Davies v Davies** [1960] All ER 248; [1960] 1 WLR 1004; 104 Sol Jo 745, CA (17)."

[10] On the said date of filing the notice and grounds of appeal (26 April 2013) the appellant had also filed a document headed "Skeleton Arguments". Since then he brought several interlocutory applications before this court. However, it was not until the court heard the appellant's notice of application number 120/2017, filed on 5 July 2017, that it was possible to make orders to facilitate the hearing of this procedural appeal. The appellant thereafter filed written submissions on 17 April 2018 and the respondent filed its response on 17 May 2018.

Preliminary issues

[11] The respondent, in its response to the appeal, raised procedural and substantive objections to the hearing of the appeal and challenged its validity. However, those might fairly be regarded as newly-raised issues, as they were not canvassed in the issues raised in the notice of appeal before the court; neither are they contained in a counter-notice of appeal. In view of rule 1.16(2) of the Court of Appeal Rules, at the hearing of an appeal a party cannot rely on matters not contained in its notice of appeal or counter-notice unless it was relied on below or the court has given such permission. While no permission was sought or has been granted to argue these issues, I am mindful of the fact that sub-rule (3) does not confine the court's consideration of an appeal to the grounds of appeal as set out but further provides that a decision may not be based on a ground not set out unless the other party has had sufficient opportunity to contest that ground.

[12] One procedural objection raised by the respondent is that the scope of rule 16(1) of the Legal Profession Act ("LPA") does not permit an appeal from the finding by the panel of the existence of a prima facie case. In my view that issue brings into focus the court's jurisdiction to hear and determine this appeal. Although raised without proper opportunity given to the appellant to address it, this being an issue of pure law, and of critical importance to the grounding of our jurisdiction in this matter, without any prejudice to the appellant's appeal, I will make a few observations concerning it.

[13] The jurisdiction of the Court of Appeal to hear appeals from the Committee is derived from section 16(1) of the LPA. It stipulates that:

> "16. -(1) An appeal against any order made by the Committee under this act shall lie to the Court of Appeal by way of rehearing at the instance of the attorney or the person aggrieved to whom the application relates, including the Registrar of the Supreme Court or any member of the Council, and every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court."

As expressly provided by the section, "any order" made by the Committee under the LPA is appealable.

[14] The case of **Abraham Dabdoub and Raymond Clough v The Disciplinary Committee of The General Legal Council (Ex Parte Dirk Harrison, Contractor General Of Jamaica)** [2018] JMCA App 33, from this court, is helpful in resolving the issue of whether "order" includes the finding of a prima facie case. In that case, the then Contractor General brought a complaint before the GLC against the applicants in their capacities as attorneys-at-law. The Committee found that the applicants had established that there was a prima facie case to be answered.

[15] The applicants thereafter filed in the Supreme Court a fixed date claim form ("FDCF"), which, in the main, sought a declaration that no prima facie case had been properly established. Brown-Beckford J struck out the FDCF on the basis that it was an abuse of process. She held that, if there was any dissatisfaction with the Committee's finding of a prima facie case, the proper recourse available to the applicants was an appeal to the Court of Appeal pursuant to section 16(1) of the LPA.

[16] My learned sister, Phillips JA, writing on behalf of the panel of this court that heard the appeal against the decision to strike out the FDCF, endorsed the ruling of the

learned judge and refused the applicants' application for permission to appeal. A portion of Phillips JA's dictum in refusing permission to appeal speaks to the very issue now being considered. Phillips JA said:

> "[25] …it seems very clear to me that the applicants will not be able to demonstrate that section 16(1) of the LPA does not provide a right of appeal from the decision of the Committee.…
>
> [26] It is pellucid that an appeal lies against any order of the Committee to the Court of Appeal. The decision of the Committee that a prima facie case has been made out is an 'order' of the Committee. The appeal is by way of a rehearing of the order made by the Committee. The appeal can be made by any person aggrieved by the decision to which the application before the Committee related. The appeal shall be made in such form and in the manner dictated by the rules...
>
> …
>
> [27] It is clear that once the documentation has been sent to the attorney-at-law, and they have been given the required time period within which to respond to the allegations made in the complaint to the Committee, then it shall consider the application and any response thereto. Once it is of the opinion that a *prima facie* case has been shown, the Committee shall fix a date for the hearing of the complaint.
>
> [28] There is no question that the applicants have an avenue of redress by way of appeal under the LPA where the right of appeal is provided. It will therefore be very difficult for the applicants to demonstrate, faced with the particular wording of section 19(4) of the Constitution, that the learned judge would have erred in declining to exercise her powers to otherwise remit the matter to the appropriate authority, having been satisfied that there was adequate means for redress for the alleged contravention. Section 16 of the LPA obviously provides that redress, and that is clearly the route that the applicants ought to have taken. Any argument to the contrary does not seem sustainable.

> [29] It is also very clear that the reliefs sought in the fixed date claim form are the same reliefs that one can obtain under section 16(1) of the LPA. It does not appear to be arguable that the order referred to in section 16 of the LPA is not one made by the Committee in this case. There is no indication that the order could only be one in relation to which *viva voce* evidence had been taken. There is no such restriction in the said provision or elsewhere in the LPA, and I am of the view that that argument has no merit."

[17] On a reading of the above paragraphs, the contention of the respondent that the notice of appeal is invalid on the basis that what is sought to be appealed, does not fall within the scope of section 16(1) of LPA, is clearly unmeritorious. Furthermore, in this case, the panel had commenced hearing evidence in the matter, the said evidence providing a greater basis for the finding of a prima facie case. The appellant, pursuant to section 16(1) of the LPA, clearly has a right of appeal against the finding of the panel that a prima facie case was made out.

[18] The respondent had also submitted that the appeal ought to be dismissed as an abuse of process. The respondent argued that the non-action of the appellant between filing his grounds of appeal and skeletal arguments and the filing of the notice of application number 120/2017 led to the delay in the hearing of the appeal such that the appeal ought to be struck out. Clearly, this newly-raised issue, in the absence of proper notice to the appellant and his response, could very likely ensue to his prejudice. I therefore, decline to consider that submission, as it cannot be regarded as being properly before the court.

Issues

[19] With all due respect to the appellant, it must be noted that the submissions and "Skeletal Arguments" filed and presented by him, to a significant extent, lack coherence, thus making discerning the real issues the more difficult. That factor was further worsened by the fact that some of the documentary evidence placed before the panel for its consideration was, for some unknown reason, not before this court for consideration. The detailed written decision of the panel of the Committee, however, proved extremely helpful in providing the background to the complaint and the evidence considered in arriving at its decision.

[20] It is to be noted that, where the grounds of appeal call for a consideration of whether the appellant was guilty of professional misconduct, that issue would not have properly arisen for determination at that stage of the proceedings (that is, at the stage of determining whether a prima facie case had been established), and so does not fall for consideration in this appeal. Further, we have not considered the appellant's grounds of appeal in relation to costs, as that matter, as sufficiently noted in the decision of the panel, had arisen from a dispute as to fees owed to the appellant. The bill of costs in question had been the subject of a taxation by the complainant and then an appeal before G Brown J, at the instance of the appellant. Any dissatisfaction with that decision would, therefore, of necessity, have to be dealt with by way of an appeal from the decision of G Brown J.

[21] Accordingly, in view of the grounds of appeal as listed, and, in keeping with the issues which would properly have been before the panel at the relevant stage of the

proceedings, (that is, the determination of whether a prima facie case had been established), these are, in my view, the issues that arise for discussion:

(i) was the complaint properly before the Committee?

(ii) was the validity of the proceedings affected by breaches of the minutes of order?

(iii) was a prima facie case properly established?

(iv) was the conduct of the panel tainted with bias, prejudice or criminality?

Issue (i): was the complaint properly before the Disciplinary Committee?

[22] The appellant has sought to impeach the validity of the proceedings before the panel on the basis that Iela Stuart had been substituted as the complainant by her son, Dean Stuart, and that Dean Stuart had failed to file an affidavit or give viva voce evidence. He has also raised as an issue the contention that the proceedings were rendered invalid as the affidavit that stood as the complainant's examination in chief had been short served.

[23] The respondent, on the other hand, has submitted that the appellant ought not to succeed because, inter alia: (i) he participated fully in the substantive hearing; (ii) he answered the complaint brought against him, and so the substratum of his appeal has disappeared.

Discussion

[24] Section 12(1) of the LPA stipulates that:

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

[25] Further, rule 3 of the Legal Profession (Disciplinary Proceedings) Rules ("the Rules") (which is given statutory force by section 14(2) of the LPA) provides that:

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

[26] The cumulative effect of both provisions, that is relevant to this matter, is that a person who has a grievance against an attorney in a professional capacity may apply to the Committee requiring the attorney to answer to the allegation. That application is required to be in writing by way of "Form of Application against an Attorney-at-Law" and "Form of Affidavit by Applicant", setting out the factual premise of the allegation(s).

[27] The issue of whether the phrase "under the hand of the applicant" that is used in the rules, circumscribes the interpretation of section 12 of the LPA, arises for discussion in this appeal. This is so as, the appellant, relying on the case of **General Legal Council ex parte Whitter v Frankson** [2006] UKPC 42 has advanced the position that the proceedings before the panel were nullified by virtue of the complainant having been substituted by her son, Dean Stuart. While there was no evidence placed before this court to support that allegation of substitution, a few observations may be made in relation to the cited authority.

[28] In **General Legal Council ex parte Whitter v Frankson** a complaint of professional misconduct was made against an attorney to the GLC by Mr Whitter, on behalf of his mother. The Committee had proceeded to hear the complaint on an affidavit sworn by Mr Whitter. This court, by a majority, reversed the decision of the Committee to strike the attorney from the roll. The rationale for the decision was that, pursuant to section 12 of the LPA, the Committee did not have jurisdiction to hear an application by Mr Whitter brought on behalf of his mother.

[29] On appeal, the Privy Council reversed this decision on the premise that the primary provision in section 12 ought not to be restricted by the rules. The Board found that, while the rules were an important consideration in the construction of section 12, they could not be given independent effect in order to exclude the possibility of a complaint through an agent. On the authority of that dictum, therefore, a complainant may be represented by agent, (which has not been proven to have been the case in the proceedings before the panel giving rise to this appeal). Furthermore, the panel, in its

written decision, regarded Iela Stuart as the complainant. The panel observed that the proceedings were instituted by way of the required form of application and the supporting affidavit sworn by her. The panel also acknowledged that these two documents were the only initiating documents placed before it for consideration. It is expressly stated in the decision of the panel that the complainant's affidavit that stood as her examination-in-chief was admitted with no objection from the appellant. It has long been recognized that an appellate court frowns upon the raising of new arguments on appeal that were not raised below. In the absence of a compelling reason to allow this point to be now advanced, in circumstances in which an objection was not taken below and put to the panel for its consideration, that objection ought not now to be allowed to be used as a point of attack against the panel's decision.

[30] The filing of the initiating documents was clearly in keeping with the proper procedure to institute a complaint before the Committee as set out in section 12 of the LPA and rule 3. This complaint, therefore, in my view, lacks merit.

Issue (ii): was the validity of the proceedings affected by breach of the minute of order?

[31] The appellant contended that the panel had acted in breach of minute of order dated 30 January 2006 (made by a differently-constituted panel) by proceeding with the complaint dated 13 May 2004, instead of the original complaint. He also submitted that the proceedings before the panel should not have commenced because he had complied with the said minute of order. Further, he submitted that the panel had proceeded to hear the complaint despite his objection that section 13(3) of the LPA had

been breached in that a two-member panel had made the orders reflected in the said minute of order. He likewise argued that the panel had proceeded to hear the complaint despite the fact that he had filed an appeal.

Findings of the panel

[32] The panel observed that the cross examination of the complainant by the appellant had featured references to an agreement between the parties as allegedly contained in a minute of order of 30 January 2006. The panel noted, as contended by the appellant, that a panel composed of two members had made the orders reflected in that minute of order. The contents of the order were recounted in the written decision as follows:

> "(1) Mr. McPherson will hand over all documentation in his possession including duplicate certificates of titles to Patrick Bailey before the 3rd February 2006.
>
> (2) On completion of (1) above Mr. Bailey will withdraw the amended complaints against Mr. McPherson.
>
> (3) Mr. McPherson and Mr. Bailey agree to negotiate in good faith an agreement on costs due to Mr. McPherson by the 11th March 2006 for which date the matter is adjourned for mention.
>
> (4) Failing agreement original complaint will be set down for hearing."

[33] It was the view of the panel that the appellant's cross-examination of the complainant in relation to that minute of order was done in an effort to demonstrate that the complaint ought not to have been pursued by the complainant nor heard by the panel. The panel found those questions to be irrelevant, as there was no evidence

that the required permission to withdraw the complaint had been sought pursuant to rule 15 of the Rules. Therefore, the panel reasoned that it properly fell to it to consider the merits of the complaint.

[34] The panel also stated that it was at liberty to proceed on the complaint, as the form of complaint and affidavit dated 13 May 2004 were properly before it. Further, the panel questioned the validity of the relevant minute of order by virtue of the composition of that panel (two members instead of the stipulated three). The panel also found the reference to "original complaint" in order 4 to be unclear.

Discussion

[35] Section 13(3) of the LPA states that:

> "(3) Each division shall appoint its own chairman and, subject to subsection (3A), shall act only while at least three members thereof are present."

[36] Sub-section 13(3A) stipulates permissible instances where a panel may continue to hear an application pursuant to section 12, albeit the number of its members is reduced by reason of the illness, death or incapacity of any of its members. While the panel had noted that the complaint had come on for hearing before various panels but was not heard, there is an absence of an explanation of the circumstances which led to the minute of order being made or the constitution of that panel.

[37] Rule 15 of the Rules provides that:

> "No application shall be withdrawn after it has been sent to the Secretary, except by leave of the Committee. Application

> for leave to withdraw shall be made on the day fixed for the hearing unless the Committee otherwise direct. The Committee may grant leave subject to such terms as to costs or otherwise as they think fit, or they may adjourn the matter under rule 16 of these Rules."

[38] Further, in light of the requirements of the above-stated provisions, it is important to note that there is no evidence or anything on the record indicating that permission was sought to withdraw the complaint. Accordingly, the complaint would still properly have been before the panel, which could not fairly be faulted for proceeding to hear it.

[39] With respect to the appellant's argument that the panel had continued to hear the complaint, even though he had filed an appeal, section 16(2) of the LPA is clear in its provisions that the lodging of an appeal against a decision of the Committee does not operate as a stay. It provides that:

> "(2) The lodging of an appeal under subsection (1) against an order of the Committee shall not operate as a stay of execution of the order unless the Court of Appeal otherwise directs."

[40] That provision is similar to rule 2.14 of the Court of Appeal Rules (CAR), which states that:

> "**Stay of execution**
>
> 2.14 Except so far as the court below or the court or a single judge may otherwise direct -
>
> (a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and

(b) no intermediate act or proceeding is invalidated by an appeal."

[41] While one of the orders sought by the appellant in his notice of appeal was a stay of execution, there is no evidence that he had sought that order by way of an application before the court, as is required. Further, there is no evidence of any direction having been given by this court for the filing of the appeal to operate as a stay of proceedings below. In those circumstances, without more, it would be unreasonable to chide the panel for its failure to put a halt to the proceedings. The appellant, therefore, also fails on this issue.

Issue (iii): was a prima facie case properly established?

[42] The appellant has argued by and large that there was no evidence before the panel on which a prima facie case could properly be found to have been established. A consideration of this submission will naturally have to commence with a review of the complaint that was before the panel and the evidence presented in support thereof.

[43] The complainant made nine grounds of complaint that were heard by the panel. They were framed as follows:

"1. He has charged me fees that are not fair and reasonable for the services rendered. He has refused to substantiate the billing with the proper invoicing as requested by myself in writing.

2. He withdrew from my employment without taking reasonable steps to avoid foreseeable prejudice or injury to my position and rights as his client.

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

4. He has not dealt with my business with due expedition which could compromise my rental and lease agreement on the properties but [sic] could result in excessive penalties being levied on the estate in the form of interest payments in relation to the Probate and payment of Stamp Duties being owed.

5. He has acted with inexcusable and deplorable negligence in the performance of his duties not exercising due diligence in reviewing the accuracy of his paper work and legal documents being filed.

6. He has not accounted to me for all the monies in his hands for my account or credit although I have reasonably required him to do so.

7. Having withdrawn from my employment he has not promptly refunded such part of the fees paid in advance as may be fair and reasonable.

8. He has failed to carry out my directions and or instructions given verbally and in writing, misrepresenting me in dealing with tenants and not representing the interests of the estate.

9. He has superseded the boundary of a normal- lawyer client relationship by proceeding negotiations without providing full knowledge to the client and obtaining neither authority nor consent with regards to the property development."

Portions of the evidence before the panel

[44] The complainant's case was supported in the main by two affidavits and her oral evidence in cross-examination. These pieces of evidence and the relevant exhibits were summarized in the panel's written decision.

[45] The decision recounts that it was the complainant's evidence that in October 1997 she retained the services of the appellant to obtain letters of administration in the estate of her late husband, Charles Stuart. In April 1998, however, the deceased's will was located and sent to the appellant with instructions that he should instead obtain a grant of probate. The complainant exhibited to her affidavit (as exhibit 1), a letter written by her to the appellant, dated 14 April 1998, confirming these instructions. She stated therein that she had paid the appellant $130,000.00 at his request, as a retainer fee.

[46] The complainant averred that several errors in the documentation prepared by the appellant led to delays in obtaining the grant of probate. Also, she asserted that the appellant had unfairly billed her for the costs of correcting those errors. Exhibit 3, of the relevant affidavit is a letter dated 24 October 1999 from her to the appellant, expressing concern that the grant of probate had not been obtained and imploring the appellant to obtain same. She also set out the fees paid to the appellant. Eventually, a different attorney-at-law obtained the grant of probate. She deposed that the appellant had failed to deal with her business expeditiously or with due diligence.

[47] The complainant also claimed that the appellant had been retained to address an encroachment issue (for which he had received payment). He was also to have prepared notices to quit to recover possession and sue for damages for waste. Those instructions were confirmed in exhibit 2, which is stated to be a detailed letter setting out the work to have been done by the attorney; work actually done; and fees due and fees paid. The complainant deposed that the appellant failed to address those issues.

[48] She also averred that the appellant was retained to engage the services of a Commissioned Land Surveyor to prepare subdivision plans for a property located in May Pen, Clarendon. The complainant stated that the appellant had also failed to obtain those subdivision plans.

[49] Additionally, the appellant was instructed to act for the estate in relation to the sale and lease of lands. However, she claimed, the appellant failed to comply with her express directives to cancel a sale agreement with a particular organisation. The occurrence of these events, she averred, was evidenced by exhibit 8, which was another letter containing her instructions to the appellant, and in which she had also enclosed the sum of $100,000.00 towards payment of attorney's fees. Exhibit 4 (which was also reviewed by the panel) is a letter from the complainant to the appellant instructing him not to sell any more land but to proceed to obtain the grant of probate. The letter also contained instructions to the appellant in relation to how he was to have proceeded with his handling of the estate. The complainant also asserted that the appellant had failed to account for money received from these transactions.

[50] The complainant maintained that the appellant had submitted to her a bill for fees that was excessive. The complainant produced, as exhibit number 5, the appellant's bill of costs dated 15 June 2000 purported to be for the period October 1997 to May 2000 and exhibits 6 and 7, which are letters from the complainant to the appellant disputing the amount of fees claimed in the bill of costs.

[51] The complainant also alleged that the appellant had wrongly disclosed confidential information and had failed to transfer share and stock certificates for the estate that were in his possession. Exhibits 12 and 13 are letters directing the appellant to deliver land titles to the complainant's daughter, Mrs Hillary Alexander. The complainant stated that the appellant refused to comply with that instruction.

[52] The above-stated events culminated in exhibit 14, which is a letter dated 3 November 2002, penned to the secretary of the GLC by the complainant. In that letter she accused the appellant of gross incompetence, negligence and lack of professionalism in the delivery of the services that he was retained to provide. The complainant averred that a direct consequence of the conduct complained of was that she had lost confidence in the appellant's ability to properly represent the interest of the estate.

[53] Exhibit 15, is a letter from the appellant in response to the complainant's letter to the secretary of the GLC. In that letter, the appellant vehemently denied the conduct complained of and attempted to explain his position in relation to the matters he was retained to complete. The appellant also claimed, in that letter, that probate had been obtained but that the stamp duties had not been paid due to certain difficulties in selling lands, the ownership of which was contested.

[54] The appellant contended that he had refused to hand over the titles because he was owed attorney's fees in the sum of $2,000,000.00 to $3,000,000.00. Further, that the complainant was well aware that the sub-division plans had fallen through, as the

land surveyor had become un-cooperative. In that regard, he also claimed that he was owed fees in the sum of $2,500,000.00 to $3,500,000.00 for work done in relation to the proposed development. In relation to the encroachment issue, he claimed that he was paid $77,000.00 and a suit had been initiated in the Resident Magistrates' Court (now Parish Court) and that a default judgment, which directed that a survey be conducted, had been obtained but that he was unable to access the court files as they had been destroyed in a fire at the courthouse.

[55] Exhibits 18 and 19, respectively dated 30 June 2006 and 20 March 2008, are two reports done by two separate attorneys-at-law detailing the work that had been done by the appellant and that which was outstanding. The panel found that the two reports made identical conclusions and that it was open to it to attach what weight it deemed fit to these reports. (The panel's written decision does not indicate what the conclusions were).

Decision of the Committee

[56] At pages 14 to 15 of the decision, the panel quoted the following passage from "A Practical Approach to Evidence", 2nd Edition, at page 75, paragraph 3.2.2 written by Peter Murphy:

> "There is an evidential burden on the complainant to adduce facts in support of the salient issues in the complaint, sufficient to establish to the tribunal that it may be entitled to find the respondent attorney guilty of professional misconduct, but it need not do so. This is what is meant by the phrase that 'a *prima facie*' case has been established."

[57] The panel went further than its citation of the passage to state that:

> "Successful discharge of the evidential burden, therefore requires no more than proving evidential facts sufficient to justify the tribunal of fact making a favourable finding as to the facts in issue while not requiring it to do so. This involves adducing evidence on which the tribunal of fact would, as a matter of law, be entitled (but not obliged to) find in favour of the party adducing the evidence as to the facts in issue with which the evidence was concerned".

[58] The panel opined that, on the basis of the principle emanating from the quoted paragraph, and in the circumstances of this case in which it could not be reasonably contended that there was no issue to leave to the tribunal of fact at the close of the complainant's case, a submission of no case to answer could not succeed. The panel accordingly found that, on the evidence before it, the complainant had discharged the evidential burden, thereby establishing a prima facie case.

Discussion

[59] The question of what constitutes a "prima facie case" has been considered and discussed in this court's decision of **McCalla v Disciplinary Committee of the General Legal Council** (1994) 49 WIR 213. While the Privy Council subsequently allowed an appeal in part, by the appellant McCalla, in respect of the complaint alleging plagiarism, the dictum shortly to be quoted below nonetheless remains good law. At page 230 of the judgment, this court (per Rattray P) discussed the phrase "prima facie" as contained in rule 4 of the Rules as follows:

> "The appellant maintains that the finding of a prima facie case against him was not based on any or any sufficient evidence. In my view, all this rule provides is that before a date for hearing is fixed a decision must be taken by the Disciplinary Committee based, not on evidence (since none is before it at this stage), but upon the nature of the

> allegations as to whether this is a matter on which the committee should proceed. If the matter is trivial or frivolous there does not exist 'a prima facie case' for the committee to proceed to trial. Frivolous allegations may be made against attorneys at law, the frivolity of which is evident and this provides for the committee a process by which it can weed out insubstantial complaints and clear the list of matters unmeritorious.
>
> The provision is there for the protection of the attorney at law as well as the convenience of the committee and cannot provide a valid ground for a complaint by the appellant."

[60] Whilst it is noted that the hearing of the complaint had already commenced in this case, as opposed to the proceedings considered in rule 4 of the Rules, which is before a hearing, the issue (discussed in that case) of what constitutes a prima facie case is still of relevance in this appeal. It is beyond doubt that the evidence of the complainant as adduced raised issues concerning allegations of professional misconduct. The allegations that were levied against the appellant were not frivolous; neither could it be reasonably maintained that the complaint did not demonstrate a genuine grievance. There was before the panel, evidence clearly raising serious questions in relation to imputations of professional misconduct under the LPA and that called for a response from the appellant. The appellant has, therefore, not succeeded on this issue.

Issue (iv) was the conduct of the panel tainted with bias, prejudice or criminality?

[61] The appellant has sought to raise allegations of bias, prejudice and criminal conduct against the panel.

Discussion

[62] The principle of law enounced in **Porter v Magill** [2002] 1 All ER 465, at paragraph [103], is to the effect, that where there is a suggestion that the judge was biased:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

[63] Additionally, also aptly demonstrated by this court in the decision of **Roald Nigel Adrian Henriques v Hon Shirley Tyndall QC and Others** [2012] JMCA Civ 18**,** is the procedure that the court should employ in its consideration of the issue of whether bias exists. Harris JA, after a review of the modern authorities concerning this issue, opined at paragraphs [53]-[54] that:

> "[53] **Porter v Magill** proposes that … the court should be guided by a dual step process. First, it should examine the evidentiary material on which the allegation is founded. Thereafter, it should determine whether, on a balance of probabilities, a fair-minded observer would conclude that there is a real possibility of bias on the part of any member of the tribunal whose right to sit on the tribunal has been challenged …
>
> [54] The test of apparent bias is an objective one. It presupposes that a decision-maker would be divorced from any semblance of partiality. The overall objective is fairness, since fairness is a highly relevant tool in the armoury of a decision-maker. Since fairness is the hallmark of the administration of justice, a duty is imposed on a decision maker, at all times, to guard against any perceived notion of bias."

[64] On the basis of our review of these cases and the documents before us, there is no material on which it is possible to make a finding of bias, apparent nor actual,

against the panel. Additionally, no evidence or submissions have been presented to advance the allegation of criminal conduct arising from the proceedings of the Committee. Therefore, apart from raising that issue in his ground of appeal, the appellant has provided no support for this contention. The appellant's appeal also fails on this issue.

[65] The appellant has, therefore, failed to make good any of his grounds in this appeal; and the respondent's submissions must be accepted.

[66] In light of this, the course recommended is that the appeal be dismissed with costs to the respondents to be agreed or taxed.

STRAW JA

[67] I have read in draft the judgment of my brother, F Williams JA , I agree with his reasoning and decision and I have nothing useful to add.

EDWARDS JA

[68] I have read the draft judgment of my brother F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

ORDER

(i) The appeal is dismissed.

(ii) Costs of the appeal to the respondent, to be agreed or taxed.