[2019] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 6/2018

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

BETWEEN	**IAN H ROBINS**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Miss Nancy Anderson and Miss Shanese Henry for the appellant

Miss Carlene Larmond instructed by Rattray, Patterson, Rattray for the respondent

11, 12 June and 18 October 2019

F WILLIAMS JA

[1] I have read in draft the judgment of my sister Straw JA. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[2] I too have read the draft judgment of my sister Straw JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

STRAW JA

Introduction

[3] On 5 May 2018, the Disciplinary Committee of the General Legal Council (the committee) made an order striking Mr Ian H Robins, the appellant, from the roll of attorneys-at-law entitled to practise in the several courts of the island of Jamaica, pursuant to section 12(4)(a) of the Legal Profession Act.

[4] The appellant has appealed against this order and, in particular, the sanction imposed. The sole ground of appeal relied on is that "[t]he sanction imposed against the Appellant is manifestly excessive and harsh". In his amended notice of appeal filed on 21 May 2018, the appellant seeks a single order of this court, namely:

> "That the appeal be allowed, the sentence of striking off be set aside and in lieu thereof, the Appellant be reprimanded as the sanction for his breaches."

[5] On 29 May 2018, an order was made by consent before a single judge of this court staying the sanction imposed by the respondent until 5 October 2018. Subsequently, a series of extensions were granted and on 29 November 2018, this stay was extended with conditions attached until the determination of this appeal.

[6] It should be noted that there was an application to adduce further evidence filed by the respondent on 24 May 2019. By consent, the application was granted in terms of the notice of application. This application related to adducing three affidavits as further evidence and allowing a supplemental record of appeal to stand. The first affidavit, sworn to by Mrs Daniella Gentles-Silvera, relates to the discovery of information that

was not disclosed to the committee and documents filed by the appellant after the commencement of this appeal. The other two affidavits were sworn to by the appellant and contained evidence in response to the affidavit of Mrs Gentles-Silvera and also attached documents (declarations) filed by him with the respondent as well as documents (confirmations) issued to him by the respondent. These documents were relevant to the conditions on which the stay of execution was granted.

Background

[7] The appellant is an attorney-at-law. He was admitted to practise in November 1979. He managed to maintain an unblemished record for almost 38 years, that is, until a complaint was made on 19 July 2017 which led to the ultimate sanction of striking off. This complaint was made by Mr Allan S Wood QC by way of a 'Form of Application against an Attorney-at-Law' requiring the appellant to answer allegations of conduct unbecoming of his profession.

[8] The nature of these allegations was that the appellant failed to deliver accountant's reports to the respondent's secretary for 13 years, specifically in respect of financial years 2000 and 2005 to 2016.

[9] The appellant was notified that a hearing was scheduled for 3 February 2018 for the complaint to be heard ('the first hearing'). This notification was done by way of a 'Notice by Committee to Attorney-at-Law' dated 20 December 2017, which was sent to the appellant by registered post. The appellant did not appear and the panel took the decision to proceed in the appellant's absence. The matter was adjourned for the three-

member panel of the committee to deliver its judgment. The appellant was notified that this would be done on 14 April 2018 ('the second hearing').

[10] A day before the second hearing, the appellant filed an affidavit wherein he made *inter alia* the following admissions:

> "That I accept full responsibility for breaching the Legal Profession Act and the Legal Profession (Accounts and Records) Regulations 1999 for the year 2000 and period of 2005 to 2016, contrary to Regulations 16(1) of the Legal Profession (Accounts and Records) Regulations 1999.
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> That I am guilty of professional misconduct having regards [sic] provisions of regulations [sic] 17…
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> That I have been very negligent in my legal responsibilities to the General Legal Council of Jamaica."

[11] The appellant attended the second hearing at which time he was represented by counsel. On that date, the committee gave its judgment that the appellant's failure to deliver the said reports led to the findings that, inter alia, the appellant was in breach of regulation 16(1) of the Legal Profession (Accounts and Records) Regulations, 1999, ("the Regulations") and that he was guilty of misconduct contrary to regulation 17 of the said Regulations.

[12] In addition to the aforementioned affidavit, the appellant furnished letters of good character provided by the Suffragan Bishop of Kingston, Rt Rev Robert Thompson as well as senior counsel, Dr Lloyd Barnett, Ms Dorothy Lightbourne QC, and John Perry QC. These letters were admitted as evidence and the panel heard submissions in mitigation in respect of the sanction to be imposed.

[13] The second hearing was adjourned to 5 May 2018 and on that date, the panel stated that after reflecting on the affidavit of the appellant, his good character references and the oral submissions by counsel for the appellant, it came to the view that the appellant flouted the provisions of the Regulations for 13 years.

[14] It was the panel's view that it had no alternative but to strike the appellant from the Roll pursuant to section 12(4)(a) of the Legal Profession Act. Further, the panel explained, "[n]o other sanction would be appropriate in light of the serious and prolonged breaches of the regulations committed by the [appellant] which breaches have not been rectified". Reliance was placed on the judgment in the complaint of **C. Dennis Morrison v Audley Earl Melhado**[1] (the '**Melhado** case').

The panel's reasoning

[15] The following is the essence of the reasoning of the three-member panel of the committee for imposing the sanction that it did. The panel stated that it was relying on the reasoning contained at paragraph 25 of the **Melhado** case which reads:

> "The panel is satisfied that where such conduct remains un-rectified at the date or dates of the hearing, where nothing is said by way of explanation for the neglect or refusal to comply and where no efforts are made to correct the default, as in the instant case, the attorney ought to be precluded from continuing to practice. This is necessary for the protection of the public."

[1] Complaint No. 72 of 2007, Disciplinary Committee decision delivered 12 February 2011

Submissions on behalf of the appellant

[16] Counsel, Miss Anderson, submitted that this court ought to consider the background of the appellant. Namely, that he has been an attorney-at-law since November 1979 and had practised for nearly 39 years before he had been sanctioned. He has also been semi-retired since 2003 and, for the past three years, has been practising outside of Jamaica.

[17] It was further submitted that the appellant had admitted that he had not filed the accountant's reports or declarations and had apologised to the committee, emphasising that his practice in Jamaica was limited and that he was outside of the jurisdiction.

[18] Counsel submitted that at the time of the hearing before this court, the appellant had filed accounting reports for 2005 to 2014 inclusive, and declarations for 2015 and 2016.

[19] She stated that the only year which remained outstanding is 2000. The reason for this is because the appellant is unable to locate the accountant who worked for the firm to which he was employed during that year. Miss Anderson, in her written submissions, originally contended that the appellant should be exempted from filing this accountant's report as over 16 years had elapsed before the complaint was brought. To this end, she had argued that the effect of regulation 7(2) of the said Regulations, could be that there is a limitation period of nine years, since this is the requisite period of retention for compliance with the regulations. However, in oral submissions, counsel

resiled somewhat from this extreme position. She stated that it would not be a limitation period but argued that it would create difficulties to obtain records that may no longer exist and ultimately it would be *ultra vires* for the disciplinary committee to request records beyond nine years.

[20] In the absence of guidelines for the committee on the sanctions to be imposed for breaches of the canons of the legal profession, Miss Anderson referred this court to a guidance note on sanctions issued by the United Kingdom Solicitor's Disciplinary Tribunal as well as the Sentencing Guidance: Breaches of the Code of Conduct of the Bar of England and Wales. By reference to the guidance note on sanctions issued by the United Kingdom Solicitor's Disciplinary Tribunal, Miss Anderson has asked this court to consider that (a) the seriousness of the appellant's misconduct is not at the highest level, such that a lesser sanction is inappropriate; and (b) the protection of the public and/or the legal profession does not require the sanction of being struck off the Roll.

[21] She submitted that in the instant case, the appellant's motivation for the breaches cannot be associated with any intention to cause harm to any client. Further, there was no complaint of any breach of trust, dishonesty, concealment of any wrongdoing, advantage taken of a vulnerable person, nor planned misconduct. The appellant was semi-retired after practicing in firms for over 20 years prior. She contended that during that period, the firms would have hired personnel to handle the accounting records. It is for this reason, she submitted, that the 2000 report cannot be filed, as the accountant cannot be located.

[22] Miss Anderson emphasised that the appellant made open and frank admissions at the first hearing that he attended. She sought to compare the instant case with the **Melhado** case wherein there were eight hearings over an eight-month period and the attorney failed to attend a single hearing. Despite the failure to attend, it was contended that there were several adjournments which gave the attorney time to file. When the matter was appealed to this court, **Audley Melhado v General Legal Council**[2] ('**Melhado v GLC**'), the attorney had filed all the outstanding reports and the sanction was reduced to a suspension.

[23] In summary, Miss Anderson asserted that the committee failed to take the following into account: (i) the mitigating factors, including the appellant's good character, (ii) the number of years without any proceedings against him, and (iii) his promise to comply and file the outstanding records.

[24] A number of cases involving the failure of attorneys to file accountant's reports and pay practising fees were referred to this court. These included **Jennes Vashti Anderson**[3], **Dorcas White**[4], **Lloyd O Sheckleford**[5] and **Humphrey Lee McPherson**[6]. Miss Anderson highlighted that in several of these cases lesser sanctions were imposed and that the two where striking off was imposed were much more

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[2] [2014] JMCA Civ 41
[3] Complaint No. 123 of 2006, Disciplinary Committee decision delivered 26 April 2014
[4] Complaint No. 110 of 2005, Disciplinary Committee decision delivered 29 July 2006
[5] Complaint No. 163 of 2006, Disciplinary Committee decision delivered 26 April 2014
[6] Complaint No. 205 of 2007, Disciplinary Committee decision delivered 5 June 2010

serious than the case at bar. These two were **Marie Judy-Ann Chambers**[7] and **Michael Williams**[8].

[25] Finally, it was submitted that if the sanction is upheld there will be hardship for the appellant. Miss Anderson asked this court to be mindful that the appellant is currently engaged in a serious, lengthy trial[9] in the Turks and Caicos Islands and not only will the appellant suffer financial loss if he cannot continue to represent his client, but there will be severe difficulties and great risk concerning the conduct of representation of his client. Counsel argued that, in effect, the appellant has already been suspended for over a year. This is because the stay was conditional on the appellant appearing only in the single case in the Turks and Caicos Islands and not practising in Jamaica since 3 May 2018.

Submissions on behalf of the respondent

[26] Counsel, Miss Larmond, contended that the decision of the committee ought not to be impugned having regard to the circumstances of the case. She submitted that the appellant's single ground of appeal does not demonstrate how the committee erred. Further, it was submitted that before the panel, the appellant's conduct remained unrectified, with no efforts to correct the default and no explanation was given for the neglect or refusal to comply.

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[7] Complaint No. 148 of 2012, Disciplinary Committee decision delivered 26 April 2014
[8] Complaint No. 114 of 2005, Disciplinary Committee decision delivered 12 December 2009
[9] The Queen v Misick and others

[27] In her oral submissions, counsel sought to bring clarity to the sequence of events. It was explained that the appellant did not respond to the complaint at any point prior to 14 April 2018; that by the time he made the admissions, the appellant had already been found guilty, so that was not something that could have been taken into account when the judgment was delivered.

[28] She submitted that the principles relied on, together with the approach taken by the committee in the **Melhado** case (which formed the basis of their reasoning in the case at bar) were correct. Further, the present panel would be correct in considering itself bound to impose the sanction it had previously done in a similar case. In relation to whether this court should interfere with sanctions imposed by a disciplinary body, Miss Larmond submitted that there should be a slowness to do so. The cases of **Chandra Soares v The General Legal Council**[10] and **Andrew John Bolton v The Law Society**[11] were cited in support.

[29] Miss Larmond sought to demonstrate the inapplicability of the authorities cited by counsel for the appellant. She submitted that the two striking off cases, **Marie Judy-Ann Chambers** and **Michael Williams**, did not support the appellant's position. In both of these cases, the default spanned a period of seven years, whereas in the case at bar the appellant's default was 13 years. There was also a failure to rectify and

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[10] [2013] JMCA Civ 8
[11] [1993] EWCA Civ 32

to give an explanation and as such, in the cases where striking off was imposed, the attorneys remained in breach at the time of the hearing.

[30] In **Humphrey Lee McPherson**, where a fine was imposed, Miss Larmond pointed out that there was rectification in the midst of the proceedings.

[31] In the cases of **Jennes Vashti Anderson** and **Dorcas White**, there was a default for five years. Both attorneys were reprimanded. Miss Larmond submitted that in both cases the attorneys filed affidavits in response to the complaint and provided explanations for their failure to file accountant's reports. Another distinction which was said to be of import was that both attorneys filed the declarations or reports after the complaints were filed but before the substantive hearings. In the **Dorcas White** case, the declarations were filed within 10 days of the commencement of the complaint in June 2005.

[32] In the instant case, it was contended that the committee was plainly correct in ruling as it did. The appellant failed to file for 13 years, did not attend the trial and attended the sanctions hearing with no explanation for the failure and with the position that he has no records or may have some records. She emphasised that a common feature of the cases in which lesser sanctions were imposed was that there is rectification (usually by the time of the hearing) as well as the provision of an explanation for the failure.

[33] With regard to **Melhado v GLC**, where this court set aside the sanction of striking off and replaced it with a suspension, Miss Larmond submitted that

consideration should be given to the fact that the period of the breach was four years; that is nine years less that the appellant's breach.

[34] In answer to counsel for the appellant's argument that regulation 7(2) suggests that there should be a limitation period of nine years, Miss Larmond submitted that the said regulation is irrelevant to the disposal of the issue before this court.

[35] It was contended that there is no limitation period, and no proper basis had been or could be laid in these circumstances for this court to imply that one exists. The duty to account arises afresh each year, and it was argued that it would lead to an absurd result if the regulation were to be interpreted to allow an attorney-at-law to escape the consequences of filing the report by relying on a provision that requires him to preserve records for not less than nine years. It was further argued that the submission that the committee acted *ultra vires* was without merit, as regulation 7(2) imposed no duty on the committee and where no duty is imposed one cannot act *ultra vires*. The regulation merely stipulates a minimum period for records to be kept. Miss Larmond contended that, in any event, it must be noted that the appellant asserted no factual basis that would allow him to fall within the exempted category of persons he wishes this court to create.

[36] It was acknowledged that, while there are no guidelines issued by the respondent, the very cases cited by counsel for the appellant demonstrate that there is a consistent application of the Regulations. It was submitted that there is no basis

therefore for reliance on the guidance note on sanctions issued by the United Kingdom Solicitor's Disciplinary Tribunal.

[37] Miss Larmond took issue with the appellant's complaint that the committee failed to take into account the mitigating factors. Firstly, she submitted that this was raised in written submissions and was not contained in any ground of appeal. Secondly, she argued that it was plain from the decision that the panel heard and reflected upon the appellant's affidavit, his good character references and the submissions of his counsel who emphasised these very matters and asked for leniency.

[38] Lastly, it was submitted that, in all the circumstances, the appellant has not conducted himself in a manner that would make it appropriate for this court to exercise its discretion in his favour. Miss Larmond pointed to the fact that the appellant gave sworn evidence (by way of affidavit sworn to on 13 April 2018) before the committee that he had not practised in Jamaica for over two years.[12] She stated that this was not correct as demonstrated by the affidavit evidence of Daniella Gentles-Silvera filed on 18 June 2018 in support of the application to adduce further evidence.

[39] She stated that it was discovered by the respondent that the appellant was on record for Medimpex Jamaica Limited in protracted litigation proceedings[13] spanning the course of September 2016 to November 2017. She submitted that this was inconsistent with his affidavit which had been filed a mere five months later on 13 April 2018 for the

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[12] At paragraph 11
[13] Pfizer Limited v Medimpex Jamaica Limited et al [2017] JMSC Civ. 162

consideration of the committee. After this discovery, she noted that the appellant, in a subsequent affidavit filed 26 September 2018 agreed that he "incorrectly stated" that he had not practised. He referred to this as an error. Miss Larmond submitted that this affidavit is void of an explanation, and so too is his subsequent affidavit of 10 October 2018.

[40] She acknowledged that an explanation was provided for the inconsistency revealed in the content of the declarations submitted on 4 June 2018, which included the years 2016 and 2017. The appellant responded in the negative to item two which asked "Do you have clients in Jamaica?" The appellant explained that he realised that he had answered incorrectly as he was junior counsel for Medimpex Jamaica Limited and that this was due to his rush to comply with what an employee of the respondent had informed him was required, namely the use of the new declaration form.

Discussion and analysis

The relevant law

[41] The Legal Profession (Accounts and Records) Regulations, 1999 provide:

> "16.—(1) Every attorney shall, not later than six months after the commencement of any financial year (unless he or she files a declaration in the form of the First Schedule which satisfied the Council that owing to the circumstances of his or her case it is unnecessary or impractical for him or her to do so), deliver to the Secretary of the Council an accountant's report in respect of the financial year next preceding that year.
>
> (2) Every attorney shall produce or cause to be produced to the accountant whose accountant's report he or she proposes to deliver to the Secretary of the Council pursuant to paragraph (1) all books, records and accounts required by Regulation 6 to be kept by

him or her and in addition any files or other documents connected with, or related to, explaining or throwing any light on, anything in those books, records and account.

(3) In this regulation:-

'accountant' means a chartered accountant who is the holder of a valid practising certificate from the Institute of Chartered Accountants or a public accountant entitled to practise as such under the Public Accountancy Act.

'accountant's report' means a report made by an accountant in the form in the Second Schedule and signed by him and the attorney in the places respectively provided in that form for their signatures.

Disciplinary offences

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

[42] It should be noted that there has been an amendment to regulation 16 by virtue of the Legal Profession (Accounts and Records) (Amendment) Regulations, 2017, which was gazetted on 3 August 2017. The amended regulation 16 is set out below, with the insertions and deletions in bold for ease of reference:

"16.—(1) **Subject to paragraphs (2), (3) and (4)** Every attorney shall, not later than six months after the commencement of any financial year ~~**(unless he or she files a declaration in the form of the First Schedule which satisfied the Council that owing to the circumstances of his or her case it is unnecessary or impractical for him or her to do so)**~~, deliver to the Secretary of the Council an accountant's report in respect of the financial year next preceding that year.

(2) An accountant's report need not be delivered pursuant to paragraph (1) where the attorney satisfies the Council, by delivering a declaration in the form shown in the First Schedule, evidencing that owing to the circumstances of his or her case it is unnecessary or

impractical for him or her to do so. Such a declaration must be delivered to the Secretary of the Council not later than six months after the commencement of any financial year, in respect of the financial year next preceding that year.

(3) The Council may, upon an application in writing by an attorney, extend the period for filing of an accountant's report or a declaration required pursuant to paragraphs (1) and (2), respectively for such period as Council deems appropriate.

(4) An attorney may apply to the Council in the form set out in the Third Schedule for exemption from the requirements under this Regulation for the delivery of an accountant's report or declaration pursuant to paragraphs (1) and (2) on the ground that he or she is exclusively employed outside Jamaica, and the Council in exercise of its discretion may grant such exemption for the period of such employment outside Jamaica and subject to such conditions, as it considers appropriate.

~~(2)~~ **(5)** Every attorney shall produce or cause to be produced to the accountant whose accountant's report he or she proposes to deliver to the Secretary of the Council pursuant to paragraph (1) all books, records and accounts required by Regulation 6 to be kept by him or her and in addition any files or other documents connected with, or related to, explaining or throwing any light on, anything in those books, records and account.

(6) Subject to paragraphs (3) and (4), the Council may withhold the issue of a practising certificate to any attorney who fails to comply with Regulation 16(1).

~~(3)~~ **(7)** In this regulation:-

'accountant' means a chartered accountant who is the holder of a valid practising certificate from the Institute of Chartered Accountants **of Jamaica** or a public accountant entitled to practise as such under the Public Accountancy Act.

'accountant's report' means a report made by an accountant in the form in the Second Schedule and signed by him and

the attorney in the places respectively provided in that form for their signatures.

[43] Section 12 of the Legal Profession Act provides:

> "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—
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> (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);
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> (b) any such criminal offence as may for the purpose of this provision be prescribed in rules made by the Council under this Part.
>
> (2) …
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> (3) Any application under subsection (1) or (2) shall be made to and heard by the Committee in accordance with the rules mentioned in section 14.
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> (4) On the hearing of any such application the Committee may, as it thinks just, make one or more of the following orders as to –
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> (a) striking off the Roll the name of the attorney to whom the application relates;
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> (b) suspending the attorney from the practice on such conditions as it may determine;
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> (c) the imposition on the attorney of such fine as the Committee thinks proper;
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> (d) subjecting the attorney to a reprimand;
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> (e) the attendance by the attorney at prescribed courses of training in order to meet the requirements for continuing legal professional development;

(f) the payment by any party of costs of such sum as the Committee considers a reasonable contribution towards costs; and

(g) the payment by the attorney of such sum by way of restitution as it may consider reasonable,

so, however, that orders under paragraphs (a) and (b) shall not be made together.

[44] It is useful to begin by setting out what is required for this court to engage its discretion to vary or set aside a professional body's decision on sentence. To this end, I would adopt the statement of Dukharan JA in **Chandra Soares v The General Legal Council**, at paragraphs [31] and [32]:

> "[31] [Counsel] quite rightly referred to the principles set out in **Bolton v Law Society** which this court has consistently applied in considering appeals against penalties imposed by the disciplinary committee. In that case the court disapproved the approach by the divisional court of merely substituting its own view on penalty for the tribunal's. In this regard we refer to the words of Sir Thomas Bingham MR, at page 492:
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> > 'It is important that there should be a full understanding of the reasons why the tribunal make orders which might otherwise seem harsh. There is in some of these orders a punitive element … In most cases the order of the tribunal will be primarily directed to one or other 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 purpose by an order of suspension, plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period and quite possibly indefinitely by an order of striking off. The second purpose is the most fundamental of all to maintain the reputation of the solicitors [sic] profession as one in which every member of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the

> profession it is necessary that those guilty of serious lapses are not only expelled to [sic][14] denied re-admission.'
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> By way of reinforcing the point, the committee was well within its right to impose the penalty which it did because of the responsibility that it has. Moreover, these were more serious lapses than in **Bolton**.
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> [32] The Privy Council in **McCoan v The General Medical Council** accepted that although discretion exists in an appellate court, the court should be slow to set aside the professional body's decision on sentence, as the disciplinary committee are the best persons to weigh the seriousness of professional misconduct. **McCoan** approves of the approach of Goddard CJ in **Re A Solicitor**, that what is required is a very strong case to engage that discretion. This approach was adopted in this court by Harrison JA in **Georgette Scott's** case when he said at page 23:
>
> > '… The appellant must have been fully aware of the duty placed on her when she was retained by the complainant in the sale of his property. She failed to discharge that duty. She had breached the provisions under the Act as they relate to the client's funds and was in my view, correctly found guilty of misconduct in a professional respect. I can find no extenuating circumstances in this case which this court could use to vary the sentence recommended by the committee'."

[45] Further, in **Salsbury v Law Society**[15] it was held that "an appellate court must, absent any error of law, pay considerable respect" to the sentencing decisions of the tribunal.

[46] In the case at bar, in spite of submissions made by counsel for the appellant that he had promised to rectify the breaches committed, there is no such evidence that any such statements were made. This is not reflected in the transcript of the committee of

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[14] Misquoted, should read "but denied re-admission."
[15] [2009] 1 WLR 1286

14 April 2018, neither in the appellant's affidavit sworn to on 13 April 2018 which was presented at that hearing.

[47] In that affidavit, the appellant merely stated that he hoped to fulfil all legal requirements to the General Legal Council in the future. This court is not certain what this actually means. There was no undertaking or promises made to file the required reports or declarations at any time.

[48] There is also no merit in counsel for the appellant's submission that the respondent failed to take into account mitigating factors including the appellant's good character and the number of years of enrolment without any proceedings being instituted against him. Again, the transcript of the hearing date of 14 April 2018 states that the respondent heard and reflected on the affidavit of the respondent, the good character references and oral submissions by his counsel and that it had incorporated their content into its deliberations. The panel considered however that its primary duty was to protect the public and the general reputation of the profession.

[49] In **Melhado v GLC**, this court, in an oral judgment delivered by Panton P, allowed the appeal in part in relation to the sanction applied. The original sanction of striking off was substituted with an order for suspension of nine months. It is correct to say that, in some sense, Mr Melhado's behaviour was somewhat more egregious than the appellant's, because Mr Melhado failed to appear, even once, before the disciplinary committee, even though several adjournments had been granted over a period of

months for him to appear. But it is also correct that the appellant's breach was prolonged for 13 years compared to Mr Melhado's breach of four years.

[50] Additionally, the appellant at the time of attending the sanction hearing, as mentioned previously, did not offer an explanation as to why there had been no reports. By way of his affidavit sworn to on 13 April 2018, he stated that he had been practising in the Turks and Caicos Islands since August 2015 and that he had not practised in Jamaica for two years. The transcript of the hearing (14 April 2018) discloses that his counsel merely said that the appellant did not keep the records that the Regulations mandated and would be unable to supply any records that would enable him to comply by having accountant's reports prepared.

[51] Miss Larmond's meticulous review of the committee's decisions as set out at paragraphs [29] to [31] was of great assistance to this court and we would agree that rectification and explanation for default are factors which the committee appears to consider with some amount of regularity in these types of complaints. This was seen in the cases of **Michael Williams** as well as **Marie Judy-Ann Chambers** when compared to the committee's decision in **Jennes Vashti Anderson** and the case of **Dorcas White.** This is reflected in the committee's very reasoning, adopted from its previous decision in the **Melhado** case. It bears repeating:

> "The panel is satisfied that where such conduct remains un-rectified at the date or dates of the hearing, where nothing is said by way of explanation for the neglect or refusal to comply and where no efforts are made to correct the default, as in the instant case, the attorney ought to be precluded from continuing to practice. This is necessary for the protection of the public."

[52] In considering the sanction imposed by the disciplinary committee in **Melhado v GLC**, Panton P stated that the court was satisfied that there could be no legitimate complaint against the decision taken by the disciplinary body. He expressed his view thus at paragraph [7]:

> "[7] …Here we have an attorney who disobeyed the law which mandates that an attorney needs to file certain reports annually. He disobeyed the law, he is brought before the Disciplinary Committee and he treats the committee with scant regard ignoring all the allowances that they were giving to him. In the circumstances the committee was clearly right in ordering that he be struck from the role [sic] of attorneys."

Mr Melhado's sanction was varied by this court as fresh evidence was considered which included an affidavit explaining that he had only been enrolled in 2002, he did not establish a practice until late 2003 and the extent of his legal work did not entail holding funds on behalf of clients. He explained also that he had transferred his focus to politics and that the required reports had been filed at the time of the court hearing.

[53] There is force therefore in the submissions made by Miss Larmond and, as such, the reasoning of the committee cannot be said to be flawed as to the sentence imposed.

[54] However, there is other relevant evidence to be taken into consideration at this time. By way of his affidavit filed on 10 October 2018, the appellant has explained that he was called to the bar in Jamaica in November 1979 and practised for several years in the firm Clinton Hart and Company, then in the firm Tenn, Russell, Chin Sang, Hamilton

and Ramsay until 2003, when he became a sole practitioner and considered himself semi-retired.

[55] His counsel, by way of written submissions, has also reiterated that for over three years, he has been junior counsel representing a defendant in an ongoing case in the Turks and Caicos Islands. She has also sought to emphasize that his failure to file the relevant documentation has been due to his limited practice in Jamaica and his being out of the jurisdiction.

[56] Based on the further evidence received in the affidavits of the appellant and of Mrs Daniela Gentles-Silvera, it is apparent that the appellant has rectified the breach to the extent that he was able. He has filed declarations under the Regulations for the years 2015, 2016 and 2017 as well as 2005. He has also filed accountant's reports for the years 2006 to 2014.

[57] It is recognised that one year remains unaccounted for, that is for the year 2000. The appellant has provided an explanation for this, namely that he was practising in the firm Tenn Russell Chin Sang Hamilton & Ramsay which employed an accountant, and that the said accountant cannot be located. Even if the accountant is located, it is quite possible that the records may no longer exist as, pursuant to regulation 7(2), the firm would be under no duty to retain/preserve these records post 2009.

[58] Miss Larmond has sought to persuade his court that the sanction ought to remain as the appellant has not been forthright as set out in her submissions at paragraphs [38] to [40] of this judgment.

[59] This court has assessed this inconsistency in light of his evidence that the Medimpex case would have been the only matter in Jamaica in which he would have been engaged. The appellant stated that he was junior counsel to Dr Lloyd Barnett; that the case commenced in 2002, continued to the Privy Council in 2014 and returned to Jamaica for assessment of damages in 2015 to 2017; that on the completion of the assessment in November 2017, his retainer ended. The declarations in relation to those relevant years (2015 to 2017) speak to the fact that he was never in receipt of client's funds.

[60] He stated also that he regretted the error in the affidavit filed in April 2018 which was before the committee. He has also conceded that his declaration dated 4 June 2018 reasserts this same position of not having practised in the jurisdiction. He has explained however, that "in his rush" to comply with what he was told to be required of him by an employee of the respondent, he answered that query incorrectly on the declaration. He however reiterated, as he did before the committee, that no client's money was received by him in any of these years - 2015 to 2017.

[61] Having given due regard to his explanation, this court must also consider that the appellant's conduct (the misrepresentation as stated in the declarations for 2016 and 2017) is a distinctive feature when compared to the conduct of attorneys in similar cases and the ultimate sanctions imposed.

[62] Miss Anderson has also relied on the provision contained in regulation 7(2), which prescribes nine years as the retention period for "accounts, books, ledgers and

records, passbooks and bank statements". The court does not agree that this regulation constrains the respondent in carrying out its regulatory function beyond the nine years; nor does it absolve the appellant of his duty to comply with regulation 16. Accordingly, there is no merit in the submission that the committee would have acted *ultra vires* in entertaining the complaint relating to breaches in excess of nine years. However, the court is minded to give some consideration to the fact that a complaint made in respect of a default occurring 17 years prior may pose some amount of difficulty for the appellant to rectify.

[63] The appellant has stated that he is still not able to deliver an accountant's report or declaration for 2000, so complete rectification has not been achieved as in the cases referred to by Miss Larmond. However, this failure is weighed within the context that he would not have been operating as a sole practitioner at the relevant time but was an employee of a law firm which employed an accountant.

[64] At the end of the day, in circumstances where the rectification is not possible for one year and the attorney may in all likelihood, through no fault of his own, remain in breach, this court must grapple with whether the sanction of striking off is appropriate or whether the two purposes identified in **Bolton** could be achieved by another lesser sanction.

[65] As set out in paragraph [44] herein, the first purpose is to ensure that the offender does not have the opportunity to repeat the offence. It was recognised that this purpose can be achieved for a limited purpose by an order of suspension, as it is

hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period and quite possibly indefinitely by an order of striking off. The second purpose was described as the most fundamental of all, that is to maintain the reputation of the profession as one in which every member of whatever standing, may be trusted to the ends of the earth.

[66] The committee citing the "protection of the public" seemed to be concerned more with the second purpose.

[67] It is quite apparent that in light of the 2017 amendment to the Regulations, in particular the provision contained in regulation 16(6) (set out above at paragraph [42]) which allows the respondent to withhold practising certificates where attorneys have failed to deliver accountant's reports or declarations (as the case may be), it may be less likely that the appellant or any attorney will have the opportunity of finding themselves in a similar situation in the future as they will not be permitted to practise where they fail to comply.

[68] The maintenance of the reputation of the profession is another matter. We accept Miss Anderson's submission that the complaint against the appellant was not of any breach of trust, dishonesty, concealment of any wrongdoing, advantage taken of a vulnerable person, nor planned misconduct. Certainly, the respondent has not sought to allege any such egregious conduct on the part of the appellant. The appellant has not shirked away from his negligence in fulfilling his professional responsibility. In his

affidavit sworn on 13 April 2018, he candidly and forthrightly admitted this, calling himself "very negligent" and expressing his remorse and penitence. He also expressed his intention to fulfil all legal obligations to the respondent in the future.

[69] Given the current state of affairs, that he has been unable to practise in this jurisdiction since May 2018 (as the stay of execution ordered by this court was conditional on his practice being limited to the case in the Turks and Caicos Islands); that there has been the rectification of the breach (to the extent it is possible); the appellant's expression of contrition together with his co-operation with the respondent (in stark contrast to the **Melhado** case, where the attorney treated the committee with scant regard, ignoring all the allowances that were given) and the character references, I am moved to conclude, as this court did in **Melhado v GLC**, that, at this stage, the ultimate sanction of striking off would not be appropriate but would be excessive and disproportionately harsh.

[70] In this regard, this court also notes the committee's decision in **Courtney Kazembe**[16]. While this particular decision was not relied on by either party, it is useful as the circumstances were similar. The attorney was in breach of regulations 16(1) and 17, insofar as he failed to deliver accountant's reports or declarations for a period of 12 years[17]. He also failed to appear at the first hearing date, but attended the subsequent three hearings. The attorney admitted, through his counsel, that he committed the

[16] Complaint No. 139 of 2017, Disciplinary Committee decision delivered 15 September 2017
[17] 2002, 2003, 2004 2005, 2006, 2007, 2008, and 2010, 2011, 2012, 2014 and 2015

breaches and submissions in mitigation were made on his behalf. The committee found that the breaches by the attorney amounted to professional misconduct contrary to section 12(1)(a) of the Legal Profession Act. Subsequent to the initiation of the complaint, the attorney filed accountant's reports for the years 2008 to 2015. The sanction imposed was that the attorney was to pay a fine of $50,000.00 for each year that he was found to be in breach of the Regulations, plus costs of $50,000.00 amounting to a sum of $650,000.00 to the General Legal Council on or before 21 December 2018.

[71] It is not made clear in the order dated 8 October 2018, which contained the committee's decision delivered on 15 September 2018, whether the attorney had fully rectified the breach by the time of the hearing and/or provided an explanation for the failure. It is possible that this did occur and a record of those factors would have been useful having regard to Miss Larmond's submission that there is uniformity in the committee's imposition of lesser sanctions when there is rectification and an explanation.

[72] In any event, the period of default in the case of **Courtney Kazembe** is one year less than the appellant's. There was also a failure to attend the first hearing coupled with an admission of breach.

[73] Notwithstanding our determination in relation to the present case regarding the sanction, this court would echo the reminder to attorneys-at-law set out at paragraph [8] of **Melhado v GLC**:

> "We remind attorneys-at-law that the Legal Profession Act and the various regulations promulgated under the Act must be taken seriously. Failure to file appropriate declarations and accounts is an indication of disrespect and attorneys who display such disrespect can expect that the committee may well order a 'striking off the roll' and the court is not sympathetic in situations such as those."

[74] Having regard to the considerations outlined above, I would allow the appeal, set aside the decision of the committee and make orders for the suspension of the appellant for six months commencing from the date of this judgment, and for the payment of a fine of $50,000.00 for each of the years 2000, and 2005 to 2016, for which he was found to be in breach of the Regulations, amounting to the sum of $650,000.00.

F WILLIAMS JA

ORDER

1. The appeal is allowed.

2. The sanction of the Disciplinary Committee of the General Legal Council is set aside and in substitution therefor, the appellant is suspended for a period of six months commencing from the date of this judgment; he is also fined the sum of $650,000.00, representing $50,000.00 for each of the years 2000, and 2005 to 2016 for which he was found to be in breach of the Legal Profession (Accounts and Records) Regulations.

3. No order as to costs.