[2021] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 5/2016

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**NORMAN SAMUELS**	**APPELLANT**
AND	**GENERAL LEGAL COUNCIL**	**RESPONDENT**

Norman Hill QC, Seyon Hanson and Raymond Samuels instructed by Samuels & Samuels for the appellant

Mrs Sandra Minott-Phillips QC and Litrow Hickson instructed by Myers Fletcher & Gordon for the respondent

30 April 2018 and 26 March 2021

MCDONALD-BISHOP JA

[1] On 2 August 2016, the Disciplinary Committee of the General Legal Council ("the Committee") found attorney-at-law, Mr Norman Samuels ("the appellant"), guilty of professional misconduct in breach of Canon VIII of the Legal Profession (Canons of Professional Ethics) Rules ("the Canons").

[2] Disciplinary proceedings were initiated against him upon the complaint of one of his clients, Mr Carlton Alexander ("the complainant"). He was charged for breaches of Canon IV(r) and (s), which provides:

"(r) An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with all information as to the progress of the client's business with due expedition.

(s) In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."

[3] On 2 August 2016, the Committee, having found the appellant guilty of those charges, made the following orders :

"i) The Attorney, Norman O. Samuels is hereby reprimanded for failing to advise the Complainant as to the progress of the matter.

ii) The Attorney shall also pay by way of restitution a fine to Complainant in the amount of $800,000.00 on or before the 30th November 2016.

iii) The Attorney shall pay costs in the amount of $60,000.00 of which $40,000.00 is to be paid to the General Legal Council."

[4] The appellant, by this appeal, now challenges the decision of the Committee on 12 grounds. The background from which this challenge emanates is outlined below.

The background

a. <u>Procedural history in the Supreme Court</u>

[5] The complainant instructed the appellant to commence a claim on his behalf in the Supreme Court against four persons for personal injuries he sustained in a motor vehicle accident, which occurred in 1986. The record shows that the writ of summons, dated 25 July 1991, was filed by the appellant on 8 October 1991. It was served on the four persons named as defendants to the claim.

[6] The service of the writ of summons on the first defendant and all subsequent proceedings against her were subsequently set aside by an order of the Supreme Court dated 18 June 1992. The complainant obtained interlocutory judgment in default of appearance (default judgment) against the other three defendants on 30 December 1993. The appellant also filed summonses to appear at the assessment of damages on several occasions, following the entry of the default judgment. The second and third defendants made an application for the service of the writ on them and for the default judgment to be set aside along with all subsequent proceedings ("the summons to set aside default judgment", for short). This summons was adjourned without a date and then reissued on many occasions "to be placed before Mrs Justice Harris for continuation".

[7] The appellant continued to file reissued summonses for the assessment of damages to proceed against all three defendants and on 28 November 2000, he obtained an order to proceed to an assessment of damages hearing on 26 September 2001. On that date, the assessment of damages hearing was adjourned without a date. The available minute of order does not explicitly indicate the reason for the adjournment. However, one could easily surmise that it was done to facilitate the hearing of the summons to set aside the default judgment because two days later, on 28 September 2001, the reissued summons for leave to set aside the default judgment was filed. It was then set for hearing on 17 January 2002. In addition, the evidence of the appellant before the Committee was that the hearing was adjourned because the two defendants had applied to set aside the default judgment.

[8] On 17 January 2002, the summons to set aside default judgment was fixed for hearing before a judge in chambers and was adjourned without a date by consent of the parties. The minute of order bears an endorsement that the hearing was to be set for continuation before H Harris J. The hearing was fixed for 11 February 2003 for continuation before H Harris J. This date was later changed by the court administrator to 13 February 2003. There is no record of the matter having been before the court after 17 January 2002, neither for assessment of damages nor for the hearing of the summons to set aside the default judgment.

[9] It is seen that many dates were fixed for the continuation of the hearing of the summons to set aside the default judgment before H Harris J. The hearing was never completed and the file could not be found. By the time it was found, H Harris J was no longer at the Supreme Court.

[10] The record also shows that when the matter was not proceeding, the appellant initiated dialogue with the defendants' attorneys with a view to settlement but that bore no fruit.

[11] The complainant's file was located at some time in August 2012. However, steps were not taken by the appellant at that time to have the claim proceed because, according to him, the complainant had by then initiated the disciplinary proceedings against him.

b. Proceedings before the Committee

[12] The complainant brought his complaint against the appellant by an affidavit sworn to on 11 May 2010, which was amended during the course of the hearing on 16 July 2014. The complaint (as amended) was that:

a. the appellant had settled the case out of court without any consultation with the complainant;

b. the appellant gave the complainant money without any explanation that it was a settlement;

c. the appellant refused to accept the complainant's calls and even hung up the telephone on the complainant;

d. the appellant has not provided the complainant with all information as to the progress of his business with due expedition, although he reasonably required him to do so;

e. the appellant has breached Canon 1(b) which states that "an Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member"; and

f. the appellant has acted with inexcusable or deplorable negligence in the performance of his duties (amendment made on 16 July 2014).

[13] The hearing of the complaint commenced on 2 November 2013. It was the complainant's evidence that his case went before the court once, and on that occasion, he was in attendance but had not given evidence. The case was subsequently adjourned and he was not advised by the appellant as to what became of it. He stated that he was given the sum of $50,000.00 by the appellant and that since that payment; the appellant had not spoken to him. He stated that he had attempted to contact the appellant but that on the occasions when the appellant would answer the phone, upon hearing it was him, he would hang up the phone. The complainant denied in cross-examination that he shouted at the appellant but admitted to having raised his voice. He testified that the appellant would contact him through a lady in Linstead and also that he would often visit the appellant's office in Linstead and the appellant would tell him when to return. He accepted that the appellant would sometimes discuss the case with him and had informed him of the difficulties he was experiencing with service of a defendant and the missing file. He stated, however, that after he received the money from the appellant in October 2007, the appellant refused to take his calls. He did not agree with the suggestion of the appellant's counsel that the appellant would provide him with information whenever he requested it.

[14] When the proceedings before the Committee resumed on 13 November 2013, the appellant gave his evidence in chief and was cross-examined by the complainant. The Committee also asked him questions. The appellant's evidence was at variance with that of the complainant in some material respects. He confirmed that he filed the claim; obtained default judgment against the defendants to the claim; and, that in September

2001, he caused the claim to be fixed for an assessment of damages hearing. He stated that an application was, however, made by two of the defendants for the default judgment to be set aside.

[15] He testified that he attended court on several occasions up to 2003, but the summons brought by the second and third defendants to set aside the default judgment was not dealt with. The hearing had commenced before H Harris J but there had been several adjournments in the matter because it was sometimes listed before another judge, other than H Harris J, and eventually, in 2003, the file could not be found at the Supreme Court. It was found in August 2012. He did not take any further steps to have the case progressed thereafter because the complainant had initiated disciplinary proceedings.

[16] The appellant also testified that he had, in fact, applied for a case management conference at some time in 2003 but was unable to recall whether a date had been fixed for it to be convened. He did not have a copy of the letter he said he had written, requesting the case management conference.

[17] The appellant also confirmed giving the complainant the sum of $50,000.00 from his "own pocket". This money, he said, was not towards the settlement of the claim as alleged by the complainant, but was a loan to the complainant because he had been complaining of personal difficulties. It was given to the complainant pending the outcome of the proceedings in the Supreme Court. He denied that he had hung up the phone on the complainant and asserted instead that he would have conversations

regarding the case with the complainant, who, at times, would shout at him and curse him.

[18] The appellant further indicated that he had given updates to the complainant about the progress of his case and expressed to him at one point that the file was lost and his case was not going anywhere. He also advised the complainant that he had been having difficulties with serving one of the defendants. He maintained that the complainant was a difficult person to deal with.

[19] The matter was then adjourned to 19 December 2013 for the appellant to be further questioned. The matter was, however, adjourned on two subsequent hearing days. When the hearing resumed on 12 July 2014, the panel directed the complainant to amend his complaint to raise the allegation of inexcusable and deplorable negligence based on the appellant's evidence, regarding his request for case management conference. This amended affidavit was filed on 16 July 2014. On the next hearing date before the Committee (13 September 2014), the complainant was recalled to give evidence and his amended affidavit of 16 July 2014 was tendered into evidence.

[20] Counsel appearing on behalf of the appellant was permitted to cross-examine the complainant in relation to the contents of the amended affidavit. The main thrust of the challenge to the amended affidavit was that the document appeared not to have been written by the complainant and that, although the complainant seemed to have challenged whether a case management conference had been applied for on his behalf, he did not know what a case management conference was.

[21] On 16 July 2016, the Committee found the appellant guilty of professional misconduct in breach of Canon VIII of the Canons ('the liability decision'). The Committee found that the appellant failed to return to court after 13 February 2003 and that after he had paid the sum of $50,000.00 to the complainant, he did not speak to the complainant again. The Committee accepted, however, that this payment was not in settlement of the claim as was alleged by the complainant but, rather, a loan from the appellant to the complainant.

[22] The Committee also concluded that the appellant had failed to provide the complainant with an update on his matter. No letter had been produced by the appellant to indicate that he had advised the complainant as to the status of the matter. As such, the complainant, the Committee said, "really had no idea as to what became of his matter". The Committee noted, therefore, that notwithstanding how rude the complainant might have been, the appellant would have had a duty to advise him as to the progress of his matter. It found that he had breached Canon IV(r).

[23] With respect to the application for case management conference, the Committee concluded, that the appellant had failed to make the application in accordance with Part 73.3(4) of the Civil Procedure Rules, 2002 ("the CPR"), as was required. This resulted in the claim being automatically struck out under rule 73.3(8). The Committee stated its disapproval of the appellant's evidence on this particular issue. It noted, in particular, that instead of admitting his failure to apply for case management conference, the appellant sought to rely on, "technical objections and obfuscation such as that the

complaint ought not [to] have been amended; the Complainant did not understand what a Case Management Conference was; [and] the amendments to the complaint were not handwritten..."

[24] In the light of these findings, concerning the appellant's failure to apply for a case management conference, the Committee found that he acted with inexcusable or deplorable negligence in the performance of his duties in breach of Canon IV(s).

[25] On 2 August 2016, the sanction was imposed on the appellant and the written reasons for that decision ("the sanction decision") were provided.

The appeal

[26] On 30 August 2016, the appellant filed a notice of appeal, challenging the Committee's decision on these grounds:

> "a. The panel acknowledged that the Attorney and the Complainant spoke about the matter either in person or on the telephone, and that neither the Attorney nor the Complainant communicated to each other in writing, and still found that the Attorney failed to provide the Complainant with all information as to the progress of the client's business with due expedition;
>
> b. The panel failed to appreciate that proceedings in the claim were adjourned from the year 2003 waiting for the [defendants] in the claim to proceed with their application to dismiss a defendant from the action;
>
> c. The panel invited the Complainant to amend his complaint to plead negligence in circumstances where the amended complaint as contained in the Complainant's Affidavit in support of same was partially typed and partially hand written, and the Complainant gave oral evidence that he did not instruct all of the new typed amendments to his Form of

Complaint and the Affidavit and that he did not know what a Case Management Conference was;

d. The panel found the Attorney guilty based on an Affidavit which contained statements that the Complainant/Affiant denied knowledge of;

e. That the panel failed to take into account the fact that the Attorney had consistently attended the court in representation of the Complainant for a period in excess of ten years during which time he obtained a default judgment and had the matter fixed for assessment of damages;

f. The panel failed to take into account the fact that the default judgment had been set aside, and the Attorney was having significant difficulty advancing the case based on numerous technical objections from the Attorneys-at-Law representing the Defendants, including but not limited to the fact that the court file could not be located on the last occasion (i.e. February 13, 2003) when it was scheduled to be heard, and the matter had consistently suffered from adjournments which were not sought at the request of the Attorney over a ten year period;

g. The panel shifted the burden of proof from the complainant to the Attorney in respect of whether a Case management conference had been applied for;

h. The Complainant produced no evidence from the Registry of the Supreme Court to validate whether or not a case management conference had ever been applied for definitively;

i. The panel rejected the Attorney's evidence of whether a case management conference had been applied for;

j. The panel in determining the sanction to be handed down failed to account for the fact that the matter was conducted on a contingency basis, and that in the circumstances any sum awarded to the Complainant would have to be reduced by one third on account of the sum which would have been deducted on account of the Attorney's fee;

k. That the panel failed to give reasons or adequate reasons regarding the basis of the fine it imposed on the Attorney,

and failed to account for the fact that the Attorney would have been paid from the proceeds of any awards received by the Complainant;

l. That the fine imposed by the panel in the sum of Eight Hundred Thousand Dollars ($800,000.00) is harsh and excessive, and ought to be reduced."

[27] In the light of the above stated grounds, the appellant now seeks the following orders from this court:

"a. An order setting aside the decision of the Panel; and/or in the alternative;

b. An order reducing the sanction of the Panel;

c. An order that the Respondents pay to the Appellant, the costs of this appeal and in the tribunal below, to be taxed if not agreed;

d. Such further and/or other relief as this Honourable Court deems just."

[28] The grounds of appeal (some of which overlap) have given rise to a consideration of five main issues, which involve mixed questions of law and fact. The issues are:

I. whether the appellant failed to update the complainant as to the progress of his case (ground a.);

II. whether the Committee's invitation to the complainant during the course of the testimony of the appellant to amend his complaint to include a claim for negligence, amounted to bias; was significantly prejudicial to the appellant; and deprived him of a fair hearing (grounds c. and d.);

III. whether there was a duty on the appellant to apply for a case management conference and whether he bore the burden of proof to provide evidence to the Committee that one had had in fact been applied for (grounds g. h. and i.);

IV. whether the appellant performed his duties with inexcusable and deplorable negligence (grounds g. b. e. and f.); and

V. whether the fine that was imposed on the appellant was harsh and excessive (j. k. and l.).

Discussion and findings

Issue I.

Whether the appellant failed to update the complainant as to the progress of his case (ground a.)

[29] In considering whether this court may properly disturb the Committee's findings of fact, with respect to this challenge as well as others under other grounds of appeal, regard is had to the standard of review that must be engaged by this court. The authorities have made it clear that for this court to justifiably interfere with the Committee's decision on an issue of fact, it must have found that the Committee was plainly wrong. It must first be satisfied that the Committee erred in its evaluation of the evidence by making a mistake that is sufficiently material to undermine its conclusion that the appellant was guilty of professional misconduct as found. See, for instance, **Bahamasair Holdings Ltd (Appellant) v Messier Dowty Inc (Respondent)**

(Bahamas) [2018] UKPC 25, and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21.

[30] Mr Norman Hill QC, on behalf of the appellant, argued that the key question that is to be asked in relation to this issue is whether steps had been taken by the appellant to advance the claim through the court. He noted the steps that had been taken by the appellant to secure a date for an assessment of damages hearing and that there was still before the court, the issue of the determination of the summons to set aside the default judgment in relation to two defendants. He pointed out emphatically that the matter went before the court on several occasions; the matter has had numerous adjournments; and, that the case file could not be located for a long time. All these issues, according to Mr Hill, were not as a result of the appellant failing to ensure the progress of the claim. Rather, it would have been incumbent on all the parties involved in the matter, and not just the appellant, to see to it that the matter was appropriately progressing smoothly.

[31] Queen's Counsel further noted that this is a case in which the "three important elements, constituting the administration of justice in a civil case", namely, the court, the parties and their legal representatives, "[would] have to act in sync" for the matter to proceed. He pointed out that the single most important thing in all the circumstances is that "when correspondence went to the defendants' attorneys, there was no reply".

[32] Queen's Counsel argued that the evidence indicated that the complainant was kept up to date as to the progress of his claim, and as such, the Committee's finding to the contrary, was strange.

[33] Mr Hill also asked this court to note that there had been a default judgment obtained in the matter, which has not been struck out. This means, according to him, that the case was still under the management of the court, and as such, the Committee "had no power to act on the matter".

[34] Mrs Sandra Minott-Phillips QC, in her response on behalf of the respondent, submitted that the appellant, by his own admissions, has not done anything in his client's matter since 2003. She noted that he was "unable to produce a single piece of correspondence" with the complainant in the 25 years between the date he filed the writ of summons in 1991 and the date of the Committee's decision, reprimanding him for failing to advise the complainant of the progress of the matter. Queen's Counsel contended that the Committee was correct in its findings in this regard.

[35] The arguments of the appellant on this ground cannot be accepted; the respondent's position is preferred. The crux of the Committee's finding in relation to this complaint was not just centred on what steps the appellant would have taken to progress the claim but, rather, whether he, having taken these steps, had communicated them and/or any information regarding the progress of the claim, to the complainant.

[36] Of relevance to this issue, are the Committee's findings of fact, expressed at paragraphs 16(c), (e) and (j) of the liability decision (record of appeal, volume 1, pp 14-15). There, it states that having read the affidavits and exhibits and having heard the evidence of the complainant and the appellant, it found the following salient facts established beyond a reasonable doubt:

> a. "The Attorney never went back to court on this matter after the 13th February, 2003 when the court file could not be found and the matter was adjourned." (paragraph 16(c))
>
> b. "After paying Fifty Thousand Dollars ($50,000.00) the Attorney never spoke to the Complainant again." (paragraph 16(e))
>
> c. "The Attorney has not provided the Complainant with information on the progress of his matter. The Panel accepts that the Complainant really had no idea as to what became of his matter. He tried to call to find out but the Attorney would not speak to him, no doubt because of the manner in which the Complainant spoke to him. Although we do not condone the Complainant shouting at the Attorney, the Attorney still had a duty to advise his client as to the progress of the client's matter yet no letters were produced to show that the Attorney had advised the Complainant as to the status of same which one would have

> expected particularly as the Complainant appeared not to be respectful to the Attorney in verbal communication. Indeed both Complainant and Attorney gave evidence that since lending the Complainant the Fifty Thousand Dollars ($50,000.00) they had not communicated with each other. None of the parties could recall when this was but one gets the impression that it was some time ago." (paragraph 16(j))

[37] It cannot be said that the finding by the Committee that the appellant failed to keep the complainant updated with the progress of his case with due expedition is not supported by the evidence. It is not disputed that the complainant's file had been lost by the court. The appellant gave evidence that he told the complainant the case was not going anywhere and that the file could not be found. He said he told him, it was a waste of time. When asked at the hearing whether he had spoken to the complainant since paying him the $50,000.00 in 2007, he said no. The Committee also noted the lack of written communication between the appellant and the complainant or any evidence to demonstrate any communication between them after 2007. The evidence of the complainant was also before the Committee that the appellant refused to speak to him and to provide information when he requested it. Those were issues of fact for the Committee to determine what it would accept or reject.

[38] Based on the evidence adduced before the Committee, including the absence of written communication from the appellant to the complainant concerning the progress

of the case, it could not have concluded otherwise than that the appellant was guilty of that charge. It was open to it to conclude that he failed to provide the complainant with the necessary information as to the progress of his matter with due expedition, when he was reasonably required to do so. It cannot be said it was plainly wrong to so find.

[39] The argument that the matter was still before the court and, so, the Committee would not have had the legal right to deal with the complaint that the appellant was not in communication with the complainant about the matter is not accepted. The respondent's jurisdiction to deal with the complaint brought against the appellant regarding his conduct was not ousted by the case in the Supreme Court. The issues to be addressed by the respondent were separate and distinct from those to be resolved in the case brought by the complainant in the Supreme Court. The Committee's decision cannot be impugned for want of jurisdiction.

[40] Ground a. therefore fails.

Issue II.

Whether the Committee's invitation to the complainant to amend his complaint to include a claim for negligence, amounted to bias and deprived the appellant of a fair hearing (grounds c and d)

[41] The appellant raises a two-pronged challenge to the Committee's decision to allow the complainant to amend his affidavit in support of the complaint. The first challenge is with respect to the stage in the proceedings at which the amendment was allowed. The second was that there was a real possibility that the Committee was biased in allowing the amendment.

(i) ***The stage of the proceedings at which the amendment was allowed***

[42] The complaint commencing the disciplinary proceedings against the appellant was contained in the complainant's affidavit of 11 May 2010. The Committee directed the complainant to amend this affidavit after the complainant's case had closed and whilst the appellant was giving his evidence. The amended affidavit, particularising the newly added allegation of negligence, was sworn to on 16 July 2014. All aspects on the original affidavit remained the same, save for the inclusion of the complaint that, "[the appellant] has acted with inexcusable or deplorable negligence in the performance of his duties. He failed to apply for a Case Management Conference".

[43] The appellant was allowed to respond, and did so in his affidavit of 20 August 2014. His response to the allegations were in the following terms:

> "(4) That I have perused the Amended Affidavit of [the complainant] sworn to on the 16th day of July 2014 and respond as follows:
>
> a. That I deny that I was negligent in the handling of [the complainant's] case
>
> b. That I deny that I failed to apply for Case Management Conference in [the complainant's] case."

[44] The appellant posited that, by this amendment, the complainant had been allowed, at the invitation of the Committee, to lay new charges against him. This he contended was severely prejudicial and gave cause for concern as it amounted to an alteration and not a true amendment.

[45] Mrs Minott-Phillips submitted on behalf of the respondent that there was nothing remarkable about permitting the complainant to amend his affidavit during the hearing. Emphasis was placed by Queen's Counsel on the fact that the complainant was a self-represented lay person, and, as such, the Committee was mindful of this fact during the course of the proceedings. In addition, in amending the affidavit, the complainant had merely added another issue to the pre-existing issues and had not substituted or corrected any prior allegations. Queen's Counsel relied on rule 17 of the Legal Profession (Disciplinary Proceedings) Rules ("the Disciplinary Proceedings Rules") to advance the position that the amendment was properly done in accordance with the relevant law.

[46] I do agree that the amendment led to a new allegation or cause of action against the appellant. An allegation of negligence was distinct from an allegation of failure to keep the client informed of the progress of his matter with due expedition. It also raised a new issue pertaining to the effect of a failure to apply for a case management conference under the transitional rules on which the Committee focused extensively. It raised questions of 'gross recklessness' and 'culpable non performance' on the part of the appellant, as the Committee itself recognised. It, therefore, raised the issue of violation of a new Canon. The amendment was, therefore, prima facie, prejudicial to the appellant as it served to exacerbate the charges against him. Therefore, it cannot fairly be argued that the amendment changed nothing or that it was unremarkable.

[47] That, however, is not determinative of the issue in the appellant's favour. The Committee cannot be said to have erred in allowing the amendment given its, apparently, honestly held view that it was necessary in the light of the evidence before it. The Committee's power to allow the amendment was derived from rule 17 of the Disciplinary Proceedings Rules, which states:

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

[48] The Disciplinary Proceedings Rules provide, therefore, that the Committee may allow amendments and/or additions to allegations in an affidavit, where it appears to it that the amendment or addition is required. The only requirement to be observed is that the attorney, against whom the new allegation is being made, is to be granted an adjournment if he would be surprised or the conduct of his case prejudiced by the amendment. This adjournment is to be on such terms as the Committee thinks just. As such, the Disciplinary Proceedings Rules allow an adjournment to be granted to allow the attorney to further prepare his case to respond to the new matter raised in the allegations, where an amendment or addition is allowed. Certainly, there was no prohibition to the making of the amendment because of the stage the proceedings had reached.

[49] The Disciplinary Proceedings Rules were observed by the Committee in so far as it allowed the appellant the time and opportunity to respond to the new allegations. The record also shows that, upon the resumption of the disciplinary hearing on 13 September 2014, the appellant was given the opportunity to cross-examine the complainant on the facts contained in the amended affidavit.

[50] It is undeniable that the appellant was given reasonable opportunity to respond to the new allegation of negligence and to confront the complainant regarding it. Therefore, the appellant's complaint, that the Committee was wrong to have allowed the amendment at the stage it did, is not justified. He could not have been prejudiced on account of the stage at which the amendment was made.

(ii) Possibility of the Committee being biased and deprivation of the right to a fair hearing

[51] I turn now to the question of whether the panel should have recused itself, it having allowed the complainant to amend his affidavit.

[52] The appellant contended that the evidence in the case demonstrates that he had been deprived of his right to a fair hearing and that the panel ought to have recused itself. The facts relied on by him were set out in his written submissions in these terms:

a. The amendment to the complainant's affidavit had been made on the invitation of the panel to proffer new charges against him. Further, the

same panel that invited the amendment also made the final decision in the matter. This was severely prejudicial;

b. The amended affidavit was not a true amendment but rather an alteration; and

c. The alterations were not done by the complainant himself but had, in fact, been typed into a handwritten document.

[53] During the course of his oral submissions before this court, Mr Hill further argued that, in addition to the above, this court ought to take note of the fact that during the proceedings, it was incumbent on the Committee to have ensured that the complainant was represented. In addition, he argued, it was apparent upon a review of the notes of evidence that both the facts and the law were coming from the panel, which meant, that they acted as "prosecutors in the matter". These facts, according to Mr Hill, would have required the panel ending the case, as to do otherwise, "would call into question the efficacy of the proceedings to produce a just and impartial result which would be severely compromised, and any ruling thereon would be tenuous in nature".

[54] In mounting this challenge on the ground of bias, the appellant placed much reliance on authorities such as **Ranger v Great Western Railway Co** (1859) 45 ER, 29; **The King v Sussex Justices exparte McCarthy sub nom R v Hurst ex p McCarthy** [1924] 1 KB 256 at page 259; **R v Gough** [1993] AC 646; and **Magill v Porter; Magill v Weeks** [2001] UKHL 67.

[55] The respondent, on the other hand, contended, through Mrs Minott-Phillips, that the Committee cannot be faulted in the exercise of its discretion to allow the complainant to amend his complaint, as an invitation to amend, in and of itself, is not indicative of bias. To so find, Queen's Counsel maintained, would mean that no adjudicator could invite an amendment and, thereafter, continue to adjudicate on a matter.

[56] I cannot accept the appellant's contention that the Committee was biased in allowing the amendment. I say so for reasons that will now be outlined.

[57] When one examines the arguments raised by the appellant as well as the facts relied on by counsel on his behalf, it is evident that he has not specifically alleged whether the Committee was guilty of actual or apparent bias or both. The challenge raised by the appellant appears to be a blanket allegation of bias. For that reason, consideration has been given to the question of whether it could be said that the Committee was biased in any way.

[58] On the point of actual bias, the decision of the English Court of Appeal in **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451 is instructive. Although not relied on by the appellant, I find it necessary to make reference to the guidance provided by that authority as to what may be considered as actual bias. It directed:

> "3. ...Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such

> objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.
>
> 4. There is, however, one situation in which, on proof of the requisite facts, the existence of bias is effectively presumed, and in such cases it gives rise to what has been called automatic disqualification. That is where the judge is shown to have an interest in the outcome of the case which he is to decide or has decided ...
>
> 5. ...
>
> 6. ...
>
> 7. **The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice ...**" (Emphasis added)

[59] With respect to apparent bias, Lord Hope of Craighead, in **Magill v Porter; Magill v Weeks,** instructed that the test to be applied 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.

[60] There is nothing in the arguments presented on behalf of the appellant and/or on the facts that have been outlined that have established that the Committee had a personal interest in the outcome of the case or acted improperly as a prosecutor in the

matter. It is unsustainable to allege that the invitation by the Committee to the complainant, who was a self-represented lay person, to amend his complaint, could amount to bias in any form.

[61] Equally unhelpful to the appellant's case is the assertion that the Committee found him guilty on an affidavit, which contained statements that the complainant denied knowledge of (ground d.). When one examines the notes of evidence as to the reason the amendments to the affidavits (which gave rise to this complaint) were both hand-written and typed, the complainant states that he was given assistance by the Legal Aid Clinic. There was nothing to disprove this assertion. Therefore, there was nothing to suggest that the Committee, itself, had assisted with the drafting of the amended document. The denial of the complainant regarding some of the contents of the affidavit does not affect the propriety of the amendment and does not support an allegation of bias.

[62] Similarly, there could be no basis to impugn the Committee's decision to allow the amendment on the basis that it failed to ensure that the complainant was legally represented. There is no requirement for the Committee to ensure that a self-represented litigant obtains counsel. The Committee's primary obligation in these circumstances would have been to ensure, that the complainant was able to present his case clearly, fairly and fully on the issues that were before it for consideration; and to offer him such assistance as was reasonably necessary and permissible by law for him to do so.

[63] There is no evidence or any matter before this court that would lead a fair-minded and informed observer, who knows all the facts and having considered them, to conclude that there was a real possibility that the Committee was biased.

[64] The appellant was not deprived of a fair hearing on account of the terms of the amendment, the stage at which it was made or the failure of the panel to recuse itself.

[65] Grounds c. and d. are, too, without merit.

Issue III

Whether there was a duty on the appellant to apply for a case management conference and to prove that that he had done so (grounds g., h. and i.)

[66] The appellant contended that there was no requirement for him to apply for a case management conference, given the stage at which the proceedings had reached in the Supreme Court.

[67] In considering those submissions, it is observed that the writ of summons was filed in 1991 and was, therefore, governed, at the time of filing, by the Judicature (Civil Procedure Code) Law. By the year 2002, there was the promulgation of the CPR in which Part 73 made provision for the transitional procedures that were to be adopted in respect of proceedings that had been before the court, prior to the CPR's commencement date. It provides that:

> "73.3 (1) These Rules do not apply to any old proceedings in which a trial date has been fixed to take place within the first term after the commencement date unless that date is adjourned and a judge shall fix the date.

2. Where any old proceeding has been adjourned part heard, the trial judge may give directions as to the future conduct of the proceedings or direct that a pre-trial review is fixed.

3. Where in any old proceedings an application is made to adjourn a trial date, the hearing of the application is to be treated as a pre-trial review and these Rules apply from the date that such application is heard.

4. Where in any old proceedings a trial date has not been fixed to take place within the first term after the commencement date, it is the duty of the claimant to apply for a case management conference to be fixed.

5. A defendant has a duty to apply for a case management conference if he has an ancillary claim under Part 18.

6. When an application under paragraph (4) is received, the registry must fix a date, time and place for a case management conference under Part 27 and the claimant must give all parties at least 28 days notice of the date, time and place fixed for the case management conference.

7. These Rules apply to old proceedings from the date that notice of the case management conference is given.

8. Where no application for a case management conference to be fixed is made by 31st December 2003 the proceedings (including any counterclaim, third party or similar proceedings) are struck out without the need for an application by any party.

9. A striking out pursuant to rule 73.3 (8) will be without prejudice to the defendants [sic] ability to claim costs."

[68] In **The Attorney General of Jamaica and another v Shane Paharsingh** [2012] JMCA Civ 6, Phillips JA provided much guidance on the transitional provisions of the CPR. At paragraph [5], she made the following pronouncements:

"[5] There have been several authorities dealing with actions which commenced before the CPR came into effect (January 2003), and addressing how the transitional provisions set

out in the CPR were to be applied ... The principles which can be extracted from these cases I would summarize in this way:

> 1. Proceedings commenced before 1 January 2003 were 'old proceedings'.
>
> 2. There were two groups of 'old proceedings': those in which trial dates had been fixed in the Hilary term 2003, and those in which no trial dates were in existence as of January 2003.
>
> 3. The CPR did not apply to 'old proceedings' in which a trial date had been fixed in the Hilary term 2003. If the trial was not heard, or was adjourned, then the matter was generally governed, thereafter, by the CPR.
>
> 4. It was the duty of the claimant to apply for a case management conference date to be fixed in 'old proceedings' in which no trial date had been fixed in the Hilary term.
>
> 5. If no date for the case management conference was fixed, the claim stood automatically struck out without any application having to be made to obtain that order.
>
> 6. The defendant also had a duty to apply for a case management conference if he had an ancillary claim under Part 18. However, once there was an application for a case management conference from either a claimant or a defendant with an ancillary claim, there had to be a consideration of the whole case. Neither party could apply for the case management conference limited to his own claim.
>
> 7. Once the application for case management was received, the registrar had to fix a date, time and place for the same.
>
> 8. The claim could be revived if struck out, if an application was made to do so by 1 April 2004, which application had to be served, but the court had no discretion to enlarge that time.

> 9. **Where a judgment existed in a claim as at 31 December 2003, rule 73 could not and did not seek to strike out the claim. The judgment remained valid until set aside.**
>
> 10. **Rule 16 makes provision for the case management conference after a default judgment is entered and before a hearing date for the assessment of damages. There is no requirement to apply for a case management conference if a default judgment has been entered."** (Emphasis added)

[69] Based on the time of the filing of the writ of summons, the proceedings would have been, on the face of it, "old proceedings", within the definition of Part 73 of the CPR. However, at the time of the transition to the CPR regime, default judgment had already been obtained against the defendants and a date set for an assessment of damages hearing for 26 September 2001. There was the summons of the second and third defendants for the default judgment to be set aside. There is also no record of whether there had been a date set for the hearing of that application and whether it has been disposed of.

[70] Mr Hill submitted on the appellant's behalf that as of 31 December 2003, there was a valid judgment, which had not been set aside. As such, there had been no requirement on the part of the appellant to apply for a case management conference. In making this argument, he placed reliance on the pronouncements of Phillips JA in **The Attorney General v Shane Paharsingh** as detailed above at paragraph [70].

[71] Mr Hill's argument was that once default judgment was obtained in the case, prior to the introduction of the CPR, the case would not have fallen for consideration

under Part 73 of the CPR for the fixing of a case management conference, but, rather, under Part 16 for damages to be assessed. It is, indeed, correct that rule 16.3(5) makes provisions for the registry to fix a date for assessment of damages, after the entry of default judgment, and to proceed to make some specified orders for the preparation of that hearing. In these circumstances, there is no requirement for a litigant (or his attorney) to apply for a case management conference. It should be noted, however, that this provision came into effect with the amendment of the CPR on 18 September 2006. Therefore, at the time the default judgment was entered in the complainant's case, there would have been no requirement for any case management conference to be held or requested or for the registry to make case management orders. The matter would have proceeded to assessment of damages, once the attorney for the complainant notified the court that the matter was ready to proceed by filing a summons for assessment of damages. That was done in this case on several occasions until the matter was adjourned by the court without a date in 2001.

[72] Rule 16.3(5) would have become applicable as at 18 September 2006, and so after that date, the duty would have fallen upon the court to give directions for the hearing of the assessment of damages, upon setting a date for it to be heard. This rule would have governed the scheduling of the hearing of assessment of damages that was adjourned without a date and which would involve the fourth defendant, who has not applied to set aside the default judgment. No duty fell on the appellant, even in those circumstances, to apply for a case management conference.

[73] Therefore, I agree with counsel for the appellant that there could not have been a duty on the appellant to apply for a case management conference as default judgment had already been entered and the matter was already before the court for hearing on the assessment of damages. His reliance on **The Attorney General v Shane Paharsingh** is not, at all, misplaced.

[74] In concluding, I would simply say that the matter was at the stage for damages to be assessed in relation to all three defendants until the default judgment was set aside. Part 73 had no applicability to the case. In the circumstances, at no time was there any legal requirement for the appellant to apply for a case management conference, be it pursuant to Part 73 or any other rule. The Committee's application of Part 73 to impose a duty on the appellant to apply for a case management conference was not correct. It erred in law.

[75] On the strength of the above findings, I would add (bearing in mind the grounds of appeal filed and for completeness) that no burden of proof ought to have been imposed on the appellant to satisfy the Committee that he had applied for a case management conference. That was, simply, not a material fact in respect of which he ought to have borne any evidential burden to the extent that failure to discharge it meant he was liable for professional misconduct. It ought not to have been treated as a fact, in issue, because it was an error on the part of the Committee to have viewed it as relevant in their unnecessary consideration of Part 73 of the CPR.

[76] There is merit in the appellant's contention that there was no duty on him to apply for a case management conference, pursuant to Part 73 of the CPR, and there was no duty on him to prove that he had done so.

[77] It may be said then, that the appellant's complaint that the complainant produced no evidence to validate whether or not a case management conference had ever been applied for, warrants no serious attention for the same reason that the issue regarding the application for a case management conference to be held was not material to the charge that the Committee had to determine.

Issue IV

Whether the appellant performed his duties with inexcusable and deplorable negligence (grounds b., e., f. and g.)

[78] The Committee took a very dim view of what it found to have been the failure of the appellant to apply for case management conference under the transitional rules. That focus resulted in its invitation to the complainant to amend his affidavit to include the allegation of negligence. It made it clear at paragraph 7 of its liability decision that:

> "...The facts to ground the amended complaint was that 'the Attorney was negligent in the handling of my case. He failed to apply for a Case Management Conference'."

[79] The amendment to add a charge of negligence was based on no other averment or evidence but that no case management conference was applied for.

[80] The Committee further reasoned at paragraph 16 of the liability decision (page 18 of the record of appeal, volume 1):

> "Applying the **Frankson case** to the present case, the fact is that even if the Complainant had not amended his complaint to include that the Attorney acted with inexcusable and deplorable negligence, **given the findings of fact that no Case Management Conference had been held, the Panel is entitled to find that the Attorney was negligent**." (Emphasis added)

It continued at paragraph 16(1) of the said decision (page 21 of the record of appeal, volume 1):

> "**The failure on the part of the Attorney to apply for Case Management Conference constitutes deplorable and inexcusable negligence**. The negligence which an Attorney must be guilty of in order to be found to have breached the Canons of professional ethics must be culpable non performance or gross recklessness. It is not enough to prove carelessness or inadvertence...
>
> **The failure of the Attorney to apply for Case management Conference in the suit filed for negligence on behalf of the Complainant by the 31st December, 2013 meant the case has been automatically struck out and as no application was made to restore it the claim is deemed not to have existed.**" (Emphasis added)

After citing rules 73.3 (7) and (8) and 73.4 (3) and (4) of the CPR, the Committee concluded that (page 23 of the record of appeal, volume 1):

> "**The fact is therefore that the Attorney had more than a year to apply for a Case Management Conference. All Attorneys would have known this and had a duty to take such steps to preserve the status of their clients' cases especially applications not made. Given the fact that the cause of action arose on 13th July, 1986 it was statute barred from the 13th July, 1993 and therefore cannot be refiled. The Complainant has lost his opportunity to pursue what appeared to be a legitimate claim and receive compensation for the injuries he sustained. <u>This</u>**

> **failure on the part of the Attorney to apply for Case management Conference is more than mere carelessness particularly when one considers the consequences to the Complainant** who is left solely without relief in circumstances where he was injured and being a passenger in one of the motor vehicles could not be held to have contributed in any way to the accident and ought to have recovered from at least one of the drivers/owners of the motor vehicle. He was an innocent passenger and party." (Emphasis added)

[81] It is an undeniable fact that the finding of inexcusable and deplorable negligence on the part of the appellant was predicated solely on the erroneous view of the Committee that the appellant had a duty to apply for case management conference in accordance with rule 73.3(4). Flowing from that, its finding of guilt was also rooted in the damaging, albeit erroneous finding, that the claim was automatically struck out due to the appellant's failure to apply for a case management conference, thereby depriving the complainant of a remedy. These errors go to the heart of the belated allegation of negligence and the verdict of guilty returned in relation to it.

[82] Removing the issue of the application for case management from the equation, the remaining facts disclosed on the evidence could not have amounted to 'culpable non performance' of duty or 'gross recklessness', which the Committee declared are constituent features of the charge of inexcusable and deplorable negligence.

[83] Queen's Counsel for the respondent's contention that, even without reference to the additional issue of failing to apply for a case management conference, the appellant's acts and omissions (recited in sub-paragraphs a-j of paragraph 16 of the liability decision) demonstrated culpable non performance or gross recklessness is

rejected. I disagree with this point of view because the Committee did not base the charge of negligence or the finding of guilt on those matters. Even more importantly, those matters, in and of themselves, were not sufficient to establish beyond a reasonable doubt, that the appellant was guilty of inexcusable and deplorable negligence under Canon IV (s).

[84] The learned authors of the text, The Law of Legal Services (2015) at pages 144 - 146, helpfully noted at paragraphs 4.39 - 4.40 that there is a distinction between the fault required for professional negligence and that required for misconduct. They referenced dicta from **Saif Ali v Sydney Mitchell & Co** [1980] AC 198 at pages 218 and 220, where Lord Diplock explained that the concept of negligence within this context involves "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or omitted to do".

[85] At page 145, paragraph 4.40 of the same text, the learned authors noted that the culpability required for misconduct does not have to amount to a lack of integrity; but it is more than simply making a mistake. Citing the words of Lord Cooke in **Preiss v The General Dental Council** [2001] 1 WLR 1926 at 1936, they continued:

> "It is settled that professional misconduct does not require moral turpitude. Gross professional negligence can fall within it. Something more is required than a degree of negligence enough to give rise to civil liability but not calling for the opprobrium that inevitably attaches to disciplinary offences."

In **Re A Solicitor** [1972] 1 WLR 869, the Court of Appeal decided that negligence by a solicitor may amount to professional misconduct "if it is inexcusable and as such to be regarded as deplorable by fellow solicitors" (see John Gould et al, The Law of Legal Services (2015), page 145 at paragraph 4.41).

[86] What then were the failings of the appellant that could be taken as constituting inexcusable and deplorable negligence, which warranted a finding of professional misconduct? I have found none, having examined the conduct of the appellant against the background of the applicable law on professional negligence and the circumstances of the case. I would opine that while the appellant, perhaps, could have exercised his initiative and asked the court to permit him to submit a reconstructed file for the matter to proceed, he had no legal obligation to do so and he was not invited by the court to give that assistance. The evidence of the appellant was also that he had problems locating documents in his office. He also sought the assistance of the defendants' attorneys to assist him in having the matter settled or for it to otherwise progress but he did not obtain their cooperation. In fact, he said there was no response to his correspondence. These facts were unrefuted and were not explicitly rejected by the Committee as not being credible.

[87] The Committee, because of its erroneous application of Part 73 of the CPR, failed to fully appreciate and, consequently, failed to accord greater weight to the fact that it was for the court to set a date for assessment of damages and the hearing of the application to set aside the default judgment. It also should have accorded greater

weight to the fact that it was solely within the province of the court to give directions or make orders for the progression of the matter, which could have included the scheduling of a case management conference. The court, however, had not reached that stage because the application to set aside the default judgment was still pending and the file could not be found. During the time the file went missing, H Harris J was no longer at the Supreme Court to complete the hearing. That means that the hearing would have had to re-commence before another judge. The appellant had no control over those matters. Indeed, an application by the appellant for a case management conference on behalf of the complainant, even outside of the Part 73 regime, was not likely to have brought any meaningful benefit to the complainant in those circumstances.

[88] The central fact that the Committee ought not to have lost sight of (although it had explicitly recognised it) was that the inordinate delay in the progression of the matter was not due to the acts or omissions of the appellant. Without the finding that the appellant had failed to apply for a case management conference (which he was not obliged to do), the Committee could not have said (and certainly did not say) that the appellant had failed to comply with any rules or orders of the court for the preparation and presentation of the case. In the result, he breached no legal duty owed to the complainant.

[89] In my view, the appellant's conduct did not reach the standard of culpability that would justify a finding, beyond a reasonable doubt, that he was guilty of inexcusable

and deplorable negligence. Even if it could be said, at worst, that he was nonchalant, lacked initiative or that he was not sufficiently proactive in seeking to find a solution to get the matter moving, that would not be enough to ground the charge of inexcusable and deplorable negligence for which he was held liable. The authorities are clear that, even, carelessness is not enough.

[90] I would conclude that the Committee was plainly wrong in its finding of fact and as a matter of law that the appellant failed in his duty to apply for a case management conference, which resulted in the matter being automatically struck out under the transitional rules. Indeed, there was absolutely no evidence that the claim was struck out. Its reasoning and conclusion on the charge of negligence resulted in not only a serious error of fact but also one of law, which cannot fairly be overlooked by this court. This error on the part of the Committee is weighty enough to undermine its conclusion that the appellant was guilty of inexcusable and deplorable negligence. That decision cannot stand as a matter of law.

Issue V

Whether the fine imposed is harsh and excessive (grounds j., k., and l.)

[91] The appellant has challenged the fine imposed on him on three bases:

(i) failure of the Committee to take into account that the matter was being conducted on a contingency basis and so, any sum awarded to the complainant should have been reduced by one-third on that basis;

(ii) absence of adequate reasons for the basis of the fine; and

(iii) the fine of $800,000.00 is harsh and excessive and ought to be reduced.

Each contention will be briefly examined.

(i) Failure to take into account retainer on a contingency basis

[92] There is nothing on the record produced to this court, which shows that there was evidence or submissions before the Committee that the appellant and complainant had an agreement for fees to be paid on a one-third contingency basis. The decision of the Committee should not be impugned on this ground, which is being raised for the first time on appeal and, more so, with no evidence to support it.

[93] There is no proper basis to hold that the fine was harsh and excessive on the ground that no reduction was made to take account of the fact that the retainer was on a one-third contingency basis. Ground j. is without merit; it too fails.

(ii) ***Absence of adequate reasons for imposition of the fine***

[94] It is not fair to say, as the appellant has alleged, that the Committee failed to give adequate reasons for its decision. In a comprehensive judgment, the Committee sets out the reasons for arriving at its decision that a fine should be imposed in the sum directed. The main consideration underlying the decision was what was regarded as the complainant's lost chance of recovering damages for the injuries he suffered because the claim was automatically struck out under rule 73.3(8) of the CPR. At paragraph 4 of the sanction decision, it clearly stated that the complainant was to be compensated for that loss.

[95] The decision was adequately reasoned by reference to relevant authorities and the submissions made by the appellant's counsel. It is unmistakable that the basis for the fine was the lost chance of the complainant recovering damages on his claim. Even if this court does not agree with the basis for the sanction, it cannot fairly be said that adequate reasons were not given by the Committee for arriving at the decision it made. This ground of appeal fails.

(iii) <u>Is the fine harsh and excessive?</u>

[96] Section 12(4) of the Legal Profession Act provides that the Committee, after hearing a complaint, may as it thinks fit; make one or other of several prescribed orders. Three of those orders that are immediately relevant are, the imposition of a fine on the attorney (12(4)(c)); subjecting the attorney to a reprimand (12(4)(d)); and the payment of the attorney of such sum by way of restitution as it may consider reasonable (12(4)(e)). The Committee may, if it thinks fit, impose more than one of those sanctions.

[97] In **Chandra Soares v The General Legal Council** [2013] JMCA Civ 8, Dukharan JA gave this reminder at paragraph [32]:

> "The Privy Council in **McCoan v The General Medical Council [**[1964] 3 All ER 143] 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 <u>the disciplinary committee are the best persons to weigh the seriousness of professional misconduct</u>. **McCoan** approves of the approach of Goddard CJ in **Re A Solicitor** [1956] 3 All ER 517], that what is required is a very strong case to engage that discretion..." (Emphasis as in original)

At paragraph [30], Dukharan JA made the point that for the appellate court to exercise its discretion to set aside the decision of the disciplinary body, "[t]here has to be material on which the court can conclude that the sentence was plainly wrong or manifestly unreasonable". I have been guided accordingly.

[98] It is evident from the reasoning of the Committee that the fulcrum of its decision to impose the fine on the appellant, by way of restitution to the complainant, was what it viewed as the lost chance to recover damages on his claim because it was struck out. This, it found, was due to the failure of the appellant to apply for a case management conference as required by Part 73 of the CPR. In this regard, the Committee opined (page 29 of the record of appeal, volume 1):

> "... Although it is accepted that the Attorney appears to have worked on the matter and that the adjournments were due to the Court's failings and not the Attorney, the fact is that the failure of the Attorney to apply for a Case Management Conference, which Mr Hanson has termed a 'mere omission', has had grave consequences in that the Complainant has lost an opportunity to recover compensation for the injuries he sustained in the motor vehicle accident and the expenses incurred ... this Complainant can no longer pursue the action in court as the matter is now statute barred, the accident having occurred on the 24th July, 1986."

[99] The complainant's lost chance to recover damages was regarded by the Committee as 'the grave consequence' of the failure on the part of the appellant to apply for a case management conference in breach of Part 73. This has proved to be a faulty premise on which to hinge the punishment of the appellant. As already established, the appellant was wrongly accused of, and convicted for, deplorable and

inexcusable negligence on the basis that he failed to apply for a case management conference.

[100] In addition, the Committee did not explicitly find, as demonstrated by its reasoning in both decisions (liability and sanction), that the appellant did not conduct the complainant's business with due expedition. It found, and rightly so, that the appellant "appears to have worked on the matter", and that the adjournments in it were due to the court's failings and not the appellant's. It was only moved to impose the sanction of the fine in the sum it did because of the erroneous view that the claim had been struck out because the appellant had failed to apply for a case management conference in keeping with rule 73.3(4). It was, however, not proved beyond a reasonable doubt, that there was a lost chance for the complainant to recover damages because the claim was struck out. Therefore, the basis for the penalty never existed. For that reason, the Committee erred in fact and law, which is sufficient to warrant the interference with its decision by this court.

[101] For the foregoing reasons, I would hold that the appeal against the fine sanction should be allowed and the order that the appellant pays $800,000.00 to the complainant by way of restitution should be set aside.

What is the appropriate sanction?

[102] The remaining question for this court, having set aside the fine imposed, is whether any penalty should be substituted for it, as an addition to the reprimand imposed by the Committee. This consideration is in keeping with the court's duty to

deal with the matter as a rehearing. Within this context, rule 2.15 of the Court of Appeal Rules ("the CAR") sets out the powers of this court in relation to a civil appeal (which includes appeal from a tribunal such as the Committee). The court is empowered to, among other things, make any order, which, in its opinion, ought to have been made by the court below (rule 2.15(b)(b) of the CAR).

[103] At paragraph 16(b) of the liability judgment, the Committee noted that, "the attorney filed suit and attended court on a number of occasions but through no fault of his own, the matters were adjourned sine die". It then continued to observe that, "the Attorney never went back to court on this matter after the 13th February, 2003, when the court file could not be found and the matter was adjourned". At no time did the Committee blame the appellant for failing to conduct the complainant's business with due expedition. Based on its reasoning, it was only detained by the complaints of the failure of the appellant to inform the complainant of the progress of the case and that he did not apply for case management conference, pursuant to rule 73.3(4). There is, therefore, no finding of fact to support the imposition of any penalty for failure to conduct the complainant's business with due expedition.

[104] The only limb of Canon IV(r) that the appellant would be guilty of would be failure to inform the appellant about the progress of the case with due expedition. It is on this alone that he should be punished. The Committee had reprimanded him for this and that will not be disturbed.

[105] While the delay may not be attributable to the appellant's failure to communicate with his client, the complainant had a right to timely information from his attorney, regarding the status and progress of his case. He is entitled to have that right vindicated. It may, however, be hard to quantify this right in monetary terms. Lord Evershed MR, in **Kitchen v Royal Air Forces Association and others** [1958] 2 All ER 241 at 250-251, helpfully instructed:

> "I come last to what may be the most difficult point of all, namely, assuming that the plaintiff has established negligence, has she proved anything other than nominal damages? It is necessary to say something of the nature of the problem which (as I understand the law) the court has to solve in determining the measure of damages in such a case as this...
>
> In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine **what the plaintiff has lost by that negligence.** The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best as it can ..."

[106] The determinative question is this: has the complainant lost some 'right of value or chose in action of reality and substance' due to the failure of the appellant to keep him abreast of the progress of his matter? A consideration of this question has evoked a negative response. The complainant has not lost the chance of recovery of damages as a result of this particular breach by the appellant. There is nothing to suggest that his claim was struck out by the date the Committee heard the case. Also, it is not readily apparent what benefit of substance and reality would have accrued to him in terms of the progress of the case, if the appellant had discharged the duty of providing

him with more information. The progress of the matter was beset by grave difficulties outside the control of the appellant.

[107] The evidence disclosed that the appellant and the complainant did have sporadic communication and that the appellant did advise him of problems he was having with the case up to 2007. The complaint to the respondent was first made in 2008. Up to then, however, the status of the case had not changed in any way that could have benefitted the complainant if he had communicated with the appellant. The status also remained the same after the formal complaint to the Committee, until the file was found in 2012. There was nothing of significance to report. There is nothing to indicate that any actual damage or harm to the complainant's case or the complainant, himself, flowed from this breach by the appellant.

[108] In **Henry Charles Johnson v The General Legal Council** [2018] JMCA Civ 3, the Committee found the attorney guilty of failing to conduct the client's business (which involved taking steps to enforce a judgment) with all due expedition as well as failure to provide the client with information as to the progress of his case. He was fined $200,000.00 with $150,000.00 made payable to the client. That sanction was upheld on appeal. As already indicated, the Committee in this case has not explicitly stated in its reasoning that it had found that the appellant had failed to conduct the complainant's business with all due expedition.

[109] Having been guided by the facts of **Henry Charles Johnson** and the sanction imposed for the breaches in that case, it is clear that the appellant's culpability is far

less than the attorney in that case. The appellant is not found guilty on both components of Canon IV(r) and the delay in the case was not due to his fault. Even more interestingly, even if the complainant had been advised of the progress of his case, he has not established what difference it would have made to the proceedings in the Supreme Court, which would have been to his benefit in any material way. Also, no benefit is apparent on an objective assessment of the situation.

[110] I have further considered that this was not an egregious breach of Canon IV(r), as the appellant was in communication with the appellant and did explain the difficulties he was having. It was not a case of there having been no communication at all or that the complainant did not know of the problems. The appellant had even offered monetary assistance to the complainant by way of the loan of $50,000.00, which was not a paltry sum.

[111] In the interests of justice, the complainant ought not to be permitted to keep the $50,000.00 that he has had for almost two decades and from which he would have benefitted, and still be given additional compensation, in circumstances where he had not proved any actual or likely harm or damage flowing from the breach in question. Even though I will readily admit that the inordinate delay in the disposal of his case in the Supreme Court is rather unfortunate and stands as a sad commentary on our system of administration of justice, it is not due to the fault or failings of the appellant. Therefore, the appellant should not be held accountable for the failings of the court to the extent that he should be disproportionately penalised for breach of Canon IV(r).

[112] Against this background, I form the view that the imposition of a monetary penalty, in addition to the reprimand already imposed, would not be commensurate with the offence for which the appellant has been held liable. The reprimand and the sum of $50,000.00 loaned to the complainant, which to date has not been repaid, would have been sufficient in the circumstances to vindicate the complainant's right to be informed of the progress of his case. The Committee was obviously of that view when it ordered a reprimand as the penalty for that breach. I would not substitute any sanction for the fine that was set aside.

[113] I conclude that the appeal should be allowed, in part, both with regards to liability and sanction.

The costs of the proceedings below

[114] The Committee awarded costs in the sum of $60,000.00 with an order that $40,000.00 was to be paid to the respondent. That means that $20,000.00 was payable to the complainant. The appellant has challenged the award of costs in the proceedings below in setting out the details of the order appealed against in the notice of appeal. He did not, however, state a specific ground of appeal in relation to it but has asked, in the orders prayed for, that he be awarded the costs of the proceedings below upon being successful in the appeal.

[115] The absence of a ground of appeal on costs does not preclude the court from dealing with the issue, given that the appellant is partially successful in his appeal. This court is empowered, in the light of this changed circumstance, to make such order as

to costs, which, in its view, ought to have been made by the Committee had it correctly held that the appellant was not liable in negligence.

[116] At paragraph 14 of the sanction decision, the Committee stated that one of the factors it considered in awarding costs was the "technical objections which the Attorney through his Attorney felt constrained to make **notwithstanding that it was clear that the Attorney had failed to have applied for a Case Management Conference"** (emphasis mine). It then continued:

> "... Rather than seek to resolve the matter the Attorney instead sought to place the Complainant to strict proof which this Panel was disappointed in as a lot of unnecessary time and expense was therefore incurred."

[117] The decision to award costs was obviously informed by the erroneous view that the Committee held regarding the duty of the appellant to have applied for a case management conference under the transitional rules. The Committee formed the view that the allegation of negligence should have been made against the appellant by the complainant. It allowed time to the complainant to prepare and file an amended complaint. It then gave time and opportunity for the complainant to be recalled for evidence to be adduced in relation to it.

[118] The appellant had a right to defend the allegations made against him that he performed his duties with inexcusable and deplorable negligence, which was a serious allegation. The burden of proof cast on him to prove that he had applied for a case management conference emanated from the erroneous view of the Committee that Part 73 applied to the proceedings in the Supreme Court.

[119] The Committee, and not the appellant, instigated the amendment, which prolonged the proceedings. It then turned out that the decision was wrong on that limb. The time that was spent and the expenses that were incurred, exploring that issue concerning the failure to apply for a case management conference, were not the appellant's fault. The appellant must not bear the costs of that aspect of the proceedings. If anyone is to bear those costs, it should be the respondent. Accordingly, I would direct that the costs order of $40,000.00, made in favour of the respondent, be set aside and the sum repaid to the appellant forthwith, if payment had been made.

[120] The costs on the issue of the negligence, which I would assess as being 65% of the costs in the proceedings below, should be the appellant's against the respondent. This takes into account the late amendment, which resulted in the appellant having to engage counsel to respond to an entirely new case. As rule 17 of the Disciplinary Proceedings Rules provides, "the Committee shall grant an adjournment of the hearing upon such terms as to costs or otherwise as to the Committee may appear just". The Committee did not grant the adjournment upon any terms as to costs or otherwise. The fact that the amendment turned out to have been made on an erroneous basis means that it is only just and reasonable that the appellant recovers costs relating to that aspect of the proceedings. Justice demands that it not be laid at the feet of the self-represented complainant, who had not applied for that amendment on his own initiative.

[121] The award of costs to the complainant to be paid by the appellant in the sum of $20,000.00 is allowed to stand because he was not the one responsible for the laying of the negligence charge against the appellant, which failed. His original complaint concerned the failure of the appellant to communicate with him about the progress of his case on which he succeeded. Therefore, he is entitled to his costs arising from his success on that issue.

Costs of the appeal

[122] In relation to the costs of the appeal, it is noted that the appellant has not been successful on all the grounds of appeal but is successful on the two most significant matters as it relates to liability and sanction. The errors made by the Committee have affected its decision in a substantial and material way. It seems fair to say that the appellant is the more successful party. In making allowance for his victory on the substantial issues of liability in negligence and the imposition of the fine sanction, and his failure on the charge relating to keeping his client informed, it seems just that 75% of the costs of the appeal should be awarded to him to be agreed or taxed unless either party is of the view that a different costs order should be made. In that event, written submissions for a different order to be made should be filed and served within 14 days of the date of this order.

Disposal of the appeal

[123] I would allow the appeal, in part, with some relevant consequential orders in these proposed terms:

1) The Committee's decision made on 2 August 2016 that the appellant is guilty of inexcusable and deplorable negligence, in breach of Canon IV(s), is set aside and a verdict of not guilty of professional misconduct under Canon IV(s) is entered on the record.

2) The fine of $800,000.00 imposed on the appellant in paragraph (ii) of that order is set aside and is to be repaid to the appellant forthwith.

3) The decision of the Committee that the appellant is guilty of professional misconduct, in breach of Canon IV(r), for failing to provide the complainant with all information as to the progress of his case with due expedition, and the sanction of a reprimand for that offence, are affirmed.

4) The award of costs in the sum of $40,000.00 to the respondent in the proceedings below is set aside; the said sum is to be repaid to the appellant forthwith.

5) The respondent shall pay 65% of the appellant's costs in the proceedings below to be agreed or taxed.

6) The order for costs of $20,000.00 to the complainant to be paid by the appellant is affirmed.

7) 75% of the costs of the appeal to the appellant against the respondent to be agreed or taxed.

8) If the parties (or any of them) are of the view that a different order as to costs should be made in respect of the proceedings in this court and/or in the proceedings below (sub-paragraphs (4), (5), (6) and (7) above), they shall, within 14 days of the date of this order, file and serve written submissions for such different order(s) to be made.

9) If no submissions are filed and served within the time stipulated at sub-paragraph (8), the orders at sub-paragraphs (4), (5), (6) and (7) shall take effect as part of the final order of the court in relation to costs of the appeal and in the proceedings below.

[124] Finally, I must say that the delay in the delivery of this judgment is deeply regretted and sincere apologies are extended to all concerned. It just could not be avoided, despite a valiant effort to do so within the context of the challenges facing the court.

SINCLAIR-HAYNES JA

[125] I have read the draft judgment of McDonald-Bishop JA. I agree with her reasoning, conclusion and the orders she has proposed. There is nothing I could usefully add.

F WILLIAMS JA

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

MCDONALD-BISHOP JA

ORDER

1) The appeal is allowed, in part.

2) The Committee's decision made on 2 August 2016, that the appellant is guilty of inexcusable and deplorable negligence, in breach of Canon IV(s), is set aside and a verdict of not guilty of professional misconduct under Canon IV (s) is entered on the record.

3) The fine of $800,000.00 imposed on the appellant in paragraph (ii) of that order is set aside and is to be repaid to the appellant forthwith.

4) The decision of the Committee that the appellant is guilty of professional misconduct, in breach of Canon IV(r), for failing to provide the complainant with all information as to the progress of his case with due expedition, and the sanction of a reprimand for that offence, are affirmed.

5) The award of costs in the sum of $40,000.00 to the respondent in the proceedings below is set aside; the said sum is to be repaid to the appellant forthwith.

6) The respondent shall pay 65% of the appellant's costs of the proceedings below to be agreed or taxed.

7) The order for costs of $20,000.00 to the complainant to be paid by the appellant is affirmed.

8) 75% of the costs of the appeal to the appellant against the respondent to be agreed or taxed.

9) If the parties (or any of them) are of the view that a different order as to costs should be made in respect of the proceedings in this court and/or in the proceedings below (as set at paragraphs (5), (6), (7) and (8) of this order), they shall, within 14 days of the date of this order, file and serve written submissions for such different order(s) to be made.

10) If no submissions are filed and served within the time stipulated at paragraph (9) of this order, the orders at paragraphs (5), (6), (7) and (8) shall take effect as the final orders of the court in relation to costs of the appeal and the proceedings below.