JAMAICA

IN THE COURT OF APPEAL

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

MISCELLANEOUS APPEAL NO COA2022MS00010

BETWEEN	**SOPHIA THOMAS**	**APPELLANT**
AND	**DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Co for the appellant

Mrs Daniella Gentles-Silvera KC and Ms Kathryn Williams instructed by Livingston Alexander & Levy for the respondent

12, 13 February 2024 and 28 March 2025

Disciplinary Proceedings – Professional misconduct by an attorney-at-law – Admissibility of complainant's affidavit – Whether the chairman of the panel of the Disciplinary Committee of the General Legal Council demonstrated apparent bias – Challenges to findings of fact and law made by the Committee – Canons I(b), V(m) & (o) and VIII(d) of the Legal Profession (Canons of Professional Ethics) Rules – Rules 3, 4, and 17, Fourth Schedule of the Legal Profession (Disciplinary Proceedings) Rule – Section 12(1) of the Legal Profession Act

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of G Fraser JA (Ag). I agree with her reasoning and conclusion. There is nothing further that I wish to add.

SIMMONS JA

[2] I, too, have read the draft judgment of G Fraser JA (Ag) and agree with her reasoning and conclusion.

G FRASER JA (AG)

Introduction

[3] On 29 July 2022, the Disciplinary Committee of the General Legal Council ('the Committee') found attorney-at-law, Sophia Thomas ('the appellant'), guilty of professional misconduct, pursuant to Canon VIII(d) of the Legal Profession (Canons of Professional Ethics) Rules ('the Canons'), in the performance of her duties as Crown Counsel assigned to the Office of the Director of Public Prosecutions in breach of Canons V(o) and I(b) of the Canons.

[4] On 30 September 2022, the Committee, by way of sanction, ordered that the appellant be suspended for a period of six months from practice, attend various ethical continuing legal professional development seminars and pay costs. The appellant, being dissatisfied with the decision of the Committee, has challenged its findings on the basis that the Committee erred in its finding of professional misconduct.

The background

[5] The facts determined by the Committee and outlined below are extracted from the documents contained in the record of appeal before the court and the Committee's decision. The relevant particulars necessary in determining the appeal are adopted.

History of criminal proceedings in the Parish Court

[6] In December 2014, a trial began in the Corporate Area Parish Court, Criminal Division, before Her Honour Mrs Wolfe-Reece (as she then was), a judge of the parish court ('the learned judge'), in which Mr Lowell Spence ('the complainant') was the defendant. He was charged on 6 December 2009 with the offences of conspiracy to defraud, uttering forged documents and obtaining money by false pretences. The appellant was the attorney-at-law from the Office of the Director of Public Prosecution assigned to prosecute the case against the complainant.

[7] During the trial on 7 November 2017, the appellant sought permission from the court to refresh the memory of bank officer, Mr Dominic Duval ('the Crown witness'). It

was the complainant's statement that when the document (a statement of the Crown witness) from which the appellant sought to refresh the Crown witness's memory was handed to his counsel, it was discovered that it was not the original but a photocopy. On his counsel's objection to the use of the photocopied document and the appellant's failure to locate the original document in her files, the trial was adjourned to allow the appellant time to retrieve the original document, which she advised was at her office.

[8] The complainant further stated that when the trial resumed on 22 November 2017, the appellant sought to hand the Crown witness a document ('impugned statement'). Counsel for the complainant objected to the impugned statement being given to the Crown witness without him first having had sight of it; the statement was then passed to counsel. After comparing the impugned statement with the photocopied document, it was discovered that the statements were not identical. The learned judge then enquired of the appellant whether the impugned statement was the original, to which she answered in the affirmative. The trial was adjourned to facilitate the examination and comparison of both the photocopied and impugned statements.

[9] On resumption of the trial, the complainant's counsel indicated to the court that he had found 11 differences between the impugned statement handed to the Crown witness and the photocopied document previously disclosed to the defence. According to the complainant, it was then that the appellant sought to explain to the learned judge that the content of both documents was essentially the same. The trial was then adjourned to allow the Director of Public Prosecution ('DPP') to address the issue.

[10] The trial reconvened, and under cross-examination by counsel on behalf of the complainant, the Crown witness admitted that on the instructions of Mr Hines (the head of the bank's internal investigation unit), he had signed the impugned statement the day before coming to court. He stated that, in May 2017, he had submitted his original witness statement to the DPP; he stated further that Mr Hines asked him to sign a new statement, which he gave to the appellant. The full scope of the appellant's actions was detailed in para. 24 of the complainant's affidavit, where he expressed the following:

> "On the said November 22, 2017, after Ms. Llewelyn left Court that day and during Mr. Samuels's cross-examination of Mr. Duval, Mr. Duval admitted on oath that:
>
> a. the statement he signed in November of 2017 was a new statement, not an original of the first statement dated May 18, 2017;
>
> b. the document which Ms. Thomas had told the Court was the original of the photocopied statement dated May 18, 2017 which was first served, was in fact signed by him in November of 2017;
>
> c. Though the date appearing immediately below his signature and name was May 19, 2017 on the document which Ms. Thomas said was the original of the photocopy, giving the impression that that was the date he signed it, that was not in fact when he signed it, as he had signed it in November of 2017, being the same month that Ms. Thomas had requested the adjournment to find the original and the same month in which she produced this document, telling the Court that it was one of the originals signed in May of 2017 and received by her from Mr. Duval in that month; and
>
> d. He had only given one original statement in May 2017, which was the statement dated May 18, 2017."

The complainant further elaborated, in para. 28 of the letter attached to his affidavit, on what he was informed had transpired in chambers between the attorneys-at-law and the learned judge, as follows:

> "Mr. Samuels further informed me that **Ms. Thomas admitted in chambers that it was she who had asked the other crown witness, Mr. Hinds, to instruct Mr. Duval to sign another statement, which she then told the Court was the original of the statement initially served on us**." (Emphasis as in the original)

[11] The trial was adjourned until 21 December 2017, when the DPP informed the court of her decision to offer no further evidence against the complainant.

The complaint before the Committee

[12] According to the record provided by the Committee, the instant matter pertains to complaint no 52/2019, which was filed against the appellant with the General Legal Council on 14 March 2019. The complaint was submitted using the form of application against an attorney-at-law, dated 13 March 2019, along with the form of affidavit by applicant of even date. Additionally, the complainant referenced and included a letter dated 24 April 2018, which provided further details. The core allegation was that the appellant had failed to uphold the honour and dignity of the legal profession by knowingly using or participating in the creation of false evidence during her prosecution of the complainant before the learned judge. The complainant contended that the appellant breached the Canons as follows:

(a) I(b) "[a]n Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may lend to discredit the profession of which he is a member";

(b) I(c) "[a]n Attorney shall observe these Canons and shall maintain his integrity and encourage other attorneys to act similarly. He shall not counsel or assist anyone to act in any way which is detrimental to the Legal Profession.";

(c) III(h) "[a]n Attorney engaged in conducting the prosecution of an accused person has a primary duty to see that justice is done and he shall not withhold facts or secrete crown witnesses which tend to establish the guilt or innocence or the accused.";

(d) V(m) "[a]n Attorney shall not knowingly use … false evidence or participate in the creation or use of evidence which he knows to be false";

(e) V(n) "[a]n Attorney shall not counsel or assist his client or a crown witness, in conduct that the Attorney knows to be illegal or fraudulent..." and

(f) V(o) "[a]n Attorney shall not knowingly make a false statement of law or fact".

[13] The complainant asserted that the Crown witness' evidence on cross-examination was that Mr Hines had instructed him to prepare the second statement, which the appellant presented to the court. He, however, made clear that his complaint against the appellant rested on her admission (in chambers as informed by his counsel and verily believed) that the appellant was the one who had instructed Mr Hines to inform the Crown witness to "sign another statement, which she then told the Court was the original of the statement initially served on us". He further stated that the appellant's action of having the new statement backdated was behaviour unbecoming of "an attorney-at-law, especially one who was prosecuting me for fraudulent conduct when she herself was breaking the law and perverting justice". In continuation of his complaint, he stated that the appellant did not follow the appropriate guidelines when she provided a changed document instead of presenting the original.

The appellant's response to the complaint before the Committee

[14] The facts surrounding the events in the Parish Court that led to the complaint are not in dispute. Significantly, the appellant's account of the incident closely aligns with the complainant's version. For the purposes of this appeal, the appellant's response to the complaint before the Committee will only be referenced when it differs from the complainant's version or when pertinent details are necessary for its resolution.

[15] On the appellant's recall, the learned judge did not grant her the permission she sought to use the photocopy to refresh the Crown witness' memory. After conducting searches of her file, she determined that the original must have been misplaced. Moreover, at para. 19 of her affidavit dated 11 June 2019, the appellant catalogued the steps taken by her after she was unable to locate the original statement, she stated as follows:

> "The matter continued on November 22, 2017. Before that day I asked Mr. Richard Hines, Manager of the Group Fraud

> Prevention Unit/Special Investigation Unit to secure a reprint of the original. **I contacted Mr. Hines and asked him to ascertain whether Mr. Duval had his original statement on the computer, I then said if he does, ask him to reprint the statement and sign it.**
>
> In the context of paragraph 19 of the complaint, **I do admit that I had told the Court that I had two original statements of Mr. Duval. This was not so.** At the time panicked and regret this error on my part." (Emphasis added)

[16] It was also her account that she did not realise when she attempted to hand the impugned statement to the Crown witness to refresh his memory that it was not identical to the original.

[17] Although the appellant acknowledged the foregoing as an error on her part, her concession was limited to her failure to realise that the statement was not an exact reprint. She contended that the impugned statement (i) was in substance no different from the original statement, (ii) was a statement made by the Crown witness, and (iii) was only "prepared because the original was mislaid". Thus, proclaiming that there was no material difference between the two statements, that could have resulted in an injustice to the complainant.

[18] The appellant denied that she had breached Canon V(m) since the impugned statement presented to the Crown witness was not false. She further denied knowingly participating in the creation of false evidence. Although admittance was made that she did state that the impugned statement was the original, she reiterated that it was merely a reconstruction of the original with minor amendments and that she thought it was an exact reprint of the said original, as requested of Mr Hines. The appellant generally rejected any assertion that she had acted unethically or breached any of the Canons alleged in the complaint.

<u>The proceedings before the Committee and the findings</u>

[19] The Committee indicated that the evidence of the appellant given on oath before them was a denial that she had led the learned judge to believe that the original

statement was located. She further rejected the assertion of having used words that would have conveyed that she had located the original statement said to be mislaid.

[20] The appellant maintained that on her return to court and in an effort to use the statement to refresh the Crown witness, she informed the court that she had "two original statements" in the matter, one that had been given to counsel for the complainant in May 2017 and one currently in her possession. She, however, resolutely avowed that she did not state that she had received both original statements in May 2017.

[21] In cross-examination, the appellant explained that in her reference to the impugned statement as the "second original", she meant that it was a document coming from the same Crown witness who had made the original statement. It is germane, at this point, to refer to the appellant's response to the query of whether the statements were two separate or a duplicate, to which she stated:

> "**The first statement, which I believe the panel has in its possession, was the statement that I had already served on Mr. Samuels from May of 2017**, and if my memory is not as accurate it's not because I wish to mislead the Panel, but **the first one was served on Mr Samuels and Mr Dabdoub and there had been full disclosure of that first statement**. When I tried to refresh the memory of the crown witness from a copy of that which Mr Samuels and everybody already had, I couldn't find it. I then went to Mr Hines and **asked him to obtain the very same thing, in other words, it is on his computer so all he is doing is to print it and give me back the same statement, which is why I refer to it as the second original**…" (Emphasis added)

During cross-examination, the appellant concurred that the Crown witness gave only one original statement in May 2017. Nonetheless, she refuted that she had duped the court into believing she had received two original statements from the Crown witness in May 2017.

[22] Although the appellant maintained that she had not examined the "second original" as she thought it was a replica, only handed to her "two to three minutes" before she

had entered the courtroom, she admitted during cross-examination that there were differences between both statements. As it concerned the date of the impugned statement ("second original"), she agreed that it was concerning that it bore the date of 18 May 2017 (the date of signature of the original statement) when it was not signed on that date but signed in November 2017. She, however, insisted that she had not given any instructions as to the date to be ascribed to the impugned statement or for it to be backdated.

[23] The Committee examined the two statements before them, the original made in May 2017 and the impugned statement made in November 2017, and noted some 11 differences.

[24] Following the hearing conducted on divers days concerning the question of the appellant's culpability, the Committee concluded that the appellant had acted in breach of Canon VIII(d), V(o) and I(b). The Committee's decision and findings of 29 July 2022, of the professional misconduct by the appellant are set out in paras. 72 to 75 in its written pronouncement. For clarity and completeness, it is prudent to reproduce the Committee's findings. They are set out below as follows:

> "The Panel makes the following findings as it is obliged to do by virtue of section 15 of the Legal Profession Act:
>
> (a) At the trial date of 7 November 2017, the Respondent did not lay the foundation of the use of the photocopy statement to be used to refresh the crown witness' evidence as she indicated to the Trial Judge that the original was at her office;
>
> (b) That based on the Respondent's indication that the original was at her office and on the Respondent's application, an adjournment was granted to produce the original statement;
>
> (c) The Respondent made checks at her office and discovered at that time that the crown witness' original statement was mislaid/ lost;
>
> (d) The crown witness did not have another original of the statement he gave in May 2017;
>
> (e) The Respondent spoke to Hines and requested that he ascertain from the crown witness whether he had the

original statement on his computer and if so, he should reprint it for presentation at trial;
(f) At the trial date of 22 November 2017, the Respondent did not inform the judge that she had not found the original statement and that she had secured a reprint before having the document passed to the crown witness;
(g) That the statement presented was not a replica with an original signature or a "second original" but a new document with changes both to grammar and the content though the changes were not material;
(h) The Respondent did not check the statements to ensure that the reproduction was an exact replica of the original;
(i) The Respondent did not know that the document delivered to her by Mr Hines had some changes to content, though not material; and
(j) The Director of Public Prosecution offered no further evidence in the matter against the complainant."

[25] In light of these findings, concerning the appellant's conduct in performing her duties as Crown Counsel in prosecuting the case against the complainant, the Committee found that the appellant failed to maintain her integrity. Her "lack of candour" was "a departure from the justness and dignity of the profession". The committee further found that the appellant acted in a way that discredited the profession and that her "…conduct was gross and repeated and therefore intentional in misleading the Court as to the provenance of the so called 'second original'. It was not a simple mistake or error in judgment". On those bases, the Committee made its orders as set out in paras. [3] and [4] above.

The appeal

[26] On 6 October 2022, the appellant filed notice and grounds of appeal against the decision of the Committee and the sanctions imposed. The aspects of the orders being appealed are as follows:

"a. The defendant is guilty of professional misconduct

b. The defendant is suspended from practice for a period of six months commencing 1 November 2022.

c. The Defendant is to attend the following Continuing Legal Professional Development seminars: (1) Ethical aspects of the decision to prosecute and the prosecution of criminal cases (Justice David Fraser); and (2) Contemporary Ethical Issues In Criminal Law Practice (Mr. Peter Champagnie KC), and must produce a certificate of attendance to the General Legal Council no later 31 March 2023.

d. Costs to the Complainant in the sum of $100,000.00 to be paid on or before 31 December 2022,

e. Costs to the General Legal C in the sum of $300,000.00 to be paid on or before 31 March 2023."

[27] The grounds of appeal challenging the Committee's decision are:

"a. The Disciplinary Committee of the General Legal Council erred in law in concluding that the Appellant was guilty of professional misconduct on the basis that she sought to use in evidence a statement from the crown witness Dominic Duvall, such statement being produced by Mr. Duvall himself at the request of the Appellant given, the absence of the original statement of Mr. Duvall which could not be located for the purpose of refreshing memory.

b. The Disciplinary Committee of the General Legal Council erred in law in failing to appreciate that the statement purportedly made by Mr. Duvall as representing his original statement, was admissible for the purpose of refreshing his memory, as it represents the crown witness himself statement and ought not to have been used by General Legal Council as a basis to make a finding that the Appellant was guilty of professional misconduct.

c. The Disciplinary Committee of the General Legal Council erred in law when it made a finding that the Appellant 'knowingly presented a document to the Court knowing it was not what it purported to be'.

d. The Disciplinary Committee of the General Legal Council erred in failing to appreciate that the crown witness Lowell Spence admitted in cross examination

that he had no evidence the Appellant had instructed Mr. Duvall to make any change to his crown witness statement; the said crown witness statement was handed to the Appellant which was handed to the Appellant while she was walking into Court.

e. The GLC failed to appreciate that on the state of the evidence there was absolutely no evidence that the Appellant knew that Mr. Duvall had made the editorial changes to his Crown witness Statement when the said statement was handed to the Appellant by Mr. Hinds while Appellant was walking into Court and had no time to scrutinize the said statement.

f. The Disciplinary Committee of the General Legal Council erred in law when it failed to appreciate that at the end of the complainant's case there was no evidence before the tribunal that the Appellant had committed any wrong for her to be called on to answer any of the disciplinary charges.

g. The Disciplinary Committee of the General Legal Council erred in law in failing to appreciate that the conduct of the Director of Public Prosecutions in dismissing/discontinuing the case against the complainant Mr. Lowell Spence, could not be used as a basis to conclude that the Appellant had committed any wrong, to warrant any disciplinary proceedings being brought against her.

h. The Disciplinary Committee of the General Legal Council erred in law in failing to appreciate that on the totality of evidence presented by complainant, none of the offences had been made out against the Appellant, as there was no evidence that the Appellant had any mens rea to commit any of the disciplinary charges.

i. The Disciplinary Committee of the General Legal Council erred in law in failing to appreciate that there was no complaint before the Disciplinary Committee of the General Legal Council as stipulated under the **Legal Profession Act**, and the Regulations made thereunder, which clearly stipulate that a complaint must be supported by a sworn affidavit, which was absent in this case.

j. The Disciplinary Committee of the General Legal Council erred in law when it failed to appreciate that in the absence of an affidavit in support of the complaint, they had no discretion to embark on a hearing, as there was no jurisdiction in the first instance to commence the proceedings.

k. The Disciplinary Committee of the General Legal Council, erred in law when it failed to appreciate that the letter which was exhibited under the hand of Mr. Spence, as constituting the affidavit evidence, did not satisfy the requirements of the law, as to what constitutes an affidavit, rendering the said proceedings null and void and of no effect.

l. The Disciplinary Committee of the General Legal Council erred in law in failing to appreciate that the evidence contained in the letter of Mr. Lowell Spence to support the complaint on oath, was purely inadmissible hearsay evidence, and could not have been relied on by The Disciplinary Committee of the General Legal Council to make findings of fact against the Appellant.

m. The Disciplinary Committee of the General Legal Council erred in law in continuing with the proceedings against the Appellant after it emerged in the course of the trial, that prior to Counsel for the Appellant concluding his submissions in law in support of the Appellant's case, the chairman of the committee, who presided over the trial, invited counsel for the Appellant to make a mitigation plea, before the end of the Appellant's case demonstrating a clear case of apparent bias.

n. The Disciplinary Committee of the General Legal Council erred in law when it failed to appreciate that the statement by the chairman inviting the Appellant's counsel to make a mitigation plea, before the end of the Appellant's case, demonstrating a clear case of apparent bias, goes to the jurisdiction of the tribunal rendering any findings thereafter against the Appellant null and void and of no effect.

o. The Disciplinary Committee of the General Legal Council erred in law when the chairman in handing down the sanction, made unwarranted remarks about the conduct of the Appellant's case in defending herself, which clearly demonstrates that the chairman was operating under apparent bias in her findings of guilt against the Appellant.

p. The Disciplinary Committee of the General Legal Council erred when it imposed the sanctions it did which were clearly excessive and disproportionate."

Further, the appellant challenges findings in fact and law as follows:

"a. Findings of fact

i. The Appellant is guilty of professional misconduct in breach of VIII(d) in that she has breached Canons V(o) and I (b) of the Legal Professional Ethics) Rules.

b. Findings of Law

i. That the Appellant breached VIII (d) in that she has breached Canons V (o) and I (b) of the Legal Professional Ethics) Rules."

The issues

[28] These grounds of appeal, though copious, raise specific issues. This court finds that from the 16 grounds of appeal filed, the core issues necessary to be addressed and which would be dispositive of the appeal can be conveniently dealt with by adopting an issue-based approach. Accordingly, the following issues have been identified by this court:

i. Whether the Committee erred as to the admissibility of the complainant's affidavit filed in support of the complaint (grounds i, j, k and l).

ii. Whether the Committee's chairman showed apparent bias in conducting the disciplinary proceeding (grounds m, n and o).

iii. Whether the Committee erred when it found that the appellant knowingly presented a document to the court, with the knowledge that it was not what it was purported to be (grounds c, e, and h).

Grounds not pursued

[29] When the appeal was heard on 12 February 2024, counsel for the appellant informed the court that she would no longer pursue ground (p), which challenged the sanctions imposed by the committee as excessive. Consequently, no ruling will be made on the sanction.

[30] Several other grounds of appeal were also left unaddressed. Mr Wildman made no submissions regarding grounds (a), (b), and (d), nor did he present arguments in support of ground (g), which alleged that the committee erred in law by considering an irrelevant factor, that is, the *nolle prosequi* entered by the DPP. Likewise, King's Counsel, representing the respondent, did not address ground (g). At the outset of her oral submissions, she explicitly noted that while 16 grounds of appeal had been filed, some were not pursued, making a response unnecessary.

[31] Given the absence of any arguments on ground (g), I consider it abandoned and find no need for further analysis. Similarly, after reviewing the issues raised in the grounds that were argued, I find that grounds (a), (b), and (d), along with any other unaddressed grounds, lack merit and require no further examination.

Issue 1: Whether the Committee erred as to the admissibility of the complainant's affidavit filed in support of the complaint (grounds i, j, k and l)

Submissions on behalf of the appellant

[32] Counsel Mr Wildman, on behalf of the appellant, submitted that the affidavit of the complainant used to initiate the complaint was, in fact, a document purporting to be an affidavit. Mr Wildman submitted that the affidavit did not contain facts, which must be included in any affidavit used to support a complaint. He also submitted that the complainant had instead written a letter containing the facts to be incorporated and to

buttress the document filed as an affidavit. This letter, he said, did not meet the requirements of an affidavit, as it was a mere letter not given on oath. In support of this position, Mr Wildman brought to the court's attention section 12(1) of the Legal Profession Act ('the LPA'), which stipulates that a complaint against an attorney-at-law ought to be initiated by way of an affidavit, setting out the alleged conduct of the attorney-at-law amounting to a breach of the Canons. Mr Wildman further submitted that section 3 of the Interpretation Act defines an affidavit as any document to which a person affirms or declares instead of swearing.

[33] Mr Wildman argued that the document initiating the complaint against the appellant was not in compliance with section 12 of the LPA and, not being a sworn document, was not an affidavit that the Committee had jurisdiction to admit into evidence and subsequently rely on to make adverse findings against the appellant. It was Mr Wildman's further submission that where there was a breach of a statute, as was the case before the Committee, the purported evidence should be excluded and not be relied on. Counsel sought to support his submission by relying upon the cases of **R v Monica Stewart** (1971) 12 JLR 465 ('**Monica Stewart**') and **National Transport Co-operative Society Limited v The Attorney General of Jamaica** [2009] UKPC 48.

[34] Mr Wildman maintained that in keeping with the above-mentioned authorities and principles, the Committee erred when they accepted the contents of the complainant's letter as admissible evidence against the appellant. This error, Mr Wildman contended, constitutes a sufficient basis on which this court can quash the decision of the Committee.

Submissions on behalf of the respondent

[35] On the other hand, King's Counsel, Mrs Gentles-Silvera, submitted that the Committee did not err when it accepted and relied on the complainant's affidavit, including the content of the letter. King's Counsel advanced her position by relying on several cases, such as **R v Disciplinary Committee of the General Legal Council Exparte Winston Churchill Waters McCalla** (unreported), Court of Appeal, Jamaica, Miscellaneous Suit No M 75/92, judgment delivered 30 April 1993 ('**Exparte Winston**

Churchill'), **Lisamae Gordon v Disciplinary Committee of the General Legal Council** [2022] JMCA App 11 ('**Lisamae Gordon**') and **Don O Foote v General Legal Council** [2021] JMCA Misc 2 ('**Don O Foote v GLC**').

[36] In particular, King's Counsel commended the authority, **Exparte Winston Churchill,** as supporting her submission that rule 3 was not mandatory. In that case, after hearing arguments concerning the failure to comply with the affidavit form prescribed by rule 3 of the Legal Profession (Disciplinary Proceedings) Rules ('the LPA Rules'), the committee agreed that the affidavit was defective but found that the rule of the LPR was merely directory. Further, they found that by virtue of section 14 of the LPA, the committee had the discretion to vary rule 3. On appeal of the decision of the Committee in **Exparte Winston Churchill**, the full court pronounced that where there was considerable compliance with the statutory requirements, it could not rationally be said that prejudice was suffered by the applicant. Moreover, the court held that the objective of rule 3 and section 12 of the LPA, as it concerns the affidavit, was to inform attorneys-at-law of the facts upon which the complaint against them was made. So, although defective, the objective of the affidavit was achieved.

[37] King's Counsel also argued that the guidance from the decision of **Don O Foote v GLC** indicates that some defects in procedure can be waived by the parties and corrected by the court as irregularities. King's Counsel, in particular, highlighted para. [44] for this court's attention, where it was pronounced that "not all breaches of procedural requirements will result in the action being invalidated unless it is a defect which goes to the jurisdiction". It is with this guidance that King's Council submitted that any defects in the affidavit arising from the letter not being properly exhibited were not errors that affected the jurisdiction of the Committee.

[38] King's Counsel highlighted para. (h) of the complainant's affidavit, which was a standard form with marginal notes, which read "set out facts complained of". She stated that the facts are distinctly stated in the affidavit as required. The letter merely gave more details concerning the discussion between counsel, the court and the police officers,

as well as the input of the DPP as to the outcome of the matter. It was further submitted that even without the inclusion of the letter, the affidavit was not defective as it contained sufficient facts necessary to bring to the appellant's attention the case she had to meet. King's Counsel contended that even if there was a defect in the affidavit, the defect would have been waived when the appellant responded to the complaint, accepted the direction of the Committee and made no objection to the affidavit during the hearing. Therefore, reliance by the Committee on the affidavit did not affect its jurisdiction.

Discussion

[39] I understand that the appellant is indirectly challenging the Committee's jurisdiction by contending that there was no admissible or adequate evidence before it capable of grounding the complaint. To determine this issue, I need to appraise the LPA and the LPA Rules from which the Committee derives its authority. By virtue of section 12 of the LPA, an aggrieved person, such as the complainant in the instant matter, is permitted to file a complaint against an attorney-at-law based on behaviour that is perceived to amount to professional misconduct. Section 12(1) of the LPA, makes the following provision:

> "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…
>
> > (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)"

[40] Rule 3, Fourth Schedule of the LPA Rules, furthermore, requires that:

> "An application to the Committee to require an attorney to answer allegations **contained in an affidavit shall be in writing under the hand of the applicant in Form 1 of the Schedule to these Rules** and shall be sent to the secretary, together with an affidavit by the applicant in Form

2 of the Schedule to these Rules stating the matters of fact on which he relies in support of his application." (Emphasis added)

[41] Rule 4, Fourth Schedule of the LPA Rules, cited below, provides that the Committee may as it deem fit require further information to be supplied relating to the assertions made by the complainant. It details as follows:

> "(1) Before fixing a day for the hearing of any application under rule 3, the Committee -
>
> (a) may require the applicant to supply such further documents or information relating to the allegations as the Committee thinks fit; and
>
> (b) shall serve on the attorney against whom the application is made a copy of the application and the affidavit in support thereof, together with all other relevant documents and information.
>
> (2) An attorney who is served under paragraph (I)(b) shall, within forty-two days of such service, respond in the form of an affidavit, to the application.
>
> (3) Upon the expiration of the period mentioned in paragraph (2), the Committee shall consider the application and the response thereto (if any), and if the Committee is of the opinion that-
>
> (a) a prima facie case is shown, the Committee shall proceed in accordance with rule 5;
>
> (b) no prima facie case is shown, the Committee may dismiss the application without requiring the attorney to answer the allegation.
>
> (4)…"

[42] Additionally, in accordance with rule 17, Fourth Schedule of the LPA Rules, amendments and additions to an affidavit may be made. Rule 17, states that:

> "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."

[43] The substantial principles to be extracted from the abovementioned provisions are the following:

1. Allegation(s) of professional misconduct that an attorney is entreated to answer may apply to the committee in an affidavit - the affidavit shall be in writing under the hand of the applicant and in the prescribed form 1.

2. The complainant's affidavit must state the facts being relied on to ground the complaint.

3. Full disclosure must be made to the attorney against whom the application is made inclusive of the affidavit in support thereof, together with all other relevant documents and information.

4. The Committee, under rule 4(1)(a), has the power to require additional information before the hearing.

5. Upon hearing the complaint, the Committee may exercise its discretion to allow for an amendment, addition or further affidavit where they deem the circumstances so required. Provided that, any such modification does not result in any prejudice to the attorney-at-law. Where the attorney-at-law may be taken by surprise or prejudiced, an adjournment must be granted to allow him time to meet the amended case.

[44] The decision of **McCalla v Disciplinary Committee of the General Legal Council** (1994) 49 WIR 213 addressed how the Committee is to proceed in assessing whether an affidavit is sufficient. Rattray P, at page 230, in his discourse concerning rule 4 of the LPA Rules, enunciated that:

> "…In my view, **all this rule provides is that before a date for hearing is fixed a decision must be taken by the Disciplinary Committee based, not on evidence (since none is before it at this stage), but upon the nature of the allegations as to whether this is a matter on which the committee should proceed. If the matter is trivial or frivolous there does not exist 'a prima facie case' for the committee to proceed to trial.** Frivolous allegations may be made against attorneys at law, the frivolity of which is evident and this provides for the committee a process by which it can weed out insubstantial complaints and clear the list of matters unmeritorious." (Emphasis added)

[45] In the case of **Humphrey Lee McPherson v the General Legal Council (Ex parte Iela Joyce Stuart)** [2020] JMCA Civ 14, this court addressed whether the complaint had demonstrated "a genuine grievance". At para. [60], F Williams JA expressed the following:

> "…It is beyond doubt that the evidence of the complainant as adduced raised issues concerning allegations of professional misconduct. The allegations that were levied against the appellant were not frivolous; neither could it be reasonably maintained that the complaint did not demonstrate a genuine grievance. There was before the panel, evidence clearly raising serious questions in relation to imputations of professional misconduct under the LPA and that called for a response from the appellant…."

[46] To buttress his complaint that the Committee lacked jurisdiction when it embarked upon the instant hearing, Mr Wildman submitted that the defect in the affidavit and letter was such that it amounted to a breach of the LPA and was, therefore, inadmissible. He relied on the decision of **Monica Stewart** as authority that where proceedings were

commenced in breach of the statute creating the tribunal, such proceedings are deemed to be a nullity.

[47] In the **Monica Stewart** case, the resident magistrate embarked upon a trial on an indictment signed by the Clerk of Court. The appellant had pleaded guilty to the offence of false pretences, pursuant to section 330 of the Larceny Law, Cap 212 and was sentenced to a term of six months' imprisonment at hard labour. As is so often the case, the accused, dissatisfied with the imposed penalty, appealed both conviction and sentence. Contrary to the requirements of section 272 of the Judicature (Resident Magistrates) Law ('JRML'), the resident magistrate had made no order of indictment on the information, directing that the appellant be tried for the offence of which she was convicted. The Court of Appeal, in allowing the appeal, adumbrated that section 272 of the JRML must be strictly complied with, and non-compliance rendered the trial a nullity.

[48] Significantly, the Resident Magistrate was only empowered to try indictable offences designated by section 268(1) of the said legislation that created the office of resident magistrate. Section 330 of the Larceny Law was one such offence specified in section 268(2) of the JRML. So, to assume jurisdiction of that offence, the procedure stipulated in section 272 of the JRML had to be strictly adhered to. The signing of the order of indictment was what signalled the assumption of the Resident Magistrate's jurisdiction to commence the trial of an indictable offence.

[49] To resolve the problem, the Court of Appeal considered it necessary to clarify the meaning of jurisdiction in two contexts. Jurisdiction, in one sense, meant the mode of bringing a defendant before the court. Even if there was "an irregularity or illegality in the mode…" this "does not affect the validity of the conviction…", (**R v Hughes** (1879) 4 QBD 614 cited). Jurisdiction in the other sense, "that is, the power of a Court or judge to entertain an action, petition or other proceedings" etc. Such procedure must be observed 'before the charge is gone into' in accordance with the statutory provision (**R v Cockshott and others** [1898] 1 QB 582 and **R v Southampton Justices ex parte Porteous** [1929] All ER Rep 182 cited).

[50] Edun JA, at page 469D, enunciated that:

> "In the instant case, we are of the view that the words in s. 272 of the Judicature (Resident Magistrates) Law, Cap. 179:
>
> 'the magistrate shall, after such inquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction … make an order…'
>
> constituted the condition precedent which the resident magistrate had to comply with before assuming any jurisdiction at all."

[51] In my view, the case of **Monica Stewart** is distinguishable from the case at bar, as the jurisdiction which is in issue here is that pertaining to the mode by which the appellant herein was brought before the Committee. To determine whether the matter was frivolous or trivial, to proceed to trial or not, the Committee was duty bound to consider the affidavit evidence proffered in support of the complaint, in conjunction with any other document(s) before them, and that is what the Committee in fact did. I believe the affidavit penned by the complainant contained sufficient facts to convey to the appellant the case she had to meet and thus was not defective. Standing on its own, the affidavit could properly have supported the complaint. Furthermore, in accordance with rule 4, the Committee, if it deemed fit, had the authority to allow the complainant to supply such further documents or information (not affidavits) relating to the allegations. The complainant's letter, dated 24 April 2018, fell within that category and hence was admissible at the discretion of the Committee. I would emphasise that, unlike the Committee, the Resident Magistrate had no discretion to exercise. It was, therefore, beyond reproach that the Committee allowed the complainant's letter accompanying his affidavit to stand, regardless of its form. In the circumstances, the Committee did not lack jurisdiction when it heard and determined this complaint.

[52] Before concluding this point, I wish to address an observation related to the jurisdictional issue. At the outset of the proceedings before the Committee on 18 September 2021, Mr Wildman, who was also representing the appellant at that stage, made preliminary submissions regarding the form of affidavit and the letter, comprising the complaint. Initially, he had indicated that the complainant's affidavit was devoid of

substance and replete with hearsay, as it sets out the mindset of the complainant's attorney-at-law. Later in his submissions, Mr Wildman asserted that the complainant had submitted no affidavit. His assertion spurred the following exchange among Mr Wildman, Mr Hyatt (counsel appearing then for the complainant) and the panel (the Committee):

> "Panel: Those are your submissions?
>
> Wildman: Those are my submissions Milady.
>
> Panel: Thank you. Mr Hyatt.
>
> Hyatt: I heard what Mr. Wildman has said however, Mr Spence has an affidavit in writing, which is exhibited at tab D, where he sets out in his own writing the facts as he understands them and he was present at all times during this trial. There is no hearsay. He saw and heard what took place in the court room.
>
> Wildman: Where is that Affidavit please. I am not seeing that affidavit. I see a witness statement. I don't see an affidavit.
>
> Panel: Mr. Wildman there is an affidavit. Mr. Hyatt are you holding it up to the screen? The Affidavit … Form of Application against an Attorney-at-law and then Form of Affidavit by Applicant?
>
> Hyatt: Yes. That is what I am holding up.
>
> Panel: You have the Form of Affidavit by the Applicant Mr. Wildman?
>
> Wildman: I have the Form of Affidavit by Applicant yes.
>
> Panel: What we have let me just make sure we are all on the same page. We have the two form pages and then following that is a letter dated April 24, 2018 and in the body of the Affidavit he refers to that letter and incorporates the contents of the letter.
>
> …

Wildman: If the letter is incorporated into the Affidavit as it seem to be what they are saying then I would have a number of objections to some of the contents of the letter.

Panel: So, you have content, objection to the contents of the letter so your preliminary objection you are withdrawing it as to jurisdiction?

Wildman: To the extent that the letter is being incorporated into the affidavit then I would have objections to a number of the contents of the letter.

Panel: Alright but that being as an evidentiary thing not to jurisdiction?

Wildman: Yes.

Panel: So, you will withdraw that objection on the preliminary point?

Wildman: Yes.

Mr. Wildman withdraws his submissions on preliminary objection as to jurisdiction." (Emphasis as in the original)

[53] Mr Wildman later sought to take another point. This concerned the letter and whether it was properly incorporated into the affidavit. Mr Wildman's submission in that regard was as follows:

"Wildman: Milady I am taking a technical point but also a point of substance. I am saying that I have looked at the letter milady and I see where there was an attempt to incorporate the letter into the affidavit. I am saying, Milady, you got to go under the rules of evidence. The affidavit…, the letter must be certified as being part of the affidavit. It can't be a free-standing letter. It has to comply with certain procedure and that letter is not complying with the procedure for incorporation into the affidavit. I am saying that the letter on its own does not qualify to be part of the affidavit."

[54] From the tenor of his responses and this latter submission, Mr Wildman had changed his stance from objecting "to some of the contents of the letter" to the admissibility of the letter itself. What is clear to me is that there had been no revival of the jurisdictional issue. Mr Wildman was specifically asked if he was withdrawing his objection as to the jurisdiction of the Committee and had responded in the affirmative.

[55] Having abandoned the jurisdictional point as to whether there was a sworn affidavit setting out the complaint as required by law, it can be taken that the appellant voluntarily submitted to the jurisdiction of the Committee. It is, therefore, surprising that counsel framed and argued the ground of appeal listed i. "[t]he affidavit point" (see para. [27] above) attacking the jurisdiction of the Committee.

[56] I believe the appellant's conduct in rehashing the issue contained in ground of appeal i. is questionable. I say this having regard to the enunciation of Goff LJ in **Astro Exito Navegacion SA v WT Hsu** [1984] 1 Lloyd's Rep 266, who explained the circumstances in which a person voluntarily submits to the jurisdiction of the court (in this case the Committee). At page 270, Goff LJ said:

> "…Now a person voluntarily submits to the jurisdiction of the court if he voluntarily recognises, or has voluntarily recognised, that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of such claim."

[57] On all accounts, the appellant had participated in the proceedings by responding to the complaint contained in the complainant's affidavit and letter; she had submitted her own affidavit in response, dated 11 June 2019, and can be said to have accepted the jurisdiction of the Committee. The preliminary objection that Mr Wildman advanced in

that regard was withdrawn. In all good conscience, the appellant ought not to be allowed to advance this ground of appeal.

[58] Furthermore, decipherable from the allegations in the complainant's affidavit, which grounded the complaint, was the averment of conduct that was unbecoming of an attorney-at-law. On examination of the affidavit, the allegations outlined are that during the trial in the Parish Court:

1. The appellant was the attorney-at-law from the DPP's office who prosecuted the complainant on alleged fraud charges.

2. During the trial, the appellant sought to refresh the Crown witness' memory with what she informed the court was the "original" of the photocopy statement previously served on the complainant.

3. When the impugned statement was examined by counsel representing the complainant, at least 11 differences were discerned between it and the photocopy of the original previously served on the complainant.

4. When counsel for the complainant cross-examined the Crown witness, he admitted that the impugned statement, which the appellant purported to be the original, was not, in fact, the original statement.

5. It was further discovered that he signed the impugned statement during the trial in November 2017, while the original was signed in May 2017.

6. The complainant further submitted his letter to the GLC dated 24 April 2018, which contained additional salient details.

[59] The affidavit, which recounts the foregoing evidence, includes the Crown witness' admission that the document was not, in fact, the original, contrary to the appellant's assertion. The affidavit, on its own, clearly set out the allegations and facts, which necessitated a response from the appellant.

[60] I do not find that the form of affidavit was flawed or that the Committee erred in deeming it admissible, as it contained sufficient factual details requiring the appellant's response. Based on this finding, the Committee, in exercising its discretion, could allow the affidavit to stand alongside the letter, which it considered necessary for providing additional context. In my view, the issues arising from the affidavit and letter were clearly and sufficiently outlined. Consequently, the Committee did not err in admitting the complainant's affidavit. Also, it cannot be faulted for concluding that there were adequate facts to establish a *prima facie* case against the appellant and for proceeding accordingly.

[61] Grounds i, j, k and l are, therefore, without merit.

Issue 2: Whether the Committee/chairman of the panel showed apparent bias in conducting the disciplinary proceeding (grounds m, n and o)

Submissions on behalf of the appellant

[62] In written submissions on behalf of the appellant, Mr Wildman contended that the Committee committed jurisdictional error when it exhibited apparent bias against the appellant. In advancing this complaint, reference was made to the chairman's remark made on 13 April 2022. The chairman had invited Mr Wildman to commence his plea in mitigation when the proceedings were still ongoing. According to Mr Wildman, that indication meant that the Committee had pre-determined the appellant's guilt without first hearing her case in its entirety or final submissions.

[63] Mr Wildman drew this court's attention to the authority of **Livesey v New South Wales Bar Association** [1985] LRC (Const) 1107, and submitted that in that case, judges who heard the proceedings for the disbarring of counsel had previously sat on matters which concerned him, where they had "formed a view of a crown witness of fact and participated in the disbarring of the accused as an attorney-at-law". The court then found that a fair-minded observer might have reasonably thought that the findings and views the judges had formed in the previous case might have affected the proceedings "by bias by reason of pre-judgment". Mr Wildman contended that the Committee committed jurisdictional error when it exhibited apparent bias against the appellant.

Submissions on behalf of the respondent

[64] King's Counsel took issue with the submission made on behalf of the appellant and contended that, upon reading the notes of the proceedings, it is clear from the exchange between the Committee and the appellant's counsel that the chairman simply did not remember where the proceedings had reached. King's Counsel submitted that by the decision of **Porter and another v Magill** [2001] UKHL 67 ('**Porter v Magill**'), the test is whether 'a fair-minded and informed observer, would be lead to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased'. In furtherance of this position, the authority of **Barrington Earl Frankson v The General Legal Council (ex parte Basil Whitter at the instance of Monica Whitter)** [2012] JMCA Civ 52 was cited, where this court, in addressing the issue of bias, relied on para. 40 of Lord Hope's judgment in **Meerabux v The Attorney General of Belize** [2005] UKPC 12, where he stated that "[t]he question whether the proceedings are fair must be determined by looking at the proceedings as a whole".

[65] King's Counsel urged this court to find, having applied the principles in the authorities abovementioned, that no rational person would conclude that the chairman's remark was actuated by bias. The remark, she asserted, stemmed from sheer forgetfulness. King's Counsel submitted that this ground of appeal must, therefore, fail.

Discussion

[66] In determining this issue, the factual circumstances giving rise to the complaint of bias must first be examined. In doing so, I make reference to the portion of the transcript containing the exchange between Mr Wildman and the chairman of the Committee. The verbatim notes, on page 127 of the record of appeal, are instructive and have been reproduced below:

> "Panel: Good morning. We apologise for keeping you. We were dealing with other matters.
>
> Hyatt: Madam Chairman, I want to confirm that you have received the submissions filed.

Panel: Yes, we did and Mr. Wildman we got your today. Mr. Wildman would you like to proceed?

Wildman: I thought my learned friend would go first.

Panel: Mitigation is for you.

Wildman: We are not at mitigation.

Panel: … Oh I am sorry. Please excuse me. We have been doing a number of matters back-to-back and **I am confusing where we are.**

Mr. Hyatt, please go ahead. You were given thirty minutes if you had anything compelling to add to your written submissions.

Hyatt: Madam Chairman, I have not received Mr. Wildman's submissions and therefore I cannot reply to his submissions.

Wildman: (inaudible)

…" (Emphasis added)

[67] On the face of that exchange, it is apparent that the chairman had a lapse in memory; she specifically indicated as such and immediately apologised when it was brought to her attention. In the circumstances, I cannot agree that "the tribunal committed jurisdictional error by exhibiting apparent bias against the Appellant".

[68] I have examined the cited cases relied upon by Mr Wildman and have observed that in those cases, there were indeed indications of pre-judging, particularly where evidence was still pending and or there were prior dealings between the parties in a separate but related matter. Counsel, therefore, sought to rely on authorities which were not only not on point but were clearly distinguishable on the facts and the law.

[69] I further observed that although the proceedings in the instant case were ongoing, both sides had already elicited all their evidence, and the matter was at the stage for counsel to make oral submissions. I also noted that the Committee had already received the written submissions that were filed by the parties. Further, it is my view that the

absence of a closing submission is by no means detrimental and is sometimes waived by the parties. Whilst submissions may be useful to a tribunal, ultimately, it is the evidence on which their decision must be based.

[70] I next considered the applicable test to be applied in circumstances where bias is imputed to a tribunal. The test has been the subject of scrutiny and review in both the civil and criminal arenas. In **R v Gough** [1993] AC 646, is a good starting point. This was a case involving a juror who was the next-door neighbour of the brother of the accused. The juror swore an affidavit that she wasn't aware of that fact until after the jury delivered its verdict; this was unchallenged. The House of Lords refused to quash the decision based on bias since the test for bias at that time, was whether there was a "real danger" that a trial may not have been fair due to bias, the "real likelihood" test. Their Lordships, in particular, said that there is only one established special category where the law assumes bias, and that exists where the tribunal had a pecuniary or proprietary interest in the subject matter of the proceedings, and the courts should hesitate long before creating any other special category. The instant case does not fall within such a category.

[71] Another persuasive case is **Porter v Magill**. That case involved UK administrative law and emanated from a scandal where the leader and deputy leader of the Westminster Council sold council housing to strengthen their conservative majority. The auditor who investigated the plan was questioned about his impartiality. This House of Lords' decision brought the UK's test for bias in line with the test for "impartiality" within article 6 of the European Convention on Human Rights (ECHR) and most Commonwealth countries and Scotland. In his judgment, Lord Hope revisited the formulation applied in **R v Gough** and posited that "a modest adjustment of the test" that the phrase "a real danger" be deleted from the formulation since those words "no longer serve a useful purpose" in the context of bias. That authority indicated that the test to be applied is an objective one, that is to say, "what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias".

[72] The formulation in **Porter v Magill** has been consistently applied in this jurisdiction (see **Don O Foote** v **GLC** and **Linton Berry v Director of Public Prosecutions and another** (1996) 50 WIR 381 PC, **Linton Berry v Director of Public Prosecutions and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 41/1993, judgment delivered 20 March 1995) and in **Tibbets v Attorney General of the Cayman Islands (Cayman Islands)** (2010) UKPC 8.

[73] Having considered the facts and the relevant law, this court is of the view that nothing in the Chairman's remarks pinpointed by Mr Wildman has established that the chairman's conduct or behaviour was such that it gives rise to a suspicion that she was not acting impartially in hearing the matter. Having examined the notes of proceedings, the reason for the chairman's utterance, as King's Counsel submitted, displayed nothing more than sheer forgetfulness by her on where the proceedings had reached. There is nothing in the notes of proceedings to disprove this position.

[74] I, therefore, conclude that the evidence before this court is void of anything that would cause a fair-minded and informed observer, seized of all the facts and having considered them, to conclude there was a real possibility that the Committee was biased. I am so supported by the reasons and evidence outlined above. I do not accept the appellant's contention that the Committee displayed apparent bias when it made the impugned statements. I, therefore, find there is no basis to support the appellant's contention that the Committee demonstrated apparent bias.

[75] Grounds m, n and o are without evidential basis, have no merit and therefore fail.

Issue 3: Whether the Committee erred when it found that the appellant knowingly presented a document to the court, with the knowledge that it was not what it was purported to be (grounds c, e, and h).

Submissions on behalf of the appellant

[76] Counsel Mr Wildman submitted that the Committee failed to correctly identify the issues to be resolved before deciding whether the appellant was guilty of breaching the Canons. He argued that the appellant's account was that she genuinely thought what she

was presenting to the court was an original statement without any change, albeit minor. The appellant, according to Mr Wildman, was operating under a genuine mistake as to fact and, as such, lacked the necessary *mens rea* required to commit the offence.

[77] Counsel proffered the argument that the Committee had to determine whether the appellant, , had the specific intent to commit the offence alleged beyond a reasonable doubt. Mr Wildman said there was no evidence presented to negate that the appellant was operating under a genuine mistake as to fact. For that reason, he submitted that the Committee had no evidence to support that the appellant intentionally committed the offence.

[78] Mr Wildman also submitted that the proceedings before the Committee were to be treated as criminal proceedings, which standard of proof is beyond a reasonable doubt. The Committee had to be satisfied in its finding beyond a reasonable doubt, that the appellant purposefully sought to use an altered statement. Counsel made reference to the decisions of **Regina v K** [2001] UKHL 41 and **Regina v Taaffe** [1984] 1 WLR 326. He relied on the foregoing decision to make the point that in every criminal statute, *mens rea* is implied and must be proved. Counsel submitted that the principle is that a defendant is to be judged on the facts as he believed them to be (see **R v Taaffe**). He argued that the principle is quite clear, that a belief honestly held establishes a defence. Counsel further argued that conduct alone was insufficient to constitute the offence, as specific intent was required to prove the offence (see **R v Randy Kirkham** 1998 CanLII 13866 (SK QB)).

[79] Counsel contended that the Committee did not address the appellant's state of mind in line with the principles eschewed in the aforesaid authorities. Counsel submitted further that the Committee focused erroneously on the *actus reus* of the appellant without giving due weight to her state of mind. With the appellant's genuine belief being that the statement was a replica of the original, the offence could not have been found proven beyond a reasonable doubt. Counsel submitted further that the Committee decided

whether the appellant's belief was reasonably held instead of whether the belief was honestly held.

[80] Counsel, for these reasons, asked this court to find that in the circumstances, the Committee made an erroneous finding of guilt when it misdirected itself in law.

Submissions on behalf of the respondent

[81] King's Counsel, on the other hand, submitted that both the complainant and the appellant gave affidavit and *viva voce* evidence as to what occurred during the trial when the appellant sought to refresh the Crown witness' memory. King's Counsel restated the evidence that was before the Committee and submitted that the appellant's stance that the document was a "second original" was "preposterous as there can be only one original". It was also the appellant's evidence that she had instructed that there be a reprint of the original statement, which was then signed and back-dated to May 2017.

[82] Submissions were also made to the effect that the appellant knew that the impugned statement was not the original statement and would not have confessed or communicated otherwise had the learned judge and other parties not unearthed the truth. It was irrelevant whether the changes were made on the instructions of the appellant or not, or whether she knew about the changes when she presented the statement in court. King's Counsel highlighted para. 72 of the Committee's decision in support of her argument that the Committee had made no negative finding on whether the appellant knew of the changes made. The aforementioned and all the evidence, King's Counsel argued, make the finding of the Committee unassailable. What was relevant was that the appellant knew that the statement was a reprint and not the original.

[83] King's counsel asked this court to reject the appellant's contention that there was no evidence establishing that she had the *mens rea* to commit the offence charged. King's Counsel directed this court's attention to para. 56 of the Committee's decision, where the appellant's state of mind was specifically addressed. It was submitted that the appellant's

conduct demonstrated an intention to refresh the Crown witness' memory by whatever means necessary, with a document she knew was not the original.

Discussion

[84] There is no dispute that the criminal standard of proof applies to all disciplinary proceedings before the GLC. I accept that the Committee was correct in its analysis of the cases of **Wilston Campbell v Davida Hamlet (as executrix of Simon Alexander)** [2005] UKPC 19 ('**Campbell v Hamlet**') and **Bhandari v Advocates Committee** [1956] 3 All ER 742, in arriving at its conclusion that the standard of proof beyond a reasonable doubt was required. In a recent decision of this court, **Angella Smith v The General Legal Council and Fay Chang Rhule** [2023] JMCA Misc 2, Laing JA (Ag) (as he then was) at paras. [54] and [55] after a review of **Campbell v Hamlet** stated as follows:

> "[54]…In the case of **Campbell v Hamlet** [2005] UKPC 19, the appellant was an attorney-at-law in respect of whose conduct a complaint of professional misconduct had been made to the Attorneys-at-Law Disciplinary Committee in Trinidad and Tobago. Lord Brown of Eaton-under-Heywood in delivering the judgment of the Board and in addressing the appropriate standard of proof in disciplinary proceedings, at para. 16, stated the following:
>
> > 'That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt. If and in so far as the Privy Council in Bhandari v Advocates Committee [1956] 3 All ER 742, [1956] 1 WLR 1442 may be thought to have approved some lesser standard, then that decision ought no longer, nearly fifty years on, to be followed …'
>
> [55] Later in the judgment at para. 20, he made the following observation:
>
> > 'Perhaps more directly in point, however, is the decision of the Divisional Court in Re A Solicitor [1992] 2 All ER 335, [1993] QB 69, concerning the standard

> of proof to be applied by the Disciplinary Tribunal of the Law Society. Lord Lane CJ, giving the judgment of the court, referred to the Privy Council's opinion in Bhandari's case and continued at page 81:
>
> > 'It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standards. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or, to put it another way, proof beyond reasonable doubt. This would seem to accord with decisions in several of the provinces of Canada.'"

[85] In **Bhandari v Advocates Committee**, it was pronounced that "…in every allegation of professional misconduct involving an element of deceit or moral turpitude, a high standard of proof is called for…". For the decision of the Committee to stand, its finding must be buttressed by evidence that satisfies the criminal standard of proof beyond a reasonable doubt.

[86] Having established that the criminal standard of proof is applicable in disciplinary proceedings, it must now be determined whether the Committee was required to find that the appellant had the *mens rea* to commit the offence.

[87] It is accepted that the established common law assumption is that a mental element (*mens rea*) is an essential ingredient of an offence unless the legislature has expressly or impliedly indicated a contrary intention. Canon V(m) states that an attorney-at-law "...shall not **knowingly** use … or participate in the creation or use of evidence which he **knows** to be false". "Knowingly use" and "knows to be false" clearly import the element of *mens rea*, which must be construed within the context of the facts as established. In the case of **Regina v Taaffe**, their Lordships enunciated "…that when a

man's state of mind and knowledge were ingredients of the offence … he was to be judged on the facts as he believed them to be…".

[88] Certainly, the question as to whether the appellant had an honest belief that the impugned statement she presented to the court was the original statement signed in May 2017, was a critical consideration in determining the issue. The existence of an honest belief on the part of the appellant of the statement being the original must, therefore, ground the basis of the subjective test that is to be applied. It must be considered whether there existed reasonable grounds for the appellant to have rationally found to have committed the breach of Canon V(m).

[89] What, then, was the appellant's state of mind when she handed the statement to the Crown witness? A useful starting point in making that assessment is to examine any utterances or indications made by the appellant in this regard. In the written submissions proffered on the appellant's behalf, Mr Wildman indicated that she "was clear in her statement that she thought she had a **second original** from Mr Duval" (emphasis added). In cross-examination by the Committee, the appellant indicated that:

> "The first statement… **I couldn't find it**. I then went to Mr Hines and asked him to obtain the very same thing, in other words, it is on his computer so all he is doing is to print it and give me back the same statement, which is why I refer to it as the **second original**." (Emphasis added).

[90] The appellant did not at any time express any honest belief that the impugned statement was the original. Pointedly, she expressed that the original was "mislaid", and hence, she asked Mr Hines "to secure a **reprint** of the original" (emphasis added). The appellant had also deponed that:

> "I contacted Mr Hines and asked him to ascertain whether Mr Duval had his original statement on the computer. I then said if he does, ask him to **reprint the statement and sign it**. In the context of paragraph 19 of the complaint, I do admit that I had told the Court that I had two original statements of Mr. Duval. **This was not so**. At the time I panicked and regret this error on my part." (Emphasis added)

[91] Clearly, the appellant, with the knowledge that the original statement was not available, procured a substitute, which she instructed was to be reprinted and signed by Mr Duval. She, therefore, knew that the original Crown witness statement could not be procured by the Crown witness and that, by extension, she was never going to be in a position to produce it to the court. As an attorney-at-law, she would have fully understood the nature and significance of an original document, hence her insistence on calling the impugned statement a "second original". But can there be a "second original" anything?

[92] The definition of the word original, as canvassed by the Committee, I found to be very useful. In my own industry, I appreciate that the word "original", as defined by the Oxford Dictionary, is designated as an adjective, which means "the origin or source of something; from which something springs, proceeds, or is derived; primary". Similarly, the Cambridge Dictionary defines the word as "existing since the beginning, or being the earliest form of something". The foregoing definitions, therefore, connote something that is in the form in which it was first created and has not been copied or changed. The impugned statement or second document produced at a later date could not therefore, on any interpretation, qualify as an original document. The appellant herself referred to it as a "reprint" and was very much aware that Mr Duvall could not have signed it from the beginning.

[93] In the context as the appellant knew it to be, for the impugned statement to qualify as an original, such a document must have existed on 18 May 2017 and was drafted, printed and signed by Mr Duval simultaneously with the document from which the copy statement was printed. On the contrary, the appellant's expressions indicate that the original document was executed earlier. So, although the appellant insisted that there was no new material in the reconstructed document, which could have resulted in an injustice, the fact is that it was different. The Committee identified at least 11 differences between the two documents. By her insistence that the impugned statement was not different in substance, the appellant sought to escape the impact of her actions and conduct, failing to accept that she knowingly misled the learned judge regarding the provenance of the impugned statement. I have noted that on the resumption of the trial

on 22 November 2017, the appellant did not disclose to the learned judge that her efforts to locate the original document had proven futile. This is telling, especially since that was the basis upon which she obtained the adjournment on 7 November 2017. Also of significance is that the appellant had not informed the learned judge that the impugned statement was a reprinted and freshly signed document. The irresistible inference to be drawn in the circumstances is that the appellant deliberately conveyed the impression that she had found what she sought, that is, the original statement that she told the learned judge was at her office.

[94] Although the appellant was adamant that she did not give instructions to either Mr Hines or the Crown witness for the impugned statement to be back-dated, the irresistible inference is that this was the expected result. She particularly told Mr Hines that the statement was to be reprinted and signed. She gave those instructions because otherwise, how else would the document be used as an *aide memoir*? Surely, her experience as a prosecutor would have alerted her that a document executed six months after the original was executed would not be sanctioned by the court or tolerated by opposing counsel for such a purpose. If the defence had already objected to the use of a photocopy of the original, surely they would not have been agreeable to using a newly minted version.

[95] In the circumstances, as precipitated by the appellant, it lies ill in her mouth to say she had an honest belief, and indeed, it would have been perverse for any reasonable Committee to have found that the appellant held any such honest belief. Within the context of the case and the facts as the appellant knew them to be, there was sufficient evidence on which the Committee could have and had correctly determined that the appellant had the necessary *mens rea.*

[96] Though the principles from **Regina v K** and **Regina v Taffe** are instructive when deciding on *mens rea,* the cases are to be differentiated from the case at bar. On the facts of the aforesaid cases, the defendants did not have the *mens rea* to commit the offence. The facts of **Regina v Taaffe** are that the defendant was charged with the

offence of having been knowingly concerned with the fraudulent evasion of a prohibition by importation. No evidence was given in support of the charge against the defendant. His version of the events was that he was asked by a third party to carry a substance that he had mistakenly believed was currency. The House of Lords held that judged on the facts as the defendant believed them to be, he had believed that he was importing currency and not cannabis. A similar finding was made by the House of Lords in **Regina v K**, where the appellant was charged with indecent assault of a 14-year-old girl. In his defence, he advanced that he honestly believed the complainant was 16 years old, as she had told him so, and he had no reason to disbelieve her. The House of Lords held that the prosecution was required to prove the defendant's absence of genuine belief that the complainant was under 16 years of age.

[97] The circumstances of the instant case are distinguishable from the authorities cited by Mr Wildman; pertinent also are the facts as determined by the Committee. At para. 72, the Committee made the following findings necessary in establishing the offence.

> "The Panel makes the following findings as it is obliged to do by virtue of section 15 of the Legal Profession Act:
>
> (a) At the trial date of 7 November 2017, the Respondent did not lay the foundation of the use of the photocopy statement to be used to refresh the crown witness' evidence as she indicated to the Trial Judge that the original was at her office;
>
> (b) That based on the Respondent's indication that the original was at her office and on the Respondent's application, an adjournment was granted to produce the original statement;
>
> (c) The Respondent made checks at her office and discovered at that time that the crown witness' original statement was mislaid/ lost;
>
> (d) The crown witness did not have another original of the statement he gave in May 2017;

(e) The Respondent spoke to Hines and requested that he ascertain from the crown witness whether he had the original statement on his computer and if so, he should reprint it for presentation at trial;

(f) At the trial date of 22 November 2017, the Respondent did not inform the judge that she had not found the original statement and that she had secured a reprint before having the document passed to the crown witness;

(g) That the statement presented was not a replica with an original signature or a "second original" but a new document with changes both to grammar and the content though the changes were not material;

(h) The Respondent did not check the statements to ensure that the reproduction was an exact replica of the original;

(i) The Respondent did not know that the document delivered to her by Mr Hines had some changes to content, though not material; and

(j) The Director of Public Prosecution offered no further evidence in the matter against the complainant."

[98] A further complaint by Mr Wildman was that the Committee failed to consider the appellant's state of mind in arriving at its decision. Reviewing the Committee's decision illustrates that the complaint raised is unmeritorious. The Committee did not only focus on her conduct but also her state of mind, proof of which is highlighted below as extracted from para. 56 of the Committee's decision:

> "In determining the [appellant's] state of mind, the Panel considers the following relevant:
>
> (a) on the 7 November 2017 the Respondent departed from established and her own practice of showing Defence counsel the memory refreshing document before putting it in the crown witness' hand;
>
> (b) at the time of attempting to put the document in the crown witness' hand, the Respondent knew that it was a photocopy

and that the usual practice is for the original document to be used;

(c) the judge upheld the objection to the use of the photocopy and allowed an adjournment for the Respondent to locate the original which the Respondent had told the court was not on the file she had with her and that she would check back at her office;

(d) having been given the opportunity to retrieve the original from her file at office, on discovering that the original could not be found, rather than making or renewing her application to use the photocopy document, the Respondent instead opted to ask Mr. Hines to ask Mr. Duval to reprint the Statement from his computer to be treated as an original;

(e) the Respondent knew that the document was a recent reproduction and not an original of the photocopy she had disclosed to the defence counsel;

(f) having been handed the document only two or three minutes before court on 22 November 2017, the Respondent only checked the document to ensure that the material that she wanted the crown witness to refresh his memory was there;

(g) notwithstanding the earlier oversight of passing the document to the crown witness without first showing it to Defence counsel, the Respondent again on a second occasion failed to give Defence counsel an opportunity to inspect the memory refreshing document before passing it to be given to the crown witness;

(h) failing to disclose to the court or to defence counsel that the document was a reprint generated from the crown witness' computer in November 2017 prior to passing up the document to be given to the crown witness; and

(i) only disclosing the circumstances of the production of the document after the crown witness had been cross examined on it and following the defence counsel's request to cross examine Mr. Hines as to the circumstances of its production."

[99] Further, at para. 57, the Committee expressed that:

> "Even if the Respondent was utilising the second document as a second original statement, as where the crown witness had given two statements, even if the second one had minor or no revisions of the first one, she would have been under a duty to make that fact known to the judge and to the defence counsel. Her own state of mind was that it was the exact reproduction of the already disclosed statement, but she knew it was recently signed…"

In keeping with the principles enunciated in **Regina v Taaffe**, the Committee found that *mens rea* was required to prove the complaint against the appellant. Further, they found facts based on the evidence that established the appellant's guilt beyond a reasonable doubt.

[100] The charges also alleged that the appellant, by her actions, had brought the legal profession into disrepute. This aspect of the allegations concerns the legal profession's ethics, so the LPA is relevant. The LPA, and the Canons formulated thereunder, bind every enrolled and practising attorney-at-law in Jamaica (including prosecutors). By virtue of Canon V, "[a]n Attorney has a duty to assist in maintaining the dignity of the Courts and the integrity of the administration of justice". This begs the question of whether the appellant breached this Canon by her action and conduct.

[101] In making this determination, I commence with the evidence the appellant gave; she was called to the Jamaican Bar in 2008 and had been a prosecutor at the Office of the DPP since June 2012. It is apropos for me to observe that it was shortly before she joined that Office that the formal protocol of the Office of the DPP was published, namely, The Decision to Prosecute: A Jamaican Protocol, April 2012 ('the Protocol').

[102] The Protocol was prefaced by comments made by the DPP, who at pages 2 to 3 said, "[p]rosecutors in Jamaica today must demonstrate fearlessness, impartiality and a monumental work ethic in order to achieve the desired objectives". At page 9 of the Protocol, subtitled "5. The Prosecutors' Ethical Approach to Criminal Proceedings" mention is made of section 94(6) of the Constitution and the powers and concomitant responsibilities wielded by the DPP, more importantly, the Protocol recognises that

"[a]ccordingly the Prosecutor occupies a powerful and privileged position in society. Other members of the society therefore have the right to expect of their Prosecutors the highest level of professional integrity".

[103] The Protocol further makes mention of the Privy Council Appeal of **Randall v The Queen,** which is a reiteration of the principle that "**[t]he duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a Minister of Justice**" (emphasis as in the original). The judgment of Rand J in the Supreme Court of Canada in **Boucher v The Queen** (1954) 110 CCC 263, 270, which provides the following additional clarification concerning the ethical approach of the Prosecutor, was quoted at length (pages 9 and 10) as follows:

> "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; **his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings**." (Emphasis added)

[104] It can be taken, therefore, that the appellant was very much aware of her responsibility to the court and other court users in her role as a prosecutor. In determining whether the appellant had knowingly presented the impugned statement to the court with the knowledge that it was not the original statement that she was to locate and present, it was irrelevant whether or not the appellant had instructed the Crown witness to make changes or had knowledge that the changes were made. As determined by the Committee, what was relevant was the question of whether the appellant knew that the statement presented to the court as the original signed on 18 May 2017 was not the original but rather a document that was reprinted and signed in November 2017.

[105] There was evidence from both the complainant and the appellant on which the Committee was entitled to make the findings that they made. The Committee did not err when they found, that, the appellant knew that the statement was not the original but a reproduction of the original with changes, in circumstances where the appellant:

a. after being denied the request to refresh the Crown witness's memory from the photocopy statement, she informed the learned judge that the original was at her office.

b. after being unable to locate the original statement, requested that the Crown witness reprint and resign another statement.

c. On her return to court, having not located the original, she accepted from the Crown witness, a document she knew was not the original statement.

d. duped the court into believing she had located the original when she then attempted to refresh the Crown witness' memory from the reprinted statement without informing the court of her inability to locate the original at her office.

[106] In light of the foregoing, there was, in fact, overwhelming *viva voce* evidence supporting the Committee's finding. The appellant herself admitted to the facts as established. Even during her cross-examination, the evidence given did not challenge the complainant's assertion that the appellant had informed the court that she had asked Mr Hines to have the Crown witness reprint and resign the statement. Clearly, the appellant could not have been found to honestly believe that the document was the original. Nor could the appellant, having requested the reprint, have any reasonable grounds for arguing that she thought the reprint was an original. No court, having adjourned for the original to be located and on return without being informed otherwise, would have known that the appellant's attempt to refresh the Crown witness was from a statement not being the original. As far as I am concerned, there was only one original document signed by

the Crown witness on 18 May 2017. The impugned statement, which was a reprint, was not that original document and could not satisfy the meaning of the original. The evidence before the Committee was more than adequate for them to determine, beyond a reasonable doubt, that the appellant knowingly misled the court that the statement was the original.

[107] Grounds c, e and h are, therefore, too without merit.

Conclusion

[108] In all the circumstances, the appellant received a fair hearing. There was no evidence to support the alleged complaint of bias. There is nothing on the evidence from which this court could find that the Committee was plainly wrong when it concluded that the appellant had breached Canons VIII(d), V(o), and I(b) when she knowingly presented to the court a reprint of the Crown witness' statement to mislead the court of its provenance. Thus, the Committee cannot be faulted in its conclusion that the appellant brought into disrepute the profession's integrity by her actions and conduct, having the requisite state of mind at the time of committing the offence. The evidence and relevant law overwhelmingly support the Committee's finding.

[109] I, therefore, propose that the appeal be dismissed and the decision and orders made by the Committee on 29 July 2022 be affirmed. The appeal having failed, there is no reason to depart from the general rule in respect of costs. In the circumstances, I believe costs should be awarded to the respondent to be taxed if not agreed.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The decision of the Disciplinary Committee of the General Legal Council, made on 29 July 2022, is affirmed.

3. Costs of the appeal to the respondent to be agreed or taxed.