DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL ON HEARING SUBMISSIONS IN MITIGATION

COMPLAINT NO. 187 of 2012

BETWEEN	**FABIAN ALLEN**	**COMPLAINANT**
AND	**OWEN KIRKWOOD CLUNIE**	**RESPONDENT**

Panel: Allan S. Wood, QC (Chairman)
Mrs Ursula Khan
Miss Lilieth Deacon

Hearing Dates: 5th, 10th November 2014, 24th January 2015

In Attendance: Mr. Owen Kirkwood Clunie (Respondent):
Mr. Andre Earle, Ms. Kristin Lewis and Mrs. Nickeisha Young Shand, attorneys-at-law for the Respondent.

Ms. Dahlia Davis, Secretary to the Disciplinary Committee

BACKGROUND

1. On 28th September 2013, the Panel delivered a decision whereby it was ordered that:

> "(1) The name of Owen Kirkwood Clunie is struck off the Roll of Attorneys-at-Law entitled to practice in the Island of Jamaica.
> (2) Pursuant to s12 (4)(f) of the Legal Profession Act by way of restitution Owen Kirkwood Clunie is to pay the Complainant the sum of $700,000.00 with interest thereon at the rate of 6% per annum from the 31st July, 2012.
> (3) Costs in the sum of $20,000.00 are to be paid to the Complainant by Owen Kirkwood Clunie."

2. The Order was made with respect to a complaint that the Respondent had not accounted to the Complainant for all monies in his hand for the account or credit of the Complainant. The Complainant had given evidence on 21st September 2013 and a transcript of that evidence was forwarded to the Respondent. On 28th September 2013, the Respondent appeared and indicated through his then Counsel that the facts recounted in the Complainant's testimony were not in dispute. The relevant findings of the Panel in that regard were as follows:

> "i) The Complainant paid the Respondent the sum of $600,000.00 to be paid to the vendor's attorney to cover the deposit and part of the legal fees for the purchase of the premises.

ii) The Respondent failed to pay the aforesaid sum over to the vendor's attorney with consequence that the Complainant lost the premises, which was sold to someone else.

iii) The Respondent misappropriated the Complainant's money which ought to have been paid over to the vendor's attorney.

iv) Having misappropriated the Complainant's money, the Respondent defaulted on his repeated promises to refund same with an additional sum of $100,000.00 to reimburse the Complainant's expenses.

v) In breach of Canon VII (b) of the Legal Profession (Canons of Professional Ethics) Rules the Respondent has failed to account to his client for monies in hand for the account or credit of his client and has misappropriated same.

vi) The Respondent has acted dishonestly and has thereby failed to maintain the honour and dignity of the profession and his behaviour has discredited the profession of which he is a member in breach of Canon I (b) of the aforesaid Rules."

3. An appeal was pursued in the Court of Appeal (Misc Appeal No. 3 of 2013). On 31st July 2014 the Court of Appeal allowed the appeal in part, quashed the order that was made on 28th September 2013 and remitted the complaint for the Panel to hear submissions in mitigation and to determine the sanction thereafter. The Court of Appeal subsequently delivered its decision on 22nd September 2014.

4. Counsel for the Respondent advised the Panel that on 2nd October 2013, the Respondent complied with the order of the Panel by making payment to the Complainant of the sum of $762,000.00. Given that the Respondent has made restitution as was ordered, the Panel sees no necessity to give further consideration to that part of the order which was quashed by the Court of Appeal.

THE MITIGATION HEARING

5. As directed by the Court of Appeal, the Panel reconvened to hear submissions in mitigation in order to determine the appropriate sanction. The mitigation hearing was held on 5th and 10th November 2014. Although the direction of the Court of Appeal was to hear submissions in mitigation and to determine the sanction thereafter, the Respondent was permitted by the Panel to lead evidence by way of mitigation in addition to making submissions. The Panel is indebted to the Respondent's Counsel, Mr. Andre Earle for the assistance given and particularly in bringing to the attention of the Panel The Sentencing Guidance Handbook issued by The Bar Tribunals and Adjudication Service (Version 3) (hereafter referred to as the Bar Sentencing Guidance) which was developed by the UK Bar Tribunals and Adjudication Service in collaboration with the Bar Standards Board for use by the Bar Disciplinary Tribunals.

THE EVIDENCE

6. At the mitigation hearing evidence was led from the Respondent and four other witnesses, namely Honourable Clarence William Walker, retired Judge of Appeal, Rev. Witson Lloyd Williams, Rector of the St. Mathews Church, Allman Town and Attorneys-at-Law, Paul Beswick and Edmund Gordon.

7. The Respondent's evidence in summary was that:

i) He became an attorney in October 1994. At that time he was a police officer.

ii) He retired from the police force in 2004.

iii) At retirement he held the rank of Deputy Commissioner of Police.

iv) He practiced consistently from 2006.

v) In respect of the complaint, after the matter was dealt with in September 2013, he made restitution to the Complainant as ordered by the Panel in the first week of October 2013 and he again apologized to the Complainant for the situation that had arisen and for the inconvenience caused.

vi) He had previously apologized when he provided the Complainant with written promises respectively dated July 4, 2012 and September 19, 2012 to repay the $600,000.00 together with an additional sum of $100,000.00 (Exhibits 2 and 3). He further stated that the additional $100,000.00 was to compensate the Complainant for the inconvenience that was caused and it was the appropriate thing to do.

vii) He had been a police officer for 39 years.

viii) At the time of his retirement at the rank of Deputy Commissioner of Police he was in charge of special projects.

ix) While in the Jamaica Constabulary Force, for 24 years he had been a member of the Special Branch, an elite unit of the force whose members are specially vetted for integrity, intelligence and exemplary behaviour.

x) Since the making of the order of the Panel, he has not practised and this has adversely affected his ability to provide for his family. He has found it extremely difficult to meet his normal day-to-day expenses and he has to be assisted by his wife and a sibling. He has not been able to provide financial assistance to his children, a situation that has been depressing to him.

xi) The Respondent referred to publications made online and in two daily newspapers which gave widespread publicity to his striking off and which carried his picture causing him severe distress and embarrassment.

xii) If allowed to resume practice, he promised to observe more studiously the Canons of the Legal Profession and to zealously and literally guard clients' funds to ensure that there is complete accountability.

xiii) In response to questions from the Panel, the Respondent agreed that there was marked similarity between the criteria for membership of the police force and the Special Branch and the criteria for attorneys-at-law and that there was no substantial difference.

xiv) Also in response to a question from the Panel, he stated that he had placed the Complainant's money in a client account and further that he had made an error in allowing someone else to have access to that account.

8. The testimony of Paul Beswick, a practising attorney-at-law was that he met the Respondent who was a friend of his partner when the Respondent came from the Norman Manley Law School to do in-house training. He found the Respondent's work ethic to be outstanding and was impressed with his ability. The further testimony of Paul Beswick was that he had been a member of the Jamaica Defence Force for 23 years, retiring in 2014 at the rank of captain and based on his interaction with the Respondent, he took the view that he was trustworthy and dependable and always truthful. In his view, the incident that gave rise to the complaint was a mistake and he would be willing to work with the Respondent.

9. In similar vein, Edmund Gordon also an attorney-at-law stated that he had known the Respondent for 5 years and that they had worked and consulted on matters. He found the Respondent to be an upright person and in all his dealings had never lost trust in him.

10. Retired Judge of Appeal, Clarence William Walker gave evidence that he had known the Respondent for at least 40 years going back to when the Respondent was a corporal assigned to the Special Branch, an elite division of the police force; that in 1988 he had recommended the Respondent as a fit and proper person to be admitted to the Faculty of Law. Although he had not seen much of the Respondent after he had qualified, on the occasions when he did see him it was his impression that the Respondent was scrupulous and fairly successful and he firmly believed that the Respondent could acquit himself in pursing his profession if given the chance. Further, that having spoken with the Respondent he believed that what had happened was not in keeping with the Respondent's character and he believed that the Respondent would never make that kind of mistake again.

11. The testimony of Reverend Witson Williams, Rector of St. Mathews Church and member and chaplain of the Lay Magistrates Association was that he had known the Respondent from 1973 when he was posted at St. Cyprians Church, August Town. He interacted with the Respondent frequently until he was posted to Trelawny. The witness did not state precisely when he was posted to Trelawny but volunteered that he had become a Justice of the Peace for Trelawny in 1993 and this was transferred to Kingston in 2003 when he took up the posting at St. Mathews Church in Kingston. In the period while he was in Trelawny he met the Respondent occasionally and recently they had met on four occasions when he had counselled the Respondent. In response to questions from the Panel, the witness stated

that the counselling had occurred this year. He found the Respondent to be straightforward, outspoken, frank and willing to help. On the basis of his discussions with the Respondent, the witness stated that if it was in his authority, he would allow the Respondent to resume his practice.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

12. On the basis of the evidence tendered in mitigation, Counsel for the Respondent submitted that there were several mitigating circumstances which the Panel should take into account in exercising its discretion to determine the appropriate sanction to impose pursuant to s 12(4) of the Legal Profession Act, namely:
    a. Remorse
    b. Exceptional circumstances
    c. First offence
    d. Restitution
    e. Candour and Cooperation
    f. Adverse publicity
    g. Character evidence
    h. Financial Ruination

13. He cited the decision of Bolton v Law Society [1994] 1 WLR 512 which had been repeatedly approved and applied by the Disciplinary Committee and the Court of Appeal on the issue of sanctions for professional misconduct. However, he went on to submit that there had been a gradual shift from the inflexible approach in Bolton and that there had been established a very small residual category of cases where striking off would be disproportionate, harsh and excessive. In supporting the submissions that the Disciplinary Committee had shifted away from the inflexible Bolton approach, he cited a decision of the Disciplinary Committee in Levy-Manfred v Ramon Gordon Complaint 118/2012 decision 28th September 2013, where a conditional suspension had been imposed on the attorney for breach of similar Canons, albeit with there being no finding of dishonesty. Additionally the Attorney had in fact done some work for his client.

14. It was urged that the Panel should make either an order of reprimand or at most a suspension for a period not exceeding 12 months from 28th September 2013 accompanied by the orders of restitution and costs that had been set aside by the Court of Appeal.

THE APPLICABLE PRINCIPLES

15. In light of those submissions, we turn to consider some of the authorities. The starting point is of course the decision of Sir Thomas Bingham MR in Bolton v The Law Society (supra) p 518, where he stated:

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost

invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well ...

It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

16. We turn to consider the some of the authorities and materials that have considered the decision in Bolton. In the Bar Sentencing Guidance, at par 3.1- 3.2 the purposes of applying sanctions are set out as follows:-

3.1 The purposes of applying sanctions for professional misconduct are:

a) To protect the public and consumers of legal services;

b) To maintain high standards of behaviour and performance at the Bar;

c) To promote public and professional confidence in the complaints and disciplinary process.

3.2 The three purposes of applying sanctions (outlined above) have equal weighting; in fulfilling the purposes it is important to avoid the recurrence of behaviour by the individual as well as provide an example to other barristers in order to maintain public confidence in the profession. Decision makers must take all of these factors into account when determining the appropriate sanction to be imposed in an individual case. Decision makers should also bear in mind that sanctions are preventative and not intended to be punitive in nature but nevertheless may have that effect.

17. Dishonesty receives special treatment at section 6 of the Bar Sentencing Guidance and in that regard par 6.2, states:

"Dishonesty
Any dishonesty on the part of a member of the Bar, in whatever circumstances it may occur, is a matter of great seriousness. It damages the reputation of the profession as a whole, quite apart from its effect on the reputation of the individual barrister. Dishonesty is incompatible with the duties placed on barristers to safeguard the interests of their clients and their overriding duty to the court. Public interest requires, and the general public expects, that members of the Bar are completely honest and are of the highest integrity. Therefore, in cases where it has been proved that a barrister has been dishonest, even where no criminal offence has been committed, disbarment will almost always have to be considered (see Part II section B – Acts of dishonesty). For guidance on dealing with situations where the barrister has been, or may have been, dishonest during the course of proceedings, see paragraph 7.5."

18. The approach to be adopted with regards to sanctions for dishonesty is set out at par 6.4, which the Panel accepts and which Counsel for the Respondent accepted as an accurate summary of the applicable principles of sentencing in a case of dishonesty:

"In the case of *SRA v Sharma ([2010] EWHC 2022 (Admin),* Mr. Justice Coulson outlined the following points in relation to the appropriate sanction for dishonesty:

a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see *Bolton* and *Salisbury.* That is the normal and necessary penalty in cases of dishonesty, see *Bultitude.*
b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see Salisbury.
c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary or over a lengthy period of

time, such as *Bultitude*; whether it was a benefit to the solicitor, and whether it had an adverse effect on others."

19. In Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin), the judgment of Bingham M.R. in Bolton was considered by the Divisional Court in an appeal brought by the Solicitors Regulation Authority (SRA). The Solicitors Disciplinary Tribunal had found a solicitor guilty of dishonesty but suspended him from practice for 3 years. The SRA appealed that decision to the Divisional Court which found that the sentence of suspension was excessively lenient, that there was a serious and significant case of dishonesty and that the normal sanction of striking off the Roll should be ordered. In delivering the judgment of the Court, after referring to the passage which we have already quoted from Bolton p 518, Coulson J reviewed some of the subsequent decisions and summarised the law at pars 7 to 13 as follows:

"7 Support for the proposition that a finding of dishonesty against a solicitor will not all automatically lead to striking off can be found in the decision of this court in Burrowes v the Law Society [2002] EWHC 2900 Admin. That was a case in which a married couple wished to make a will, but when their solicitor Mr. Burrowes attended upon them to draw it up there was no witnesses. He told them that as a result the will could not be completed. They instructed him that whatever the consequences they wanted to execute the will there and then without witnesses, and in what was subsequently described as "a moment of madness", Mr. Burrowes added to each will the details of two people who were not present, one of whom worked for his firm. There was no suggestion of any personal gain on his part.

8 Another unusual feature of the case was that although the parties before the Tribunal had agreed an amendment to the charges faced by Mr. Burrowes, the Tribunal itself refused to allow that amendment. That was the subject of some criticism by this court. In all the circumstances of the case the court concluded that the decision to strike off Mr. Burrowes was disproportionate. In what Rose LJ described as 'the unusual circumstances of this case', no alternative penalty was imposed on Mr. Burrowes.

9 In Bultitude v the Law Society [2004] EWCA civ 1853, a solicitor who had devised a system of false debit notes in order to account for a long series of credit balances which had been the subject of concern on the part of the accountant who had been appointed by the Law Society to look into Mr. Bultitude's firm's affairs was struck off by the Tribunal. The divisional court substituted a penalty of suspension for 2 years but the order to strike off was reinstated by the Court of Appeal. Kennedy LJ said:

'...but we can and in my judgment should take cognoscence of what the profession regards as the normal necessary penalty to be imposed upon those found to have acted dishonestly.'

10 Finally in this series of cases there is the decision in Salisbury to which I have already referred. There the allegation referred to the dishonest amendment of a cheque to which £1,000 was added by Mr. Salisbury in circumstances where it was accepted that that money was indeed due to him. Mr. Salisbury was struck off by the Tribunal. The divisional court substituted

an order for 3 years suspension, but in the Court of Appeal the original order was reinstated. At paragraph 37 of his judgment Jackson LJ said.

'In my view the Divisional Court fell into error in holding that there was exceptional facts which brought this case to the very bottom of the scale of dishonesty. The court also erred in concluding that this case fell into the very small residual category where striking off was not appropriate. On the contrary this was a case of serious dishonesty by the solicitor where the normal consequences should follow.'

11 This morning during Mr. Treverton-Jones' very helpful submissions we were also referred to the decision of this court in the Law Society v Andrew John Tilsiter [2009] EWHC 3787 Admin , which was another case in which the solicitor was found guilty of dishonesty, again in relation to financial matters. The Solicitors Disciplinary Tribunal had suspended him from practice but this court substituted an order that he be struck off the Roll. In addition we have been referred to a number of decisions of the Solicitors Disciplinary Tribunal itself. Some of those were helpfully summarised in the judgment of Rose LJ in Burrowes and others have been identified in Mr. Treverton-Jones' skeleton argument.

12 Speaking for myself I am not persuaded that it is appropriate in these sorts of cases to embark upon a long trawl through the decisions of the Tribunal, particularly given that so many of them are so obviously fact-sensitive, to try and identify some that may be similar to the case under review. Simply by way of example I note that of the cases summarised by Rose LJ in Burrowes, most (if not all) are cases in which there was significant personal mitigation by reference to stress and mental health issues, which obviously do not arise in the present case. There is also some doubt as to whether allegations of dishonesty or findings of dishonesty were being made in every case.

13 It seems to me, therefore, that looking at the authorities in the round, that the following impartial points of principle can be identified: (a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see Bolton and Salisbury. That is the normal and necessary penalty in cases of dishonesty, see Bultitude. (b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see Salisbury. (c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, such as Burrowes, or other a lengthy period of time, such as Bultitude; whether it was a benefit to the solicitor (Burrowes), and whether it had an adverse effect on others."

20. In the more recent case of The Law Society (Solicitors Regulation Authority) v Emeana & Others [2013] EWHC 2130 (Admin), the Divisional Court again intervened in cases of serious misconduct to substitute orders of striking off as the appropriate sanction for serious misconduct falling short of dishonesty. The point was made that serious professional misconduct which was not dishonest may nonetheless require striking off in order to maintain the reputation of the profession. Moses, LJ stated at pars 22 to 26 in that regard:

The Appropriate Sanction

22 This court must bear in mind that the Tribunal is an expert and informed tribunal, best able to assess what is needed to uphold standards of integrity, probity and trustworthiness in the profession of solicitor. But it is not restricted to interfering only in "very strong cases". It should interfere where the sanction was "clearly inappropriate" (Law Society v Salsbury [2008] EWCA Civ 1285 [30]).

23 The essential argument advanced on behalf of both Mr. Ijewere and Mr. Ajanaku is that neither was guilty of dishonesty. Suspension or striking off should be reserved for far more serious cases and both were able to supply examples of cases where fines had been imposed such as Tinkler v SRA [2012] EWHC 3645 (Admin) where for six breaches, including misleading clients as to the nature of the partnership, permitting unadmitted persons to influence or control the practice, and failing to act in clients' best interests, a fine of £40,000 was reduced to £20,000. In Weston v Law Society suspension was imposed for breach of the Solicitors Accounts Rules for which Mr. Weston was not directly responsible. In Adeeko v SRA [2012] EWHC 841 a solicitor was suspended for 18 months in relation to inadequate accounts in a single ledger concerning a single file.

24 This appeal took a familiar course. The respondents were able to show cases of at least as great a gravity where fines were imposed and the appellant authority was able to refer to cases where it appeared the failures were no more severe but at least suspension was ordered.

25 I did not find this process of assistance. Of course, the disciplinary tribunal must strive for consistency. But uniformity is not possible. The sentences imposed are not designed as precedents. The essential principle is that which was identified by Sir Thomas Bingham MR in Bolton v Law Society [1994] 1 WLR 1286 . The profession of solicitor requires complete integrity, probity and trustworthiness. Lapses less serious than dishonesty may nonetheless require striking off, if the reputation of the solicitors' profession "to be trusted to the ends of the earth" is to be maintained.

26 The principle identified in *Bolton* means that in cases where there has been a lapse of standards of integrity, probity and trustworthiness a solicitor should expect to be struck off. Such cases will vary in severity. It is commonplace, in mitigation, either at first instance or on appeal, whether the forum is a criminal court or a disciplinary body, for the defendant to contend that his case is not as serious as others. That may well be true. But the submission is of little assistance. If a solicitor has shown lack of integrity, probity or trustworthiness, he cannot resist striking off by pointing out that there are others who have been struck off, who were guilty of far more serious offences. The very fact that an absence of integrity, probity or trustworthiness may well result in striking off, even though dishonesty is not proved, explains why the range of those who should be struck off will be wide. Their offences will vary in gravity. Striking off is the most serious sanction but it is not reserved for offences of dishonesty.

21. It should be observed that in the Emeana Decision at pars 24 to 25 and also in the Sharma Decision at par 12, the Divisional Court found little assistance in the citation of other cases to demonstrate that less severe sanctions had been imposed for conduct of similar gravity. We agree. Cases of misconduct and dishonesty are infinitely variable and, in our view, no useful purpose can be served by demonstrating that others may have gotten away with a lenient sanction for the same or even more serious conduct. If prior decisions on sanction were to be treated in that manner as binding precedent, then it becomes readily apparent that a decision imposing an unduly lenient sanction could diminish the ability of the Disciplinary Committee to enforce proper professional standards. We entirely reject that approach as being unhelpful and indeed it is a slippery path leading to the erosion of proper professional standards. The Disciplinary Committee has to be guided by principle.

22. From the foregoing authorities, we understand the applicable principles relevant to sanctions for serious dishonesty to be:

i. The governing principle is that dishonesty by a member of the legal profession is not tolerated and the attorney who is guilty of serious dishonesty should expect to be struck from the Roll of Attorneys-at-Law. This sanction is applied "almost invariably" no matter how strong the mitigation advanced.

ii. However the qualifying words "almost invariably" support that there may be an exceptional case where striking off is not the appropriate result. Such cases are rare. In determining whether the case is so exceptional that striking off would be a disproportionate sanction, the factors to be considered include those set out in SRA v Sharma (supra) at par. 13, namely the nature and scope of the dishonesty, whether it was a momentary lapse as opposed to having been sustained over a period, whether it was committed for personal benefit and whether it had an adverse effect on others.

iii. The seemingly harsh sanction of striking off is not applied to punish the attorney but rather to protect the public and to maintain the reputation of the profession. The reputation of the profession is based on maintenance of standards of honesty and integrity which all persons should rightly and confidently expect to be observed by attorneys in their dealings.

iv. Again, because the paramount objective is to protect the public and the reputation of the legal profession, where serious dishonesty has been committed, apart from the very exceptional case, it would diminish the reputation of the profession if a lesser sanction were to be applied which permits the attorney to continue in practice. The orders of the Disciplinary Committee would rapidly cease to have any deterrent effect, standards of the profession would be inevitably lowered and the public put at risk.

23. It was the submission of learned Counsel that the evidence led in mitigation brought this case within the exception where striking off would be unjust and disproportionate. We turn to consider the evidence and grounds of mitigation that were advanced on the Respondent's behalf though not in the order advanced.

FIRST OFFENCE

24. It was urged that the fact that this was the Respondent's first offence was a mitigating factor. A single act of serious dishonesty is sufficient to warrant striking off. However, as previously noted, acts of dishonesty can be infinitely variable and some acts may be far more serious than others. Factors that need to be considered include the seriousness of the dishonesty, the circumstances that led to the dishonesty, whether it resulted in loss to the client or a third party and whether the attorney engaged in the dishonest act for personal benefit. The Panel has found that the Respondent had acted dishonestly and this finding was affirmed by the Court of Appeal.

25. The dishonesty in this case was extremely serious taking the form of misappropriation of client's money. His client was a small grocer who wanted to purchase a house for his family as he had been given a notice to quit. He gave the deposit money and fees to the Respondent who was recommended to him by a friend. He was entitled to believe that an Attorney who had had a distinguished career in the Police Force would act with integrity, probity and trustworthiness. But this was not to be as the Respondent misappropriated his client's funds, an act which his own Counsel termed "egregious". It caused loss to the Complainant and was plainly committed for personal gain. Accordingly, we do not consider that the fact that this was the Respondent's first and only offence is a mitigating factor given the nature and gravity of his dishonesty to a client who was depending on his integrity.

REMORSE & EXCEPTIONAL CIRCUMSTANCES

26. It was urged that the Respondent had expressed sincere remorse and had apologized to his client when restitution was made and before that, when he had signed two memoranda on July 4 and September 19, 2012 promising to repay the sum of $600,000.00 that had been misappropriated together with an additional sum of $100,000.00. It was submitted that the exceptional circumstances of this case were that the Respondent gave the Complainant not one but two signed memoranda agreeing to pay back the principal sum together with the additional amount to compensate the Complainant for his inconvenience and incurred expenses and interest.

27. It is to be recalled that the Respondent had accepted the Complainant's evidence. We therefore turn to look back at the Complainant's evidence in that regard, which was that on February 17, 2012 he had paid the Respondent the sum of $600,000.00 which should have been paid over by the Respondent to the vendor's attorney to cover the deposit and fees for the purchase of premises at 183B Windward Road. Subsequently, the Respondent called him to say that the deal had come through. That was an obvious a lie. The Complainant got no agreement to sign. Thereafter, the Complainant could get no response from the Respondent and he later learnt from others that the property was sold to another. Eventually, he had to threaten the Respondent that he was going to make a complaint to the General Legal Council and it was that time that he received the first written promise by memorandum dated July 4, 2012 (Exhibit 2) to repay the sum of $600,000.00 together with the additional sum of $100,000.00 to reimburse the additional expenses which he had incurred.

28. By Exhibit 2, the Respondent promised to make repayment on 31st July 2012; the promise was not met, no payment whatsoever was received and the Complainant again had to

make contact with the Respondent to threaten him again with the making of complaint. As a result, on September 19, 2012 a further document was signed (Exhibit 3) whereby the Respondent promised to repay the money on 30th September 2012. Again nothing was heard from the Respondent and no payment whatsoever was received. The Complainant's further testimony was that he approached the Respondent after the Complainant's mother had died seeking some money to bury her and at that time the Respondent told him that he was sorry and that he was awaiting payment of some money from the Government and the Complainant would be repaid when the money was received. This clearly demonstrated that he had used his client's funds for his own benefit and would repay same when reimbursed by his alleged creditor.

29. The Complainant's evidence demonstrates not merely the misappropriation of his money but also that over an extended period, the Respondent made no effort whatsoever to repay any part of the sum misappropriated and indeed failed to comply with what were then empty promises of repayment given under threat of complaint being made to the General Legal Council. It was not until after the order for restitution was made on 28th September 2013 that the Complainant was repaid by the Respondent.

30. In his testimony, the Respondent did not candidly admit that he misappropriated the Complainant's money but rather stated that he made a mistake in allowing someone else access to his client's account. The Respondent volunteered no explanation as to how someone else could access his client's trust account and misappropriate the money therein without his own participation and complicity. In this regard he failed to present to the Panel the factual background surrounding the offending act or as described in SRA –v- Sharma (supra) the nature, scope and extent of the dishonesty itself.

31. Further in his testimony the Respondent conveyed that he was apologetic and remorseful in his communications with the Complainant. That is contradicted by the evidence that after taking his client's money, the Respondent had initially falsely stated that the sale agreement had gone through and thereafter that the promises of repayment (Exhibits 2 and 3) were only given after threats were made by the Complainant to make a complaint to the General Legal Council. The Complainant's evidence was accepted by the Respondent on 28th September 2013. We find that the Respondent was not being candid in his testimony to the Panel hearing his plea in mitigation.

32. We do not find that expression of remorse or the giving of promises to pay, after the Complainant had threatened to make complaint to the General Legal Council, make this matter exceptional so that striking off would be an order that is disproportionate or unjust. In fact the Respondent has failed to bring himself within that residual category where striking off would be a disproportionate sentence.

RESTITUTION AND COOPERATION

33. In the judgment delivered in the Court of Appeal (Misc Appeal 3/2013) Phillips JA stated at par 49 that the fact that the sums have been repaid would perhaps be a fact for the consideration of the Committee.

34. It should not be forgotten that the loss to the Complainant was not merely money, subsequently repaid, but the loss of the dwelling house which the Complainant had

intended to purchase for his family's accommodation and the consequences of this loss caused grave hardship to the Complainant who had to house some members of his family separately by virtue of this loss – thereby splitting up his family in different living quarters when they had to evacuate his rented abode. The fact that the Respondent has now made restitution in the full sum with costs as ordered on 28th September 2013 is commendable and is a matter that the Panel takes into account. However, as previously observed, restitution was made after an extended period of time after several promises of repayment had been breached and after the Complainant had lost the house that he had intended to purchase with the money that was misappropriated and the Complainant and his family had suffered hardship on being separated.

35. We note that in previous decisions of this Committee which have been affirmed by the Court of Appeal, the making of restitution did not justify a conclusion that the order of striking off was disproportionate or unjust: see Chandra Soares v General Legal Council (2013) JMCA Civ 8, Georgette Scott v General Legal Council CA 118/2008 Decision 30th July 2009. Indeed in those cases, restitution had been made before the hearing of the complaints and the complainants sought to discontinue the proceedings.

36. Having taken the fact of restitution into account and having given consideration to the circumstances which led to restitution, we find that the making of restitution does not bring this matter into the category of exceptional circumstances that renders the sanction of striking off unjust or disproportionate.

37. Again it was submitted that the Respondent was cooperative throughout the disciplinary proceedings and that at the hearing on September28, 2013 his then Counsel had advised the Panel that there was no dispute as to the facts and on 2nd October 2013 he complied with the order by making restitution inclusive of costs and ceased to practice. The approach adopted by the Respondent was commendable and has saved the Complainant further delay and anxiety. However, the misappropriation of the Complainant's money by the Respondent was the worst form of dishonesty; we find that the subsequent admission to the Panel followed by compliance with the order of the Panel does not justify a lesser order than striking off. Of note is the fact that Counsel for the Respondent termed the Respondent's dishonesty as "egregious" more than once – thereby agreeing with the Panel that his dishonesty was very serious.

CHARACTER EVIDENCE

38. Evidence of the Respondent's good character was given by a cadre of eminent persons including a retired judge of appeal who spoke to the Respondent's good character and trust worthiness and that the dishonesty which had occurred would in their view not be repeated if the Respondent were allowed to resume practice. However, apart from Edmund Gordon, we formed the impression that the other witnesses had had only occasional and limited interaction with the Respondent during his years of practice in the period 2006 to 2013.

39. Further, we note that Reverend Williams commenced his testimony by speaking from a prepared text held on his lap. He had to be told by the Panel that that was not allowed. More importantly, we noted from his testimony that the counselling sessions with the Respondent had occurred recently in 2014 prior to the mitigation hearing. It is reasonable

to infer that Respondent engaged in the counselling sessions in order to lead such evidence at the mitigation hearing, whereas we would have expected that such counselling would have been sought contemporaneously or shortly after the act of misappropriation if the Respondent had been genuinely moved by remorse and recognition of his need for guidance.

40. In any event, how are we to treat the evidence of good character given by the eminent witnesses. The Bar Sentencing Guidance states with regards to character evidence at par 7.1:

> "Barristers are entitled, as part of their mitigation, to put forward character references/witnesses to support their submission. However, while such evidence can be relevant to the sanctions imposed, it should be treated with caution and panels should be wary of becoming distracted from the main issues by an abundance of character evidence. The fact that a barrister was previously of 'good character' and has a good reputation, can only go so far in mitigating his/her behaviour and the more serious the breach, the less weight should be attached to character evidence. The emphasis should be on the nature of the breach and the circumstances in which the breach occurred."

We fully endorse and accept these statements.

41. Also with respect to character evidence and evidence of mitigation, Sir Thomas Bingham stated in Bolton (supra) at p519:

> "Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. 'Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

42. It is not unusual that an attorney will be able to tender a wealth of evidence of good character and testimonials from colleagues and acquaintances. What is compelling to the Panel is that the Respondent, a person of such reputed good character, having been one of the most senior officers in the Jamaica Constabulary Force steeped in the tradition of honesty and integrity, could stoop to the misappropriation his client's money and then fail to honour his subsequent written promises to repay same. The Panel finds that the testimony of good character is not such a mitigating factor that warrants a lesser sanction such as a reprimand or a suspension. It does not touch the essential issue which is the need to maintain among members of the public a well grounded confidence that any attorney they instruct will be a person of unquestionable integrity, probity and trustworthiness,

ADVERSE PUBLICITY

43. We accept the Complainant's evidence that the order of striking off was widely publicised and would have caused humiliation and embarrassment to him and his family. However, the Panel does not accept that such publicity made the Respondent a victim. The fact that the Respondent could advance such a ground by way of mitigation betrayed his failure to appreciate the gravity and consequences of his dishonesty. The striking off order would inevitably have been publicised, but in our view, the true reason for the widespread publicity was the shock caused to well thinking members of the society that the Respondent who had held such a trusted position in the security forces and who was now a member of a honourable profession also deserving of utmost trust, should so debase himself and his profession by misappropriating his client's money. We reject the submission that the publicity given to the order of striking off made on 28th September 2013 now justifies some lesser order or in any way mitigates the gravity of the Respondent's misconduct.

FINANCIAL RUINATION

44. We also accept that the result of the order striking off the Respondent resulted in severe financial challenges. However, as was observed in Bolton v The Law Society at 519 (supra), this is the invariable consequence of such an order and it cannot justify some lesser order where striking off is warranted. Although the consequences are unfortunate, the reputation of the profession is more important than the fortunes of the individual. All members who enjoy the privileges of the profession should therefore understand that that there is a price to be paid for dishonesty. The unfortunate consequences that arise from striking off do not warrant a conclusion that it is the wrong sanction for dishonesty in the present case.

CONCLUSION

45. By way of conclusion, the Panel reiterates that the striking off order which it proposes to make is not imposed with the intent of punishing the Respondent, but rather in order to protect the public and the reputation of the Profession. As we have so found in this decision, the misconduct committed by the Respondent was followed by subsequent dishonourable conduct such as his lies and dishonoured promises to repay the Complainant. The injury to the Complainant was not simply a monetary loss in that it resulted in the loss of the dwelling house that he intended to purchase for himself and his family in their desperate need for accommodation when they got notice to move. The

Respondent's misconduct amounted to extreme dishonesty and there are, in our view, no exceptional or extenuating circumstances warranting the imposition of a lesser sanction. Indeed, we go further that the imposition of a lesser sanction would be so shocking that it would damage the reputation of the legal profession in the eyes of right thinking persons and it would undermine the maintenance of high standards of behaviour and honesty by members of the legal profession. In the circumstances, having considered the evidence and submissions tendered for the Respondent by way of mitigation, we see no reason to deviate from the order that was made on September 28, 2013 and we hereby order that the name of Owen Kirkwood Clunie be struck off the Roll of Attorneys-at-Law entitled to practice in the several courts of the Island of Jamaica. Restitution having been made and the Complainant's costs having been paid, we make no order in that regard.

Dated 24th day of January 2015

Allan S. Wood, QC

Mrs Ursula Khan

Miss Lilieth Deacon