JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

MISCELLANEOUS APPEAL NO COA2019MS00010

BETWEEN	**DON O FOOTE**	**APPELLANT**
AND	**GENERAL LEGAL COUNCIL**	**RESPONDENT**

Abraham Dabdoub, Douglas Thompson and Able-Don Foote instructed by Douglas Thompson for the appellant

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

16 and 17 March and 5 November 2021

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of Edwards JA. I agree with her reasoning and conclusion, and there is nothing that I could usefully add.

EDWARDS JA

Introduction

[2] This is an appeal brought by Mr Don O Foote ('Mr Foote') against the decision and orders of the Disciplinary Committee of the General Legal Council ('the Committee') made on 20 July 2019 and 23 November 2019, respectively. The Committee found him guilty of professional misconduct and struck him from the roll of attorneys-at-law entitled to practice in the island of Jamaica. This decision was arrived at by the

Committee after hearing a complaint brought against Mr Foote by his client, Ms Janet Russell ('Ms Russell'). Having found Mr Foote guilty of professional misconduct, the Committee ordered that:

> "1. [Mr Foote] shall be struck from the roll of Attorneys entitled to practice in the several courts of Jamaica.
>
> 2. He will pay the sum of Two Million Three Hundred and Thirty Three Thousand Three Hundred and Thirty Three Dollars and Thirty Three Cents ($2,333,333.33) as restitution to the Complainant.
>
> 3. He will pay costs to the General Legal Council in the amount of One Hundred Thousand Dollars ($100,000.00)".

[3] I will now look briefly at the circumstances which led to that result.

Summary of the facts

[4] In 2006, Ms Russell filed, in the Supreme Court of Jamaica, a claim of negligence against the defendant, who was her former dentist. As the case meandered through the courts, Ms Russell, for various reasons, changed several attorneys in her quest for compensation from the defendant for the injuries she sustained. At some point, she settled on Mr Foote, a very senior lawyer licensed to practice in the courts of Jamaica. Ms Russell signed a contingency agreement with Mr Foote, in which she agreed that he was entitled to a one-third contingency fee of any settlement sum arrived at on her behalf, and that any expenses advanced on the case was to come from her two-thirds of the settlement. Eventually, Mr Foote successfully negotiated a settlement, on her behalf, with the attorneys–at-law representing the defendant. This settlement was for $23,000,000.00, being $21,000,000.00 in full settlement of the claim, and $2,000,000.00 for legal costs. This settlement obviated the need for a trial, and a notice of discontinuance was filed by Mr Foote on 19 July 2012.

[5] However, peculiarly, Mr Foote claimed that he gave Ms Russell two release and discharge documents to sign. In one of those documents, the settlement figure was stated to be $16,000,000.00, and in the other, the settlement figure was stated to be $23,000,000.00. Mr Foote alleged that Ms Russell had signed them both, on the same day, before the same Justice of the Peace. Ms Russell denied knowing anything about a $23,000,000.00 settlement prior to her complaint to the General Legal Council ('the GLC'), and denied signing any document headed 'release and discharge' with that figure or at all.

[6] According to Ms Russell, she did not know that a settlement had been reached until 30 November 2012, when she was given a letter by Mr Foote, outlining that a settlement had been arrived at in the sum of $16,000,000.00, and that her two-thirds of the settlement, after the contingency fee was extracted, amounted to approximately $10,666,666.70. That letter also enclosed a cheque in that amount, for which Ms Russell was to sign as received. She did so. Mr Foote, a few months thereafter, borrowed $7,000,000.00 of that sum from Ms Russell, which he agreed to repay over a period of six months, with interest. The loan was not repaid on time and Ms Russell claimed that it was Mr Foote's tardiness in keeping to the timeline for repayment of the loan, and his conduct towards her as a result, which initially aroused her suspicions as to the exact amount of the settlement he had received on her behalf. As a result, on 11 November 2013, she wrote to Mr Foote requesting a copy of the settlement agreement and a document that she had signed in his office in the presence of a Justice of the Peace. This was not forthcoming from Mr Foote, who responded by letter citing the confidentiality clause in the release and discharge document, which he claimed Ms Russell's spouse, Mr Salmon, had been shown.

[7] Ms Russell, thereafter, embarked on what can only be described as a fact-finding mission, which took her to the registry of the Supreme Court, sometime in November 2013. At the registry, she discovered that the settlement agreement had not been filed, it being an out of court settlement, but that the case had been discontinued from

19 July 2012. Since the letter attached to her settlement cheque from Mr Foote had indicated that the settlement was arrived at in November 2012, she was astute enough to recognise that the case would not have been discontinued in July before a settlement was reached in November.

[8] On 13 December 2013, Mr Foote provided Ms Russell with a copy of an undated release and discharge document for a settlement sum of $16,000,000.00, which contained a confidentiality clause that prohibited the terms of the settlement from being publicly disclosed. Ms Russell's suspicions were further aroused as, although she recognised her signature on the document, the first page did not look like the document she had signed in Mr Foote's office prior to the settlement. As a result of this, she requested that Mr Foote provide her with a copy of the settlement agreement and a statement of account, but again, this was not forthcoming. Instead of furnishing the document and a statement of account, as requested by Ms Russell, Mr Foote cited the confidentiality clause contained in the release and discharge document, which he told her prevented the disclosure of the settlement sum.

[9] Concerned about this discrepancy, as well as Mr Foote's behaviour towards her and his non-responses to her enquiries, Ms Russell set about doing further, and what I would describe as, detective work. One of the several steps she took was to seek the assistance of an attorney-at-law, whom I will refer to as 'CB', to get a copy of the original settlement agreement, as Mr Foote had adamantly refused to furnish her with it.

[10] Acting on Ms Russell's instructions, CB wrote twice to Mr Foote, first in January and then in February 2014, seeking clarity on the date of discontinuance, date of the settlement and the payment sum. He also requested a copy of the settlement agreement and a full accounting of all monies collected on Ms Russell's behalf, dates collected, withdrawals made and for what. This request was met with, what can be safely described as, a somewhat trenchant response from Mr Foote. He failed to provide

the documents requested or the accounting but instead sought to characterise Ms Russell as ungrateful and unconscionable.

[11] Not being deterred, and having previously written to the GLC seeking its intervention, Ms Russell filed a formal complaint to the GLC on 19 November 2014, against Mr Foote, supported by an affidavit and later, a supplemental affidavit. At a hearing of the matter before a panel of the Committee on 5 March 2016, Mr Foote was directed to provide a statement of account for the settlement sum he received on behalf of Ms Russell. In compliance with that order, Mr Foote, by way of letter dated 17 March 2016, sent Ms Russell a statement of account for the sum of $16,000,000.00.

[12] What happened next forms the gravamen of the case. Ms Russell's then attorney, CB, obtained and sent to her, by letter dated 22 April 2016, a copy of the release and discharge document, with her signature, which was sent to him by the defendant's attorney in the civil suit. That release and discharge document reflected a settlement sum of $23,000,000.00.

[13] Ms Russell's next move was to secure the services of another attorney-at-law from a firm, which I will refer to as 'GTS', to recover from Mr Foote, the remaining $7,000,000.00 from the $23,000,000.00 settlement. Mr Foote, having been written to by an attorney from GTS, responded with a letter, the contents of which I will expose later in this judgment. The result of it, however, is that Mr Foote, having claimed to have been entitled to the $7,000,000.00 as reimbursement for expenses and disbursements made on behalf of Ms Russell, eventually returned $5,322,172.50 to Ms Russell, through GTS.

[14] Mr Foote was brought before the GLC, by Ms Russell, to answer a complaint of breaches of the following Canons:

> 1. Canon VII(b)(ii) which states that "an attorney shall account to his client for all monies in the hands of the Attorney for the account or credit of the client, whenever reasonably required to do so"; and

2. Canon I(b) which states that "an attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member".

[15] Mr Foote filed an affidavit at the GLC in response to Ms Russell's initial affidavit. He also filed an affidavit of the Justice of the Peace, who he claimed had witnessed the execution, by Ms Russell, of two discharge and release documents. He did not file an affidavit in response to Ms Russell's further affidavit.

[16] The statement of account filed by Mr Foote, at the instance of the GLC, accounted for $16,000,000.00 only. No statements of account were ever filed in respect of the $23,000,000.00 or for the $7,000,000.00, which represented the difference between $16,000,000.00 and $23,000,000.00.

The hearing by the Committee and its findings

[17] The Committee heard evidence in this matter over several dates between 30 May 2018 and 19 March 2019. Ms Russell gave evidence on her own behalf and was cross-examined. Mr Foote chose to remain silent and refused to have his affidavit in response to the complaint tendered as his evidence in chief, if it meant he had to subject himself to cross-examination. In the result, Mr Foote gave no evidence on his own behalf and relied on the evidence of the Justice of the Peace in support of his case.

[18] There was also documentary evidence, consisting mostly of letters between Mr Foote and Ms Russell, as well as between Mr Foote and Ms Russell's attorneys, the contingency agreement, and the two discharge and release documents, all of which were examined by the Committee. At the end of the hearing, the Committee found that the complaint against Mr Foote had been made out beyond a reasonable doubt, and that he was guilty of failing to account when reasonably required to do so, as well as professional misconduct.

[19] In coming to its decision, the Committee gave a chronological history of the complaint and recounted the evidence given by both sides. Of the evidence of the Justice of the Peace, the Committee found significant the fact that:

a) the Justice of the Peace did not confirm that the two release and discharge documents before the Committee were the same ones he had witnessed and stamped; and

b) he was not in a position to explain the discrepancy brought on by the contents of the letters it had before it.

[20] The Committee made 20 major findings of fact, at page 18 of the decision, as follows:

> "1. The Complainant retained the Attorney by way of a contingency agreement with regard to a civil suit.
>
> 2. The suit was settled without a trial on its merits.
>
> 3. The suit was settled in the sum of Twenty Three [sic] Million Dollars of which Twenty One Million was for compensation and Two Million was for costs.
>
> 4. That by letter dated the 30th November 2012 the Attorney stated that the suit was settled for Sixteen Million Dollars.
>
> 5. That the Complainant was paid in accordance with the contingency agreement between the parties on a 2/3 to 1/3 basis.
>
> 6. That the suit was discontinued on the 19th July 2012 by the filing by the Attorney of a Notice of Discontinuance in the Supreme Court of Jamaica.
>
> 7. That this fact was never communicated by the Attorney to the Complainant and it was only by a visit to the Supreme Court Registry that the Complainant discovered this fact.

8. That up to December 2013 the Attorney had not disclosed to the Complainant any Release and Discharge document.

9. That up to and including the disclosure of the release and discharge document in December 2013 there was no document suggesting a settlement for a sum other than for Sixteen Million Dollars.

10. That upon his submission of a statement of account to the General Legal Council the Attorney was certifying that the relevant settlement figure was Sixteen Million Dollars.

12. That subsequent to the submission of the statement of account the Attorneys for the Defendant in the civil suit disclosed the release and discharge document which formed the basis of the settlement which was for Twenty Three [sic] Million Dollars.

13. That upon this disclosure being done the Complainant filed an additional affidavit with supporting documents which was served on the Attorney at a hearing.

14. That the Attorney contrary to law did not file an affidavit in response to this fresh affidavit.

15. That in the Attorneys [sic] letters to the attorneys [GTS] the Attorney claimed that he was entitled to the difference between the Sixteen Million and the Twenty Three [sic] Million of Seven Million Dollars.

16. That the Attorney never provided any statement of account with regard to the Seven Million Dollars to justify the basis of his entitlement.

17. That the Defence of the Attorney which relied on the acceptance by the Panel that the Complainant signed two separate release and discharge documents for different amounts with regard to the same settlement was patently false.

18. That the Complainant was not aware of the settlement of Twenty Three [sic] Million Dollars until it was disclosed to her by the Attorneys for the Defendant in the civil suit.

> 19. That the Attorney relied on the non-disclosure clause in the release and discharge settlement document to deliberately avoid disclosing the true settlement figure to the Complainant.
>
> 20. That the conduct of the Attorney was dishonest as he contrived a scheme calculated to deceive the Complainant with a view to fraudulently deprive the Complainant of the full benefit of her settlement."

[21] The Committee considered that Mr Foote, in a letter dated 26 May 2014, had stated that Ms Russell had been asked by him to sign only two documents pertaining to the settlement, that is, the contingency fee agreement and a release and discharge agreement, to bring the matter to a closure. This it found to be in direct contrast to what the Justice of the Peace was now saying, which was that he had witnessed two release and discharge documents being signed by Ms Russell. The Committee, therefore, found that there was a material discrepancy in Mr Foote's case.

[22] The Committee also took note of the fact that, in that said letter of 26 May 2014 to the GLC, Mr Foote maintained that there was no basis for the complaint, as Ms Russell had received her share of the settlement in accordance with the documents she had signed. It considered a letter dated 16 April 2016, written by Mr Foote to GTS, where he indicated that the $7,000,000.00 (the remaining balance from the settlement sum of $23,000,000.00) was "due to him as his costs, disbursements and expenditures, incurred at her request, as negotiated/claimed by him against the insured defendant".

[23] However, the Committee took account of letters dated 30 November 2012, sent to Ms Russell by Mr Foote, in which the payment representing two-thirds of the settlement figure of $16,000,000.00 was enclosed. In that letter, Mr Foote indicated that the only expense Ms Russell might have to reimburse him for was the fee to secure the doctor's attendance at trial, if that amount was not refunded by the doctor.

[24] The Committee acknowledged that the burden of proof rested on Ms Russell to the required high standard, that is, beyond a reasonable doubt. It recognised that

although Mr Foote did not himself give evidence, he did rely on documents to refute Ms Russell's assertions. It stated its understanding of Mr Foote's case, at page 9, as follows:

> "…[T]hat there was an agreement between himself and the Complainant for expenses to be incurred outside of the contingency fee agreement. These expenses would be repaid to him and would not form part of the settlement figure paid to the Complainant. Therefore of the Twenty Three [sic] Million Dollars the Seven Million Dollars difference with the Sixteen Million Dollars would be the figure, outside of the contingency fee agreement, which would cover his expenses and disbursements. **Further the existence of the confidentiality clause restricted his obligation to disclose the actual settlement figure**, for to do so, would cause the money to be refunded. Accordingly, since the misconduct complained of related to the accounting to the Complainant of money in his possession on her behalf, this had been satisfied by the statement of accounts rendered to the GLC in March of 2016. Further all of this must been [sic] seen in light of the Complainants instructions to him by letter of 12 March 2012 which ends by saying 'as such I will accept no less than Sixteen Million Jamaican dollars after legal fees and other legal expenses relating to this matter.' The Complainant had received her share of the Sixteen Million Dollars pursuant to the contingency agreement, hence, there was no more for her to get." (Emphasis added)

[25] The Committee described Mr Foote's reasoning as a fallacy, in the light of his defence that two release and discharge documents were signed by Ms Russell. The Committee considered that if the settlement sum was for $23,000,000.00, part of which would include expenses and disbursements outside of the contingency agreement, which would be repaid by Ms Russell, there would have been no need for a release and discharge for $16,000,000.00. In the absence of any oral evidence from Mr Foote on this issue, the Committee only had the evidence of Ms Russell to consider. The Committee also noted that up to the time of the filing of the statement of account with

the GLC, there was no accounting for the $23,000,000.00. Instead, the account spoke only to a settlement of $16,000,000.00. The Committee found, crucially, that "[t]he attorney conveyed the impression in all his letters to the complainant, the GLC and to CB that there was only a settlement for [$16,000,000.00], hence his accounting for only that amount in his submitted statement of account".

[26] In respect of an attorney's duty to account pursuant to Canon VII(b)(ii), the Committee found that since the payment of $23,000,000.00 in the release and discharge document was specifically made to Ms Russell, in the settlement of her suit, it "therefore compels [Mr Foote] to account for that amount of money". The Committee further found that it was "patently obvious that [Mr Foote] was not going to account for this sum as he all along relied on the sum of [$16,000,000.00] as the sum for which he was accountable". Crucially, too, the Committee found that Mr Foote used the non-disclosure clause to refuse to disclose the actual amount of the settlement for dishonest purposes. It found that the non-disclosure clause was for the claimant's benefit and not the attorney's, and that the defendant's attorney in Ms Russell's suit had no reluctance in disclosing the said release and discharge to her attorney, CB.

[27] Also of significance is the Committee's finding that the contents of the letter dated 30 November 2012, sent by Mr Foote to Ms Russell, in so far as it conveyed the impression that the matter was just settled as at that date, was deliberately misleading and was calculated to deceive Ms Russell. This was so because Mr Foote had filed the notice of discontinuance on 19 July 2012 and the release and discharge referred to a discontinuance to be filed after the settlement sum was paid. The settlement sum was paid to Mr Foote in July of 2012. Therefore, the notice of discontinuance filed 19 July 2012 was after the settlement sum was paid. However, the Committee noted that Mr Foote's letter of 30 November 2012 to Ms Russell indicated that he had given an ultimatum to the defendant's attorneys to settle the matter before 30 November 2012. The Committee found that when Mr Foote wrote this letter, the suit had already been

discontinued for four months. It was largely on that basis, it found that the letter was calculated to deceive Ms Russell.

[28] The Committee bemoaned the paucity of any evidential challenge to Ms Russell's evidence from Mr Foote, but determined, however, that it still had to go back to Ms Russell's evidence, to ensure that her evidence "met the burden and standard of proof". It found that Ms Russell's evidence was consistent, with few if any contradictions or discrepancies. It said that based on the state of the evidence, it could only conclude that Mr Foote was guilty of professional misconduct. The Committee found, therefore, that a breach of both Canons outlined in the complaint had been made out to the requisite standard, and that consequently, the appellant was guilty and subject to the sanction it imposed.

Notice and grounds of appeal

[29] Mr Foote filed a notice and grounds of appeal on 12 December 2019 challenging the findings and decision of the Committee. The 12 grounds of appeal itemized therein covered issues dealing with the jurisdiction of the Committee (ground 1); deprivation of a fair hearing and failure to uphold the no case submission (grounds 2 and 10); unreasonable rejection of the evidence of his witness (grounds 3, 6 and 7); insufficient evidence and unsafe verdict (grounds 8, 9 and 11); failure to take account of the complainant's conduct, character and mental instability (grounds 4 and 5); and that the sanction is manifestly excessive (ground 12).

The role of this court in matters of this nature

[30] The power of this court to hear and determine appeals from the decisions of the Committee is set out in sections 16 and 17 of the Legal Profession Act ('LPA'). Those sections provide that the appeal to the Court of Appeal is by way of a rehearing, and this court may dismiss the appeal and confirm or vary the orders of the Committee, or, it may allow the appeal and set aside the orders, or order a re-hearing by the

Committee. Rule 1.16(1) of the Court of Appeal Rules also states that an appeal to this court shall be by way of a rehearing.

[31] Another consideration of equal importance concerns the approach of appellate courts to appeals from a disciplinary committee composed of experienced members of the profession. In the case of **Re: A Solicitor** [1974] 3 All ER 853, at pages 859 to 860, it was put thus by Lord Widgery CJ:

> "It has been laid down over and over again that the decision as to what is professional misconduct is primarily a matter for the profession expressed through its own channels, including the disciplinary committee. I do not, therefore, for one moment question that if a properly constituted disciplinary committee says that this is the standard now required of solicitors that this court ought to accept that that is so and not endeavour to substitute any views of its own on the subject."

[32] Notwithstanding the fact that this appeal is a rehearing, absent any error of law or misapplication of the facts by the Committee, showing it to be plainly wrong or that it acted irrationally or that there are other extenuating circumstances shown to cause this court to interfere, it will be slow to substitute its views for that of the Committee on the whole matter. I will, therefore, deal with the issues raised in the grounds, accordingly. Counsel on both sides cited cases in support of their submissions. Although all cases were examined, I will only refer to those which proved relevant and useful to what this court has to decide.

Whether the Committee acted outside of and/or contrary to statute thereby depriving itself of jurisdiction and rendering the proceedings a nullity - ground 1

[33] Counsel for Mr Foote, Mr Dabdoub, argued that disciplinary hearings before the Committee are mandated to be heard in camera, based on the Legal Profession (Disciplinary Proceedings) Rules (hereinafter referred to as 'the Rules') contained in the Fourth Schedule to the LPA. Rule 14 of the Rules provides that "[the] Committee shall hear all applications in private, but shall pronounce their findings and orders in public".

He submitted that by virtue of section 14 of the LPA, which refers to the rules in the Fourth Schedule as being those in force, rule 14 has the legal effect of statute. He submitted that the presence of Mr Clifton Salmon, Ms Russell's spouse, at the hearing, contravened rule 14 and deprived the Committee of jurisdiction, thus rendering the entire hearing unfair, null and void. Counsel argued that the Committee is an inferior tribunal with no "inherent form" and, therefore, must conform to the statute from which it derives jurisdiction.

[34] Counsel also argued that the fact that Ms Russell had indicated that Mr Salmon was a witness meant that he should not have been allowed to remain in the hearing throughout her evidence. Furthermore, counsel complained, Mr Salmon interfered with Ms Russell's evidence by prompting and coaching her.

[35] Counsel argued further that despite the fact that Mr Foote did not object to Mr Salmon's presence, and that Mr Foote's spouse was also present, it was the Committee's duty to ensure that the proceedings were held in private, as required by the Rules. This failure, counsel maintained, rendered the proceedings a nullity. He relied on **R v Monica Stewart** (1971) 12 JLR 465 at page 468, and **Barrington Earl Frankson v The General Legal Council (ex parte Basil Whitter at the instance of Monica Whitter)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 52/99, judgment delivered 2 March 2004, at page 15.

[36] Counsel submitted that "[o]nce proceedings are instituted contrary to provisions of the Act, then the order of the Tribunal must be null and void". Counsel maintained that this issue goes to the jurisdiction of the Committee to hear and determine the complaint, and that its lack of jurisdiction cannot be waived. He submitted that parties cannot consent to a jurisdiction which does not exist. For this purpose, he relied on **Strachan v The Gleaner Co Ltd and another** [2005] UKPC 33.

[37] Ms Minott-Phillips QC, however, submitted, on behalf of the GLC, that the case of **Monica Stewart** is not applicable to this case. Queen's Counsel noted that the court in

that case expressly made the distinction between jurisdiction going to process and jurisdiction going to the power of the court to hear and determine a matter. She argued that the relevant provision relied on in **Monica Stewart**, which was section 272 of the then Judicature (Resident Magistrates) Act (now Judicature (Parish Courts) Act) was not a rule of procedure, but rather a precondition that went to the power of the court to hear and determine the matter. Rule 14 of the Rules, she stated, is a rule of procedure going to process, and that no defect in the process, even if it existed, could render the proceedings a nullity. Mrs Minott-Phillips pointed to the fact that both parties had their spouses present at the hearing and that Mr Foote expressly stated that he did not object to Mr Salmon's presence, so that even if his presence was a breach, that breach would have been cured by Mr Foote's express acquiescence. Counsel also contended that Mr Foote's reliance on the case of **Barrington Earl Frankson** was misplaced, as the Court of Appeal's ruling on that point had been overturned by the Privy Council.

[38] Mr Foote's complaint in this ground is without merit. I agree with Mrs Minott-Phillips that there is a distinction between jurisdiction going to process and jurisdiction affecting the power of the tribunal to adjudicate on a matter. The case of **Monica Stewart** is an example of the latter. In that case, the court found that the requirements in section 272 of the Judicature (Resident Magistrates) Act for the Resident Magistrate, to make an order for indictment endorsed on the information before commencing a trial on indictment, was a condition precedent with which the Resident Magistrate had to comply before assuming jurisdiction to try the matter (see page 6). That was a requirement which went to the heart of the jurisdiction of the court to hear and determine the matter, and failure to fulfil that condition rendered any such trial on indictment a nullity.

[39] I also agree with Mrs Minott-Phillips that Mr Foote's reliance on the Court of Appeal's decision in **Barrington Earl Frankson** is also misplaced. That decision dealt with the construction of section 12 of the LPA as to whether an aggrieved person could bring a complaint to the GLC against an attorney-at-law by way of an authorised agent

applying on his behalf. It, therefore, dealt with the question of *locus standi* to institute proceedings at the GLC. The Court of Appeal determined, at page 15 of that judgment, that once proceedings were instituted contrary to the provisions of the LPA, then the orders of the tribunal were null and void. It found, therefore, that the *locus standi* of the complainant went directly to the jurisdiction of the tribunal to hear the complaint.

[40] The case of **Barrington Earl Frankson** went on appeal to the Privy Council (reported as **General Legal Council Ex p Whitter v Frankson** at [2006] UKPC 42). In that decision, the Privy Council overruled the decision of the majority of the Court of Appeal and decided that their interpretation of section 12 of the LPA was too narrow, and that the application to the GLC, made by the son of the complainant, acting under a power of attorney, was properly made. The case was remitted to the Court of Appeal to be heard on its merits.

[41] **Strachan v The Gleaner Co Ltd** was an appeal against the order of a judge of the Supreme Court, refusing to set aside, as a nullity, the order of a judge of co-ordinate jurisdiction. This court, by majority, was hesitant to accept the argument that the order of Walker J to set aside a default judgment made after damages had already been assessed, was bad for want of jurisdiction, and therefore a nullity. However, this court found, that even if Walker J had no jurisdiction, Smith J, a judge of co-ordinate jurisdiction, could not properly set aside his order. The issue went on appeal to the Privy Council, which was asked to consider two questions. The first was whether Walker J had the jurisdiction to set aside the default judgment after damages had been assessed, and the second was, if he did not, whether Smith J could properly set aside his order.

[42] The Privy Council decided that Walker J had the jurisdiction to make the order setting aside the default judgment for damages to be assessed, even after damages were awarded on final judgment. Although the Board said that it was not strictly necessary to go on to the second question, it determined that the question whether Smith J had the jurisdiction to set aside Walker J's judgment was an important question

in the light of the confusion caused by the terminologies "irregularities" and "nullities". The Board pointed out that the terms are generally used to distinguish between defects in procedure, which can be waived by the parties and corrected by the court, and those which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside, *ex debito justitiae.* The latter are defects which go to jurisdiction and cannot be waived or consented to.

[43] In **Powell v Spence (Jamaica)** [2021] UKPC 5, the Privy Council was asked to determine whether the commencement of forfeiture proceedings in the Resident Magistrates' Court by way of notice of application was valid, where the law required it to be commenced by plaint. The Board determined that it was. It found that the requirement for forfeiture proceedings to begin by plaint was a procedural requirement, and that the notice filed, contained all the information that the plaint required pursuant to statute (with the exception of the plaint number). As a result, the notice operated to properly commence the proceedings, and, in so far as it was required to amend the notice to bring it in line with the requisite procedural requirements, there was power in the court to amend under section 190 of the Judicature (Resident Magistrates) Act.

[44] It is clear, therefore, that not all breaches of procedural requirements will result in the action being invalidated, unless it is a defect which goes to jurisdiction. In this case, apart from the fact that the appellant agreed to have Ms Russell's spouse, as well as his own spouse, present, and raised no objection to their presence, it is highly debatable whether the presence of a spouse at a private hearing, renders that hearing public. In any event, it would be, at most, an irregularity and not a nullity.

[45] Rule 14 of the Rules indicates the process by which the hearing is to be held, which is in private. This is a rule of procedure purely for the benefit of the parties involved, and therefore, can be waived by the parties with the permission of the Committee. The requirement that proceedings are to be held in private is not a condition precedent to the assumption of jurisdiction by the Committee, and the presence of both spouses would have been an irregularity, at most, which was

acquiesced in and thereby waived by Mr Foote. Both parties who had the primary interest in the proceedings, desired that the hearing be held in the presence of their spouses. There is, therefore, no basis for Mr Foote's complaint that the Committee lacked jurisdiction.

[46] Separate and apart from the issue of jurisdiction, Mr Dabdoub contended that Mr Foote did not get a fair trial as a result of the conduct of Mr Salmon at the hearing. Counsel pointed to the fact that Mr Salmon had been observed speaking to Ms Russell whilst she gave evidence and had been seen "'coaching her". In fact, the transcript of the notes of proceedings of 22 November 2018 indicates that at one point a member of the Committee admonished Mr Salmon that he "cannot actually coach the witness, you cannot tell her what to say or what not to say". However, this was after Ms Russell had been asked a seemingly innocuous question as to whether she believed in God. The transcript also reflects that on 13 February 2019, Mr Foote raised the issue of Mr Salmon "glancing and touching", presumably Ms Russell, whilst she was in the witness box". The transcript of the proceedings showed that Mr Foote also observed that Ms Russell and Mr Salmon were "going out there talking and coming back in". In fact, the Committee had to admonish Mr Salmon that he was "here primarily as an observer" and that Ms Russell was "actually, literally in a witness box". Apart from these recorded observations, Mr Foote raised no objection to the continued presence of Mr Salmon.

[47] Relying on the case of **R v Momodou and Limani** [2005] 2 Cr App R 6, from the Court of Appeal of England and Wales, Mr Dabdoub argued that, as a result of the conduct of Mr Salmon in coaching Ms Russell, Mr Foote did not get a fair trial. In **Momodou**, it was said that the training or coaching of witnesses in criminal proceedings is not permitted. Witnesses, the court said, should be allowed to give their evidence uninfluenced by what anyone else has said, whether formally or informally. The court also pointed to the dangers inherent in such training or coaching. On the facts of that case, although there was organized witness training, the court found that,

in the circumstances, and looking at the evidence overall, the arrangements for training for the two witnesses did not undermine the safety of the conviction.

[48] In this case, it seems to me that there is some valid basis for Mr Foote's complaint in this regard. The behaviour of Mr Salmon, while Ms Russell was giving evidence, was utterly unacceptable and the Committee ought to have taken steps to prevent it in the interest of fairness, either by removing him from the hearing or by some other means. Nevertheless, the conduct of Mr Salmon was in the face of the Committee. It was in a position to see and hear the extent of any coaching or interference by Mr Salmon and to determine whether his conduct affected the independence and credibility of Ms Russell's evidence. That being said, however, there is no evidence in the record of the proceedings before the Committee, that Mr Salmon's conduct was so disruptive or obstructive, or that he so coached and interfered with Ms Russell while she gave evidence, so as to result in any unfairness to Mr Foote in meeting the charge brought against him.

[49] Furthermore, Ms Russell's evidence was contained in her affidavits filed before the Committee and to the extent that it veered from her oral evidence, there was ample scope to cross examine her and to suggest she was coached to say these things. Looking at the matter in the round, it cannot be fairly said that Mr Salmon's conduct undermined the safety of the Committee's decision. Mr Foote has not demonstrated, in these circumstances, that he suffered any unfairness as a result of the presence and conduct of Mr Salmon.

[50] There was also a complaint that Ms Russell had indicated from early that Mr Salmon was to be a witness in respect of certain events. Mr Dabdoub submitted that, as a witness, Mr Salmon ought not to have been allowed to remain. Mr Salmon, however, did not give evidence at the hearing, and it is clear from the context within which Ms Russell referred to him as her witness, that she meant that he was a witness to a certain event, to wit, the loan to Mr Foote, and not that he was going to be called as a witness at the hearing. He gave no affidavit to the GLC, and furthermore, the loan

to Mr Foote, though it was somewhat alluded to in the narrative of the case, did not form the subject matter of any complaint against Mr Foote before the GLC.

[51] Ground 1 would, necessarily, fail.

Whether the appellant did not receive a fair hearing by an independent and impartial tribunal and whether the panel erred in failing to uphold the submission of no case to answer - grounds 2 and 10

[52] Mr Dabdoub raised several issues relating to the impartiality and independence of the Committee, all of which, he said, resulted in Mr Foote not being afforded a fair hearing. Counsel anchored his submissions on these grounds on substantially four different factors, which were: bias and/or partiality, prejudgment, descent into the arena, and the Committee's treatment of the no case submission. I will deal with each in turn. Before I do so, I should also point out that the Committee, in its decision, dealt with some of the issues which had been raised in submissions at the hearing. The Committee disagreed, for reasons which it gave, that it had prejudged the issue with regard to Ms Russell's knowledge of the settlement figure of $23,000,000.00. On the question of whether it had descended into the arena and had acted as judge and prosecutor by leading the examination in chief of the complainant, the Committee determined that it could not be a judge in its own cause, and that the issue had to be determined by "another judicial body". On the question of bias, it considered the principles and concluded similarly that it could not "proffer an opinion", since as the decision maker, it was not well placed "to assess the influence of something which may have operated on the mind subconsciously".

[53] I will begin with the issue of bias and/or partiality.

(i) <u>Bias and/ or partiality</u>

[54] Mr Dabdoub argued before this court, that the chairman of the Committee had a personal bias and ought to have recused himself. The basis of this complaint arose in this way. At the start of the hearing, on 30 May 2018, the chairman recognized Mr Salmon as the litigant in a case in the Saint James Parish Court, in Montego Bay, in

which he appeared as counsel for the opposing party. In that matter, the chairman had applied to set aside a default judgment which had been secured by Mr Salmon, and the case had been set for trial. The chairman asked Ms Russell and Mr Salmon, whether in the light of his involvement in that case, they were prepared to have him hear the matter. They both said they had no objection. The chairman did not ask Mr Foote whether he had any objection and Mr Foote indicated none on his own motion.

[55] The allegation of bias first raised its head in the proceedings, on the same day, after Mr Foote's attorney withdrew, having been denied an adjournment. Mr Foote then asked for an adjournment to get new counsel, which was refused. The Committee was of the view that, based on the age of the matter (four years), it should proceed with the evidence-in-chief of Ms Russell and defer cross-examination. It was suggested that Mr Foote apply to seek new counsel after the evidence-in-chief was taken. At that stage, Mr Foote indicated that he wished to raise a preliminary point. He then asked the chairman to recuse himself on account of bias. An enquiry was made by the panel as to whom the bias was against. The response from Mr Foote was that the chairman would be biased. The Committee made no further response to this issue of bias, nor was a ruling made by the Committee at the time the accusation was made. The record simply reflects that the panel stated: "let the record shows [sic] that we are commencing the matter". The complainant was then called upon to give evidence.

[56] Before this court, counsel for Mr Foote argued that the failure of the chairman to make the same enquiry of Mr Foote, which he had made of Ms Russell and Mr Salmon, amounted to a "grave departure from fairness" and that the chairman was tainted by bias. Counsel submitted that apart from the issue of apparent bias raised by the chairman himself, "the tribunal ought to have been balanced, so as to emit [equality], in keeping with the age old principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done". Counsel argued that it was clear that Mr Foote was deprived of a fair hearing as the rule applicable to one party was not afforded to him, and that the chairman clearly had a conflict of interest.

[57] Counsel pointed to the fact that the chairman was asked to recuse himself but failed to do so, giving no reasons. He also questioned the Committee's conclusion, in its judgment, that the question of its own apparent bias was not a consideration for it.

[58] Mrs Minott-Phillips pointed to the fact that Mr Salmon was merely an observer in the case and was not a party to the proceedings. She submitted that no issue of actual or apparent bias was derived from his presence. Consequently, Queen's Counsel argued, the failure of the chairman to ask Mr Foote if he objected to the chairman's inclusion on the Committee, on account of his appearance as counsel in an unrelated matter, against a person not a party to the proceedings, did not constitute a defect in the proceedings which would render it unfair.

[59] In addressing the issue of bias, the Committee, in its decision, considered various authorities including **Porter and another v Magill** [2002] 1 All ER 465, which it referred to as the "modern law of apparent bias", and **Georgette Scott v The General Legal Council** (**ex parte Errol Cunningham**) (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, judgment delivered 30 July 2009, and concluded at page 18, that:

> "From the reading of these cases it becomes clear that whenever assertions of bias are being made it is necessary to show by analytic assessment, not on general impression or presumption, that there is a personal interest in the decision maker and the decision is likely to be, or has been tainted because of it. For the reasons expounded above the issue of the determination of the Panel being biased is not one upon which the Panel can proffer any opinion because as stated above '<u>and the judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously</u>.'" (Emphasis as in original)

[60] It is clear that the Committee did not consider it proper to rule on the issue of bias, whether actual or apparent. However, the challenge made in this case is to apparent bias and there is no allegation of actual bias.

[61] It is a well-established principle that no man should be a judge in his own cause (see **Regina v Gough** [1993] AC 646) and that any decision-making process must be fair. The decision maker will be presumed to have acted fairly and impartially and the burden of proof rests on any person alleging unfairness or partiality on the part of the decision maker. In determining whether there was unfairness, the proceedings must be considered as a whole (see this court's ruling in **Barrington Earl Frankson v The General Legal Council (ex parte Basil Whitter at the instance of Monica Whitter)** [2012] JMCA Civ 52, at para [70], citing **Meerabux v The Attorney of Belize** [2005] UKPC 12).

[62] The test of bias applicable to this jurisdiction was confirmed by the Privy Council in **Linton Berry v Director of Public Prosecutions and Another** (1996) 50 WIR 381 at 385, to be that propounded in **Regina v Gough**. In **Regina v Gough**, at page 670, Lord Goff of Chieveley stated the test in terms of the real danger of bias rather than the likelihood of bias. He expressed it as follows:

> "Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him…".

[63] The test in **Regina v Gough** was approved and modestly modified by the House of Lords in **Porter v Magill**, to bring it in line, they said, with that which is applied in some Commonwealth jurisdictions and Scotland, in the light of the criticisms of "the real danger" and "reasonable likelihood" tests (see the judgment of Lord Hope of Craighead, beginning at 494, with which the other Lords agreed). In that case, the test was said to be "whether the fair-minded and informed observer, having considered the facts, would

conclude that there was a real possibility that the tribunal was biased" (see page 507). The Privy Council in **Meerabux** expressly approved and applied this test, which it considered to be now settled (see paragraphs 22 and 25). This objective test was approved and applied by this court in **Barrington Earl Frankson** (the 2012 decision).

[64] It is not necessary for actual bias to be established. It is sufficient that the alleger shows that there were existing circumstances which would cause a fair-minded and reasonable person to doubt that justice was impartially done in the matter. This was the principle applied by the Full Court in **Norma Von Cork v the Director of Public Prosecutions and the Attorney General** (unreported), Supreme Court, Jamaica, Suit No M106/1998, judgment delivered 1 December 1998, at page 20, relying on **R v Gough**. It is possible to have conscious or unconscious bias, as was recognised by this court in **Wilmot Perkins v Noel B Irving** (1997) 34 JLR 396 at page 402G.

[65] The litmus test is objectively that of the informed and fair-minded observer armed with knowledge of all the circumstances. Would such a person consider that there was a real possibility of bias on the part of a member of the tribunal, in the circumstances known to him? Naturally those circumstances must show reasonable evidence of bias or a possibility of bias.

[66] Mr Foote's complaint of bias arose seemingly from two issues. The first being that the chairman of the Committee was involved in a case where Ms Russell's spouse, Mr Salmon, was the litigant on the other side, and the second being the fact that Ms Russell's and Mr Salmon's views were sought on the matter but not Mr Foote's. In my view, for reasons which I will give, neither complaint has any merit.

[67] A fair-minded observer would consider that the Committee was made up of professional persons, all attorneys-at-law, and that the appellant is also an attorney-at-law. A fair-minded observer would also consider that the chairman of the panel who was hearing the complaint against the appellant, acted as an attorney for the opposing party in a matter involving the spouse of the complainant who is now before the

Committee. Would a fair-minded and informed observer, with knowledge of those facts, conclude that there was a real possibility that the chairman was or would be biased? I am inclined to think not. The fair minded and informed observer would see that there was no link between the complaint and the case involving Mr Salmon, nor was Mr Salmon directly involved in the complaint before the Committee.

[68] In **Barrington Earl Frankson** (2012), this court dealt with the question of whether there was apparent bias because one member of the Committee had been represented by another in an unrelated matrimonial cause. In considering that question, this court relied on the case of **Locabail (UK) Ltd v Bayfield Properties Ltd and another** [2000] QB 451 at page 480, for the general proposition that a previous solicitor client relationship would not give rise to an automatic disqualification in certain circumstances, including where the solicitor or advocate is involved in the case being adjudicated on. In **Locabail**, the court said it could not conceive of any circumstance in which an objection could be taken on the basis of "previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him". This court concluded, in **Barrington Earl Frankson** (2012), that it had not been shown that the two members had any direct or indirect interest in the outcome of the hearing and there was no link between the proceedings in which the member was retained by the other and the complaint. **Locabail** was considered with approval in **Porter v Magill**.

[69] In the instant case, there was no evidence that the chairman had any interest in the outcome of the case. It could not be said that he was acting as a judge in his own cause, nor could it be fairly said that his conduct could raise any suspicion of bias. Therefore, I would conclude that no fair-minded and informed observer, being fully aware of the facts, would say there was a real possibility the chairman was tainted by bias.

[70] As regards the second basis for Mr Foote's complaint, counsel maintained that the failure by the chairman to enquire of Mr Foote whether he had an issue with him

adjudicating on the matter, in the same way he had asked the other two persons, led to unfairness to Mr Foote, especially since the issue of possible bias was raised by the chairman himself.

[71] It is true that the chairman did not make the same enquiry of Mr Foote. In the interest of equal treatment, it may very well be viewed as an error on his part. It may also well be that he thought he knew the answer, bearing in mind the case in St James, in which Mr Salmon was a litigant, did not involve Mr Foote or Ms Russell. On 30 May 2018, Mr Foote and his then counsel, Mr Williams, were both present before the Committee. After the chairman made the enquiry of Ms Russell and Mr Salmon, the transcript records Mr Williams' only comment to be, "yes". Mr Williams then went on to apply for an adjournment. It seems to me, that even in the absence of a direct question from the chairman posed to Mr Foote, both he and his counsel had the opportunity to indicate an objection if they had one.

[72] The failure to apply equal treatment to Mr Foote by enquiring if he too had any objection did create the risk of a complaint from Mr Foote. However, what is decisive is whether the complaint by Mr Foote is objectively justified (see **Hauschildt v Denmark** (1989) 12 EHRR 266 cited in **Porter v Magill** at page 506). Furthermore, even though an enquiry was not made of him directly, the enquiry of Ms Russell and her spouse was made in his presence, and he could have indicated an objection there and then, which the panel would have had to consider. He did not do so. This is not a novel view to take of the matter, and a similar approach was taken by Justice Maurice Kay in **The Queen v The Secretary of State for the Home Department** [2000] WL 461 (cited by counsel for Mr Foote), in considering the issue of the failure to invite the Kingdom of Belgium to make representations regarding the disclosure of the medical report of senator Pinochet in extradition proceedings. In that case, the court held that Belgium knew the request for representation was being made of others, and the deadline to do so, and had the opportunity to make such representation, even though it was not

expressly invited to do so. If it had so done, the Secretary of State would have been bound to consider them.

[73] In this case, the chairman's failure to make the same enquiry of Mr Foote must be viewed in the context of the circumstances of his marginal encounter with Mr Salmon, which had nothing to do with Mr Foote. The question at this stage, is what the fair-minded and informed observer would have thought, and whether he would have concluded that there was a real possibility of bias. Although the chairman failed to act equally in making the enquiry, there was nothing in this failure which indicated a real possibility of bias. Objectively speaking, therefore, it has not been demonstrated, in these circumstances, that there was a real possibility of bias or that the chairman failed to act impartially.

[74] This complaint is without merit.

(ii) Prejudgment before the hearing

[75] Mr Dabdoub argued that the chairman expressed belief in Ms Russell's case before any evidence had been heard by the Committee. He complained that the statement made by the chairman that the settlement figure of $23,000,000.00 and the release and discharge were unknown to Ms Russell, was made before any evidence had been heard, and showed that the Committee had made up its mind on the critical issue in contention before hearing any evidence from the parties.

[76] To illustrate his submission, counsel pointed to a portion of the transcript of the notes of the proceedings of 30 May 2018, at page 2, showing discourse between the Committee and then counsel for Mr Foote as follows:

> "Williams: I am aware of the settlement figure it is not a secret.
>
> Panel: It might not be a secret, but it is a secret to Ms. Russell."

[77] Counsel also pointed to the fact that the Committee later denied the accuracy of its own record, at page 3 of the transcript of 19 March 2019, as follows:

> "Thompson: You are saying what I have read is not what was said?
>
> Panel: Right, and similarly, the part about it being a secret to Miss Russell is inaccurate as well."

[78] Before this court, Mr Dabdoub contended that the response by the chairman and the attempt to deny the accuracy of the record, showed that there had been prior improper communication out of court, since this was not in the complaint and no evidence had yet been led. Counsel asked the rhetorical question, "how else would the Chairman know this?" This, he said, would lead a reasonable person to conclude that there had been prior communication.

[79] Counsel further argued that the transcript of 14 February 2019, at page 24, showed that the Committee had displayed a belief in Ms Russell's case before the case for the defence had been heard. Those notes read as follows:

> "Thompson: The seven arose as a result of the Release and Discharge for $23 million…
>
> Panel: Up to the time of the complaint, that Release and Discharge was never known of, by the complainant.
>
> Thompson: With respect sir, that is what the complainant is saying, that is not what Mr. Foote is saying. Mr. Foote is saying both documents, both for the $23 Million and the $7 Million, were known of at the same time…"

[80] Mrs Minott-Phillips submitted that this complaint was much ado about nothing, as the Committee would have had the complaint and the affidavit in support of the application before them, as well as a supplemental affidavit by the complainant filed 15 November 2017, almost a year prior to the hearing in May 2018. Having read these documents, she said, the Committee would have known what Ms Russell's complaint was, and that she was saying she did not know of the $23,000,000.00. Paragraph 17 of

the latter affidavit, she contended, would have formed the basis for the Committee to say that Ms Russell was saying she did not know of that amount.

[81] Counsel maintained that the transcript does not support the claim of prejudgment alleged by the appellant, but, instead, supports the findings of fact made by the Committee. Counsel argued that the facts, in this case, constitute the clearest case of an attorney failing to account to his client on reasonably being required to do so.

[82] At first blush, the impugned statements made by the Committee on the 30 May 2018 would be a matter of concern. This is largely because it could convey, and in light of Mr Foote's complaint, did convey to him, that on these matters it accepted Ms Russell's case as true, before hearing all the evidence. However, the statement complained of has to be viewed in the context of the broader discussion between the Committee and Mr Williams, who then appeared for Mr Foote. Just before the impugned statement, at page 2, it ran thus:

> "Panel: There was a further Affidavit of Ms. Russell which Mr. Foote should have replied to which he did not but considering the central issue in the matter, you may really wish to advise your client.
>
> Williams: What is the date of the Affidavit?
>
> Panel: 15th November, 2017 more than six month [sic] ago.
>
> Williams: From my recollection, I cannot recall seeing this Affidavit.
>
> Panel: On the 3rd February, 2018 when Mr Foote was here it was served on Mr. Foote so you might want to as the Affidavit says the settlement was for $23 million and Mr. Foote was paying $16 million.
>
> Williams: I am aware of the settlement figure it is not a secret.
>
> Panel: It might not be a secret, but it is a secret to Ms Russell."

[83] Section 12(1) of the LPA, which deals with complaints to the Committee, states that anyone who alleges a grievance caused by an act of professional misconduct committed by an attorney may apply to the Committee to have that attorney answer the allegations contained in an affidavit. That application is then heard by the Committee in accordance with the rules set out in section 14 (section 12(3)).

[84] The complaint by Mr Foote, in my view, weakens in the face of the clear context within which the statement was made by the Committee. It clearly was in regard to the content of the affidavit filed by Ms Russell on 15 November 2017. The evidence which was contained in that affidavit, remained unanswered and, therefore, unchallenged by Mr Foote himself. This is what was being pointed out by the Committee on 30 May 2018. The statement made by the Committee, of which Mr Foote complains, has to be viewed in that light.

[85] I do not agree with Mr Dabdoub, therefore, that Mr Foote did not receive a fair trial as a result of the statement by the Committee made on 30 May 2018. Furthermore, the assertion that the statement is evidence that there was improper communication is unsustainable.

[86] With regard to the statements made by the Committee on 14 February 2019, these too have to be considered in the context within which they were made. The impugned words were said during the no case submission, which was being made by then counsel for Mr Foote, Mr Thompson. Mr Thompson, in his submissions, having separated the $23,000,000.00 settlement figure into sums of $16,000,000.00 and $7,000,000.00, submitted to the panel that the $16,000,000.00 had been accounted for, and that the remaining question before the Committee was whether the balance of $7,000,000.00 had also been accounted for. Mr Thompson's contention was that there had also been an accounting of the $7,000,000.00. A question was asked by the Committee as to how the issue of the $7,000,000.00 arose in the first instance, based

on the evidence. It is necessary to outline in full what took place after that question was asked. At pages 23 to 24 of the transcript, it was said:

> "Thompson: Based on the evidence… Well, I confess that I do not have that set of evidence which speaks to how the $7 million arose. Possibly, if there is some note that…
>
> "Panel: Mr. Thompson, if you look at the complaint, it was filed in November 2014 and the $7 million settlement of which you speak is in 2016.
>
> Thompson: Yes, and understandably so, and this would have been…
>
> Panel: And up to the time of the filing of the complaint, there was no idea about the $7 million.
>
> Thompson: No. With respect, no sir.
>
> Panel: Yes.
>
> Thompson: Because at the time of the filing of this complaint, my understanding is, at the time of the filing of the complaint, Miss…
>
> Panel: She was still asking for certain documents that she had not yet received.
>
> Thompson: At the time of the filing of the complaint she had already received what was due to her in relation to the $16 million.
>
> Panel: Right, but, she had not yet been given a Statement of Account, up to the time of filing this complaint.
>
> Thompson: A Statement of Account in relation to the $16 million dollars sir?
>
> Panel: As simple as that.
>
> Thompson: A Statement of Account in relation to the $16 million?
>
> Panel: In relation to the $16 million.

Thompson: Well, on her evidence…It is her evidence that she agreed and knew of the $16 million…

Panel: Based on the contingency agreement, but she had never been given a Statement of Account in relation to the $16 million.

Thompson: But in relation to the $16 million sir, when the $16 million was derived she received her 2/3, no complaint, and Mr. Foote received his 1/3. I do not know the document through which that was done, in terms of what letter and I do not know if that letter had been put before you…

Panel: Yes, it was put before us. Letter dated November 30, 2012.

Thompson: That would be in…

Panel: I do not really want to stop there…

Thompson: No, no. Would it be in the bundle I borrowed from you sir? Yes, I see it, a letter from Mr. Foote.

Panel: Right, but there was no Statement of Account.

Thompson: So, we come now Mr Chairman to a definition…

Panel: No. The point that…had asked was how the $7 million arose based on the evidence so far?

Thomson: The seven arose as a result of the Release and Discharge for $23 million…

Panel: Up to the time of the complaint, that Release and Discharge was never known of, by the complainant.

Thompson: With respect sir, that is what the complainant is saying, that is not what Mr. Foote is saying. Mr. Foote is saying both documents, both for the $23 million and the $7 million [sic], were known of at the same time and she is saying…

Panel: Wait, and she asked for a Statement of Account, that is what she was asking for at the time of her complaint. Are

you aware that he did file a Statement of Account that is a part of the documents before us?

Thompson: No, Mr. Foote has filed no documents in that regard, but what I am saying…

Panel: Hold on, one was submitted to the General Legal Council, a Statement of Account by him, after it was made an order by a Panel. You are not aware of that?

Thompson: I am not aware of that sir.

Panel: That statement of Account, although she, according to what you are saying, would have known of the $23 million, there is no mention of it in the statement of it being more than $16 million. That is the Statement of Account he filed, at the order of…and this is now where the $7 million comes from.

Thompson: As I understand it, in relation to the $7 million, the $7 million was outside of the contingency agreement between Miss Russell and Mr Foote.

Panel: For expenses? Well those were suggestions that were put to her.

Thompson: Yes. That is what was agreed between them and she was fully aware of that and that is why when we look at the $7 million… That is why when she proposed to alter her instructions to him, to try at that stage, to capture whatever other monies that she was already aware existed… She is coming here…She knew that this money existed, because she has her $16 million already…

Panel: How come the statement of account did not include the $7 million?

Thompson: Because, in so far as his responsibility to account to her, for monies, his responsibility to account to her, it did not include…

Panel: What he was entitled to?

Thompson: Anything above the $16 million, so therefore…

> Panel: And that is the proper construction of a Statement of Account by any lawyer? It would only show what the client would be entitled to?
>
> Thompson: Well a Statement of Account to a client, would properly only speak to what the client is entitled to. It would not necessarily speak to what a client is not entitled to, because why would you put in a Statement of Account, sums of money in which the client has no interest?
>
> Panel: We understand what the submission is."

[87] It is clear, therefore, that the Committee was in discourse with the attorney, with a view to understanding his submissions in the light of the complaint and the assertions made in evidence led thus far. In my view, there is nothing in the transcript to suggest the case was prejudged. I am fortified in this view by the fact that the Committee had earlier in the transcript anticipated a possible no case submission being made, which it said, "may or may not be successful".

[88] The material contained in the affidavits, which were in evidence before the Committee, both in the initial complaint and in evidence at the hearing, showed that:

> the notice of discontinuance was filed 19 July 2012 and the case was settled in July 2012;
>
> the letter dated 30 November 2012 given to Ms Russell by Mr Foote and which enclosed her settlement cheque indicated a settlement of $16,000,000.00;
>
> Mr Foote only gave a copy of a release and discharge to Ms Russell on 13 December 2013;
>
> that release and discharge was for a settlement sum of $16,000,000.00;
>
> there was a second release and discharge document allegedly signed by Ms Russell which indicated a settlement sum of $23,000,000.00;

> the release and discharge for $23,000,000.00 was disclosed to Ms Russell by the defendant's attorneys; and
>
> it was Ms Russell's contention, in her affidavits before the GLC, that she knew nothing of the release and discharge for $23,000,000.00 before it was disclosed to her by the defendant's attorneys.

[89] Based on this, it is clear that it was a correct statement of Ms Russell's case that she was saying she knew nothing of a $23,000,000.00 settlement sum or of the release and discharge in that amount. This case is completely different from the case of **R v Dudley Peters** (1978) 15 JLR 251, on which Mr Foote relied. In that case, the resident magistrate had written in his notes of evidence, shortly after the beginning of cross-examination of the appellant, that the court was "satisfied that both witnesses of the facts are telling the truth". The Court of Appeal quashed the appellant's conviction on the basis that it could not be said, in those circumstances, that he had received a fair trial. In this case, there is no such expression borne out in the transcript, and there is nothing from which it may be implied that this was the position of the Committee, at the end of the complainant's case.

(iii) Descending into the arena

[90] Mr Dabdoub submitted that although Ms Russell had retained several attorneys during the course of her litigation, she chose to represent herself at the hearing before the Committee. He argued that despite the Committee being fully aware that it was Ms Russell's choice to do so, it acted as her advocate and assumed her representation. He said that, as a result, it was the Committee that elicited every question in her examination in chief, thereby relinquishing its role as impartial umpire and descending into the arena. Counsel argued that the Committee, by doing so, failed to act as an impartial tribunal.

[91] Counsel contended that since the Committee, on 14 February 2019, had indicated that its usual practice was to admit affidavit evidence as examination-in-chief, then allow cross-examination, if the opposing party so desires, it significantly departed

from its own practice by asking Ms Russell 112 questions, many of which were leading questions, on material issues, and were designed to bolster the complainant's case, instead of admitting her affidavit as her evidence-in-chief. This he said, was opposite to the approach taken with the evidence of Mr Foote's witness, whose affidavit was admitted into evidence and who was asked no question in chief. The committee's own explanation, on 14 February 2019, to Ms Russell, as to the procedure for re-examination which would have been adopted had she had an attorney, counsel said, proved his contentions.

[92] Counsel reminded this court that the disciplinary hearings were quasi-criminal and that the standard of proof was beyond a reasonable doubt. He argued that the sheer number of interventions showed that the Committee failed to "steer clear of advocacy and remain aloof from the fray". This, he said, placed the case squarely in the same bracket as the case of **Peter Michel v R** [2009] UKPC 41.

[93] Mrs Minott-Phillips argued, however, that the Committee was a tribunal and not a court of law. In that regard, she maintained, it was not bound by strict rules of evidence in the same way applicable to a court. She contended that tribunals generally have a wider latitude on admissibility and "the like." She submitted that a court should not countenance an attorney-at-law using legal technicalities to extricate himself from his duty to account to his client for all monies received by him on her behalf.

[94] She argued further that there was nothing remarkable or unusual in the Committee providing guidance to unrepresented laypersons. Counsel maintained that it was in fact the Committee's duty to do so. She noted that the guidance given in this case was limited to assisting Ms Russell to negotiate the applicable procedures and did not extend to advocating on her behalf. She submitted further that nothing in the transcript established that the Committee descended into the arena to advocate against Mr Foote.

[95] I take the view that the Committee ought to follow its own stated procedure. The question is whether it failed to do so, and whether in so failing, it fell into error and descended into the arena. Rule 10, as amended by the Legal Profession (Disciplinary Proceedings) (Amendment) Rules, 2014, provides:

> "10.- (1) Subject to the provisions of this rule, the Committee may, in its discretion, either as to the whole case or to any particular fact or facts, proceed and act upon evidence given by affidavit.
>
> (2) Any party to the proceedings may require the attendance upon subpoena of any deponent to any such affidavit for the purpose of giving oral evidence, unless the Committee is satisfied that the affidavit is purely formal and that the requirement of the attendance of the deponent is made with the sole object of causing delay."

It also provides that the Committee may direct that oral evidence be given by video link or any other electronic means. This begs the question then as to what procedure the Committee should have followed in taking the oral evidence of a deponent who is called to give oral evidence, especially a complainant who is unrepresented.

[96] **Peter Michel** involved a criminal trial where Mr Michel was represented by counsel. The decision in that case was not dependent on the volume of the interventions *per se*, but on the nature of those interventions. The nature of the impugned conduct was explained in paragraph 12 of the judgment of the Privy Council, which highlighted the fact that the interruptions occurred during the prosecution's case, as well as during the appellant's evidence. The interventions were said to be damaging to the defence, in that, they were patronising, showed scepticism, sarcasm, and mockery, and amounted to a generally hostile cross-examination. The Board, however, recognised that it is not in all cases that a departure from good practice will render a trial unfair, and that it would be rare for the impropriety to be so extreme as to require a conviction, which was safe in all other respects, to be quashed (see paragraph 28 of the judgment).

[97] In this case, none of the impugned features of the interventions which existed in **Peter Michel** was present. Ms Russell was an unrepresented layperson appearing before the Committee, having filed affidavits in support of her complaints. She was called to give oral evidence. In examining the transcript, it is clear that the initial questions to her from the Committee were designed to identify the witness, the complaint, and the supporting affidavits filed, so that they could properly be tendered into evidence. That took care of the first 15 or so questions asked. Thereafter, the questions surrounded the identification of documents referred to in Ms Russell's affidavits. A further 8 or so questions covered the identification of the contingency agreement. 12 questions were asked leading to the identification of a letter dated 30 November 2012 from Mr Foote, relating to the settlement. A further 16 questions led to the identification of another letter dated 11 November 2013, relating to a demand for both the repayment of a loan to Mr Foote, as well as for a copy of the original settlement agreement.

[98] With the exception of three questions relating to the loan to Mr Foote, a further seven questions were asked leading to the identification of four documents referred to in Ms Russell's affidavit as documents received from the Supreme Court relating to her suit, which were then tendered into evidence. Another eight questions led to the production of a letter dated 11 December 2013, from Mr Foote to Ms Russell, advising her that her settlement was confidential. Five questions led to the admission into evidence of a release and discharge document stamped 29 November 2013, and which indicated that a copy was received 13 December 2013, whilst a further seven questions led to the production in evidence of a letter dated 22 April 2016 and an undated release and discharge dated June 2012 relating to the true settlement sum. Of the remaining questions, 10 led to the identification of a letter dated 16 April 2016 from Mr Foote to Ms Russell's then attorney, enclosing a cheque for $3,300,000.00, which was tendered into evidence; three were with regard to the cheque itself which was attached to the letter, also tendered into evidence; four led to the tender into evidence of a statement of account dated 17 March 2016 from Mr Foote to Ms Russell; and a further five

questions dealt with the statement of account and the reason Ms Russell believed that there had been a failure to account.

[99] Following an adjournment, the hearing resumed on 11 October 2018. At that hearing, seven questions were asked of Ms Russell surrounding a further affidavit sworn to by her on 20 September 2018, which was then tendered into evidence. At that point, she was asked if she had any further documents which she wished the panel to look at, or anything else to say, to which she replied no. The examination-in-chief ended there.

[100] It is clear, therefore, that with Ms Russell being unrepresented and her case being largely dependent on documentary evidence, the assistance of the Committee was necessary to identify those documents and their provenance and to have them tendered into evidence. In my view, with the exception of a few unnecessary questions, the Committee did not descend into the arena, but largely stuck to the affidavit evidence of Ms Russell, and asked only questions which were necessary to have the documents identified, dealt with in context, and tendered into evidence. Based on the transcript, therefore, no injustice was done to Mr Foote, and he was not taken by surprise or hampered in his defence as a result of the questioning of Ms Russell by the Committee. There is no merit in this complaint.

(iv) Findings of fact on the no case submission and failing to uphold the submission of no case to answer

[101] This aspect of the case was argued by Counsel Mr Able-Don Foote for the appellant. He argued that the transcript showed numerous comments on the evidence at the stage of the no case submission which, he said, were tantamount to findings of fact. Counsel argued that the issue of $7,000,000.00 and the Committee's insistence that Ms Russell had no idea of it and that she did not know of the release and discharge for $23,000,000.00 were critical facts going to the root of the case. He said it was wrong for the Committee to find on those facts before the close of the case. Counsel relied on the case of **R v Oscar Serratos** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 26/2004, judgment delivered 28 July 2006, in

submitting that no comment on the credibility of a witness is to be made at the no case submission stage, neither should any snide remarks be made about the defence to denigrate the defence. Counsel contended that the Committee was guilty of doing both. He argued that everyone is entitled to a fair hearing and Mr Foote did not get a fair hearing.

[102] Counsel also argued that calling on Mr Foote to account by stating that "there is something for him to give an account" is tantamount to a finding of fact which suggests belief in Ms Russell's case before hearing the totality of the evidence. Counsel maintained that the statement shifted the burden of proof onto Mr Foote who was not compelled in law to prove anything.

[103] Mrs Minott-Phillips, submitted, in response, that the Committee's dismissal of Mr Foote's no case submission and their calling on him to account was flawless. She contended that based on the nature of the complaint before the Committee, it could only have been met by cogent evidence adduced by Mr Foote, that an accounting had been provided, in keeping with his fiduciary duty. Queen's Counsel also submitted that misconduct was *prima facie* established with evidence that, having been reasonably required to do so, Mr Foote had not accounted for the money in his hand for the account of Ms Russell or to her credit. That misconduct, she contended, was to be rebutted by Mr Foote.

[104] Mrs Minott-Phillips maintained that a statement by the Committee that Mr Foote should give an account, after the no case submission was made, did not constitute a reversal of the burden of proof. She further submitted that Mr Foote had the duty to account and not the burden of proof, but that his attorney appeared to have conflated the two issues. Queen's Counsel noted that Mr Foote had the right to remain silent but did so at his peril, since his witness' evidence did not provide any answer to the charges.

[105] At the end of Ms Russell's evidence a no case submission was made on behalf of Mr Foote by his then counsel, Mr Thompson. Mr Thompson made his application on two limbs. The first involved the non-disclosure clause, which he said was contained in both release and discharge documents that the Committee was being asked to find that Ms Russell did indeed sign. Mr Thompson asked the Committee to consider whether it was precluded, on the basis of the 'confidentiality' clause, from enquiring into the documents, which he then intimated it was.

[106] The second limb of Mr Thompson's submission related to the question of whether Mr Foote had accounted to Ms Russell. He submitted that Ms Russell, having agreed to accept $16,000,000.00 in settlement and to be paid two-thirds of that sum in accordance with the retainer agreement, was only entitled to an accounting for that sum. This, he said, she had already received. In other words, Ms Russell, having agreed to accept a settlement of $16,000,000.00, was not entitled to the $7,000,000.00 and, therefore, there was no need for Mr Foote to account to her for that sum. He also submitted that, nevertheless, even though she was not entitled to an accounting for that sum, the arrangement between Mr Foote and Ms Russell's attorneys (GTS), for Ms Russell to be repaid the balance from the $7,000,000.00 by Mr Foote, after deducting the sums for expenses and his one-third contingency fee, amounted to an accounting. He submitted, therefore, that Mr Foote had already accounted for the $7,000,000.00 and there was nothing for him to answer.

[107] These submissions by counsel, as the basis for the Committee not to call on Mr Foote to answer the charges, were clearly unsustainable and the Committee cannot be faulted for ruling that there was a case to answer.

[108] It is rather ironic that Mr Foote now complains that the Committee made findings of fact at the no case submission stage, when it was the Committee that had to remind his counsel on at least two occasions, that at that stage it was only dealing with assertions and whether there was a *prima facie* case, and was not making findings of fact (see pages 21 to 22 of transcript of 14 February 2019).

[109] With regard to the complaint about the treatment of the $7,000,000.00 at the no case submission stage, it has already been shown that it was Mr Thompson, acting as counsel for Mr Foote, who sought to say that the $7,000,000.00 had been accounted for. The Committee merely reminded him that the series of events on which he relied took place in 2016, whilst the complaint had been made in 2014, at which time Ms Russell was saying she knew nothing of the $7,000,000.00. The Committee also pointed out to Mr Thompson, who said he was unaware of it, that a statement of account had been filed with the GLC, in respect of only $16,000,000.00. Counsel's ultimate submission was that the question was not when the accounting was done but whether it was, in fact, done. He also argued that since it had been done (in the letters to GTS) before the trial, there was no need for a trial and Mr Foote ought not to be called upon to answer the charges. The Committee took time to consider the submission and returned with a ruling that there was a case to answer. This is what the transcript of 14 February 2019 showed that the Committee said on the no case submission, at page 30:

> "The Panel has considered your submission very carefully and have looked at the evidence so far. At this stage it is our ruling that there is a case to answer."

[110] The transcript shows that the words that the Committee used, which, in Mr Able-Don Foote's view, constituted a finding of fact, were said after the ruling on the no case submission. The words were used by the Committee in explaining the procedure to Ms Russell, after she indicated a desire to question Mr Foote. It went like this, at page 34:

> "Panel: Which is your right as well. Your evidence has been given in total, you have been cross-examined, you have presented your case in full, a submission was made that the case be dismissed on basis that it has not reached the level to find that there is a case to answer for Mr. Foote. The Chairman has indicated that the Panel does not agree that the case should be dismissed, there is something for him to give an account, and he has said he does not want to give evidence, but he wants to submit the document and you can cross-examine the person who gave the document. The document Mr. Thompson showed you today, your

> response to the document he showed you is evidence, but the document itself is not evidence."

[111] In the case of **Oscar Serratos v R**, the appellant had been convicted of three offences under the Dangerous Drugs Act. One of the ingredients to be proved, was possession, which required proof of knowledge on the part of the appellant that he had the thing in question and that the thing he had was a dangerous drug. At the close of the Crown's case, and in ruling on a no case submission made on behalf of the appellant, the Resident Magistrate made a statement that it was evident to the court that "he had knowledge of what was behind the panels". This court found that, in making that statement, the Resident Magistrate was making a finding of fact as to the knowledge of the appellant that cocaine was located behind the panels. This, it said, was an unfortunate error, as at the stage of a no case submission, the resident magistrate had not yet heard from the appellant. This court sought to remind judges that in ruling on no case submissions, no comment should be made on the credibility of witnesses or on the evidence.

[112] In this case, the Committee did no such thing. The Committee simply ruled, on 14 February 2019, that there was a case to answer. In explaining this to Ms Russell, by using the words "something for him to give an account", the Committee meant no more or less than that there was a case for Mr Foote to answer.

[113] There is, therefore, no merit in the complaints made in grounds 2 and 10 and those grounds must fail.

Whether the weight of the evidence was in favour of the appellant and was unreasonably rejected, having regard to the evidence of the Justice of the Peace and the weaknesses in the complainant's evidence, so that the verdict was unsafe (grounds 3, 6, 7, 8, 9 and 11)

[114] These grounds were also argued by counsel, Mr Able-Don Foote. Counsel highlighted three aspects of the evidence heard by the Committee. These were lies and conflicts in the evidence of Ms Russell, the strength of the evidence of the Justice of the

Peace, and the contract Mr Foote claimed to have had with Ms Russell, in the context of the legislative framework of the LPA. I will consider each in turn.

[115] On these remaining grounds, Mrs Minott-Phillips submitted that they all challenge the findings of the Committee on issues of fact, which, she said, were matters within the Committee's discretion that should not be disturbed.

(i) Lies, discrepancies and inconsistencies

[116] Mr Able-Don Foote submitted that based on the "complete lies and unresolved conflicts" in the evidence of Ms Russell, juxtaposed against the uncontradicted evidence of the Justice of the Peace, the case against Mr Foote was not made out beyond a reasonable doubt. Counsel cited **Bhandari v Advocates Committee** (1956) 3 All ER 742.

[117] Counsel argued that Ms Russell's evidence, viewed as a whole, could not be accepted as true. He pointed to, what he said, were several inconsistencies in her evidence, which showed that it did not reach the threshold of the standard of proof beyond a reasonable doubt. He asked this court to note Ms Russell's answers with regard to her attorney's representation in getting Mr Foote to pay her what was due to her from the $7,000,000.00 outstanding from the settlement sum. Counsel maintained that Ms Russell was unreliable because she moved from being satisfied with her attorney's representation, to not being satisfied, and then to her attorney being the best.

[118] It is difficult to understand or to agree with the submissions from counsel, as no inconsistency or unreliability was shown in this aspect of Ms Russell's evidence. The question was asked of Ms Russell whether she was satisfied with her lawyer's representation. She said that she was satisfied. She was asked if the issue of the $7,000,000.00 was settled. She said to a point. This, she said, was because she accepted the money which was negotiated by her attorney. Nevertheless, she was clearly of the view, which she had shared with her attorney, that Mr Foote should have

paid all of the money back, with interest. I do not find her viewpoint to be inconsistent with her acceptance of the sums negotiated by her attorney. The last question was whether the agreement gave her justice. She clearly saw that question as a criticism of her lawyer, to which she affirmed her earlier statement of being satisfied with her lawyer, by stating that she is the best.

[119] The submission by counsel that these responses made Ms Russell an unreliable witness has no merit.

[120] Counsel also maintained that Ms Russell had lied that the sum of $7,000,000.00 was in contention. She was asked if she had a dispute with Mr Foote in relation to the sum of $7,000,000.00. She said no. She was later asked if she disagreed with the $7,000,000.00 he took. She said yes she disagreed because she had not known of that $7,000,000.00 and only knew of the $16,000,000.00 he had written to her about. Counsel maintained that these two statements are irreconcilable.

[121] The evidence, which the Committee accepted, is that it was after Ms Russell had discovered that the settlement was for $23,000,000.00 and not $16,000,000.00, that she hired an attorney to have Mr Foote return the $7,000,000.00. After negotiations with Ms Russell's attorney, Mr Foote returned the balance after expenditures and his fees were deducted. Ms Russell's evidence was that she felt he ought to have returned all of it, with interest, but she conceded that she had agreed with her attorney to accept the amount offered. Again, I am unable to agree with counsel. To say that you have no dispute regarding the sum of $7,000,000.00 is not inconsistent with saying you disagree with the taking of it because you did not know about it. This is against the background that Mr Foote had initially sought to retain the full $7,000,000.00 balance from the $23,000,000.00 settlement, and the fact that it was Ms Russell's attorney who later caused Mr Foote to repay over five million dollars, after proven expenditures made on behalf of Ms Russell, by Mr Foote, had been deducted. That complaint also has no merit.

[122] Counsel also submitted that one of Ms Russell's most compelling lies was with regard to whether she had signed any of the discharge and release documents. Counsel pointed to the fact that having been asked on 30 May 2018 if she had signed any agreement in the course of the settlement, she said no. Ms Russell was also asked if, in relation to the receipt of the money, she had signed any release and discharge document, and she said no. Counsel submitted that Ms Russell cannot be believed with regard to the documents she signed, because on 14 February 2019, when she was cross-examined by Mr Thompson, she admitted that she had signed a document which was witnessed by the same Justice of the Peace, in respect of $16,000,000.00.

[123] She was also asked if she had said she never signed a release and discharge for $16,000,000.00. Her response was that she did not sign a document marked 'release and discharge'. The document she signed was something different and was witnessed by the Justice of the Peace. She agreed the document she signed was for the $16,000,000.00 but denied it was marked 'release and discharge'. She maintained that she received an undated document marked 'release and discharge' from Mr Foote's office on 13 December 2013. She also denied signing the release and discharge for $23,000,000.00.

[124] Counsel submitted that the overall credit of Ms Russell was "shattered" based on the fact that she admitted to the GLC, by letter dated 11 March 2014, that she had signed the release and discharge. Counsel also pointed to the evidence of the Justice of the Peace that Ms Russell signed both documents.

[125] In her letter to the GLC of 11 March 2014, Ms Russell indicated that she wrote to Mr Foote on 11 November 2013 requesting a copy of the "**Settlement Agreement** and **a document** that he had asked me to signed [sic] in the presence of a Justice of the Peace in his office" (emphasis added). She did not refer to the document as a release and discharge. It is also to be noted that Ms Russell said that she was not given a copy of the document at the time she signed it. She indicated that having later received a copy of the document from Mr Foote, she questioned its authenticity

because she could not recall seeing the first two pages at the time of signing, and the document was undated and bore no official markings. It is in those circumstances that Ms Russell denied signing the release and discharge document for $23,000,000.00, at all, and denied signing a document titled 'release and discharge' for the $16,000,000.00, although she did sign a document which referred to $16,000,000.00.

[126] Counsel referred to the evidence before the Committee that, exhibited to the complaint to the GLC, was a letter dated 11 March 2012, which indicated that Ms Russell had instructed Mr Foote that she was willing to accept no less than $16,000,000.00 after lawyer's fees and other legal expenses. However, it turns out that this is not the correct version of the letter which was signed by Ms Russell and sent to Mr Foote. The correct letter sent to Mr Foote instructed him that Ms Russell was willing to accept no less than $16,000,000.00, from which he could take his one third contingency fee. Counsel contended that Ms Russell deliberately tried to mislead the GLC by sending the wrong copy of the instruction letter she sent to Mr Foote.

[127] Ms Russell admitted to the Committee that the wrong version of the letter was sent, and explained how that occurred. She said that she had written the letter, at Mr Foote's request, then went back and tweaked it. She had saved the two versions separately. The one she sent to the GLC, she had found on her 'thumb drive' and thought it was the correct one because it had the words 'delivered by hand' written on it. She denied that she deliberately sent the wrong copy with the intent to mislead the Committee. In my view, although the wrong copy of the letter was sent to the GLC, in the grand scheme of things, bearing in mind the charges against Mr Foote, this instruction letter could not have misled the Committee to arrive at a wrong decision. It was also open to the Committee to accept her explanation and to find that it was not sent with any intent to mislead and that, in any event, it did not affect her credibility. There is no merit to this complaint.

[128]

(ii) The impact of the evidence of the Justice of the Peace

[129] Mr Able-Don Foote contended that the Committee's rejection of the Justice of the Peace's evidence on the basis that the documents were not examined and confirmed by him is a fatal error. Counsel pointed out that the Committee came to this conclusion even though it had insisted that the Justice of the Peace give evidence by electronic means. Counsel submitted that that evidence effectively contradicted the complainant's claim that the $23,000,000.00 was a secret to her.

[130] Counsel also pointed out that Ms Russell's evidence was "shattered" because if, as she said, she did not sign any release and discharge document, there was no basis on which she would be entitled to be paid. Counsel argued that since she had admitted to signing a document for $16,000,000.00 before the Justice of the Peace, there was no basis on which the Committee could reject his evidence. His evidence, counsel contended, remained uncontradicted at the end of the case. Counsel submitted that this was so, in the light of the fact that Ms Russell had agreed, in writing, that she would accept $16,000,000.00, less the contingency fee.

[131] Counsel maintained that there was an explanation for the $7,000,000.00 which, he said, was for advances made to Ms Russell for travel overseas and for her son to accompany her. He argued that this explained the difference between the $23,000,000.00 and the $7,000,000.00. Counsel argued that the evidence of the Justice of the Peace supported Mr Foote's case and substantiated the claim that expenses were made. Counsel argued that expenses were to be taken out first, which was the $7,000,000.00, leaving $16,000,000.00 out of which the contingency fee would be taken. He contended that this was the reason for the two release and discharge documents. Counsel also submitted that when the expenses of $7,000,000.00 were excluded, the accounting would properly be on the $16,000,000.00. He also said that paragraph 3 of the letter dated 16 April 2016 to GTS from Mr Foote, provided an explanation for the $7,000,000.00. Counsel argued that Ms Russell knew the $7,000,000.00 was for expenditure, which was why she signed the release and

discharge document for the $23,000,000.00 that was witnessed by the Justice of the Peace. Counsel also argued that the $7,000,000.00 was not subject to an accounting, and that the accounting was only required on the amount to which Mr Russell was entitled.

[132] Mrs Minott-Phillips argued that there was no evidence before the Committee that Ms Russell agreed that Mr Foote was entitled to $7,000,000.00 for expenses. She also pointed out that the accounting to the GLC made no mention of expenses.

[133] I have to agree with Mrs Minott-Phillips. Indeed, I find the submissions of Mr Able-Don Foote, surprising, to say the least. Mr Foote relied on the evidence of the Justice of the Peace to somehow defend a case against him for failing to account and for breach of the Canons. The Justice of the Peace's evidence is that he witnessed Ms Russell affixing her signature to the two release and discharge documents, and that they were read and explained to her by Mr Foote. He said areas in them were highlighted to her, she asked for further clarification, and indicated she understood what she was signing.

[134] In my view, the evidence of the Justice of the Peace was of limited value to Mr Foote's case, in the light of the charges brought against him. The Justice of the Peace gave evidence that he witnessed Ms Russell signing the two release and discharge documents on the same day. He could not and did not give any explanation why it was necessary to give effect to two release and discharge documents for one settlement. Neither could he explain how the defendant's attorney only had a release and discharge signed by Ms Russell for the $23,000,000.00, whilst Mr Foote had in his possession, signed release and discharge documents for both sums. He also could not say why no accounting was given of the full settlement received by Mr Foote, on behalf of Ms Russell, when Mr Foote was reasonably requested to do so. Only Mr Foote could explain that, and on that issue, he remained trenchantly, irrefutably, and unrepentantly silent. This was especially significant in the light of the two release and discharge documents and his withholding of $7,000,000.00 of the settlement sum.

[135] The Committee did not reject the Justice of the Peace's evidence on the basis of his credibility, but rather, on the basis that it was not helpful. It was not helpful because the documents were not identified as being one and the same as those witnessed and later stamped by him (and I agree with Mr Able-Don Foote that this was largely because his evidence was given electronically). More significantly, however, the Committee found that the Justice of the Peace could not provide an explanation for the discrepancy between his evidence that two release and discharge documents were signed, and Mr Foote's assertion, in his letter to the GLC, that the two documents he had asked Ms Russell to sign, pertaining to the settlement, were the contingency fee agreement, and a release and discharge document. The only inference that the Committee could have drawn from the latter was that Ms Russell was asked to sign only one release and discharge document, which was in direct contrast to the evidence of the Justice of the Peace that he witnessed her signing two documents. There was, therefore, this significant and unexplained discrepancy on Mr Foote's case before the Committee at the end of the case.

[136] Also of significance was the fact that the Committee was unable to "discern why it was necessary to be signing two separate release and discharge documents relating to the same parties over the same matter but for two different amounts on the same day at the same time". There was this mystery which the Justice of the Peace could not solve, and in the absence of any evidence from Mr Foote and any accounting for the $23,000,000.00, the mystery remained unsolved.

[137] In the light of the two release and discharge documents in different figures, Mr Foote's letter to the GLC that he required Mrs Russell to sign only the contingency agreement and a release and discharge, and the fact that he only accounted for $16,000,000.00, it is difficult to see how the evidence of the Justice of the Peace could effectively damage Ms Russell's case against Mr Foote.

[138] Mr Foote, in my view, seemed to have misunderstood the case against him. Whilst doubt may have been raised as to whether Ms Russell had signed the two

documents entitled 'release and discharge' or just one, or even none, her evidence was that when she became suspicious of Mr Foote's actions, she demanded a copy of the original settlement agreement and also an accounting. Mr Foote provided neither to her. The claim against him is for failure to account when reasonably required to do so. Even when asked by the GLC to account, he accounted only for $16,000,000.00 despite having received a $23,000,000.00 settlement on Ms Russell's behalf. There is, to date, no explanation, or statement of account provided by him to the client, of the difference between or reason for the two release and discharge documents, in two different sums, for the same settlement. There is, to date, no accounting to Ms Russell or to the GLC, following her complaint, for a settlement of $23,000,000.00 or for the balance of $7,000,000.00.

[139] Ms Russell's original complaint to the GLC, on 11 March of 2014, simply requested assistance from the GLC to have Mr Foote provide a copy of the original documents and an explanation as to the date of the settlement that he had given her. She also sought their advice as to the impact of the confidential clause on any complaint she might make to the GLC. This complaint followed upon letters written to Mr Foote on 20 December 2013 and 28 January 2014, by Ms Russell's attorney CB, to disclose the settlement sum and for an accounting. The exact request in the letter of 28 January 2014 was for:

> "…[F]ull accounting of all monies collected on her behalf, date of collection and withdrawals made from the same for benefits enumerated as being granted to her prior to the settlement as well as the amount deducted for legal services."

[140] This was not forthcoming. Instead, in answer to CB's letter of 20 December 2013, Mr Foote in a letter dated 16 January 2014, spoke of the help he gave to Ms Russell at great personal and financial expense to himself. He spoke of discharging his obligation to Ms Russell by disclosing the settlement to her in November 2012, before the trial date on 13 December 2012, even though, he said, she knew of the settlement from June 2012 when she signed the release and discharge. He denied owing her any

interest on the sum kept for a little over three months, citing regulations 8(1)(ii) and 10(ii) of the Legal Profession (Accounts and Records) Regulations 1999. He also spoke to the fact that she had received her share of the settlement with no deductions made from it. At the same time, he pointed to expenses he said he paid for on her behalf but did not disclose how or if he intended to recoup those expenses, since they were not deducted from the $16,000,000.00. In that letter too, he indicated that the release and discharge he disclosed to her, formed the basis of the filing of the notice of discontinuance and the termination of the matter.

[141] In response to the letter from CB dated 28 January 2014, Mr Foote wrote a letter dated 21 February 2014, in which he referred to the terms of the '**Confidential Release and Discharge**', which he said she signed before a Justice of the Peace and which "spoke to and formed the basis of the filing of the notice of discontinuance". He also maintained that Ms Russell had already received from him a copy of that document which he sent to her on 12 December 2013 to refresh her memory. Since Mr Foote disclosed only the release and discharge pertaining to a $16,000,000.00 settlement, it is clear that this is the document to which he referred. It is clear, therefore, that he intended to convey, and did convey, that the settlement was for $16,000,000.00, and that it was on the basis of that settlement that the case against the defendant dentist was discontinued. In the said letter of February 2014, Mr Foote had contended that that release and discharge contained the settlement, and that his cheque to Ms Russell on November 2012, reflected her "share entitlement" based on the retainer fee agreement she had signed.

[142] In his response to the GLC dated 26 May 2014, Mr Foote maintained that he had asked Ms Russell to sign two documents "pertaining to the settlement of her case", which were a contingency agreement and a release and discharge "to bring the matter to closure". He said he had provided copies of these to her. He enclosed a copy of the contingency agreement in his letter to the GLC but refrained from providing a copy of the release and discharge because he said he was "not at liberty to disclose its terms"

because of the confidentiality clause in clause 5 of the document. He told the GLC that after a satisfactory conclusion of the settlement was reached, he had prepared and had "Ms Russell sign the Release and Discharge document before a Justice of the Peace which was accepted by the Defendant's Attorney". He claimed that Ms Russell knew about the settlement from June 2012 when she had signed the release and discharge. He also said, "this document was witnessed by a Justice of the Peace who also was aware of the settlement sum" and the confidentiality clause. He refused to provide a copy of the document stating simply, "I won't do it". Importantly, there is no mention of a second release and discharge document signed by Ms Russell and witnessed by the Justice of the Peace. In the said letter, Mr Foote maintained that there was no basis for the complaint and that there was nothing left for Ms Russell to get.

[143] It is to be recalled that the second release and discharge for $23,000,000.00 was disclosed by the defendant's attorneys and not by Mr Foote. With the exception of the figures on the first two pages, it is in all other respects identical to the release and discharge for $16,000,000.00. At no time did Mr Foote refer to or disclose the existence of the second release and discharge document in any correspondence to Ms Russell or her attorneys before the document was secured from the defendant's attorneys. In his letter to Ms Russell dated 30 November 2012, in which he announced the settlement, he referred to a sum of $16,000,000.00 and a cheque of $10,666,666.00 made out to Ms Russell. He also referenced money paid in advance to a doctor to secure his attendance at the trial, for which he had requested a refund. No mention was made of $23,000,000.00 or of an additional sum of $7,000,000.00.

[144] The accounting provided by Mr Foote, by way of a letter dated 17 March 2016, after being ordered to account, referenced the one-third contingency fee and a payment to Ms Russell's previous attorneys-at-law from $16,000,000.00. It seems entirely curious, in those circumstances, for counsel to submit that Ms Russell's credibility is "shattered", when Mr Foote has alleged that she signed two releases in June of 2012 for two different sums, but he did not disclose the settlement to her until

November of 2012. He also provided, when asked to do so, a copy of only one release and discharge document, and did not mention a sum of $23,000,000.00 in any of his correspondence to Ms Russell and her attorney, or to the GLC. It is clear, therefore, that even if Ms Russell had signed a document in June 2012, her assertion that she did not know she was signing a release and discharge and did not see the front of the document is supported by the evidence from Mr Foote that he told her of the settlement in November just before the trial date in December.

[145] The Committee, in coming to its findings, would have had the opportunity to see and hear Ms Russell and the Justice of the Peace and to properly assess their evidence. It was a matter for the Committee to determine whether it found Ms Russell a credible witness and whether in the light of her oral and documentary evidence before it, it could properly arrive at the decision it made. The Committee clearly took the view that there were no lies or unresolved conflicts in Ms Russell's evidence which could cast doubt on the veracity of her complaint against Mr Foote, and that the evidence of the Justice of the Peace could not assist Mr Foote to successfully defend the charges made against him. I cannot find any flaw in its reasoning, findings or conclusions on any of the points complained of, which would cause this court to interfere.

[146] These contentions by Mr Foote are, indeed, without merit.

(iii) <u>The contractual and legislative framework</u>

[147] Mr Able-Don Foote submitted that the parties were free to enter into any contractual arrangement they wished. He argued that the two release and discharge documents, the contingency agreement, and Ms Russell's instructions in writing that she would accept $16,000,000.00 in settlement, from which Mr Foote would get his one-third, provided evidence of the parties' contractual agreement. Counsel maintained that Mr Foote was duty bound to act on his client's instructions as attorneys are creatures of instructions.

[148] Counsel argued that, against the background of Ms Russell's contractual arrangement with Mr Foote, the issue of the $23,000,000.00 was moot, as the credible evidence of the Justice of the Peace was that she signed that release and discharge for $23,000,000.00. This, counsel argued, showed that Mr Foote acted in keeping with his instructions, and that Ms Russell authorized Mr Foote's retention of the $7,000,000.00. Counsel contended that this position was supported by Ms Russell's acceptance that she had no dispute with Mr Foote about the sum of $7,000,000.00.

[149] This is a surprisingly confusing and, I dare say, astounding contention from counsel. This seems to suggest that where an attorney-at-law is retained to negotiate a settlement on behalf of a client and that client indicates a ballpark figure below which she is not prepared to accept, such an indication results in an agreement between the attorney and his client that, if negotiations are successful above that ballpark figure, the attorney is authorised to retain the difference for himself. If my interpretation of counsel's submission is correct, I can find no support for this notion in law or simple common sense.

[150] Mr Foote also seems to be relying on two different defences. The first being that Ms Russell authorised him to retain the $7,000,000.00 because she agreed with him that she would accept $16,000,000.00, from which he could take his contingency fee. Presumably, therefore, anything over and above that which he negotiated with the insurers belonged to him. The second defence was that the $7,000,000.00 was for expenses and disbursements he made on her behalf which he was authorised to recover separately from the insurers or was entitled to recover from the settlement sum. None of these propositions were sustainable on the evidence.

[151] The release and discharge for $23,000,000.00 would signify an agreement between Ms Russell and the defendant, to release and discharge the defendant from any further claim or demand, in consideration of the payment of that sum. The release and discharge for $16,000,000.00, would, likewise, be an agreement between Ms Russell and the defendant to discharge him from any further obligation, claim or

demand in consideration of that sum. How would Mr Foote figure into any of those two arrangements? He would not have been a party to any of those two agreements. Mr Foote's contract was in the contingency agreement, which was for one-third of the settlement sum, and for any costs incurred in pursuing the claim to be deducted from the client's share.

[152] Following the logic of Mr Foote's contention, his agreement with Ms Russell to retain any sum above the $16,000,000.00 she agreed to accept, would come from the signing of two separate releases between Ms Russell and the defendant, her letter indicating her ballpark figure for settlement negotiations and the contingency agreement. This contention, on any clear reading of those documents, whether read individually or together, can best be described as misguided, and at worst, preposterous.

[153] Mr Foote was a trustee of the sums he collected on behalf of Ms Russell. That being so, Mr Foote's obligation was to disclose the settlement sum of $23,000,000.00 to Ms Russell, take out his expenses, as agreed, take out his contingency fee, and remit the balance to Ms Russell, with a proper statement of account. There is no scenario in which it could possibly be said that Mr Foote was justified in arranging for the signing of two separate discharge and release documents discharging the defendant from further obligation to Ms Russell, in two separate figures, based on any contract he claimed to have had with Ms Russell. Mr Foote has produced no document purporting to be a contract between himself and Ms Russell authorizing him to retain $7,000,000.00 from the negotiated settlement of $23,000,000.00, nor has he provided proof of any oral contract to that effect.

[154] Mr Foote's contention that he had an arrangement with Ms Russell for him to retain the $7,000,000.00 is not sustainable.

[155] Mr Able-Don Foote also argued that since Mr Foote had been charged for failing to account, that offence was not made out, as the charge was made pursuant to Canon

VII(b)(ii). Counsel argued that the charge was subject to regulation 14(a) of the Legal Profession (Accounts and Records) Regulations 1999. Regulation 14 states that:

> "Nothing in these Regulations shall:
>
> (a) affect any arrangement in writing, whenever made, between an attorney and his client as to the application of the client's money or interest thereon;

[156] Counsel argued that the requirement to account and pay interest is superseded by regulation 14. He claimed that there was an arrangement in writing which is evidenced by letters between Mr Foote and counsel for Ms Russell, with regard to the $7,000,000.00. Therefore, he said, the charge was not made out.

[157] Based on this submission, one may well ask "how was the balance of $7,000,000.00 (representing the difference between $16,000,000.00 and $23,000,000.00) resolved? Despite Mr Foote's claim that Ms Russell had received all she was entitled to, on 10 May 2016, an attorney at GTS wrote to Mr Foote to claim otherwise. In that letter, GTS stated, amongst other things, that they had discovered that the settlement was for $23,000,000.00 and not $16,000,000.00, and reminded Mr Foote that the agreement stated that $2,000,000.00 of the $23,000,000.00 was in full settlement of all legal costs. They demanded the balance (requesting, in error, $8,000,000.00 instead of $7,000,000.00) within seven days, in default of which both criminal and civil action would be taken.

[158] In reply to that demand, in a letter erroneously dated 16 April 2016, Mr Foote wrote to GTS, enclosing a cheque of $3,333,334.00, on account of Ms Russell, to be held in escrow, "until the resolution of this matter". He also corrected the balance as being $7,000,000.00 not $8,000,000.00. He claimed that of the $7,000,000.00, when the $2,000,000.00 for costs was deducted, the balance of $5,000,000.00 represented disbursement and expenditures incurred by him. He did not include a statement of account. The enclosed cheque, he said, represented two-thirds of $5,000,000.00, if it was considered that the contingency agreement was applicable to the $5,000,000.00

which, he said, was "outside the settlement sum signed off on by Ms. Russell". So even at this juncture, Mr Foote was still laying claim to the $7,000,000.00.

[159] In order to understand Mr Foote's claim to the $7,000,000.00, it is best to quote from his letter directly. At paragraph 3 of the letter, he said:

> "This difference of $7 million represents the amount negotiated/claimed by me against the insured and is due to me (as my cost, disbursement & expenditure incurred by me at Miss. Russell's request) AND NOT 'sums which Mr. Foote has for Ms. Russell'. What you have not yet "discovered" is that your client Ms. Russell has not yet disclosed to you that she entered into Confidential Private Agreements/Contracts with Dr. [M] and myself for the re-payment of these charges because they had to be paid by someone and paid upfront for the successful negotiated completion of her case." (Emphasis as in original)

[160] Further on, at paragraph 8 of the letter, he said:

> "Ms. Russell then authorized me **orally and in writing** to make these payments on her behalf and then re-claim them directly as expenses against the insured **OUTSIDE OF the Contingency Fee Agreement** executed between us…" (Emphasis as in original)

[161] Mr Foote then listed 12 items as "some but not all" of his "disbursements and expenditures". They included payment to an overseas pain specialist to secure his attendance at trial, conferencing and booking expenses with the said overseas specialist, airfare and hotel accommodation costs for Ms Russell and her son to attend doctor's appointment overseas, cash maintenance for Ms Russell, airfare for travel overseas by Mr Foote in relation to Ms Russell's case, and costs of phone calls to overseas pharmacies. None of these items included a figure.

[162] By way of comment, it seems to me that, even if these were expenditures advanced outside of the contingency fee arrangement, it would not be unreasonable for Ms Russell to request that they be justified by Mr Foote and that he account for the expenditures for which reimbursement was being claimed from her settlement.

[163] GTS wrote back to Mr Foote on 25 May 2016, pointing out the error in the date in the letter of 16 April 2016 from Mr Foote, which they received 18 May 2016 by hand. They also demanded he repay a sum of $8,036,572.40, representing the full $7,000,000.00 plus interest and attorneys' fees.

[164] The only indication of how the disbursements from the $7,000,000.00 were eventually accounted for in terms of dollars and cents, is to be found in two letters, both of which were dated 1 June 2016, from GTS to Mr Foote's then attorney. GTS wrote that Mr Foote had represented in writing to them, as well as to his own attorney that the $7,000,000.00 was for upfront expenses made on behalf of Ms Russell. GTS, however, pointed out that documentary evidence (letters signed by Ms Russell and Mr Foote's wife who, it appeared was also his office manager) showed that the money advanced on behalf of Ms Russell were for expenses involving overseas travel and overseas doctors. These amounted to $130,147.00 for air fare for Ms Russell and her son, $30,202.00 for travel arrangements to see a doctor in Florida, and a US$900 loan made to Ms Russell. GTS, therefore, calculated that Mr Foote had advanced only $238,757.00 to Ms Russell. Based on the contingency agreement, GTS also calculated that Mr Foote was entitled to a third of the $7,000,000.00, less the expenses. Ms Russell, they told him, was, therefore, entitled to the balance with interest at 2%. GTS calculated that balance to be $5,401,757.80. When the sum of $3,333,334.00, which had been sent by Mr Foote to be held in escrow was deducted, a balance remained of $2,068,423.80 which GTS demanded, on Ms Russell's, behalf that he repay.

[165] However, in a second letter also dated 1 June 2016, GTS acknowledged receipt of a cheque for $500,000.00, from Mr Foote's then attorney, which resulted in the sum of $2,068,423.80 being reduced by that amount. It was agreed that that balance would be paid by Mr Foote on the 21 June 2016.

[166] It is clear, therefore, that although Mr Foote had represented to Ms Russell's previous attorney, CB, in letter dated 16 January 2014, that she was paid her share of the money with no deduction for his advances to fund the case before and after the

settlement, Mr Foote was now claiming to GTS that the $7,000,000.00 was retained as reimbursement for expenses he incurred on Ms Russell's behalf. It is also evident, therefore, that the letter to CB was deliberately written to give the impression that Mr Foote did not reimburse himself for "his money" advanced to Ms Russell. His claim of being entitled to retain the $7,000,000.00 as reimbursement for expenses paid out by him was also clearly not borne out by the evidence and by the fact that he eventually had to refund to Ms Russell, the greater portion of the $7,000,000.00.

[167] The Committee also properly considered the fact that, in Mr Foote's letter of 30 November 2012 to Ms Russell, the only cost Mr Foote had referred to for reimbursement was that paid to the overseas doctor to secure his attendance at trial. However, in his letter to GTS dated 16 April 2016, he claimed that the $7,000,000.00 was due to him as "costs, disbursements and expenditures" incurred at Ms Russell's request, "as negotiated/claimed by him against the insured". He, however, never gave an account to Ms Russell for those, costs, disbursements and expenditures, even when reasonably required by her to do so.

[168] The fact that Ms Russell had to secure the services of GTS to disgorge Mr Foote of the funds he had retained from the settlement sum, can by no means be relied on by him as compliance with his duty to account. The demands made by GTS for Mr Foote to return the monies he retained from the $7,000,000.00 to which he was not entitled, were made at a time when Mr Foote had already failed to account to Ms Russell when he was reasonably required to do so. The fact that he was forced to repay monies he was not entitled to was not an arrangement under regulation 14, nor did any of the letters to or from GTS, purport to be an accounting from Mr Foote to Ms Russell. He, therefore, cannot rely on any arrangements with GTS to refund monies belonging to Ms Russell, to answer the charge of failing to account to Ms Russell when reasonably required to do so.

[169] In my view, the case against Mr Foote for failing to account was made out to the requisite standard of proof, beyond a reasonable doubt, as stipulated in **Bhandari v**

Advocates Committee. The Committee made no error in their findings and cannot be faulted for arriving at the conclusions which it did, on the charge of failing to account in breach of Canon VII(b)(ii). I take the view that, indeed, this court on rehearing the case, could come to no contrary position.

[170] With regard to the breach of Canon I(b), (bringing the profession into disrepute) I am also of the view that the case was made out to the highest standard of proof, and that the Committee could have come to no other conclusion than the one it did. I agree that the evidence pointed inescapably to the conclusion that Mr Foote used the non-disclosure clause in the release and discharge document to avoid disclosing the true settlement sum to Ms Russell, and, indeed, I would go further to state, to the GLC.

[171] I also agree with the Committee's conclusion that the letter of the 30 November 2012, in so far as it conveyed the impression that the case had just been settled, when, in fact, it had been settled in July 2012, was calculated to deceive.

[172] The Committee was at liberty to accept Ms Russell's evidence that she was not aware of the settlement for $23,000,000.00 until it had been disclosed to her by the attorney for the defendant in her civil suit. There is no evidence that Mr Foote at any time disclosed to Ms Russell that he had obtained a settlement of $23,000,000.00 on her behalf. Mr Foote's case was that Ms Russell signed two documents for two different figures, and that the documents were explained to her, but there is no evidence of what exactly was said to her or whether she was told the settlement was for $23,000,000.00 and not the $16,000,000.00 which she was also signing for. She was also not given any reason by Mr Foote for having to sign two separate releases in separate figures. There was no evidence that the release for $16,000,000.00, though it purported to be an agreement between Ms Russell and the defendant in her suit, was ever sent to the defendant's attorneys. They had settled for $23,000,000.00 and had a release and discharge in that sum. What then was the purpose of the release and discharge for $16,000,000.00?

[173] The finding by the Committee that the conduct of the attorney was dishonest, cannot be faulted. I can see no other reason for his conduct than, as found by the Committee, that it was calculated to deceive Ms Russell and deprive her of her full entitlement under the settlement. Mr Foote's claim to the full $7,000,000.00 was not substantiated by the evidence. The fact that Mr Foote was eventually forced to reimburse $5,322,172.50 shows the depth of the deceit perpetrated by him on Ms Russell. These arguments have no merit.

[174] Grounds 3, 6, 7, 8, 9 and 11 would necessarily fail.

The mental state and conduct of Ms Russell- grounds 4 and 5

[175] As regards ground 4, which questioned Ms Russell's mental stability, the submission was that her overall behaviour "begs the question" whether she was suffering from a mental or psychological condition. Reliance was placed on Ms Russell's admission that the case affected her psychologically and that she was on medication. Counsel also submitted that, as there was no evidence that she was on medication at the time she filed her complaint, the Committee ought not to have relied on her evidence as it could be inferred she was "labouring under a disease of the mind". For this submission, counsel relied on the case of **Keith Nichol v R** [2018] JMCA Crim 8.

[176] Not entirely surprising, no submissions were made in answer to this ground by Mrs Minott-Phillips.

[177] The evidence is that Ms Russell admitted that she was affected psychologically by the case, was not feeling well, and was on medication, specifically Lyrica. There is no evidence she suffered from a disease of the mind at the time she made her complaint or when she gave evidence before the Committee. In the case of **Keith Nichol,** the evidence of the complainant in a criminal trial was uncorroborated. Although there was no evidence before the jury that conclusively proved that the complainant was ill at the time of the incident complained of or at the time he gave his evidence, there was evidence before the jury that he had been found to be suffering from bipolar disorder

and mania sometime after the incident This court found that the trial judge had erred in not warning the jury as to the mental state of the complainant. In the instant case, there was independent documentary evidence in support of Ms Russell's complaint, and there was absolutely no evidence she suffered from a disease of the mind at any material time and, more specifically, at the time of her complaint or at the time she gave her evidence. This ground is unmeritorious.

[178] So too is ground 5 regarding her dissatisfaction with what counsel for Mr Foote has described as a "plethora of professionals". No more needs to be said of this ground.

[179] In the result, the appeal against the Committee's findings that Mr Foote is guilty of the complaints made against him must fail.

The sanction - ground 12

[180] On November 2019, the Committee held a hearing to determine the sanction to be imposed on Mr Foote. At that hearing, having heard submissions from counsel and relying on the case of **Bolton v Law Society** (1994) 1 WLR 512, the Committee sanctioned Mr Foote, in the manner outlined at paragraph 2, above.

[181] No submissions were made by either side on the issue of the sanction.

[182] Section 12(4) of the LPA gives the Committee the power to make orders or a combination of orders, as it thinks just. Those orders include striking off, suspension, fine, reprimand, prescription of legal education courses, costs, and restitution. The only limit on the Committee's power to make one or more of these orders is stated in the proviso to section 12(4), that the Committee has no power to order both a striking off and a suspension together.

[183] The Committee clearly thought the orders it made were just, and no basis has been shown why it was wrong to do so. **Bolton v The Law Society**, on which the Committee relied, is an English case involving an appeal by the Law Society against the decision of the Queen's Bench Divisional Court quashing the order of the Solicitor's

Disciplinary Tribunal that solicitor Andrew John Bolton be suspended from practice for two years for professional misconduct. The Divisional Court instead imposed a fine. The Law Society appealed against that decision to the Court of Appeal. The Court of Appeal took the view that the professional disciplinary tribunal in that case, the Law Society, was the body best suited to assess the seriousness of professional misconduct by its members, and that the appellate court should not, save in a very strong case, interfere with its sentence.

[184] For this court to differ from the Committee in the sanctions it imposed, a very strong case has to be shown. This was the position taken by the Privy Council in **Colin Kenneth McCoan v General Medical Council** [1964] 1 WLR 1107, where the Board agreed with Lord Goddard CJ in **re A Solicitor** [1956] 1 WLR 1312, that it would require a very strong case for the Court of Appeal to interfere as it took the considered view that the members of the disciplinary committee were the best persons to weigh up the seriousness of the professional misconduct.

[185] Nothing has been shown to suggest that this is a strong case requiring this court to interfere with the sanctions imposed. To the contrary, it is clear that this is a serious case of professional misconduct. In **Bolton v the Law Society** Sir Thomas Bingham M.R. noted, at page 518 of the report, that:

> "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."

[186] The sanctions imposed were completely within the discretion of the Committee and were, in the circumstances of this case, appropriate. Ground 12, therefore, has no merit.

Disposal

[187] In the premises, therefore, this appeal ought to be dismissed and the orders of the Disciplinary Committee of the General Legal Council affirmed. Both parties asked for their costs. The General Legal Council, being the entirely successful party, is entitled to its costs to be taxed, if not agreed. This is in keeping with the principle that costs follow the event.

SIMMONS JA

[188] I, too, have read, in draft, the judgment of Edwards JA with which I agree. I have nothing further to add.

MCDONALD-BISHOP JA

ORDER

i) The appeal is dismissed.

ii) The decision and orders of the Disciplinary Committee of the General Legal Council made on 29 July 2019 and 23 November 2019 are affirmed.

iii) Costs of the appeal to the General Legal Council to be agreed or taxed.