BARBADOS

IN THE SUPREME COURT OF BARBADOS

COURT OF APPEAL

CIVIL APPEAL

COMPLAINT NO. 108 OF 2008

In the matter of the Legal Profession Act Cap 370A of the Laws of Barbados.

And in the Matter of Mr. Philip Vernon Nicholls Attorney-at-Law.

AND IN THE MATTER OF THE COMPLAINT OF ELMA KATHLEEN INNISS AND JOYCE PATRICIA BOWEN EXECUTRICES OF THE ESTATE OF JOHN PARTICK CONNOR, DECEASED

Before The Hon. Kaye C. Goodridge and Rajendra Narine, Justices of Appeal and the Hon. William J. Chandler, Justice of Appeal (Acting).

2019: November 13th
2020: February 25th
July 28th
August 19th, 31st
October 6th
2021: July 27th

Appearances:

Mr. B. L. V. Gale QC, Mrs. Laura Harvey-Reade and Mr. Ivan Alert with him for the Virtual Complainants.
Mr. Rita Evans on behalf of the Disciplinary Committee.

Sir Elliott Mottley QC of Elliott D. Mottley & Co. Attorneys-at-Law, Mr. Michael Carrington QC, Mr. Stuart Mottley and Ms. Kimberly Moe with him, for the respondent.
Mr. Patterson Cheltenham QC, Mrs. Rosalind Smith-Millar with him, for the Barbados Bar Association.

Ms. Donna Brathwaite QC, Mr. Roger Barker and Ms. Kim Ramsay-Moore with her, amici curiae on behalf of the Attorney-General of Barbados.

DECISION

CHANDLER JA (AG.)

Introduction

[1] This matter involves an application on behalf of the Disciplinary Committee of the Barbados Bar Association (the Disciplinary Committee/the Committee) to this Court for an order that the name of Philip Vernon Nicholls, Attorney-at-Law (the respondent) be removed from the roll of Attorneys-at-Law practicing in this Island under **section 21 (2) (a)** of the **Legal Profession Act Cap 370A** (**Cap 370A**).

[2] For the purposes of this decision, the salient facts may be kept within a narrow compass. They are as follows:

In 2007, the respondent was retained by Mr. John Patrick Connor, and his wife (the vendors), in the sale of property situate at Lodge Hill, St. Michael at the price of $950,000.00. The sale was completed and the purchase price duly paid. However, it is alleged that the respondent failed to pay over the

net balance of purchase price to the vendors. The vendors subsequently died and Elma Kathleen Inniss and Joyce Patricia Bowen, executrices of the estate of John Partick Connor, deceased (the virtual complainants) filed a complaint with the Disciplinary Committee which was chaired by Ms. Cicely Chase QC, now **Chase J**. The complaint was heard on 23 March 2010, 13 July 2010 and 20 July 2010. In issue, was whether the vendors retained the respondent as their Attorney-at-Law or the firm of Cottle Catford & Company (Cottle Catford) a firm of Attorneys-at-Law of which the respondent was a former partner.

[3] The Report of the Disciplinary Committee (the Report) dated 16 July 2019 was forwarded to the Chief Justice by its Chairman and is at the heart of this matter. It found the allegations of misconduct proved against the respondent and recommended that the respondent be disciplined for breaches of the ***Legal Profession Code of Ethics, 1988 (the Code of Ethics)***. Those recommendations are now reproduced in full:

> **"Recommendation**
>
> 1. Mr. Philip Vernon Nicholls be disciplined for breaches of Rules 70, 74 and 87 and 88 of the Code of Ethics.
> 2. Mr. Philip Vernon Nicholls should be ordered to repay the funds due to the Complainants with interest there [sic] at the rate of 6% per annum.

3. That Mr. Philip Vernon pay the costs of the Complainants in this matter.
4. That Mr. Philip Vernon Nicholls be disbarred from the Barbados Bar Association and removed from the Rolls of Attorneys-at-Law for reckless and unsatisfactory and unprofessional misconduct as a result of the several breaches aforementioned and regarding the use of the Complainants' funds without their permission and to their extreme financial detriment and disadvantage and to that of their then principals, now deceased,
5. That in accordance with the law, the Report be submitted to the Court of Appeal for its consideration."

[4] The Report, on its face, recorded that the persons present were Mrs. Cicely P. Chase Q.C. Chairman, Mr. J. H. Andrew Brewster, Deputy Chairman and Ms. Rita Evans (Ms. Evans) as a member of the Committee. Excused was Mr. Malcolm Deane, member. Ms. Avril Sealy, secretary to the Disciplinary Committee, was recorded as being in attendance. The dates of hearing recorded on the Report are Tuesday 23 March 2010, Tuesday 13 July, 2010 and Tuesday 20 July, 2010.

[5] It is important to note that Ms. Evans informed this court on 20 February 2020, that she was not present when the Report was compiled.

The point in limine

[6] Sir Elliott Mottley QC (Sir Elliott), counsel for the respondent, queried *in limine* the validity of the Report, namely whether the Committee which made the Report was quorate and consequently whether the matter was properly before this court.

[7] In his written submissions filed 6 March 2020, Sir Elliott raised a second issue as to what documentation should this court consider in coming to a decision with respect to the Report.

[8] These issues, raised in limine, have spawned the submissions on which we are asked to rule.

[9] The following affidavits were filed with the permission of the Court consequent upon these submissions:

THE ALERT AFFIDAVIT

[10] On 3 March 2020, Mr. Alert filed his affidavit (the Alert affidavit) to show that "…the Disciplinary Committee which discharged the investigatory duty of hearing the complaint in this matter was at all times quorate." At paragraph 2 of the said affidavit he deposes that the affidavit is made from matters within his own knowledge and from the records provided from the Disciplinary Committee and from the minutes of the hearings held on 23 March 2010, 13 July 2010 and 20 July 2010. At paragraph 4 he deposed that

the Committee that heard the complaint comprised Miss Cicely Chase, QC, Chairman, Mr. Andrew Brewster, Deputy Chairman, Miss Rita Evans, member, Miss Shelley Stuart, member, Mr. Samuel Legay, member and Mr. Malcolm Deane, Member. At paragraph 5 he deposes that Mr. Deane recused himself from the matter. Mrs. Avril Sealy performed the duties of Secretary to that Committee.

[11] At paragraph 6 he deposes that the Committee sat and heard the complaint on the three occasions mentioned in paragraph [4] and that, on each occasion, he together with all five remaining members of the Committee were present.

[12] Paragraph 7 recounts his efforts to obtain the Report and record of proceedings and the receipt of part of the official record less the Report on 20 February 2010 and his receipt of the Report via e-mail on 21 February 2020. In paragraph 9, Mr. Alert deposes that he swears the affidavit to "show that the Disciplinary Committee which discharged the investigatory duty **of hearing the complaint in this matter was at all times quorate (emphasis added)**."

THE EVANS AFFIDAVIT

[13] I now reproduce the salient parts of the affidavit of Ms. Rita Evans, Attorney-at-Law filed 13 March 2020 (the Evans affidavit) for its full purport and effect:

"1…..

2. In so far as the facts and matters deposed herein are within my own knowledge, they are true. In so far as they are not within my knowledge, they are true to the best of my information being derived from my own records as a member of the Disciplinary Committee as well as the Minutes Book which is maintained by the Secretary of the Disciplinary Committee.

3. I state that despite diligent efforts, the whereabouts of the original file as it relates to this matter are unknown. As such, I am unable to make reference to any of the details contained therein.

4. I recall that during my tenure as a member of the Disciplinary Committee (2009 - 2011), a complaint (Complaint No. 108 of 2008) was received by the Committee filed by the Complainants against the Respondent.

5. As far as I can recall, the other members who formed the Committee were Miss Cicely P. Chase Q.C., Attorney-at-Law (as she then was), who served as Chairperson; Mr. G. H. Andrew Brewster, who served as Deputy Chairperson; Mr. Malcolm Deane; Mr. Jomo Hope; Ms. Shelley Stuart and Mr. Samuel Legay.

6. From my records, the matter came on for hearing on the 23rd March 2010, 13th July 2010 and 20th July 2010, with the 20th July 2010 being the last day that evidence was taken.

7. I have had sight of a report dated the 16th July 2019 which was submitted to this Honourable Court by the then Chairman and wish to advise that as far as I am aware, **there was no meeting held on the 16th July 2019 with the persons who are named on the face of the report. As such, I am unable to shed any light with respect to the compilation of the said report." (emphasis added)**

THE RESPONDENT'S SUBMISSIONS

[14] Sir Elliott submitted that the Report stated that three members were present and therefore the Disciplinary Committee's decision contravened the **Fourth Schedule** of **Cap 370A** which required a quorum of four Attorneys-at-Law. Sir Elliott further submitted that, since the Report did not establish a quorum, any decision thereon was invalid. He relied upon *Shackleton on The Law and Practice of Meetings 9th Edition, 23 October 1997, Sweet and Maxwell, Frank Shackleton and Ian Sherman,* and *D'Arcy v The Tamar, Kit Hill, and Callington Rly Co (1867) L. R. 2 Exch. 158.*

[15] Sir Elliott also submitted that since the Committee was not quorate there was no valid document before this Court upon which any decisions or pronouncements could be made.

THE VIRTUAL COMPLAINANTS' SUBMISSIONS

[16] Mr. B. L. V. Gale QC, counsel for the virtual complainants, submitted that, whilst the face page of the Report only listed three members as being present, there was no evidence filed before this court on behalf of Mr. Nicholls upon which the court could rely to come to a conclusion that a quorum was not present relative to the decision of the Disciplinary Committee.

[17] He submitted further that Mr. Nicholls appears to be requesting this court to draw an inference, in the absence of evidence, that the decision of the Disciplinary Committee was arrived at by a Committee that was not quorate. It was his submission that "…this Court is not permitted to come to such a conclusion based on what is speculation in the absence of evidence before it." Mr. Gale QC argued that the only evidence before the court were the Alert affidavit and the Evans affidavit.

[18] With respect to the Evans' affidavit he opined that Ms. Evans at paragraph 7 swore that she was not aware and by inference did not attend a meeting on 16 July 2019, the date of the Report. In the circumstances the persons present on the face page of the Report did not reflect the persons present on 16 July 2019. The only other dates mentioned in the Report, Mr. Gale QC further argued, were the dates of hearing of the complaint. He submitted therefore that "the persons present on the face page of the Report were intended to reflect those Committee members who were present at the hearing of the complaint. On a reading of the transcripts there is clearly an error on the face page of the Report as these transcripts show they were five (5) Committee members present at all material times for the hearing of the actual complaint before the Disciplinary Committee."

[19] Counsel argued also that the Evans affidavit provided no evidence to support the respondent's argument that "the Committee which heard [sic] made a decision on the complaint which is the subject matter of the Report before this Court was quorate or not." He made reference to the decision in **Re: Joyce Griffith complaint No. 7 of 2013** (**Re: Joyce Griffith**) and **Re: Balfour Layne complaint No. 39 of 2004** (**Re: Balfour Layne**) and in particular the dictum of **Chandler J** in **Re: Joyce Griffith** that "evidence and not mere speculation is required in support of that allegation and none has been produced here."

[20] It was therefore Mr. Gale QC's submission that the transcripts of the proceedings showed that the Committee which heard the complaint was quorate and that could not be rebutted by mere speculation without evidence to the contrary and relying on what was clearly an error on the face page of the Report.

[21] Mr. Gale QC argued further that, if there was any procedural defect in relation to the Report, the error was not material and could not invalidate the Report. He submitted that "The presumption must be that the Report as signed by the Chairman is the Report of the Committee who heard [sic] the complaint in the absence of any evidence to the contrary." Counsel noted that "...the covering letter from the Chairman of the Committee who signed

the Report and submitted it to the Chief Justice represented clearly that the Report was that of the Committee who [sic] heard the complaint".

[22] Mr. Gale also relied upon another dictum of **Chandler J** in **Re: Joyce Griffith** that "the consequences of an administrative failure depend on the seriousness of that failure or, where there are multiple failures, whether the cumulative effect of such failures rendered the process, as a whole, unfair or if the procedural irregularities […] are so wholesale and so fundamental that the consequence is that no true and final Report was ever submitted and the subsequent determinations of the appropriate authorities are as a result invalid and or no effect, the Court will decline to act upon the Report."

[23] With respect to the second issue identified by Sir Elliott, Mr. Gale QC submitted, on the authority of **Re: Therold Fields [unreported] C. A. Complaint No 31 of 2008 (Re: Fields)** and **Re: Niles**, **47 WIR 38 (Re: Niles)** that the powers of the Disciplinary Committee are recommendatory only, whereas this court makes a final determination on rights and obligations. It was his submission that this court can rely on the entire record of proceeding before the Disciplinary Committee in determining whether or not disciplinary action should be taken against an attorney-at-law and what that action should be.

[24] It was also Mr. Gale QC's submission that this Court has an overriding jurisdiction over Attorneys-at-Law, citing **Re: Browne, (1972) 7 Barb L. R. 62** (**Re: Browne**) in which **Douglas CJ** quoted approvingly the dictum of *Lord Esher M.R. in Re: Grey [1892] 2 QB 443 (Re: Grey)* which is reproduced at para [58] of this decision.

[25] Mr. Gale QC proffered that, apart from **section 22** of **Cap 370A**, this Court has jurisdiction to discipline Attorneys-at-Law under **section 23** of **Cap 370A**. It was his opinion therefore that the Court could exercise jurisdiction under **section 23** based upon the materials before the Court even if it was reluctant to rely upon the Report. He argued further that, on the material before the Court, when the facts are examined, this was a very serious case of professional misconduct on the part of an Attorney-at-Law who had admitted appropriating his client's funds and who had also admitted to his inability to repay those funds.

THE DISCIPLINARY COMMITTEE'S SUBMISSIONS

[26] Mr. P. K. H. Cheltenham QC, counsel for the Barbados Bar Association, submitted that **section 21(1)** of **Cap 370A** provided that the sender of the Report is the Committee and the Chief Justice its recipient. The Report must bear the Chairman's signature. He submitted that the listing of the three

names on the cover of the Report under the rubric "present" is open to the following interpretations:

(a) it may be indicative of the persons who compiled the Report;

(b) indicative of the persons who agreed with the content of the Report; or

(c) indicative of the persons who were present at the hearing.

[27] With respect to the compilation of the Report, counsel submitted that neither **Cap 370A** nor the subsidiary legislation made thereunder prescribed how the Report ought to be compiled.

[28] It was his further submission that **Section 21(1)** of **Cap 370A** required that the Report be signed by the Chairman, however the legal subject of that provision and of **Rule 2** of the **Legal Profession (Disciplinary Committee Reference to Court of Appeal) Rules**, **1985** (**the Rules**), was the Committee. In so far as the requirement to submit a Report is imposed upon the Committee, it was counsel's argument that "…the intention is that the report be reflective of the collective will of the Committee, notwithstanding that it is signed by the Chairman alone."

[29] With respect to manner in which decisions of the Committee are arrived at, counsel argued that neither **Cap 370A** nor the subsidiary legislation prescribed how decisions of the committee are to be taken, that is whether unanimously or by majority. He urged that the view expressed in *Barnsley v*

Marsh [1947] 1 All. E. R. 874 that the views of the majority shall prevail if there is a difference in opinion ought to be adopted.

[30] With respect to the persons' present at the hearing, Mr. Cheltenham QC noted that the question remained why the Report listed three persons as being present and one person as having been "excused" from the matter. He ventured no answer to this question which he raised but referred to **paragraph 9(4)** of the **Fourth Schedule** of **Cap 370A** which requires a quorum of four Attorneys-at-Law to be present, two of whom must be of at least ten years standing in the profession.

[31] Mr. Cheltenham QC submitted that this Court could refer the Report back to the Committee on any point required by us. He opined however, that the critical question was whether there was "an administrative failure so grave as to render the Report submitted on 16th July 2019 a nullity and cause the court to decline to act upon it".

[32] Counsel argued that if indeed the Report is an accurate reflection of the collective will of the Committee which heard the complaint, and if indeed the listing of the three names at the cover of the Report was intended to represent persons who were present at the hearing of the complaint, and provided that the evidence deposed as to who was present at the hearing is neither discredited nor refuted, the inference is that the listing of three

persons is the result of an administrative failure in the form of imprecise editorship. Such a failure, without more, ought not to invalidate the Report, counsel finally submitted.

THE SUBMISSIONS OF THE SOLICITOR GENERAL

[33] Written submissions were purportedly filed on behalf of the "first defendant" on 27 July 2020 by Ms. Kim Ramsay-Moore in association with Mr. Roger Barker. They submitted that when a Report is submitted to the Chief Justice and is set down for consideration by this Court, it is "anticipated" that the Report will be a valid one. It was counsels' submission that, where there was a question related to the validity of the Report, it is within the discretion of this Court to look beyond the Report if this would assist in the administration of justice under **section 21(5)** of **Cap 370A**. Counsel noted the fact that, as one listed on the face of the Report as "present", Ms. Evans deposed that she had no knowledge of it and that there is currently no explanation as to why this is so and "as such there can be no speculation as to why it is so" and suggested that the Court may have to delve further for an explanation. Counsel conceded that, on the facts presented, there is some doubt that **paragraph 9(6)** of the **Fourth Schedule** can be applied to a situation where it appears that there may not have been a

meeting at all. Counsel submitted that "If there was no meeting to compile the report then it cannot stand."

[34] Counsel also submitted that this Court has an inherent jurisdiction to discipline Attorneys-at-Law for their misconduct, relying upon *In Re H. A. Grey [1892] 2 Q.B. 440* and *Halsbury's Laws of England, Volume 65, 2015 at paragraphs 201-56.* Counsel and made reference to this Court's duty to deal with cases justly and to ensure public confidence in the legal profession and social stability.

[35] In conclusion, it was counsel's opinion that there were a number of irregularities in the Report and it was difficult to determine its validity. If the Report was found to be valid, counsel submitted, this Court was not precluded from considering other relevant information separate from the Report in order to fulfill its mandate in the administration of justice.

[36] I note that even though the written submissions of Ms. Ramsay-Moore and Mr. Barker were purportedly filed on behalf of the first defendant, they represent the Solicitor General who is an interested party and upon whom the Report must be served by virtue of **section 21** of **Cap 370A**. I therefore am of the opinion that those submissions were filed on behalf of the Solicitor General whose interest in these proceedings is a public one. It must be noted that no submissions were filed or made by Ms. Rita Evans on behalf of the

Disciplinary Committee and that she informed this court that she would not be filing any submissions.

THE ISSUE

[37] It seems to be common ground that the principal issue for this court to decide is whether the Report is void for procedural irregularity, that is, whether it failed to comply with the provisions of **Cap 370A** and the **Rules** which are later set out in this decision.

The Law

[38] The applicable law is found in **section 21** and the **Fourth Schedule** of **Cap 370A** which provide as follows:

> "21. (1) Where the Committee decides after hearing an application under this Part, that a case of professional misconduct has been made out against an attorney-at-law, the Committee shall within twenty-one days of its decision forward to the Chief Justice a report signed by the Chairman, of its findings, with the reasons for its decision, and with any recommendation in relation thereto, as it thinks just, in accordance with subsection (2).
>
> (2) On the hearing of an application under this Part, the Committee may, as it thinks just, in its report make any recommendation as to -
>
> *(a)* removing from the Roll the name of the attorney-at-law to whom the application relates;"

Rule 9(4) and (6) of the **Fourth Schedule** provide as follows:

> "(4) The Quorum of the Committee shall be four members, two at least of whom shall be of more than 10 years standing in the legal profession."
>
> ….

> (6) The validity of any proceeding of the Committee shall not be affected by any vacancy amongst the members thereof or by any defect in the appointment of a member thereof".

DISCUSSION AND ANALYSIS

[39] The Report was submitted almost 10 years after the last date of hearing of the complaint before the Disciplinary Committee. On its face three names of the members of the Disciplinary Committee appear as being present, namely Mrs. Cecily Chase QC, Mr. G. H. Andrew Brewster, Deputy Chairman and Ms. Rita Evans as member. Mr. Malcolm Deane is recorded as having been excused from the matter. The minutes of the meeting of the Disciplinary Committee for 13 July, 2010, record that Mr. Deane recused himself from the matter, page 4 line 4 and it was so ordered, page 5 line 25.

[40] The onus is on the Disciplinary Committee to ensure that its Report to the Chief Justice complies with procedural requirements of the **Fourth Schedule** of **Cap 370A**. Having raised the issue of procedural irregularity in limine, the respondent has the evidential burden only of supporting his submissions on the facts. There is no onus upon the respondent under **Cap 370A**. This is the fallacy in Mr. Gale QC's submission that there was no evidence filed before this court on behalf of Mr. Nicholls upon which the court could rely to come to a conclusion that a quorum was not present relative to the decision of the Disciplinary Committee. That notwithstanding,

the Report forwarded to the honourable Chief Justice listed three persons as being present and Mr. Deane as having been excused, thus the issue of whether the Committee was quorate when the Report was compiled was raised on the face of the said Report upon which the Disciplinary Committee seeks to invoke our jurisdiction.

[41] I consider that having regard to the rights of all concerned, including the need to protect the public from unscrupulous Attorneys-at-Law and particularly to the draconian nature of the order to remove an Attorney-at-law's name from the roll, that the standard of proof, though a civil standard, is a high one.

[42] Mr. Gale QC's submissions that a quorum was present during the hearing and presumably the same applied when the Report was compiled, fails to address one very important point, namely, that there is no evidence, save and except what is on the face of the Report and the Evans affidavit, to guide the Court in resolving this issue. In coming to this conclusion, I must have regard to Mr. Gale QC's submission that the affidavit evidence of Mr. Ivan Alert, Attorney-at-Law provides the evidential basis for the submission that there was a quorum present. We now analyse the submissions against the evidence presented.

[43] The issue raised by Sir Elliott with respect to quorum is concerned with the compilation of the Report and not the quorate nature of the hearings. Indeed there are no minutes of any meeting when the Disciplinary Committee met to consider the proceedings and make its recommendations. Mr. Alert, in association with Mr. Gale QC, was counsel for the Virtual Complainants, neither he nor Mr. Gale QC can speak to whether or not the Disciplinary Committee was quorate when the Report was compiled or when its recommendations were made since they were not members of that Committee and could not have been present at any of its meetings. The Alert affidavit is therefore unhelpful to resolve the issue of whether or not the Disciplinary Committee was quorate when its recommendations were made and its Report compiled.

[44] The Report indicates that three persons were present and one excused. It does not specifically state at what point in time these persons were present. Having regard to the fact that the minutes record the presence of five members at the meetings whilst the face of the Report only records three, the issue of quorum and the validity of the Report is squarely raised. I agree with Mr. Cheltenham QC that this leaves open a number of interpretations.

[45] I am of the view that this raises a subsidiary but important issue, that is, how was this Report compiled and who participated in the decision to make the

recommendations which are the subject matter of the application before us. There is no evidence on the face of the Report as to whether the findings and recommendations were unanimous or by way of majority. This Court can only act on the evidence submitted to us by the Disciplinary Committee. I cannot presume, as Mr. Gale QC urged us to do, that those members of the Disciplinary Committee who attended the hearings participated in the preparation of the Report or at least that a quorum of them did so. This is because the evidence on the face of the Report and the evidence of Ms. Evans negates such a presumption.

[46] I now consider the Evans' affidavit as it impacts on the point in limine and in particular paragraph 7 thereof which is worth repeating.

> "7. I have had sight of a report dated the 16th July 2019 which was submitted to this Honourable Court by the then Chairman and wish to advise that as far as I am aware, **there was no meeting held on the 16th July 2019 with the persons who are named on the face of the report. As such, I am unable to shed any light with respect to the compilation of the said report." (emphasis added)**

[47] This affidavit evidence is uncontroverted. In addition I remind myself that Ms. Evans informed this court orally that she was not present when the Report was compiled. The only conclusion which can be drawn from this unchallenged affidavit evidence is that there was no meeting held on 16 July 2019 to which she was a party and that she did not participate in the making

of the Report. As of the date of her affidavit, Ms. Evans was still unable to locate the original file at the office of the Disciplinary Committee.

[48] There is therefore doubt as to the manner in which the Report was compiled and who participated in its compilation and the emergent recommendations emanating from within the Disciplinary Committee's case from a member of the said Committee. Far from assisting in clearing up the irregularity with respect to quorum, Ms. Evan's evidence compounds the said irregularity with respect to the Report.

[49] No attempt was made by the Disciplinary Committee to amend the Report. The Disciplinary Committee has not proffered before this Court that it was quorate when its Report was compiled. To make matters worse Ms. Evans conceded that the Committee was not quorate at that time. The net result is that the Disciplinary Committee is satisfied with the Report and is content to proceed upon the said Report it has placed before this Court pursuant to its mandate under **section 21** of **Cap 370A** and which is the originating process upon which our jurisdiction is founded.

[50] The Disciplinary Committee has never alleged nor has it provided any evidence to support the allegation that it was quorate. Similarly, the virtual complainants have been unable to support the submissions put before us by

Mr. Gale QC because they are unable to speak to the manner in which the Disciplinary Committee reached its decision and made its recommendations.

[51] It must be remembered that the application before the court involves not only the right of the virtual complainants to their money, the need to maintain public confidence in the legal profession, but also the right of the respondent to due process of law.

[52] In my opinion the Disciplinary Committee has failed to discharge the burden of proof which lies upon it to prove that it was quorate when the Report was compiled.

[53] I now consider the effect of the lack of a quorum on the validity of the Report and on these proceedings. Mr. Gale QC submitted that, even if there was a procedural defect on the face of the Report, this was not fatal since such errors were not material and could not invalidate the Report, he relied upon **Re: Joyce Griffith** and the dictum of **Chandler JA (AG)** previously referred to in this decision. I have taken into account that dictum with respect to procedural irregularities which I now set out in full:

> "If the Report was vitiated by a serious procedural irregularity or irregularities **(R (on the application of Kuteh) v Upper Tribunal Administrative Appeals Chamber and another [2012] All ER (D) 58 (Jun)** or if the procedural irregularities are so wholesale and so fundamental that the consequence is that no true final Report was ever

> submitted and the subsequent determinations of the appropriate authorities are as a result invalid and of no effect, the court would decline to act upon the Report."

That dictum must be taken in context, namely, that in **Re: Joyce Griffith**, there was an allegation that a certain member of the Disciplinary Committee was not present on certain dates of hearing. His name did not appear on the list of attendees at the beginning of the minutes for certain dates of hearing, however the actual minutes revealed that he was present and actively participated in the proceedings on the impugned dates. In that case therefore, the procedural irregularities related to an error in the list of attendees as distinct from the actual attendees. In those circumstances the procedural irregularity was merely an error in recording and did not materially affect the substantive issue as to whether or not the Disciplinary Committee remained quorate during its hearings and in the production of its Report.

[54] In **Re: Joyce Griffith**, no issue was raised as to whether or not the Disciplinary Committee was quorate when its Report was compiled as is the case in the matter at Bar. **Re: Joyce Griffith** may be distinguished from the case at Bar on this ground. In consequence we are unable to accept Mr. Gale's QC submissions.

[55] With respect to Mr. Cheltenham's QC submissions on this issue, the following factual matters are of importance. The question whether not a

majority decision of the members is required must be understood in the context that they must first be a quorum of the Disciplinary Committee, being present at the time a decision is reached and recommendations made in order to render (1) the proceedings valid and (2) any recommendations emanating from that Committee lawful, see *County of Gloucester Bank v Rudry Merthyr Steam* and *House Coal Colliery Co. Ltd [1895] 1 Ch. 629; Re London Flats [1969] 1 W.L.R. 711*.

[56] Mr. Cheltenham QC opined that the listing of the three names on the cover of the Report under the rubric "present" is open to three different interpretations without venturing any opinion as to whether or not the compilation of the Report emanated from a Disciplinary Committee which was quorate. I find it important to repeat those possible interpretations now, namely that:

(a) it may be indicative of the persons who compiled the Report;

(b) indicative of the persons who agreed with the content of the Report; or

(c) indicative of the persons who were present at the hearing.

Any opinion reached by this Court on the interpretation to be placed on the irregularity in the face page of the Report must be informed by the evidence presented, namely the minutes of meetings and the filed affidavit evidence.

In this regard the affidavit evidence of Ms. Rita Evans previously set out in this decision is crucial as it is the only evidence of a member of the Disciplinary Committee as to what transpired which is properly before this Court.

[57] The unchallenged evidence of Ms. Evans that there was no meeting held on 16 July 2019 renders it impossible to find that the names on the front page of the Report, which included hers, is (1) indicative of the persons who compiled the Report. Her further evidence that, as there was no meeting held, she was "…unable to shed any light with respect to the compilation of the said report" rules out the interpretation that it is (2) indicative of the persons who agreed with the content of the Report. Furthermore the unchallenged affidavit evidence of Ms. Evans at paragraph 7 expressly contradicts any suggested interpretation that it is (3) indicative of the persons who were present at the hearing.

[58] One specific aspect of this matter which is particularly troubling is the lacuna between the last date of hearing of the Disciplinary Committee and the submission of its Report. Nowhere in the minutes of the proceedings is there evidence that, notwithstanding the passage of time, a quorum of the Committee of 2010 ever resolved that the recommendations in the Report ought to be made. No date of such deliberations can be found in the minutes

of the final date of hearing neither are there any minutes that there was an error on the face page of the Report. It is not for this court to assume that this is so, it is for the Disciplinary Committee to establish by evidence that it is in fact so and I can find no trace of such evidence.

[59] With respect to the submissions of Mr. Gale QC that this court retains jurisdiction over Attorneys-at-Law by virtue of **section 24** of **Cap 370A**, we agree with that submission. We also agree with the dictum of *Lord Esher M.R.* in *Re: Grey* and adopted by **Douglas CJ** in **Re: Browne (1972) 7 Barb. L. R. 62 (Re: Browne)** which is now reproduced:

> "…the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore, be affected by anything which affects the strict legal rights of the parties.
> But the two things, the breach by the solicitor of his duty as such, and the legal right of the client, are quite distinct. The client had a right to the money, but the Court has a right to see that its own officer does not act contrary to his duty."

In **Re: Browne, Douglas CJ** was sitting as a judge of the High Court exercising original as distinct from appellate jurisdiction. This matter was brought before us under **section 21** of **Cap 370A** by the Disciplinary Committee whose jurisdiction to hear the complaint had been statutorily invoked. The duality in the jurisdiction of the Disciplinary Committee and of

this Court has been eminently pointed out by counsel, namely, as **Simmons CJ** opined in **Re: Errol Niles** that the Disciplinary Committee's role is investigatory whereas the role of this Court is to impose sanctions. No complaint has been made to us by the virtual complainants. I do not think that we should cloud those jurisdictional boundaries by usurping the Disciplinary Committee's failed role utilising **section 24** of **Cap 370A**. We will return to section 24 later in this decision.

[60] It remains only for me to address briefly some of the opinions and conclusions canvassed and reached by our brother **Narine JA** in his dissenting judgment.

[61] First, **Narine JA** opined that there is no reason in principle why we ought not to consider the Chairman's letter of 10 August, 2020 and the attached amended Report which has been placed before us. The record of proceedings for 28 July 2020 at page 2 lines 16-21 show that we stated quite clearly that this letter had not reached us. Hence we were not possessed of it. Responses to further enquiries concerning this letter and the attached amended Report revealed that it had not been received at the Registration Department or by the then Chief Justice, **Sir Marston Gibson, KA**. Therefore, the court, in my opinion, could not countenance the letter of 10 August 2020 in the absence of an appropriate application.

[62] When this matter first engaged our attention on 13 November 2019, no such letter was before us then. The first mention of it was made by Mr. Gale QC on 28 July 2020 after we had received submissions on the point of procedural irregularity raised by Sir Elliott. No reference to such a letter was made by counsel for the Disciplinary Committee and, it appears that no such letter was received by counsel for the Barbados Bar Association, the Honourable Attorney General of Barbados and the respondent. See page 3 of the record at lines 5, 6 and 8. Counsel for the Disciplinary Committee was silent on the issue. In her opening remarks no mention was made of such a letter or amended face page of the Report.

[63] I preface our further discussion on this issue by noting that on 13 November 2019, Mr. Cheltenham QC suggested to the Court that there should be some clear understanding as to who has carriage of getting records circulated if not "we are likely to hear the same problem when we return." **Goodridge JA** responded "….shouldn't it have been the Committee?"

The following extract is instructive:

> "Mr. Cheltenham, QC: I would have thought so because….
>
> Goodridge, JA: The Disciplinary Committee is the one having prepared the report, …it is sending the report to the court through the Chief Justice, the report should have been accompanied with the notes or

> minutes of proceedings and all interested parties should have been furnished with copies of those documents that is my understanding….But it was the Committee which was driving this process. It is when the documents get to the Court of Appeal that we deal with it. The Committee has a responsibility to do what it should do."

In the face of such exhortation I do not consider it evidentially correct for Ms. Chase to seek to forward to this Court an amended Report via the Honourable Chief Justice without the Disciplinary Committee making the appropriate application to amend the Report supported by affidavit, setting out the reasons for the amendment and serving these documents on counsel for all parties, including the Virtual Complainants. This would have given all counsel the opportunity to agree, to or resist the application. To do otherwise would be a denial of justice to the other parties especially in light of Sir Elliott's preliminary point. Once this matter has engaged this Court's attention, the Honourable Chief Justice, who coincidentally is not a member of this panel, has no authority to accept or forward any documentation to us. I repeat, however, that no letter was forwarded to us or received by us from the Honourable Chief Justice.

[64] With respect to permitting the former Chairman to appear before us to give evidence with respect to the authenticity of the Report. The record of proceedings for 28 July 2020, shows that Mr. Gale QC, on a "point of enquiry", informed us that he had been in contact with **Chase J** who advised him that she had submitted an amended page 1 of the Report to the Chief Justice and enquired whether it had reached this Court. Save for **Narine JA**, it had not, neither had it reached counsel for the respondent, the Disciplinary Committee or the Solicitor General. Counsel also informed us that **Chase J** was available and made an application that we require her to attend this court to clear up the matter once and for all. Goodridge JA then indicated that there was a procedure for having this done.

[65] On 28 July 2020, at page 28 of the record of proceedings, I made the point that "… Ms. Evans from the Disciplinary Committee has made no application with respect to the Report. Mr. Cheltenham, QC, on behalf of the wider Bar has made no such application, and they are the people who brought this matter before this Court." The reality is that it is the Disciplinary Committee and not the Bar which brought the matter before us. In spite of the fact that the integrity of the Report was clearly in issue and that it had been brought to the attention of all parties, the Disciplinary Committee did not apply to adduce evidence with respect to the Report apart

from the Evans affidavit. The Disciplinary Committee brought this matter before us and it is its responsibility to prove its case.

[66] With respect to Mr. Gale QC's application, I do not consider that Mr. Gale's approach was the correct one for dealing with this matter. Counsel was inviting this court to call Ms. Chase as our witness, we could not, in the circumstances, accede to this invitation and properly rule upon Sir Elliott's submission. We do not believe that **Part 1.1** of the **Supreme Court (Civil Procedure Rules) 2008** (**CPR)** is a panacea for this Court to get involved in this matter in the manner suggested by counsel.

[67] On 31 August, 2020 Mr. Gale QC applied to have the documents received by himself "to be admitted as part of the Record. **Particularly as it relates to amending the Report which this Court has before it for consideration…" (emphasis added)**. We denied this application on the grounds that the application could not be granted for the purpose indicated by Mr. Gale QC and set out in parenthesis above. The reason being that the Report was not authored by his clients who could not, in the ordinary course of events, have had any knowledge of what transpired during the deliberations of the Disciplinary Committee and simply put, the Report was not their document to amend.

[68] I am concerned that the application has come from the Virtual Complainants' counsel and not the Disciplinary Committee itself which is the applicant before us. If the Disciplinary Committee felt that there was some error in the Report, whether on its face or otherwise which ought to have been cleared up, this ought to have been communicated by the then Chairman to its counsel and the relevant application supported by affidavit, made, instead communication was made with counsel for the Virtual Complainants, a party with an interest to serve. Further, at no stage in the proceedings did counsel for the Disciplinary Committee indicate that she had received an amended Report.

[69] I earlier indicated that no revised Report had been filed with us and none had reached us at the commencement of this matter, it appears, however, that the letter of 10 August 2020 from the Chairman of the Disciplinary Committee which purported to include the amended Report. Unlike our brother **Narine JA**, we could not countenance this letter and attachment for the reasons set out above in the face of Sir Elliott's point in limine. In addition, there could be no amended Report unless we had given leave to amend and none was sought. The procedure adopted was in our view in breach of the rules of evidence. If a formal application had been made and served on all parties, those parties would have been enabled to either consent to or oppose the

application in accordance with natural justice. Given the fact that Sir Elliott had already raised the issue of procedural irregularity, the submission of a letter with an amended Report without explanation or an opportunity to challenge it, would serve to undermine the procedural point ex post facto and would not be in the interest of justice.

[70] I also find difficulty with the fact that Mr. Gale QC is seeking to amend a Report not authored by his clients whilst the Disciplinary Committee of which Ms. Chase was Chairman, represented by Ms. Rita Evans, has made no such application. In this regard, I must reflect upon the position taken by the Disciplinary Committee on 25 February 2020 when the issue of quorum was first raised by Sir Elliott, **Goodgidge JA**, as she then was, addressed Ms. Evans as follows:

> "…Ms. Evans who coincidentally happens to have been a member of that Committee, and is now the present Chair of the Committee,….indicated that the names stated on the front of the report is an accurate representation of the persons who were present at the time the report was compiled. Ms. Evans is free to tell me whether I've heard her right or wrong."
>
> Ms. Evans, is that what you conveyed to the Court?
>
> MS. EVANS: It is. Indeed, My Lady.
>
> GOODRIDGE, JA: That the report was compiled by the three persons present.
>
> MS. EVANS: No, ma'am, the report was compiled by the Chairman, [three] persons comprised that particular hearing.

GOODRIDGE, JA: Yes but three persons who were present when you were doing all of that.

MS. EVANS: Yes, ma'am.

GOODRIDGE, JA: And Sir Elliottt has raised the point that a quorum, anything that the Disciplinary Committee is doing, according to paragraph 9(4), anything that it is doing; whether it is having a hearing or whatever there must be four members present.

MS. EVANS: It must be quorate. We must be quorate.

GOODRIDGE, JA: That is a quorum, and on the face of the document –

MS. EVANS: **We were not quorate at the time (emphasis added)**.

GOODRIDGE, JA: …there was no quorum. Now that is a fundamental issue that has to be addressed. Yes?

MS. EVANS: You heard me correctly.

GOODRIDGE, JA: So I heard you correctly. I am having problems with my ear because my sinus are giving me no end of trouble. But did I hear you correctly, counsel?

MS. EVANS: You heard me correctly. Yes.

GOODRIDGE, JA: Thank you. That is the fundamental issue that has to be addressed. So don't tell me about who was when ever, what ever was happening."

[71] I cannot ignore Ms. Evans concession in relation to quorum set out in parenthesis above neither can we ignore the lack of minutes supporting the claim of an error on the face of the report or the failure to provide any

evidentiary basis to support the premise that the Committee was quorate when it (1) deliberated on the evidence or (2) made its recommendations.

[72] In the circumstances, I considered it wrong in law to grant Mr. Gale QC's application.

[73] I turn now to the suggestion that this Court can act upon the minutes if not satisfied that the Report is properly before us. This point has already been dealt with under our conclusion that the Report is a nullity and no action can be taken thereon. The minutes are supportive of the Report and have no standing on their own.

[74] With respect to the suggestion that the Connors have been dealt an injustice by this Court, nothing can be further from the truth, rather, it is our intent and duty to do justice to all parties, including the Connors. Justice also involves fairness to the respondent whose livelihood is at stake. We reiterate the position of this Court with respect to the protection of the public as outlined in **Re: Joyce Griffith**. The need to protect the public is a prime consideration but not the only consideration. The first consideration is whether the matter is properly before this Court so as to ground our jurisdiction. The hurdle of procedural irregularity must therefore first be overcome.

[75] Jurisdiction to hear the matter is properly established when the Report is properly before us. It is only then that we act upon it and impose any penalty upon the respondent. It is in the context of deciding the appropriate penalty that the public interest and therefore the interest of the Connors has its impact. The interest of the Connors is, in my opinion, not a determinant of whether the Report is properly before us.

[76] With respect to the inherent jurisdiction of the Court under **section 23** of **Cap 370A**, I am of the view that that jurisdiction has been misunderstood in this matter. I do not consider it necessary to dilate on this concept which was considered in **Magisterial Application No. 6 of 2014, Oscar Maloney v Commissioner of Police**. Suffice to say that if the Report is a nullity, this Court has no jurisdiction, inherent or otherwise, to act upon it or anything contained therein.

Conclusion

[77] Whilst I applaud Mr. Gale QC's vigorous representation of his clients' interests, it cannot, in our view, be correct for the Virtual Complainants, who could have no knowledge of the Proceedings before the Committee, to seek to speculate as to what occurred before the Committee especially where no minutes have been provided. In addition I cannot ignore Ms. Evans concession in relation to quorum set out in parenthesis above. If the

Disciplinary Committee, faced with a challenge to its Report based on procedural irregularity, is content to proceed on its Report forwarded to the Honourable Chief Justice in accordance with **section 21** of **Cap 370A**, I consider it inappropriate to speculate in the manner in which counsel has invited us to do.

[78] In the circumstances, I considered it wrong in law to grant Mr. Gale QC's application.

Disposal

[79] In the circumstances it is ordered that the application of the Disciplinary Committee is dismissed.

Justice of Appeal (AG.)

GOODRIDGE JA:

[80] I have read the decisions of **Narine JA** and **Chandler JA (AG)** and I concur in the decision and disposal of the matter of **Chandler (JA**). I wish only to deal briefly with the Order of Court and which is set out at paragraph [112] of **Narine JA's** dissenting judgement. The Order was vacated because it did not accord with what Mr. Gale QC had requested of us. Mr. Gale QC applied

to us to request **Chase J** to attend this Court to clear this matter up once and for all. He never sought leave to file an application, his application was for us to require **Chase J** to attend before us to clear up the matter. In addition, I had earlier given leave to the Disciplinary Committee's Attorney-at-Law to file an affidavit in relation to the Report. Her affidavit is set out, in extenso, in **Chandler JA (AG's)** judgement. Ms. Evans, as a member of the Disciplinary Committee which heard the complaint and made its report was just as competent as **Chase J** to inform this Court as to the circumstances surrounding the preparation of the Report and she did so. Ms. Evans never asked for **Chase J** to swear an affidavit. In any event, **Chase J** was the Chairman of the Committee and not the Committee itself. Instead **Chase J** communicated with Mr. Gale QC and not with her counsel.

[81] As set out in the decision of **Chandler JA (AG)**, in response to Mr. Cheltenham QC, I stated quite clearly that it was the responsibility of the Disciplinary Committee to file and serve the documents in this matter, contrary to that view, which was not opposed by any member of the panel, we found ourselves in a situation where the virtual complainants and not the Disciplinary Committee are seeking to adduce evidence of what transpired in the deliberations of the Committee. There is no indication as to what

Chase J could say other than what Ms. Evans deposed to as a member of that Committee which could "…clear the matter up…".

[82] Of significance is the exchange between **Narine JA** and Ms. Evans at pages 53 et seq of the record which is now reproduced:

> "CHANDLER, JA: Just finish because I am going to ask you one simple question for which I want one simple answer:
> You are saying to us that when this report was [compiled] you were not present?
> MS. EVANS: No, sir.
>
> CHANDLER, JA: Very well.
>
> MS. EVANS: I thought we are speaking about the hearing because any meetings, hearings, then we list the persons who are present who comprise the panel. But with respect to the compilation of the report that compilation was done by the Chairman of the Committee and I was not present.
>
> NARINE, JA: Ms. Evans, is it customary that at the time at which the report is actually written or put together that other members in addition to the Chairman would be present?
>
> MS. EVANS: Yes, sir, because what the Committee does, We sit as a Committee and we discuss, deliberate and have our findings. Those things are written down and then we give them to the secretary to type up so that each member who sat on the Committee will be a part of the process.
>
> NARINE, JA: Of the final report?
>
> MS. EVANS: Yes, sir.
>
> NARINE, JA: But you are not in a position to see from your own notes who was present.

> MS. EVANS: No, sir.
>
> NARINE, JA: So you rely on what is written on the face of the report?
>
> MS. EVANS: Yes, sir. Because in some cases as well, a report might be done because of the varying practices of the attorneys who sit on the panel. A report might be done and then submitted via e-mail so that we can round-robin.
>
> CHANDLER, JA: No, what we are concerned about is this particular report.
>
> GOODRIDGE, JA: The front of this report says that this is a report and present were three persons. Look at your report.
>
> MS. EVANS: I have looked at it, My Lady.
>
> GOODRIDGE, JA: So I am just trying to understand this page and what you said.
>
> MS. EVANS: Not with the compilation of the report. Certainly, I cannot say that."

[83] In this exchange **Narine JA** focused mainly on the issue of inaccuracies on the face page of the Report, this however does not solve the problem of the manner in which the Report was compiled, who participated in its compilation and the recommendations emanating therefrom. Having regard to the fact that Ms. Evans deposed that she played no role in the compilation of the Report, it is evident that the integrity of the Report is the central issue which the Disciplinary Committee addressed in the Evans affidavit.

[84] Early in these proceedings I warned against any fishing expeditions in this matter. At pages 53 et seq of the record of proceedings, Ms. Evans informed us of the procedure usually adopted in respect of the compilation of Reports and the manner in which members of the Committee are involved in the process. She did not indicate what procedure, if any, was adopted in relation to this Report. In the face of Sir Elliott's challenge to the Report one would have expected Ms. Evans to have dealt with that matter in her affidavit. Furthermore, none of the counsel before us sought to cross-examine Ms. Evans on her affidavit. The questions relating to procedure and compilation of the Report came from this panel.

[85] What is even worse is the suggestion that **Chase J** can clear up this matter once and for all. The Disciplinary Committee presented minutes to us of their meetings for three dates of hearing, thereafter there are no minutes to indicate that it met to either (1) deliberate on the evidence and come to a finding that the respondent was in breach of any or all of the provisions of the Code of Ethics (2) consider what sanction was appropriate (3) whether any finding was unanimous or by majority, and (4) which members of the Committee participated in the deliberations, findings and ultimate recommendations (quorum). It is my considered opinion, that calling **Chase J**, in the absence of minutes, would not have assisted the Court in clearing

up the matter once and for all but would only have led to further confusion in light of Ms. Evans' evidence that no more meetings were held after the final date of hearing recorded by the minutes.

[86] In my opinion, the Order as framed would have lead us into a fishing expedition which was not supported by any evidence.

Justice of Appeal

NARINE JA, dissenting:

BACKGROUND

[87] The facts of this matter are quite disturbing.

[88] In or about December 2007, John Patrick Connor and Hazel Sheila Connor sold two parcels of land for the sum of $950,095.64. Cottle Catford and Co. the firm of attorney Philip Vernon Nicholls of which he was the sole partner had conduct of the transaction on behalf of the vendors. The firm received the purchase price of $950,095.64. After deductions for the property transfer tax, stamp duty, commission, and legal fees, there was a balance of $861,243.64 due to the vendors.

[89] Despite numerous requests for payment, Mr. Nicholls failed to pay over the balance due. The vendors subsequently filed a claim for the debt, and obtained a default judgment in June 2008, which remains unsatisfied, except for a payment of $100,000.00 and further payments amounting to $15,000.00.

[90] In his defence before the Disciplinary Committee (the Committee) Mr. Nicholls case in essence was that he was formerly in a partnership comprising Joyce Jannette Griffith, Allan St. Clair Watson and himself which was dissolved as at 31 December 2002. From 1 January 2003, Mr. Nicholls continued to operate under the name Cottle Catford and Company, of which he then became the sole partner.

[91] It was Mr. Nicholls's case, before the Committee that because of substantial overdrawings of his former partners, the firm was unable to satisfy its debts and was running at a deficit of $3.5m. After he assumed sole responsibility for debts of the firm, all funds that came in were used to finance the deficit.

[92] As noted before, the partnership was dissolved as at 31 December 2002. The purchase price due to the Connors was paid into the firm in or about December 2007, some five years after the dissolution of the partnership, and were applied, according to Mr. Nicholls to satisfy debts of the firm, caused by the overdrawings of his former partners, more than five years before.

[93] The evidence before the committee is clear and uncontroverted. Mr. Nicholls has never denied that the monies were paid into the firm by the purchasers for disbursement to the vendors and were misappropriated for purposes which had nothing to do with the vendors. There was no evidence that Mr. Nicholls took any steps to safeguard the interest of the vendors, or to prevent their money from being applied to the debts of the firm. In fact, Mr. Nicholls admitted that the money is still owing, but sought to cast blame on his former partners, who ceased to be partners some five years before the purchase monies were paid into the firm.

[94] That in a nutshell was the case before the Committee. Unsurprisingly, the Committee made adverse findings against Mr. Nicholls, and found him to be in breach of Rules 70, 74, 87 and 99 of the Code of Ethics. The Committee recommended, inter alia, that Mr. Nicholls be disbarred, and should be ordered to repay the money with interest.

The Proceedings before the Committee

[95] The Committee met to hear the complaint on 23 March 2010, 13 July 2010 and 20 July 2010. No issue is raised in this court as to the composition of the quorum that sat to hear the complaint.

[96] It appears that after the last hearing the Committee somehow lost track of the complaint for nine years. On 16 July 2019, the chairperson of the

Committee wrote to the Chief Justice enclosing a copy of the Report of the Disciplinary Committee. The report is also dated 16 July 2019.

[97] On the face of the Report is recorded:

> "Present
>
> | | |
> |---|---|
> | Miss Cicely P. Chase, QC | Chairman |
> | Mr. G. H. Andrew Brewster | Deputy Chairman |
> | Miss Rita Evans | Member |
>
> Excused from the matter:
>
> | | |
> |---|---|
> | Malcolm Deane | Member" |

[98] Sir Elliott Mottley QC filed an application before this court on 20 February 2020, seeking inter alia, a declaration that "the Report of the Proceedings and the Proceedings by the Disciplinary Committee of the Bar Association which led to the Report are ultra vires, null and void and of no effect".

[99] Sir Elliott referred this court to **para 9(4)** of the Fourth Schedule of the **Legal Profession Act, Cap 370A** (the Act), which states that a quorum of the Committee shall be four members, at least two of whom shall be of more than ten years standing in the legal profession. On the face of the report, only the chairman, deputy chairman and one member, Ms. Rita Evans, was listed as present.

[100] Interestingly, in his affidavit in support of the application, Mr. Nicholls stated at para 2, that between 2008 and 2010 the complaint was heard by a Committee comprising:

Cicely Chase, QC	Chairperson
Andrew Brewster	
Malcolm Deane	
Rita Evans	
Shelly Stuart	
Samuel Legay	
Averil Sealey was Secretary to the Committee	

[101] Mr. Ivan Alert, one of the Attorneys who appeared for the complainants before the Committee, filed an affidavit on 3 March 2020, annexing the minutes of the meetings at which the complaint was heard. These minutes revealed that the members of the Committee that heard the complaint were correctly set out by Mr. Nicholls in his affidavit, except that Mr. Malcom Deane's name does not appear as being present on 20 July 2010.

[102] Ms. Rita Evans the present chair of the Disciplinary Committee, appeared before the court on behalf of the Committee. She swore an affidavit in this matter on 13 March 2020. In her affidavit she stated that the original file in this matter could not be found. However as far as she could recall the members of the Committee were Cicely P. Chase, QC, Andrew Bannister, Malcolm Deane, Jomo Hope, Shelley Stuart and Samuel Legay.

Interestingly, Ms. Evans' list includes one additional member - Mr. Jomo Hope.

[103] Ms. Evans further deposed that she has had sight of the Report dated 16 July 2019, and that as far as she was aware, there was no meeting held on that date with the persons named on the face of that report. As such, she states that she is unable to shed any light with respect to the compilation of the report.

[104] At this point I make two observations. The first is that no one in this matter ever suggested that any meeting of the committee was convened on 16 July 2019. It was simply the date of the report and the date of the covering letter addressed to the Chief Justice.

[105] The second observation I make is that at this point is that the evidence of Mr. Nicholls, Ms. Evans and Mr. Alert put it beyond doubt that the committee was quorate at all times that it met to hear the complainant. This having been clearly established, the focus of the objection then shifted to the compilation of the report.

[106] The basis of Sir Elliott Mottley's submission was simply that on the face of the report only three members of the Committee were listed as being present. It followed that the Committee was not quorate, rendering any decision it

made invalid. Accordingly, this court had no valid document before it to consider.

[107] Mr. Cheltenham, QC submitted that the listing of three names on the cover of the report as being present, was open to three interpretations:

(a) that these were the persons who compiled the report, or

(b) the persons who agreed with the contents of the report, or

(c) the persons who were present at the hearing.

[108] We have already noted that the minutes of the meetings and the affidavits of Mr. Nicholls, Ms. Evans and Mr. Alert clearly established that there were at least five persons in attendance at the meetings of the committee. This reduces Mr. Cheltenham's analysis to inferences (a) and (b).

[109] As Mr. Cheltenham, QC pointed out, neither the Act nor the rules made thereunder provides any procedure as to how the report is to be compiled. There is no requirement under the Act or the subsidiary legislation that a formal meeting of the Committee must be convened to consider the evidence, or to draft the report. The only requirement is that it must be signed by the chairman.

[110] As a matter of common sense the length and depth of the consultation would depend on the evidence and the complexity of the issues before the Committee. While the consultation and discussion among the members may

be informal or brief, especially where as in this case the allegations are admitted, the report of the Committee should reflect the collective will of the committee or the majority of its members. A tribunal does not always come to a unanimous decision. However, in view of Mr. Nicholls' admission of the allegations made against him, it would be difficult to imagine that any member of the committee would come to a different conclusion, to that contained in the report.

[111] Ms. Evans has stated in her affidavit that as far as she is aware "there was no meeting held on 16 July 2019 with the persons named on the face of the report. As such, I am unable to shed any light with respect to the compilation of the said report".

[112] Ms. Evans appears to base her inability to shed any light on the compilation of the report, on the holding of a meeting on 16 July 2019, of which she was not aware. As noted before, there is no evidence that any meeting was held on that date. It is simply the date of the report and the covering letter to the Chief Justice.

[113] The affidavit of Ms. Evans has fuelled speculation as to the circumstances under which the report was compiled.

[114] On 28 July 2020, Mr. Gale QC informed this court that he was in contact with the former chairman of the Committee, now a Judge of the High Court,

and brought to the attention of the court that he was in possession of an amended report. Mr. Gale further indicated that the former chairman was willing to attend before this court to shed light on the issues surrounding the report.

[115] Sir Elliott Mottley QC objected to Mr. Gale's application to have the chairman attend before this court, submitting that it was improper conduct for Mr. Gale to approach the former chairman. I did not quite understand the basis for this suggestion of impropriety on the part of Mr. Gale.

[116] Mr. Cheltenham QC supported Mr. Gale's application. He noted that ex facie, the report does not comply with Rule 9(4) of the rules made under the Act which appeared to be "a technical deficiency". Further, the report did not indicate whether the decision and findings of the Committee were made unanimously or by a majority. The attendance of the former chairman would provide clarity to this issue.

[117] The panel retired for almost an hour and a half to consider the application. There was a spirited exchange among the panel. Finally, the panel managed to arrive at an order, which in my view accorded with the justice of the case, and would assist in providing relevant evidence in relation to the preliminary issue.

[118] Upon resumption of the hearing, the President pronounced the following order of the court:

> (1) Leave is granted to complainants to file and serve the appropriate application supported by affidavit on or before 7th August 2020.
>
> (2) The other parties to these proceedings are at liberty to file affidavits in response on or before 14th August 2020.
>
> (3) The parties to file submissions on or before 14th August 2020.
>
> (4) The matter is adjourned to 19th August 2020.

[119] At this point Sir Elliott Mottley QC prevailed upon this court to reconsider its order. He further indicated that he intended to cross-examine the chairman, who as noted before is now a High Court judge. Sir Elliott asked the court to consider the implications on the administration of justice in the event that this court makes an adverse finding with respect to the credibility of a sitting judge. After some exchanges between the attorneys and the court without further consultation with the panel, the President of the Court vacated the order, expressing a position that she was "uncomfortable" with the matter.

[120] On 19 August 2020, this matter was adjourned to 31 August 2020. On that day, the President informed the attorneys that the court had carefully considered Mr. Gale's application to have the former chairman attend or to

have her evidence given on affidavit, and had determined that the court would not "embark upon the course suggested by Counsel" but would decide this case on the documents already before it, Mr. Gale QC then informed the court that he had received an e-mail from the former chairman of the Committee, copied to all counsel, containing three enclosures:

(a) a letter dated 24th October 2019 to the Chief Justice,

(b) a copy of a letter dated 10th August 2020 addressed to the Chief Justice, and

(c) a letter enclosing an amended copy of the report dated 16th July 2019.

[121] Mr. Gale QC submitted that pursuant to **s. 21** of the Act, all that is required is that the report be submitted to the Chief Justice. Since the Amended Report was submitted to the Chief Justice, it now forms part of the record before this court. Sir Elliott Mottley QC contended that the documents were not properly before this court. The court ruled that no letter dated 24 October 2019 was located, and the letter dated 10 August 2020 was not properly before the court.

[122] Mr. Gale, QC then made an application for leave to file an application to admit the documents referred to in **para 118** above including the Amended Report, submitting, inter alia, that it would be grossly unfair to shut out the complainants from providing evidence to meet the preliminary objection.

[123] Mr. Cheltenham, QC supported Mr. Gale's application, submitting that the court should adopt a functional approach in dealing with the issue, and should not be deterred by "procedural niceties". The matter was adjourned to 6 October 2020.

[124] On that day, the court by a majority ruling, refused Mr. Gale's application to admit the documents.

[125] In view of the matters that I have set out in the preceding paragraphs, I must confess that I have great difficulty in understanding **para 49** of the judgment of Chandler JA (ag.) where it says:

> *49. "No attempt was made by the Disciplinary Committee to amend the Report. The Disciplinary Committee has not proffered before this court that the Disciplinary Committee was quorate, when its Report was compiled."*

[126] It appears that **para 49** of the judgment of Chandler JA (Ag.) may be suggesting that it was the place of the Disciplinary Committee to put the relevant evidence before this court rather than the complainants. I respectfully disagree with that position. What does it matter in the final analysis what the source of the evidence is? This court exercised its discretion to prevent the complainants from adducing relevant evidence on the preliminary issue.

[127] The letter dated 10 August 2020 and the Amended Report, did in fact come to the attention of the court and were included in the bundle before us. In my view these documents are properly before this court.

[128] **Section 21(1)** of the Act provides that the committee shall within 21 days of its decision forward to the Chief Justice a report signed by the Chairman. **Section 21(3)** mandates the Chief Justice to refer the report to the Court of Appeal for its consideration. The Act does not require the report to be filed in the court, or to be annexed to any affidavit.

[129] No party in this case has suggested that the covering letter dated 16 July 2019, or the report of the same date are improperly before this court. Neither of these documents bears the court's stamp or is annexed to any affidavit in the proceedings before this court.

[130] In similar fashion the letter of the chairman dated 10 August 2020, and the amended report have made their way to the court file. The letter dated 10 August 2020 is addressed to the Chief Justice. It refers to a letter dated 24 October 2019, which the chairman of the committee wrote to the Chief Justice enclosing the Amended Report. The letter is signed by the Chairman.

[131] The Amended Report is identical in all respects to the original report, except that it records under the rubric "Present", the following names:

Miss Cicely P. Chase, QC	Chairman
Mr. G. H. Andrew Bannister	Deputy Chairman
Miss Rita Evans	Member
Miss Shelley Stuart	Member
Mr. Samuel Legay	Member

[132] Under the rubric "Recused from the matter", the Amended Report lists Mr. Malcolm Deane. This same information is recorded in the original report, except that the word "Excused" was used instead of "Recused".

[133] The members listed on the face of the Amended Report are the same as those stated in the affidavits of Mr. Nicholls, Ms. Evans and Mr. Alert, and stated in the minutes of the meetings of the committee, except that Ms. Evans mentioned an additional member, Mr. Jomo Hope.

[134] I can think of no reason in principle why this court cannot consider the letter of the Chairman dated 10 August 2020 and the Amended Report, which have been placed before us. Even if this court has concerns about the authenticity of these documents, these concerns could have been addressed, by permitting the former chairman to come before us to give evidence, or to place before us an affidavit dealing with the issues of quorum, and compilation. However, the majority determined that the letter of 10 August 2020, and the Amended Report were not properly before the court, and so refused to look at them, and further determined that no evidence would be admitted to clarify the issues raised in the preliminary submission.

[135] In my judgment, the issue of quorum has been put to rest by the affidavit evidence set out before, and the minutes of the meetings. Further, the issue with respect to the compilation of the report is pure speculation, unsupported by any evidence whatsoever. To make matters worse, evidence which may have cast light on the circumstances under which the report was compiled, has not been allowed.

[136] It is clear in my mind that the face page of the original report contained an error in recording the persons present, or as Mr. Cheltenham, QC put it in his written submissions, "the inference is that the listing of three persons is the result of an administrative failure in the form of imprecise editorship".

[137] It is most unfortunate that this error has given rise to an unmeritorious preliminary submission which has found favour with the majority of this court.

[138] Accordingly, it is my view that the report is not so flawed by virtue of procedural regularity that this court cannot act on it. A mere error in recording the persons present, which is clearly apparent having regard to the evidence before us, cannot provide any valid basis on which this court can decline jurisdiction.

[139] Having perused the first draft of my dissenting opinion, Chandler JA (Ag.) as he is entitled to, sought to deal with issues I raised from paragraph 59 et seq., I wish to respond briefly.

[140] It was suggested that it was inappropriate for the former chairman (Ms. Chase) to seek to forward an amended report to the Court, without making a formal application, supported by affidavit before this court. In fact, it was the place of the Committee, who brought this matter before the court to make such an application, not the virtual complainants, who were not the makers of the document. Further, in the absence of such an application, the attorney (Mr. Nicholls) would not have an opportunity to challenge the amended report, which would serve to undermine his, procedural point and this would not be "in the interest of justice."

[141] In my view the role of the Committee is not to be regarded as an adversarial one. The Committee is tasked with a function to investigate complaints made by members of the public with a view to ensuring the highest ethical and professional standards of conduct by attorneys in carrying out their professional duties. The Committee has no interest in this matter beyond assisting the court in deciding the issues raised. In fact, Ms. Evans, who appeared before this court for the Committee did not object to any of the applications made by Mr. Gale QC to call Ms. Chase to give

evidence in person, or by affidavit. Nor did Ms. Evans, at any time, suggest that she was the proper party to make any such application.

[142] In fact the maker of the document in question was the former chairman, Ms. Chase, who expressed to Mr. Gale, her willingness to attend before this court to give viva voce evidence, or to provide evidence on affidavit in relation to the compilation of the report and the issue of quorum. All applications by Mr. Gale to adduce evidence through Ms. Chase, were rejected by this Court. Had any such application been granted, the Attorney (Mr. Nicholls) would have had full opportunity to cross-examine and to make submissions. It is difficult to see how any injustice could have arisen to the attorney. The injustice in this case, unfortunately, was visited upon the virtual complainants who were deprived of the opportunity to put forward their evidence on the procedural issue raised in limine.

[143] In paragraph 70, Chandler JA (Ag.) refers to a concession made by Ms. Evans in relation to quorum, allegedly made in the extract of the transcript set out in paragraph 69. A careful reading of the extract reveals that Ms. Evans agreed that "on the face of the document" (the Report) there was no quorum. There is no evidence in this matter that there was any meeting of the Committee on the date in question. The date 16th July 2019, appears at the end of the Report above the signature of the Chairman. To all

intents and purposes, this is the date of the report, not the date of any meeting of the Committee.

[144] Sir Elliott Mottley QC has sought to persuade this court that the Report of the Committee is a nullity on the basis that the Committee was not quorate at the time that the Report was compiled. However, there is no evidence before this court with respect to the compilation of the report, and the court has refused to permit such evidence to be given by the best source (Ms. Chase), the Chairman who signed the report. The Report, being a nullity in Sir Elliott's submission, cannot be used for any purpose, even though the Attorney has admitted unequivocally in his evidence before the Committee that he used the proceeds of the sale of the property of the virtual complainants for his own purposes. This court then, is being asked to deliberately close its eyes to uncontradicted evidence of wrongdoing, in reliance on a technical procedural issue raised by the attorney, for which no evidence has been provided. Fortunately, there is another course open to this court.

[145] If this court takes the position that it cannot act on the basis of the report, there is another avenue which the court can access to do justice in this case. This court is not powerless. Ms. Ramsay-Moore, who appears on behalf of

the Attorney General, submits that this court has jurisdiction to discipline attorneys at common law, which is preserved by the Act.

[146] **Section 23** of the Act provides:

> ***123. "Notwithstanding anything in this Act, the jurisdiction, power or authority vested in any court immediately before the commencement of this Act -***
>
> ***(a) by the common law to discipline, or***
>
> ***(b) by any enactment to deal with contempt of court committed by, barristers or solicitors shall continue to be exercisable after such commencement in relation to attorneys-at-law."***

[147] Ms. Ramsay-Moore also referred us to a dictum of Lord Esther in **Re H.A. Grey [1982] 2 Q B 440** at **443**:

> ***"The principle so laid down is that the court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the court, which is exercised not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the court's own officers. That power of the court is quite distinct from any legal rights or remedies of the parties, and cannot therefore, be affected by anything which affects the strict legal rights of the parties."***

[148] Even if this court considers that the report is fatally flawed, it can act on the uncontroverted evidence as contained in the minutes of the meetings of the Committee (annexed to the affidavit of Mr. Alert) in evidence before us. In his evidence before the Committee given on 20 July 2010, Mr. Nicholls essentially admits that the partnership dissolved on 31 December 2002, and

that he subsequently used client's finds received into the accounts of Cottle Catford to pay off debts of the partnership. This included funds owing to the Connors received by his firm some five years after the dissolution of the partnership.

[149] This is clear, compelling, and uncontradicted evidence given by Mr. Nicholls himself, which is before us, on which this court can act independently of the report of the Committee.

[150] In **para 58** of the majority judgement reference is made to the observations of **Simmons CJ** in **Re Errol Niles** in which the learned former Chief Justice drew a distinction between the roles of the Committee and that of the Court of Appeal. As **Simmons CJ** pointed out, the role of the Committee is investigatory. The Committee holds an injury investigating the facts of the complaint. While the Committee is required under **s. 21** to provide its findings, reasons for decision and recommendations, this court is not bound to accept the recommendations of the Committee. Under **section 22(1)** of the Act, the Court of Appeal may, having given due consideration to the report, dismiss the application, or impose any sanction which it considers appropriate including removal of the Attorney from the Roll, suspension from practice for up to three years, imposing a fine on the Attorney or reprimanding him.

[151] The simple point is that the sanction to be imposed on the attorney for professional misconduct, is a matter which is ultimately to be determined by this court, after a review of the evidence before it.

[152] The minutes of the meetings of the Committee are before us, independently of the report. The evidence with respect to the conduct of the attorney is uncontroverted and in fact supplied by the attorney himself. The evidence clearly establishes breaches of the Legal Profession Code of Ethics, in particular Rules 70, 74, 87 and 88 (1):

> Rule 70 An attorney-at-law shall not retain money he received for his client longer than in absolutely necessary.
>
> Rule 74 In the performance of his duties an attorney-at-law shall not act with inexcusable or undue delay, negligence or neglect.
>
> Rule 87 In pecuniary matters, an attorney-at-law shall be punctual and diligent, he shall never mingle funds of others with his own and he shall at all times be able to refund money that he holds for others.
>
> Rule 88 (1) An attorney-at-law shall keep such accounts as clearly and accurately distinguish the financial position between himself and his client as and when required.

[153] As noted before, **section 23** of the Act preserves the common law jurisdiction of this court to discipline attorneys for misconduct. In acting on the uncontroverted evidence before us, this court will not be usurping the

function of the Committee. The Committee has carried out its investigatory function, the results of which are before us. It is now the duty of this court to carry out its function of considering the evidence, and coming to a determination of whether the attorney should be disciplined for his admitted breaches of the code of ethics, and if so, what sanctions should be imposed on him.

[154] This court must not shirk its duty to do what is required in this case to exercise its disciplinary jurisdiction over an attorney-at-law, in a situation where the evidence of misconduct is in fact uncontroverted.

[155] In the matter of **Allison Alexander an Attorney-at-Law (Re Alexander Complaint No. 42 of 2015** (referred to by **Chandler JA (Ag.)** in **In the Matter of Joyce Griffith, Attorney-at-Law Complaint No. 7 of 2013**, at **para 67**, **Mason JA** (as she then was) observed:

> ***"The purpose behind the regulation of the profession is to maintain a good public image, to insist that persons comply with the values of conduct and if the circumstances should arise, to remove the deviant members of the profession."***

[156] These sentiments were echoed by **Chandler JA** (Ag) in **Joyce Griffith** (supra) at **paras 61**, **73**, **74** and **75**, set out below:

> ***"61. The purpose of disciplinary proceedings is to demonstrate to the members of the profession and to the public at large that the profession can and will enforce standards of conduct and skill. This reinforces public confidence in the profession.***

> ***73. The Court has a duty to deal with cases justly. In so doing it must balance the interests of all parties and ensure that its discretion is exercised reasonably. The rule of law remains a sturdy pillar ensuring the stability of our society and as such proportionate sanctions must be imposed in an effort to maintain public confidence in the legal profession in particular and in the legal system in general.***
>
> ***74. The imposition of an appropriate sanction must be an effective individual deterrent to the respondent and a general deterrent to others in the legal profession, who by virtue of the nature of the services provided, hold positions of trust towards their clients and must not use their positions for personal gain.***
>
> ***75. Our duty to sanction misconduct is critical to maintaining public confidence in the legitimate provision of legal services in this Island. We take this responsibility very seriously."***

[157] I associate myself wholeheartedly with the sentiments expressed by **Chandler JA** in the paragraphs cited above. These observations apply with equal force to the facts of this case, which are similar in material respects to the Joyce Griffith case. The similarities appear striking when one considers **para 76** of the judgment in **Joyce Griffith** under the rubric "conclusion":

> ***"76. Having considered the relevant submissions and the uncontroverted facts we find that, though the offence is the respondent's first and that she did admit her guilt, five years have elapsed during which the complainant has remained without the benefit of over $128,778.70. Two promises to repay have been unfulfilled. The misconduct is therefore of a serious nature and the sanction imposed must reflect this."***

[158] I would venture to say that the facts of this case are far more egregious than those in **Joyce Griffith**. The sum owed is several times more, and the money has been outstanding for more than 13 years.

[159] The extreme hardship suffered by the Connors cannot be ignored and cries out for justice. They were two elderly people who sold their home in 2007, with a view to making provision for themselves when they were old and infirm. Mr Connor died without receiving the proceeds of sale. The executrices of his will are complainants in this matter. His wife, Hazel Sheila Connor was admitted to Rendezvous Retreat Nursing Home due to advancing age and medical conditions. Due to the lack of finances she had to be removed from the Nursing Home to the care of her two sisters. She had lost her feet and suffered paralysis in her hands. This court was not provided with evidence as to whether she is still alive.

[160] As observed by **Chandler JA (Ag.)** in **para 73** of **Joyce Griffith** (referred to above) this court has a duty to deal with cases so as to achieve justice between the parties. In the exercise of its discretion, it must consider the evidence and the matters that are relevant to its decision. It must consider not only the interests of the parties concerned, but also the importance of maintaining public confidence in the system of justice in deciding whether sanctions should be imposed on practising attorneys who offend against the

code of ethics and acceptable standards of conduct that the society can reasonably expect from the legal profession.

[161] The legal system has clearly failed the Connors. The proceeds of what was probably their most valuable asset were misappropriated by an attorney for purposes that had nothing to do with their own interest. Having filed a complaint in 2008, it was finally heard in 2010 and a decision not given until July 2019. The delay is nothing short of scandalous, and even though the chairman was not permitted to provide any explanation for the delay in submitting the report of the Committee, it is difficult to conceive of any reasonable explanation that could justify such a delay.

[162] The final injustice meted out to the Connors was received in this court which refused to exercise its discretion so as to achieve a just result, in the face of uncontradicted evidence. This is not a proud day for the administration of justice in this country.

DISPOSAL

[163] In the result I would have dismissed the preliminary objection, and proceeded to hear the substantive matter.

Justice of Appeal