JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 52/99

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**BARRINGTON EARL FRANKSON**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL exparte Basil Whitter (at the instance of Monica Whitter)**	**RESPONDENT**

Earl Witter, Maurice Frankson, Richard Rowe and David Morales instructed by Rowe, McDonald & Co., for the Appellant

Dennis Morrison, Q.C., Charles Piper instructed by Piper & Samuda for the Respondent

February 18, 19, 20, 21, 22
May 21, 22, 24 2002 and March 2, 2004

DOWNER, J.A.

The important jurisdictional issue raised in this appeal by Mr. Earl Witter of counsel, is whether Basil Whitter had the competence to institute proceedings before the Disciplinary Committee (the "Tribunal"), against the attorney-at-law Barrington Earl Frankson. The appellant Frankson, was retained by Monica Longmore the mother of Basil Whitter in proceedings on which the Court adjudicated in ***Slydie Basil Joseph Whitter v. Monica Whitter*** SCCA No. 16

of 1988 delivered June 1, 1989 and ***Barrington Frankson v. Monica Longmore*** Motion 13/99 delivered July 31, 2000. In the first case, the decision went in favour of Monica Whitter, in that this Court decided that she was entitled to half the proceeds from the sale of the matrimonial home. Her complaint had been that the appellant Frankson had failed to remit the proceeds of the sale to her. She had a contingency agreement pursuant to section 21 of the Legal Profession Act (the "Act") with the appellant Frankson whereby he was entitled to 25% of the proceeds of the sale. She later terminated that retainer, and the appellant Frankson instituted proceedings against her to recover his fees. This was the subject matter of the second case. Here again she succeeded, in that the default judgment, the appellant Frankson obtained against her was set aside. It is against this background, that the issue of the competency of Basil Whitter acting on behalf of his mother arises. Specifically is he entitled to institute proceedings on the issue of the professional misconduct and default of Barrington Frankson before the tribunal on behalf of his mother?

The Construction of section 12 of the Legal Profession Act

To determine the validity of proceedings instituted before the Tribunal it is necessary to examine the relevant provisions of the Act.

Section 12, in so far as material reads:

> "12. – (1) Any person alleging himself aggrieved by an Act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such

> person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by an attorney, that is to say –
>
> (a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect); ..."

The wording of section 12(1)(a) suggests that the professional misconduct (including any default) must relate to such person who has retained the attorney. The Registrar or a member of the Council may make a like application. Section 12(1) was drafted to incorporate the use of the reflexive pronoun himself and the phrase "such person" further emphasizes that it is the person aggrieved who must swear to the originating affidavit. Alternatively, a Judge may make or cause the Registrar to make an application to the Committee in a defined circumstance. This is provided for in section 12(2) of the Act which reads as follows:

> "12. –(2) In any matter or hearing before a court a Judge, where he considers that any act referred to in sub-paragraph (a) or (b) of subsection (1) has been committed by an attorney, may make or cause the Registrar to make an application to the Committee in respect of the attorney under that subsection.
>
> In this subsection 'court' means the Supreme Court, the Court of Appeal, a Resident Magistrate's Court, the Traffic Court or any other court which may be prescribed."

Section 2 of the Act defines Registrar as the Registrar of the Supreme Court.

Then section 12(3) reads:

> "12. – (3) Any application under subsection (1) or (2) shall be made to and heard by the Committee in accordance with the rules mentioned in section 14."

Section 12(4)(a) and (c) is also pertinent, it reads:

> "12. –(4) On the hearing of any such application the Committee may as they think just make any such order as to –
>
> (a) Striking off the Roll the name of the attorney to whom the application relates, or suspending him from practice on such conditions as they may determine, or imposing on him such fine as they may think proper, or subjecting him to a reprimand;
> ...
>
> (c) the payment by the attorney of any such sum by way of restitution as they may consider reasonable."

Restitution must be to such aggrieved person entitled to institute proceedings or the person at whose instance the Judge or Registrar had made the complaint pursuant to section 12.

There is a reference to section 14 in section 12(3) of the Act and that section requires consideration. The section reads as follows:

> "14. – (1) The Disciplinary Committee may from time to time make rules for regulating the presentation, hearing and determination of applications to the committee under this Act.
>
> (2) Until varied or revoked by rules made by the Committee pursuant to subsection (1) the rules contained in the Fourth Schedule shall be in force.

> (3) For the purposes of any application made to them under this Act, the Committee may administer oaths and the applicant or the attorney to whom the application relates may sue out writs of subpoena *ad testificandum* and *duces tecum,* but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.
>
> (4) An application to, or an enquiry or proceeding before, the Committee shall be deemed to be a legal proceeding within the meaning of that expression as used in Part 11 of the Evidence Act."

Section 14(3) speaks of the applicant which is the person aggrieved by the attorney's misconduct. Any member of the Council or the Registrar (see section 12(1)) or a Judge or Registrar (see section 12(2)) may also institute proceedings. The agent of the person aggrieved has no standing pursuant to section 12. The Act provides for the members of the Council or the Registrar to be statutory agents.

It is helpful to examine the schedules to the Act to determine if they assist in elucidating the issue of Basil Whitter's competency in the circumstances of this case. Paragraph 7 of Schedule 1 reads:

> "Subject to the provisions of this Schedule the Council may regulate its own proceedings."

Any such regulations cannot exceed its powers under the Act.

The rules in the Fourth Schedule are of importance. Rule 3 reads:

> "3. An application to the Committee to require an attorney to answer allegations contained in an affidavit shall be in writing under the hand of the applicant in Form 1 of the Schedule to these Rules and shall be sent to the secretary, together with an

> affidavit by the applicant in Form 2 of the Schedule to these Rules stating the matters of fact on which he relies in support of his application."

Then Rule 4 enables the Tribunal to dismiss the application if no prima facie case is made out. It reads:

> "4. Before fixing a day for the hearing, the Committee may require the applicant to supply such further information and documents relating to the allegations as they think fit, and in any case where, in the opinion of the Committee, no *prima facie* case is shown the Committee may, without requiring the attorney to answer the allegations, dismiss the application. If required so to do, either by the applicant or the attorney, the Committee shall make a formal order dismissing such application."

If proceedings are properly instituted the following rules are applicable:

> "8. If either or both of the parties fail to appear at the hearing the Committee may, upon proof of service of the notice of hearing, proceed to hear and determine the application in his or their absence.
>
> 9. Where the Committee have proceeded in the absence of either or both of the parties any such party may, within one calendar month from the pronouncement of the findings and order, apply to the Committee for a rehearing upon giving notice to the other party and to the Secretary. The Committee, if satisfied that it is just that the case should be reheard, may grant the application upon such terms as to costs or otherwise, as they think fit. Upon such rehearing the Committee may amend, vary, add to or reverse their findings or order pronounced upon such previous hearing."

These provisions are appropriate in instances where the parties have not appeared and documentary evidence from the previous records of the Court or otherwise, enables the tribunal to adjudicate on the merits of the case.

Rule 10 is crucial. It reads:

> "10. The Committee may, in their discretion, either as to the whole case or as to any particular fact or facts, proceed and act upon evidence given by affidavit:
>
> Provided that 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 are 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."

The originating affidavit dated 17th February 1997, whose form is set out in Form 2 of the Schedule to the Act demonstrates that it failed to comply with section 12 of the Act and paragraph 3 of the Fourth Schedule. It reads at page 5 of Volume 1 of the Record:

"FORM OF AFFIDAVIT BY APPLICANT

(a) Name of the Attorney-at-law	In the matter of (a) Basil J. Whitter on behalf of Monica E. Samuels and Barrington E. Frankson an Attorney-at-law In the matter of the Legal Profession Act, 1971 (Act 15 of 1971)
(b) Name of Applicant	1, (b) Basil Joseph Whitter on behalf of Monica E. Samuels Make OATH and say as follows:
(c) Place of Residence	(1) That I reside at (c) Lot 4 Village Green, Windsor Road
(d) Parish	in the parish of SAINT ANN
(e) Occupation	and am © a Businessman
(f) Postal Address	and my postal address is (f) St. Ann's Bay P.O.

(g) Name of Attorney-at-law

(2) That (g) That I employed Mr. Barrington E. Frankson

(h) Set out facts complained of.

(3) (h)

Barrington E. Frankson knowingly conspired to defraud and conceal moneys and failed to give answers to the following questions.

(1) Why had he collected all moneys on behalf of Monica E. Samuels when he knew that her son, Basil Joseph Whitter had a power of Attorney.

(2) Failure to give dates when moneys were received from Crafton Miller on behalf of Joe Whitter. Failure to give amount collected from Crafton Miller in respect of the sale of the premises known as Cromarty on behalf of Joe Whitter.

(3) Failure to notify M.E. Samuels or Basil Whitter of settlement.

(4) To cause the loss of interest and failure to disclose what bank or whose account the money was held.

(5) Failure to notify court of the continued contact with Basil Joseph Whitter.

(6) Conspire to have his legal fees settled by Taxation Court without giving copies of all the relevant documentations, valuation report, correspondence copy titles and court papers to our attorney John Graham of Patterson, Phillipson & Graham, which would put him in a position to properly assess the bill of cost which had been laid for taxation.

Set out shortly the ground of complaint

(4) The complaint I make against the Attorney-at-law is that he (i)

(1) He has charged me fees that are not fair and reasonable.

(4) He has not provided me with all information as to the progress of my business with due expedition, although I have reasonably required him to do so.

(5) He has not dealt with my business with all due expedition.

(6) He has acted with inexcusable or deplorable negligence in the performance of his duties.

(7) He has not accounted to me for all moneys in the hands for my account or credit, although I have reasonably required him to do so."

At the commencement of this originating affidavit, it is stated that Basil Whitter was acting on behalf of his mother. Then in the grounds of Complaint numbered (1), (4), (5), (6) and (7) the originating affidavit of Basil Whitter by using direct speech gives the impression that it was he who retained the appellant Frankson. This affidavit as drafted shows the wisdom of the Legislature in confining the persons capable of instituting proceeding to, "any person alleging himself aggrieved," the Registrar, or a Council member pursuant to section 12(1) of the Act.

The other non-compliance concerns Form 1 in the Schedule which does not appear in the Record. The blank form reads as follows:

FORM 1

Form of Application against an Attorney-at-law

To the Committee constituted under the Legal Profession Act, (Act 15 of 1971)

In the matter of

and an attorney-at-law.

In the matter of the Legal Profession Act.

I, the undersigned

hereby make application that* of attorney-at-law, may be required to answer the allegations contained in the affidavit which accompanies this application.

I make this application on the ground that the matters of fact stated in the said affidavit constitute conduct unbecoming his profession on the part of the said in his capacity of attorney-at-law.

In witness thereof I have hereunto set my hand this day of 19

....Signature

.....Address

....Profession, business or occupation

*Insert full name and last known place or places of business.

Paragraph 3 of the Fourth Schedule is of such importance that it is necessary to set it out again. It reads:

"3. An application to the Committee to require an attorney to answer allegations contained in an affidavit shall be in writing under the hand of the applicant in Form I of the Schedule to these Rules and shall be sent to the secretary, together with an affidavit by the applicant in Form 2 of the Schedule to these Rules stating the matters of fact on which he relies in support of his application."

For clarification the complainant at times used her married name Whitter and used Samuels or Longmore at other times. It is acknowledged that she resides outside the jurisdiction. In such circumstances this was therefore a

classic case for the Registrar or a member of the Council to make the application pursuant to Section 12(1) or a judge causing the Registrar to make the application in conformity with section 12(2) of the Act. This is the procedure which ought to have been adopted in the present case in view of the two cases before this Court involving Monica Whitter and Monica Longmore before this court.

Are there authorities which illustrate that the proceedings in the tribunal were null and void?

Mr. Earl Witter for the appellant Frankson cited the following passage from ***Barrington Frankson v. Monica Longmore*** Motion 13/99 at page 19 from this Court where I quoted Upjohn, L.J. in ***Re: Pritchard*** [1963] 1 All E.R. 873:

> "Upjohn, L.J., who gave the leading judgment for the majority in contrast said at page 883:
>
> 'The authorities do establish one or two classes of nullity such as the following: There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with: see e.g., ***Whitehead v. Whitehead*** (otherwise Vasbor) [1962] 3 All E.R. 800. (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement: see e.g., ***Finnegan v. Cementation Co., Ltd.*** [1953] 1 All E.R. 1130: [1953] 1QB 688'."

The other case is ***R. v. Monica Stewart*** [1971] 17 WIR 381. I was the hapless counsel for the Crown. The headnote summarises the principle of law applicable. It reads at page 381:

> "The provisions of s. 272 of the Judicature (Resident Magistrates) Law, Cap. 179, which required the resident magistrate to hold an inquiry to ascertain whether the offence charged in the information against an accused person is within his jurisdiction, to make an order for trial to be endorsed on the information and to sign the order, must be strictly complied with and non-compliance with any of those provisions renders any trial on indictment relating to the charge laid in the information a nullity."

CONCLUSION

The foregoing analysis is an attempt to answer the ground in the Notice and Grounds of Appeal which reads at page 1 of the Record:

> "2. The Committee erred in law when it embarked upon the hearing of the said Complaint since the nominal complainant, Basil Whitter had no *locus standi* to institute and maintain the said Complaint. A fortiori, the Committee acted without or exceeded its jurisdiction in entertaining the Complaint."

It is to be noted that the appellant Frankson invoked the jurisdiction of the Supreme Court to challenge the jurisdiction of the Tribunal. That application was refused and it was acknowledged at page 137 of the Record that:

> "There was an interruption in the hearing of this matter from March 12th 1998 to 5th August 1998 because of proceedings instituted by the attorney in the Supreme Court seeking orders of certiorari and prohibition against this panel continuing to hear this complaint. This application was not successful."

In its judgment delivered on July 8th, 1998 in ***Regina vs. Disciplinary Committee of the General Legal Council ex parte Barrington Frankson*** M-047 of 1998 the Court (Ellis, Panton, Granville James, JJ) ruled as follows:

> "We are of the view that the Disciplinary Committee of the General Legal Council has jurisdiction to adjudicate on the complaint made by Mr. Basil Whitter against the Applicant. Mr. Whitter is acting on behalf of his mother, Mrs. Longmore, who had an Attorney/client relationship with the Applicant. There is clear evidence that she has made a complaint to the General Legal Council and has authorized her son to act on her behalf in relation to that complaint."

The problem with this formulation is that Mrs. Longmore had no authority to by-pass the mandatory provisions of the statute relating to the institution of proceedings before the Tribunal. The Supreme Court ought to have directed the Tribunal to re-commence the proceedings by resorting to section 12(2) of the Act. She was entitled to appoint an agent but not to authorize that agent to institute proceedings. The Supreme Court in the passage above, treated the complaint by the appellant Frankson as a matter of fact, when its jurisdiction was invoked to decide an issue of law. The tribunal (Pamela Benka-Coker, Q.C. Margarette Macaulay & Andrew Rattray) cannot be blamed for proceeding to hear the merits of the case in view of the Court's ruling. It is regrettable that there was no appeal from the order of the Supreme Court.

It is necessary to show the basis on which the Tribunal wrongfully embarked upon a hearing in this case in response to the originating affidavit of Basil Whitter. Mrs. Monica Samuels complained to the General Legal Council by

letter dated 3rd January 1997. This letter is at pages 126 – 127 of Volume 2 of the Record. The General Legal Council responded to Basil Whitter's originating affidavit of 7th February 1997 thus at page 131 of Volume 2 of the Record:

> "5th May, 1997
>
> Mr. Basil Whitter
> Lot 4 Village Green
> Windsor Road
> St. Ann's Bay P.O.
> St. Ann
>
> Dear Mr. Whitter,
>
> Re: Complaint No. 05/97
> Basil Whitter et al vs. Barry Frankson
>
> Your complaint was considered at the meeting of the Disciplinary Committee held on the 26th April, 1997.
>
> The decision was taken that it should be set for hearing.
>
> As soon as a date for hearing is fixed you will be notified.
>
> Yours truly
>
> Winsome Harper (Mrs.)
> Secretary

The Tribunal acknowledged that it acted on the affidavit of Basil Whitter at page 121 of Volume 1 of the Record thus:

> "The substantive complainant is Monica Whitter. The formal complainant is Basil Whitter, her son, who signed the complaint on her behalf as her duly authorized agent, and also gave oral evidence on her behalf at the hearing of the complaint."

Once the proceedings were instituted contrary to the provisions of the Act, then the order of the Tribunal must be null and void.

The statutory powers of this Court are set out in sections 16 and 17 of the Act. They read as follows:

> "16. An appeal against any order made by the Committee under this Act shall lie to the Court of Appeal by way of rehearing at the instance of the attorney or the person aggrieved to whom the application relates, and every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court.
>
> 17. – (1) The Court of Appeal may dismiss the appeal and confirm the order or may allow the appeal and set aside the order or may vary the order or may allow the appeal and direct that the application be reheard by the Committee and may also make such order as to costs before the Committee and as to costs of the appeal, as the Court may think proper:
>
> Provided that in the rehearing of an application following an appeal by the attorney no greater punishment shall be inflicted upon the attorney concerned than was inflicted by the order made at the first hearing.
>
> (2) Where the Court of Appeal confirms the order (whether with or without variation) it shall take effect from the date of the order made by the Court of Appeal confirming it."

So the order of this Court ought to be that the appeal is allowed, the order of the Tribunal be set aside and a tribunal differently constituted is directed to rehear the application. The Registrar is directed to institute proceedings before the Tribunal forthwith. The appellant Frankson is entitled to the taxed or agreed costs of this appeal.

Langrin, J.A.

I concur.

PANTON, J.A. (Dissenting)

I am of the opinion that this appeal should be dismissed.

1. The appellant, an attorney-at-law of twenty-three years' standing at the time of the disciplinary hearing, was by an order dated May 1, 1999, struck from the roll of attorneys-at-law entitled to practise in the several courts of this country. In addition, he was ordered to make restitution to Monica Whitter (known also by the surnames Samuels and Longmore) of the full sum of monies received representing the purchase price of her half share interest in the property known as Cromarty, less vendor's costs of sale and transfer. He was further ordered to pay after such deduction interest on the balance at the rate of interest paid by the National Commercial Bank, Harbour St., Kingston, on savings accounts from October 31, 1996, to the present.

2. The orders were made under the provisions of section 12 (4) of the Legal Profession Act following a hearing that lasted thirteen days between January 31, 1998, and May 1, 1999. The hearing was conducted by the disciplinary committee of the General Legal Council which found the appellant guilty of professional misconduct of the gravest kind involving breaches of Canons 1 (b), IV (f), (r), and (s), VII(b)(ii) and VIII (b) of the Legal Professional (Canons of Professional Ethics) Rules. The committee specifically found that he had misused and misapplied the funds of the complainant; and in so doing had conducted himself in a manner which struck at the very heart of public confidence in the integrity of the profession.

3. The history of the relationship between the appellant and Monica Whitter goes back to when he was retained by her to represent her in proceedings against her former husband Slydie Whitter in respect of their matrimonial property. The relevant facts so far as the retainer is concerned are set out in the unreported case **Frankson v. Longmore** (the appellant in this appeal and the said Monica Whitter) (see Motion no.13/99 in the Court of Appeal - judgment delivered on July 31, 2000). The following extract from page 64 thereof gives the picture:

> "Between October and December, 1986, an attorney/client relationship was discussed and formed between the parties. The applicant undertook the performance of legal work for the respondent on a 'contingency basis'. The applicant's 'usual contingency fee is 33 1/3 % of all sums on properties received'. However, in the case of the respondent, the agreement was for a contingency fee at a rate of 25%. The respondent agreed to this 'on condition that no additional money will be paid out' by her 'during and after the case'. She needed assurance that that would have been the position. The applicant, on behalf of B. E. Frankson and Co. gave this assurance in a letter dated April 9, 1987".

The letter from the appellant setting out the contingency fee is dated 12th November, 1986, and is at page 1 of the supplemental record herein.

4. The proceedings between Monica Whitter and her former husband ended in her favour. Thereafter, there was much tardiness in executing the order of the Court of Appeal made on June 1, 1989, "that the property be valued and sold and the proceeds thereof divided equally between the parties after the deduction therefrom of the assessed increase in the value of the property directly referable

to any improvement effected by the appellant subsequent to 13th June, 1984".

The Court also ordered the taking of accounts and that:

> (a) the parties agree on the appointment of an accountant and a valuator;
>
> (b) a valuation of the property as of 13th June, 1984, be obtained;
>
> (c) all expenditure on improvement and outgoings by the appellant (Slydie Whitter) be verified by bills and vouchers;
>
> (d) the respondent do pay half of the maintenance and property tax since 13th June, 1984; and
>
> (e) subject to sub-paragraph (d) above, the mesne profits, that is, half the estimated rent of the property be obtained from a valuator for the period commencing 13th June, 1984, up to the time of sale and be paid by the appellant (Slydie Whitter) to the respondent.

5. On June 17, 1989, the appellant advised Monica Whitter that her former husband had lodged an appeal against the judgment of the Court of Appeal. This appeal was not pursued. On October 18, 1989, the appellant, now with the law firm Gaynair and Fraser incorporating B.E. Frankson & Co., wrote thus to Slydie Whitter's attorney-at-law:

> "We shall be obliged if you would advise us as to the progress you have made in perfecting the Appeal to the Privy Council herein. No application was made for a stay of execution in respect of the judgment of the Court of Appeal, nor was any stay granted by the Court. The plaintiff/respondent is therefore entitled to take steps to enforce the judgment and our enquiry above is intended to ascertain whether the appeal to the Privy Council is being delinquently persued (sic). In the meantime we propose to

> commission valuators to assess the property and to identify and appraise the value of the alleged improvements made to the property subsequent to the 13th day of June, 1984. We trust that your client will co-operate with our valuators and distinguish such improvements clearly with a view to give in (sic) effect to the judgment of the Court of Appeal. Would you also be good enough to collaborate with us as regards the appointment of an accountant as per the Order of the Court of Appeal. We look forward to hearing from you early".

Up to eighteen months after the penning of this letter, no action had been taken on behalf of Monica Whitter to give effect to the judgment of the Court of Appeal. This is confirmed in a letter dated 30th April, 1991, signed by the late W.B. .Frankson, Q.C., then head of the Chambers of Gaynair and Fraser, and addressed to Messrs Crafton Miller & Co., attorneys-at-law for Slydie Whitter. The letter reads:

> " It appears that we are not making any progress with our intention to resolve the issues in this suit amongst ourselves. It also appears that your client's plan to appeal to the Privy Council in England is now aborted. In the meantime, your client is enjoying the property and nothing is being done by either of us to give effect to the judgment of the Court of Appeal. In the circumstances, we now request that we take steps to:
>
> (a) appoint an accountant,
>
> (b) appoint a valuator or a panel (2) valuators (sic)
>
> (c) apply to the Registrar of the Supreme Court to take accounts in terms of the order of the Court of Appeal. We look forward to receiving your usual co-operative response and hope that with

> goodwill we can bring this matter to a satisfactory conclusion".

The record indicates that on the same date as the above letter, another letter was written by the said writer to Messrs Jamaica Estates Ltd. of Montego Bay inquiring whether they:

> "would be prepared to act on behalf of Mrs. Witter as valuator of the property as at the 13th June, 1984, and to furnish in particular the value of the property i.e. the increase in the value of the property which is referable to improvement effected to the property subsequent to the 13th June, 1984".

The letter further sought advice as to the "estimate of the rental of the property from the 13th June, 1984, up to the present time".

6. Mrs. Whitter, apparently dissatisfied with how the appellant was conducting her affairs, terminated the retainer by letter dated 3rd June, 1991, that is, two years after the Court of Appeal had disposed of the matter. Thereafter, the focus of attention was the recovery of the contingency fee. On July 9, 1991, W. B. Frankson, Q.C. wrote to Monica Whitter thus:

> "There does not appear to be any need to enter into any discussion relating to honour and decency and the like but we are constrained to remind you that you are obligated to us to the extend (sic) of twenty five percent (25%) of the value of the property which the Courts found was your share of the property jointly owned by you and your former husband Slydie Whitter.
>
> We were having the property evaluated in keeping with the Judgment of the Court when your letter arrived and we expect to have such evaluation very soon.

> There is vested in us a legal and equitable interest in twenty five percent (25%) of fifty percent (50%) share of the valuation made by the Real Estate Valuator whom we have hired.
>
> Just as soon as that sum is ascertained we shall charge the property with the amount due to us and we shall proceed to give effect to the Order of the Court viz "....that the property be valued and sold and the proceeds thereof be divided equally between the parties...."
>
> Arising out of that Judgment and Order and by reason of the Agreement between yourself and us twenty five percent (25%) of your half (1/2) share vested in us from the date of the Judgment and even if you wish to let your former husband have the property you may only do so after we have been paid our interest in full.
>
> We accordingly advise you that we shall be lodging a Caveat against the title to the property and we shall thereafter commence proceedings against you with a view to having the property sold in keeping with the order of the Court and thereby recover all sums due to us with costs."

A caveat was duly lodged by the appellant on the 15th August, 1991. In his supporting affidavit, the appellant declared to the Registrar of Titles "that it was agreed that our fee in this matter would be 25% of half share of the market value of the said property". He went on to say that the Supreme Court had granted an order for partition on the 25th January, 1988, and it had been confirmed on appeal on the 9th March, 1989; that Mrs. Whitter had not yet paid the fees, and that his firm verily believed that she no longer intended to partition the property. He declared that the value of the property was $2,800,000.00 and that their (the firm's) interest in the property was "$350,000.00 and no more".

Notwithstanding that declaration to the Registrar of Titles, the appellant filed suit against Monica Whitter on the 20th September, 1993, claiming $1,788,069.47 "being monies due and owing pursuant to an agreement between the plaintiff and defendant and costs which amount remain unpaid despite the demands of the plaintiff". The particulars of the claim showed $1,750,000.00 being due as 25% of her share of the appraised value of the property, and $38,069.47 being 25% of the appraised value of the rent payable to her from 13.6.84 to 25.6.93 and continuing. The appellant entered judgment in default of appearance and defence on the 10th June, 1994. This judgment was set aside on January 7, 1999, by Marva McIntosh, J.(Acting).

However, prior to the setting aside, the appellant took out proceedings for the sale of the property. The acting Master on the 9th March, 1995, ordered that personal service be dispensed with and granted the appellant leave to serve Mrs. Whitter by registered post. The reasons for this decision are not clear. It seems, though, that the Master's decision may well have resulted in Mrs. Whitter not being represented at the subsequent proceedings for the sale of the property. On June 23, 1995, Reid, J. ordered an enquiry into the entitlement of Mrs. Whitter in the property, and for an account to be taken as to what was due to the appellant. On May 9, 1996, Reid, J. ordered the issue of a writ of sale for the property and that there should be a fresh valuation. Further to this, on September 5, 1996, the late Courtenay Orr, J. ordered that Slydie Whitter was entitled to purchase his former wife's interest. A new valuation indicated that Mr.

Whitter's half share was worth $7,875,000.00. The sale was duly completed and by September 27, 1996, the balance of the purchase price had been paid by Slydie Whitter's attorneys-at-law to Gaynair and Fraser (see pages 118 and 119 of Volume 2 of the record of appeal).

7. On November 1, 1996, the appellant filed in the Supreme Court a bill of costs for taxation in his suit with Mrs. Whitter (see page 212 of Volume 1 of the record of appeal). It was not until November 18 however that he sent the notice of taxation and bill of costs to her (see page 122 of Volume 2 of the record of appeal). Seven days earlier, she had written to him thus:

> "I am aware that you are holding my portion of the sale proceeds of "Cromarty" in your firm's clients bank account.
>
> Is it possible to release some of the money now or is the Court's permission required? I assume that the bank account is interest bearing and that I am entitled to an apportioned amount on distribution of the monies.
>
> The Court's decision on your firm's professional fees is unlikely until sometime in the new year. I would therefore appreciate clarification on these points so that I know where I stand.
>
> Please would you correspond with my son, Basil Whitter, as previously advised."

This letter was signed by Mrs. Whitter in the presence of a solicitor (see page 120 of Volume 2 of the record of appeal). On that said date, November 11, 1996, she also gave written general authority to her son "to act on (her) behalf in any transactions, meetings, discussions or anything else whatsoever

concerning (herself) or the case against (her) former husband S.B.J. Whitter". This too was signed in the presence of a solicitor in London.

8. There was no response to the letter. It was followed by other letters written by Mr. John Graham of Patterson, Phillipson and Graham who had by November 26, 1996, been retained by Mrs. Witter. The appellant and Messrs. Gaynair and Fraser treated the newly retained attorneys with disdain. They ignored correspondence and refused to divulge any information as to the monies they had received in connection with the sale of Cromarty. On January 8, 1997, Mr. Graham complained in writing to "Messrs. B.E. Frankson & Co." thus:

> "Our client does not propose to make any comment at this time on the legality of the sale and how the value at which the house was sold was arrived at. Notwithstanding this, however, our client has received no information as to the amount collected on her behalf, and your refusal to pay over to her that portion of the money which is undisputably hers she finds to be unjust, unconscionable, and illogical.
>
> Our client is requesting that we demand answers to the following questions:
>
> (a) how much money was collected on her behalf?
>
> (b) On what dates were the monies collected?
>
> (c) In what bank and in whose account is the money held?
>
> (d) Your reason for withholding that portion of the money which could not possibly have been on account of your fees?

(e) Have you recovered any costs from Joseph Witter in respect of the hearing at first instance and the appeal, and if so, how much?

(f) If monies were collected on account of the cost, what became of it?"

These questions were not answered. Indeed, up to July 30, 1998, Mr. Graham was still trying to get the information. On that date, in a letter to Mr. W.B. Frankson, Q.C., he made formal demand that Gaynair and Fraser pay into the Treasury or the Court the net proceeds of the sale free from deductions.

9. While Mr. Graham was trying to get answers from the appellant and Gaynair and Fraser, Mrs. Whitter "felt compelled" to voice her concerns to the General Legal Council. This she did by letter dated January 3, 1997. She informed the Council that there were issues relating to the appellant's conduct which had caused her great distress, and she accused him of being "totally unprofessional". Mrs. Whitter asked the Council to help her "in investigating the whereabouts of the funds and the circumstances surrounding it", and added that the Council was "at liberty to contact Mr. Graham or her son for additional information". The Disciplinary Committee of the Council sent a copy of the letter to the appellant and requested his written comments within fourteen days. On January 16, 1997, the Disciplinary Committee advised Mrs. Whitter's son of the communication that had been sent to the appellant. A meeting of the Disciplinary Committee was held on April 26, 1997, at which it was decided to set the complaint for hearing.

10. For the purposes of the disciplinary hearing, an affidavit was filed by Basil Whitter on behalf of Mrs. Whitter, his mother. The affidavit, in setting out the facts being complained of, accused the appellant of knowingly conspiring "to defraud and conceal moneys" and failing to give answers as to the amount of money received, the dates of such receipt, and the bank accounts in which the sums were held. It also alleged the loss of interest on the amount. In the said affidavit, the complaint was framed thus:

> "(a) he has charged me fees that are not fair and reasonable;
>
> (b) he has not provided me with information as to the progress of my business with due expedition, although I have reasonably required him to do so;
>
> (c) he has not dealt with my business with all due expedition;
>
> (d) he has acted with inexcusable or deplorable negligence in the performance of his duties; and
>
> (e) he has not accounted to me for all moneys in the hands for my account or credit, although I have reasonably required him to do so".

The evidence

11. At the hearing, Basil Whitter gave evidence of conversations that he had with the appellant particularly in relation to the withholding of the money from the sale of Cromarty. He said that the appellant said that he could not release any of the money until the Court had assessed the fees due to him, and that

because of the state of Jamaica he the appellant would not dare put the money in an interest-bearing account. He refused to act on Basil Whitter's suggestion that he should take $4,000,000.00 towards his fees and release the rest to Mrs. Whitter. This conversation took place on November 11, 1996.

The appellant gave evidence in which he admitted collecting money in relation to Mrs. Whitter's half share, and also that he had not given an account to Mrs. Whitter, Basil Whitter or Mr. Graham in relation to what he had collected. This is the narrative recorded at page 40 of Volume 1 of the record of appeal:

"Panel : I did not ask you that. I asked if you did not collect money in relation to Mrs. Whitter's half share?

B. Frankson: Yes

Panel: And have you ever given to Mr.Graham, Mr. Whitter or Mrs. Whitter a statement of account in relation to the proceed that you collected?

B. Frankson: No, I was not in a position to do so.

Panel: Why were you not in a position to say that these are what I have. Two million was received balance proceed was paid, judgment made and so and so. Have you ever done that?

B. Frankson: No. All documents in relation to the sale was sent to her.

Panel: What are you referring to? Are you referring to your application to get the order for sale?

B. Frankson: The bill of cost was sent to her as well as bank charges. Purchase price and taxation, no statement of account was ever sent to her to date".

Further evidence from the appellant at page 44 revealed his state of mind:

"Panel: You can only have a lien on what you are entitled to.

B. Frankson: I agree with you.

Panel: I want to know if you are saying that you have the right to hold all funds until taxation, even if it took 10 years?

B. Frankson: Yes.

Panel: The question was asked, you could not have gotten more than what is on your bill of cost. In fact you could have gotten less.

B. Frankson: I agree. I couldn't make deduction and there was no taxation.

Panel: An account is possible without a payment. The account could say this is what I did and this is what I received and this is the balance.

B. Frankson: We did prepare an account for our in - house purpose".

12. The appellant accepted the fact that by not placing the money in an interest-bearing account, interest was lost, and that it was the duty of an attorney-at-law not to retain without the express authority of his client money received for and on behalf of his client for an excessively long period of time. He also said that in the circumstances of this case he was of the view that he should

have insisted that Gaynair and Fraser did not retain Mrs. Witter's money for an unnecessarily long period. Up to the time of the disciplinary hearing, he had not sent a bill to Mrs. Whitter (page 55, Volume 1 of the record of appeal).

13. It is to be noted that although the appellant had not sent Mrs. Whitter a bill, and had not given her any information as to the whereabouts of, or the dealings with, the proceeds of the sale of her property, yet he made disbursements therefrom (page 66 of Volume 1 of the record of appeal). These disbursements were not in keeping with his assertion to the committee (as earlier noted) that he could not make any deductions without the taxation having been done. In all, he paid one million dollars to Mr. W.B. Frankson, Q.C., before the agreement for sale was signed. The learned Queen's Counsel was acting as counsel for the appellant in the case **Frankson v. Longmore**, and the sum disbursed to him was said to be a portion of his fees. The appellant also took five hundred thousand dollars out of the proceeds for himself before the sale was completed.

The findings of the disciplinary committee

14. The disciplinary committee, after advising itself as to the burden and standard of proof, found that Basil Whitter was a credible witness on whose evidence they could place considerable reliance. On the other hand, they found that the appellant, though confident, gave confusing and incoherent evidence at times on important issues. This was particularly so, they said, in relation to his answers to questions as to why he held on to all the monies, and why he did not

respond to Mr. Graham's or the complainant's enquiries. The committee listed what it regarded as undisputed facts, to the grand total of forty-nine; whereas, it reckoned that there were disputed issues of facts in four areas only. These latter areas were primarily in relation to whether Mrs. Whitter or Basil Whitter was kept informed as to the progress of Mrs. Whitter's business with the appellant.

15. The disciplinary committee also identified and determined those matters that it regarded as issues of law. Having determined the terms of the agreement between Mrs. Whitter and the appellant, the committee said that the appellant was not entitled in law to sue Mrs. Whitter for the full gross percentage of any fee allegedly due to him under the agreement as he had not completed the work he agreed to do. The committee felt that the appellant was obliged to comply with section 22 of the Legal Profession Act.

16. The most significant determination of the committee perhaps is listed at page 149 of volume one of the record of appeal at the paragraph marked 7. It reads thus:

> "Gaynair and Fraser had carriage of sale under the Agreement for sale, the attorney is a partner in Gaynair and Fraser, consequently the attorney was the attorney for the complainant and was responsible for taking steps to ensure that the funds of the complainant were handled with strict and scrupulous care, and within the boundaries of the law.
>
> The attorney was obliged to give full and complete information to the complainant, and to her authorised agent about each and every matter concerning her affairs and withholding nothing. The complainant was entitled to know where her monies were being held, and how they were being

> spent. She was entitled to the balance of the proceeds of sale excluding only an amount due for fees and expenses legitimately incurred by the attorney. The attorney was not entitled to hold on to the monies of the complainant indefinitely on the basis that he had to wait for his bill of costs to be taxed. The attorney could be entitled to no more costs than those for which his bill had been laid".

Further, at paragraph 10 on page 150, the committee determined thus:

> "Under the Canon VII (b) (ii) of the Legal Profession (Canon of Professional Ethic) Rules of 1978, an attorney is required to 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. It is our considered opinion that the attorney in these circumstances is not only obliged to provide a written statement of account to the client, but is obliged to deliver all funds in his hands due to the client when reasonably required to do so".

17. The committee then proceeded to make twenty-seven findings of fact and mixed law and fact in relation to the retainer, the sale of Cromarty, the collection of monies by the appellant and his failure to pay over to Mrs. Witter that which was due to her, and to account to her for that which he had received. Having made those findings, the committee concluded that the appellant had not charged "fees which were fair and reasonable", had not dealt "with his client's business with all due expedition", had not provided "his client with all information as to the progress of his client's business with all due expedition" and had "acted with inexcusable or deplorable negligence or neglect in the performance of his duties".

18. The remainder of the conclusions of the committee warrant being quoted.

"The gravest breach of the attorney's duties and the one with the most far reaching consequences is his failure to account for all the monies in the hands of the attorney for the account and credit of the complainant. We find the conduct of the attorney viewed as a whole, totally unacceptable. We do not understand what could have prompted him to conduct himself in the manner in which he did. We cannot understand what could have convinced him that he had a right in law to use the funds of the complainant in the manner in which he did, and then not pay a single cent to the complainant representing any balance of the proceeds of sale due to her since October 1996. The preceding interpretation is put in its most favourable light, but in our considered opinion, on the facts of this case, the attorney was not entitled to deduct or retain any fees, as he had failed to act pursuant to section 22 of the Legal Profession Act. We are of the view that the attorney has failed to maintain the honour and dignity of the profession, and has acted in a manner which tends to discredit the profession. The attorney has conducted himself in a manner which does not promote confidence in the integrity of the administration of justice and the integrity of the legal profession.

The conduct of the attorney is disgraceful and dishonourable and is also in breach of Canons 1 (b) and VIII (b) of the Legal Profession (Canons of Professional Ethics) Rules. The attorney abused the process of the Courts in order to give legitimacy to proceedings that ought not to have been pursued, namely the suit instituted by him against the complainant, suit No. C.L.F.141 of 1993.

It is necessary for us to comment on the fact that in our view, the Court did not give sufficient scrutiny to these proceedings before granting orders for the sale of realty. The complainant was unrepresented at the hearing of the summonses. In that light, greater care should have been taken to ensure that a great injustice was not perpetrated in the name of the law.

> Further, we are at a loss to understand how Messrs. Gaynair and Fraser, attorneys-at-law, could have been allowed to have carriage of sale of the agreement dated the 30th September, 1996, when the said firm had acted for the attorney in the suit under which he claimed fees, and the attorney had acted for the complainant in her suit against Slydie Joseph Witter and was a partner in the said firm of Gaynair and Fraser. There was on the face of it, a clear conflict of interests.
>
> Perhaps, if the Court had been made aware of the true facts, if a great deal of the history of the case had not been suppressed by the utilisation by the attorney of a writ specially endorsed with the statement of claim to reveal a bare debt, the Court would not have made these orders, orders which were the vehicle through which the complainant was deprived of her rights and millions of dollars to which she was lawfully entitled".

The grounds of appeal

19. The appellant has challenged the decision of the disciplinary committee on nine grounds which were filed with the record on May 4, 1999. They may be summarized thus:

> (1) the findings and/or conclusions of the committee are unreasonable, unconscionable and/or in any event, unwarranted by the evidence adduced;
>
> (2) the complainant Basil Witter has no locus standi to institute and maintain the complaint;
>
> (3) the committee erred in law in embarking on the hearing of the complaint as two members of the panel shared a symbiotic relationship;

(4) the committee erred in embarking on the hearing when there were similar issues involving the parties in a pending suit in the Supreme Court;

(5) the committee misdirected itself in holding that the appellant was not permitted in law to sue Monica Whitter for the full gross percentage of what was allegedly due to him under the contingency agreement;

(6) the committee erred in fact and law when it found that the appellant did not charge fees which were reasonable; and

(7) the committee erred in law when it ruled that the appellant was a trustee of the entire proceeds of Monica Whitter's half-interest share in the sale of the property.

The grounds summarized at (3) and (7) were not pursued.

20. ***The supplemental grounds of appeal***

In addition to the above, the appellant filed a supplemental ground on February 15, 2002, a further supplemental ground on February 18, 2002, and yet another "further supplemental ground" on May 21, 2002. These grounds are, respectively:

"(1) Even if the evidence adduced before the committee amounted to professional misconduct within the meaning of the Legal Profession Act 1972 the draconian sanction of striking the name of the appellant off the roll was in all the circumstances of the case manifestly excessive and/or unwarranted;

(2) In all the circumstances of the case the evidence adduced is not capable of amounting to professional misconduct in

law. In the result there was no basis upon which the Disciplinary Committee could lawfully have awarded the sanctions which it purported to do;

(3) That it was not open to the Disciplinary Committee to hold that the appellant had acted in breach of Canons 1(b) and VIII(b) of the Legal Profession (Canons of Professional Ethics) Rules (1978) since:

(a) no such charge or charges had been preferred against him;

(b) nor had he been required to answer any such;

(c) nor had he been in any other way alerted that he stood in jeopardy of being condemned in respect of any such.

The Committee therefore acted without or exceeded its jurisdiction in purporting to convict him of breaches of the said Canons."

21. It seems not inappropriate to deal with the supplemental grounds at this stage. The first such ground alleges that the punishment of being struck off the roll is draconian and manifestly excessive, given the circumstances of the case. Mr. Earl Witter, for the appellant, in his usual eloquent style, has urged that there can be no condign punishment without mercy. Even if the allegations against the appellant are regarded as proven, he submitted that a reprimand would have been sufficient. He pointed to section 12 (4) of the Legal Profession Act which provides for suspension, fine and a reprimand as alternative sanctions capable of disposing of the matter in a satisfactory manner. Mr. Dennis Morrison,

Q.C., for the General Legal Council, on the other hand, submitted that there was no reason to interfere with the decision of the disciplinary committee which was made up of experienced practising attorneys.

I am in agreement with the view taken by Mr. Morrison. In my opinion, if an attorney has committed serious breaches of the Code of Ethics of the profession and such breaches involve the unwarranted retention and misuse of clients' funds, there is no place in the profession for such an individual until it is absolutely clear that he has recognized his misdeed, demonstrated contrition and has given unequivocal indication that similar behaviour is unlikely in the future.

The English case **Bolton v. Law Society** [1994] 2 All ER 486, a decision of the Court of Appeal, Civil Division, reflects my thinking on the matter. It was referred to by the disciplinary committee, and relied on by Mr. Morrison in his submissions to us. The appellant Bolton, a solicitor, had misused funds received from a building society but had made good the shortage in full. The Solicitors Disciplinary Tribunal held that his conduct was wholly unacceptable and very serious. Ordinarily, he would have been struck off the Roll of Solicitors but since he was an honest man who had not stolen his clients' money in a premeditated fashion nor embarked on a deliberate course of dishonest conduct, he would be suspended for two years. The Divisional Court allowed an appeal and substituted a fine of three thousand pounds. Sir Thomas Bingham, MR, in delivering the judgment of the Court of Appeal said:

> "In my judgment, therefore, the Divisional Court gave no good reasons for interfering with the decision

> of the tribunal and acted contrary to settled principles in doing so. In the ordinary way I would without hesitation allow this appeal and restore the order of the disciplinary tribunal"(p.493h).

I am in full agreement with the posture of the English Court of Appeal as expressed in the following words by the Master of the Rolls:

> "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 ...If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking-off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case" (p.491h to 492a)

It follows therefore that if I find that there is substance in the disciplinary committee's conclusions on the facts, I would uphold the sanction that has been imposed.

22. The supplemental ground listed at two above is, it seems, a duplication of the original ground one summarized earlier.

So far as supplemental ground three is concerned, it is necessary to quote from the Canons. They are contained in The Legal Profession (Canons of

Professional Ethics) Rules dated the 12th December, 1978, and published on the 29th December, 1978, in the Jamaica Gazette Supplement Proclamations, Rules and Regulations Vol.C1, No.71. These Canons were made under the authority of section 12(7) of the Legal Profession Act which gives the General Legal Council the power to prescribe standards of professional etiquette and conduct for attorneys.

Canon 1 states:

> "An attorney shall assist in maintaining the dignity and integrity of the legal profession and shall avoid even the appearance of professional impropriety".

Paragraph (b) thereof enjoins an attorney to maintain at all times the honour and dignity of the profession and to abstain from behaviour which may tend to discredit the profession.

Canon VIII (b) states:

> "Where in any particular matter explicit ethical guidance does not exist, an attorney shall determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession".

23. At page 153 of volume 1 of the record, the committee, after reviewing the entire activities of the appellant in relation to Mrs. Whitter, concluded that he had breached Canons IV (f),(r) and (s), as well as VII (b)(ii). At page 154, the committee expressed the further view that the appellant's conduct was disgraceful and dishonourable and also in breach of the Canons set out in the supplemental ground under discussion. It is my view that the committee was

entitled to make the observation that it made, given the facts that it found. If the evidence shows a breach of VII (b)(ii) for example, as the committee found, that would be a very serious breach warranting being described as disgraceful and dishonourable. Canon VII(b)(ii) requires an attorney to 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. It certainly would call into question the integrity and professionalism of the attorney. Looked at from this angle, it is clear that there would be no merit in this complaint if there is justification for the various findings of fact made by the committee in respect of the deliberate deprivation of Mrs. Whitter of her legitimate monies, and if there is a deliberate failure on the part of the appellant to account to her for the said monies.

24 **Are the findings and conclusions of the committee unreasonable,unconscionable or unwarranted?**

In written submissions in respect of this ground of appeal, Mr. Earl Witter for the appellant conceded that the undisputed facts enumerated by the committee in its decision as well as the disputed issues of fact "are accurately stated". However, he contended that the committee's findings and conclusions on the disputed facts were wrong. As said earlier, the four disputed facts were primarily in relation to whether the appellant had kept Mrs. Whitter or Basil Whitter informed of the progress of her business with the appellant. The committee found that the appellant had not kept them so informed. As to the undisputed facts, they show clearly that the appellant, without authority, disbursed to Mr.W.B. Frankson, Q.C. monies from the proceeds of sale of the

property; and that he also allotted sums to himself from the same source (see Vol 1 page 146, paras.40 to 43). The committee also found as undisputed facts that the appellant provided no statement of account to Mrs. Whitter or her attorney, and that Mrs. Whitter had not received any monies from the sale of the property, nor had she been advised as to where her money was being held (see Vol 1 page 146 paras. 44 to 46). Bearing in mind the concession that the undisputed facts were accurately stated, it is difficult to see the logic in the contention that the committee's findings and conclusions were wrong. It is gross misbehaviour for an attorney to receive and hold money on behalf of a client, or, indeed, a former client and refuse to provide information to that individual in respect of that money. Further, it is unthinkable and unspeakable that the attorney should, without authority, withdraw sums from that money to pay his own attorney or for some other personal purpose.

25. **Locus standi**

Mr. Witter for the appellant contended that Mr. Basil Whitter had no locus standi to file an affidavit saying that he was aggrieved. Hence, he reasoned, the committee exceeded its jurisdiction in entertaining a complaint which was not properly before it. Mr. Morrison, on the other hand, submitted that "there was a plethora of evidence before the committee that the complainant had appointed Mr. Basil Whitter her agent for the purposes of concluding her business with the appellant, as well as bringing and conducting the disciplinary proceedings".

I agree with Mr. Morrison. I have referred already in paragraph 7 herein to the steps taken by Mrs. Whitter to have her complaint heard. The authority for her son to act for her is on page 121 of Vol 2 of the record, whereas her letter to the General Legal Council is on page 126 thereof. In my view there was a sufficiency of authority and standing for Mrs. Whitter's son to bring the formal complaint.

26. Section 12(1) of the Legal Profession Act provides:

> "Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney **may** apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council **may** make a like application to the Committee in respect of allegations concerning any of the following acts committed by the attorney. . . ."

I do not construe section 12(1) as meaning that a complaint by a person aggrieved **shall** be made only in the manner stated. The Act clearly distinguishes between those requirements that are mandatory and the situations that are discretionary. If Parliament intended the method stated **the only way** to invoke the jurisdiction of the Disciplinary Committee, it would have said so. It is as simple as that. Interpreters of legislation ought not to stretch the meaning of words, especially simple words, to be other than what they are. More than ten decades ago, Cotton, L.J. said:

> "I think that great misconception is caused by saying that in some cases "may" means "must". It never can mean "must", so long as the English language retains its meaning."
> **In re Baker, Nichols v. Baker** (1890) 44 Ch.D. 262 at 270.

I wish to humbly add that those words are apt today.

27. Having examined the Legal Profession Act, I am satisfied that there is nothing therein that prohibits the method used in this case to invoke the jurisdiction of the Disciplinary Committee. Furthermore, the following circumstances put paid to the submission of Mr. Witter –

> (i) the appellant, having lost an earlier challenge as to jurisdiction in the Supreme Court, returned to the Disciplinary Committee hearing and submitted to its jurisdiction instead of appealing the decision of the Supreme Court;
>
> (ii) the appellant has been fully aware all along of the allegations against him; and
>
> (iii) there is overwhelming evidence indicating that there is considerable common ground between the appellant and the complainant on the facts contained in the complaint.

The question of "locus standi" is therefore, in my view, a "non-point". With the greatest respect to my learned colleagues and to Mr. Witter, I regard the submission as devoid of merit. In my humble view, acceding to it would make a mockery of the legislation and its purpose.

28. ***Disciplinary hearing proceeding while civil suit pending***

The appellant complained that the committee embarked on a hearing at the instance of Mrs. Whitter at a time when there was a civil suit pending in the Supreme Court in respect of fees owed by Mrs. Whitter to the appellant. According to the complaint, the appellant suffered injustice as a result. The

argument put forward was that the committee, being an inferior tribunal, was obliged to defer to the Supreme Court.

Mr. Morrison commented that no authority has been cited to indicate that the jurisdiction of the committee has been ousted by the filing of the suit.

I am not surprised that no authority has been cited as it seems clear to me that the submission is without merit. If the matters before the committee and the Court were identical, there would be good reason for the committee to stay its hand until the court proceedings had been determined. However, the matters were not identical. The appellant's suit, which was filed in 1993, was for fees in respect of his services between 1986, when he was retained by Mrs. Whitter, and 1991 when she terminated the retainer. The complaint before the disciplinary committee was filed in 1997 and was primarily in respect of the appellant's failure to inform Mrs. Whitter as to the progress of her business with him, and his failure to account for monies that he had received on her behalf. It is not to be forgotten that the appellant had refused to disclose even where Mrs. Whitter's monies were being held. She was not made privy to anything in relation to her own funds. That is what the disciplinary proceedings were primarily about. The fairness or reasonableness of the fees is incidental, as I see it. That was a side issue. Mrs. Whitter saw her funds being in danger of totally disappearing, so the reasonableness of the fees was made an issue as time passed. In my view, the committee was well within its rights to hear the primary complaint.

29. ***Was the appellant permitted in law to sue for the full contingency fee?***

The appellant has challenged the finding of the committee that he was not in law permitted to sue Mrs. Whitter for the full gross percentage of any fee allegedly due to him under the agreement as he had not completed the work he agreed to do. The finding of the committee that the appellant did not charge Mrs. Whitter fees that were fair and reasonable in the circumstances has also been challenged. The argument put forward is that there are crucial issues to be considered such as the doctrine of substantial performance and its effect, the prevention of performance by the promisee and its effect, and the effect of repudiation by a party to the contract. Mr. Morrison's answer to this challenge is that the committee's finding was amply justified and is supported by the decision of this Court on the appeal in relation to the setting aside of the judgment in **Frankson v. Longmore** (Motion M13/99) (delivered on July 31, 2000).

I do not think that Mr. Morrison is correct in his interpretation of that judgment on that point. The Court was merely saying that there were issues to be tried, so there could be no entry of judgment without a hearing. Consequently, it seems to me that the appellant is right in saying that the committee may well have pre-empted the Court in holding that the fees were not fair and reasonable. However, as said earlier, this question of the fairness or reasonableness of the fees is not that which caused Mrs. Whitter to invoke the jurisdiction of the disciplinary committee. In any event, even if the committee was wrong as regards the fees (and that will be a matter for the Court to decide

eventually), the decision in respect of the conduct of the appellant on the substantial issues remains sound and unaffected.

30. ***Conclusion***

The committee found the appellant guilty of breaches of Canons IV (f),(r),and (s) and VII (b)(ii). Canon IV(f) deals with fees. In my view, the committee had no jurisdiction to adjudicate on the matter of fees given the circumstances that I have already stated.

Canon IV (r) states:

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

Canon IV(s) states:

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

Canon VII (b)(ii) reads:

> "An attorney shall –
>
> (i)...
>
> (ii) 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".

In respect of these itemized canons, there was ample evidence to support the findings of the committee. Consequently, as said earlier, I would dismiss the

appeal and affirm the decision of the committee with an order for costs in favour of the respondents.

DOWNER, J.A.

By a majority appeal allowed, orders of the Disciplinary Committee of May 1, 1999, set aside.

ORDERED:

1. There be a re-hearing before a differently constituted Tribunal.

2. That the Registrar of the Supreme Court institute proceedings forthwith.

Costs to the appellant Frankson to be taxed if not agreed.