SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.17 OF 2006

BETWEEN:

LEONARD OGILVY

Appellant

and

[1] THE ATTORNEY GENERAL
[2] THE BAR ASSOCIATION

Respondents

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Horace Fraser for the Appellant
Ms. V Georgis Taylor-Alexander, the Solicitor General, along with Ms. Jan Drysdale and Ms. Dara Modeste for the first Respondent
Mr. Dexter Theodore and Mr. Thaddeus Antoine for the second Respondent

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2006: October 18;
November 13.

JUDGMENT

[1] BARROW, J.A.: This appeal arises from a claim by the Attorney General to strike the appellant off the roll of legal practitioners. No ground was stated on the claim form but in the accompanying affidavit the Attorney General deposed that on his petition to be admitted to practice law in this jurisdiction the appellant had falsely represented that he possessed the necessary qualifications for admission to practice law and had relied upon fake documents.

[2] Section 16(3) of the Legal Profession Act, No. 31 of 2000, provides that the High Court shall admit a person to practice law in St. Lucia if satisfied that the

person has the qualifications prescribed by law, he is of good character, he does not have a criminal record except if it is for a minor traffic offence and he is not declared to be a bankrupt. The High Court judge who heard the application found beyond reasonable doubt that the appellant did not hold the qualifications prescribed by law, he was a person of bad character and he had been convicted of a number of criminal offences for which he had been sentenced to terms of imprisonment. The judge ordered that the Registrar of the High Court forthwith remove the name of the applicant from the Roll and publish the appropriate notice in the Gazette.[1]

The allegations against the appellant

[3] The Attorney General's fixed date claim form dated 15th May 2006 was supported by three successive affidavits. The claim form and affidavits did not employ the word fraud but the allegations very clearly amounted to fraud. The information upon which the judge relied may be summarised as follows.

[4] On 18th September 2001 the appellant filed a petition in the High Court supported by an affidavit and exhibited documents in which he purported to be a person entitled to be admitted to practice law before the Eastern Caribbean Supreme Court. The appellant stated in that petition that he had been awarded the Practicing Certificate by The Law Society of England and Wales to practice as a solicitor and he exhibited a copy of his purported certificate issued for the year 2000 -- 2001. The appellant also exhibited a purported Certificate of Practice issued by the Faculty of Advocates of Scotland that entitled him to practice law as an advocate. The appellant's petition was granted and the appellant was admitted to practice as an attorney-at-law by order dated 9th August 2004 (sic) in St. Lucia High Court claim No. SLUHCV2001/0800.

[1] St. Lucia Claim No. 209 of 2006 The Attorney General and The Bar association v Leonard Ogilvy, judgment delivered 30th June 2006, at paragraphs [97] and [98].

[5] The Crown subsequently obtained a copy of a letter dated 7 December 2005 sent by the Faculty of Advocates of Scotland to a prominent firm of solicitors in England stating that the appellant was not and had never been a member of the faculty. That letter was annexed to the first affidavit of the Attorney General, filed 16 March 2006, as AG 3.

[6] The Crown further obtained a copy of a letter dated 16 December 2005 sent by The Law Society to the same firm of solicitors stating that an order had been made against one Leonard Ogilvy (of a stated date of birth and address) that no solicitor should employ or remunerate him in connection with his practice as a solicitor, without the prior permission of The Law Society. The letter also confirmed that Law Society records indicated that no one of the name Leonard Ogilvy had been admitted to the Roll in England. That letter was annexed to the first affidavit of the Attorney General as AG4.

[7] By letter dated 19 December 2005 The Law Society wrote to the Solicitor General of St. Lucia and conveyed to her the same information as they had conveyed in their letter marked AG4. The letter dated 19 December was annexed to the first affidavit of the Attorney General as AG5.

[8] In his third affidavit, filed 11th May 2006, the Attorney General deposed that he had received further information from The Law Society of England in the form of an affidavit by Mr. Peter Anthony Jones, the Deputy Head of their Fraud Intelligence Unit, sworn on 23rd March 2006. The Attorney General attached the affidavit of Mr. Jones to his, the Attorney General's, affidavit. Mr. Jones had attached to his affidavit a witness statement that he, Mr. Jones, made. And Mr. Jones attached to his witness statement documents that he deposed he produced "from records held by The Law Society of England and Wales".

[9] Mr. Jones stated in his witness statement that Leonard Ogilvy had failed the legal practice course at the university that he had attended. Mr. Jones also stated that no Practicing Certificate for the year 2000-- 2001 had been issued to Leonard

Ogilvy and the copy of a Practicing Certificate that had been sent to him by fax was a false document. Mr. Jones attached a copy of that false certificate. It is a copy of the same document that supported the appellant's petition to be admitted to practice law in St. Lucia.

[10] Mr. Jones further stated that in July 1990 Leonard Ogilvy had been convicted of theft and sentenced to imprisonment for 2 months and in March 1992 he had been convicted of theft and forgery and sentenced to imprisonment for 2 years and 1 year respectively. Mr. Jones produced from The Law Society's records a copy of the conviction record detailing the conviction for theft in July 1990 and a transcript of an unsuccessful appeal before the English Court of Appeal detailing the convictions in March 1992. Mr. Jones also stated that on separate occasions Leonard Ogilvy was found guilty of contempt of court and ordered to pay a fine for misleading the court when acting as a "McKenzie friend"[2] in one instance, and sentenced to a term of imprisonment for 7 days, in the other instance, for violating an undertaking he had given upon his first contempt conviction not to make any further application to the court as a "McKenzie friend". He attached copies of transcripts of the two court proceedings in which the appellant was found guilty of contempt of court.

[11] In his third affidavit the Attorney General also provided material showing that at the time of the appellant's admission to practice in 2004 one Leonard Ogilvy had been declared a bankrupt (on 2 October 2000) but the judge decided that he could not be satisfied beyond a reasonable doubt, on this material, that the bankrupt was the appellant.

How the proceedings unfolded

[12] No transcript of the hearings was included in the record of appeal and the summary of events and occurrences that follows is taken mainly from the oral

[2] This is the name given to a lay person who makes representations to the court in assisting a litigant who is not legally represented.

submissions of counsel for the appellant and the written submissions of the Solicitor General; the summary does not purport to find any facts. The reason why there was no transcript was because the appellant had filed a request for his appeal to proceed as a summary appeal and a single judge of this court had ordered that it so proceed and that no transcript needed to be prepared. In his original notice of appeal the appellant had not challenged any finding of fact or the reception of the evidence. It was only in his amended notice of appeal that the appellant made such challenges. Counsel for the appellant did not bring to the court's attention the change in the grounds of appeal and the question whether fresh directions should be given, including whether the transcript should be included in the record of appeal so the appeal was listed for hearing with the original directions in place. However, counsel agreed at the hearing of the appeal that the appeal should proceed without the transcript.

[13] On the day following the filing of the fixed date claim form the Attorney General filed a without notice application for an injunction restraining the appellant from practicing as an attorney-at-law in St. Lucia and an order for an injunction was granted. On 21st March the appellant applied to discharge the injunction.

[14] The 22nd March 2006 was the return date for the injunction and on the hearing on that date the judge extended the duration of the injunction until 15th May 2006. On the hearing on 22nd March the claimant requested that the appellant be produced for cross-examination but counsel for the appellant did not agree to this course. On that hearing, also, the Bar Association was added as a claimant. The formal order that was entered stated, "This matter is further adjourned to the 15th May 2006 for decision and hearing of the substantive matter."

[15] On 18th April 2006 the appellant filed an application to strike out the claim on the grounds that the court had no jurisdiction to hear the claim, that it was wholly misconceived and that the claim disclosed no cause of action.

[16] On 15th May 2006 the court heard the arguments of counsel for the appellant to strike out the proceedings for lack of jurisdiction. On the following day, 16th May[3], the Solicitor General made her submissions in opposition to the challenge to jurisdiction. The judge indicated that after he had heard submissions on whether the court had jurisdiction to discipline an attorney at law he would go on to hear the substantive matter. The court indicated that it would reserve its decision and in arriving at a decision it would first consider the jurisdiction challenge. If the court decided that it had no jurisdiction that would be the end of the matter but if it decided it had jurisdiction it would then go on to consider the merits of the Attorney General's application to strike the appellant off the roll of legal practitioners.

[17] As part of his challenge to the court's jurisdiction counsel for the applicant had submitted that the fixed date claim form procedure was the wrong procedure because these were proceedings to discipline an attorney at law and disciplinary proceedings were neither criminal nor civil proceedings but were special proceedings to be conducted according to a special procedure. This court in Hansraj Matadial v Bayliss Frederick[4], an authority that the judge brought to counsel's attention, laid down that principle of law. Counsel for the appellant submitted that although the Legal profession Act[5] preserved the court's historical right to discipline an attorney at law, section 41 provided for disciplinary action to be taken in accordance with "rules of court made for the purpose … with respect to professional conduct against an attorney-at-law". Counsel submitted that since no rules of court had been made there was no procedure for the court to follow and the court could not proceed.

[18] The judge stated in the judgment[6] that he had made a preliminary ruling in the course of the hearings that notwithstanding that no rules had been made, a judge

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[3] There is confusion on whether there was a third day of hearing, as the Solicitor General stated, or there were only two days of hearing, as counsel for the appellant stated. The dates appearing above the text of the High Court judgment show two days of hearing. It does not matter because the parties do not disagree on what happened.

[4] St. Vincent and the Grenadines Civil Appeal No 23 of 2001

[5] No. 31 of 2000, at sections 36 to 40

[6] At paragraph [39] to [43].

of the High Court was empowered, by section 20 of the Eastern Caribbean Supreme Court (St. Lucia) Act[7] to "make an order as to the procedure to be followed which he or she considers necessary for doing justice in the cause or matter whether such order had been expressly asked for by the party entitled to the benefit thereof or not." The judge confirmed n the judgment[8] that he stood by his preliminary ruling.

[19] Counsel for the appellant advised this court that the judge had decided that in the absence of any procedure laid down for the conduct of disciplinary proceedings, and in acceptance of the submissions of counsel for the appellant that the Civil Procedure Rules 2000 did not apply to said proceedings since they were not civil proceedings, the court would follow the Originating Motion procedure. It is not specifically stated at what point the judge so indicated but it seems fairly clear, from the judge's summary of the course of the proceedings, that the judge would have so indicated at the time he made his preliminary ruling. The following extract from the judgment seems to bear this out:

> "[42] I had made a preliminary ruling that at the time I was of the view that section 20 was applicable. This was in order to facilitate the hearing of the action. I then said that if I found in favour of Mr. Fraser's submission I would not consider submissions by the Solicitor General, but if overruled, then I would go on to consider the submissions."

[20] Since, as the judge stated, the object of making the preliminary ruling was to facilitate the hearing of the action it seems reasonable to conclude he would logically have decided, at that time, what procedure to follow before he proceeded to hear the action. I am therefore satisfied that before the hearing of the substantive application the parties were clear as to what procedure was going to be followed. Counsel for the appellant confirmed as much to this court in his oral submissions.

[21] After the judge made his preliminary ruling he went on to hear submissions on the substantive matter from counsel for all parties. One gathers from counsel's

[7] Chapter 2.01 of the Laws of St. Lucia, 2001
[8] At paragraph [43]

submissions that the Solicitor General renewed her request to cross-examine the appellant and that counsel for the appellant requested that he be allowed to cross-examine the "witnesses" for the Attorney General but that no cross-examination was ordered. The judge reserved his decision and delivered his judgment the following month ordering that the name of the appellant be struck off the roll. The appellant challenges each aspect of the decision that went against him.

Disciplinary proceedings

[22] As appears from the summary above, the positive case that the appellant advanced in the court below was to challenge the jurisdiction of the court to discipline an attorney-at-law. The essence of the appellant's case below, which he renewed in argument before this court, was that the Legal profession Act established a disciplinary committee and set up a procedure to discipline attorneys-at-law. Counsel for the appellant submitted that the appellant was entitled to the benefit of this regime, which included the right of appeal. As noted[9] , counsel recognised the historical and inherent right of the court at common law to admit lawyers to practice law and, as an incident thereto, the right to suspend or prohibit from practice. The judge refers to this right [10] in a quote from Byron C.J. in the Matadial case. Counsel nevertheless argued, again, on appeal that while the Legal profession Act, at section 37, expressly preserved this right, it was a right that must be sparingly used because, as he had argued below, no procedure had been laid down, no rules had been made and it was inappropriate for the court's inherent jurisdiction to be invoked in those circumstances. The appellant made these arguments in extended terms and with considerable variations in his grounds of appeal and written submissions.

[23] Further, the appellant challenged on a number of bases the judge's decision that section 41 of the Legal profession Act gave the court jurisdiction and that section 20 of the Supreme Court Act allowed the judge to make an order as to the

[9] At paragraph [17], above
[10] At paragraph [33], above.

procedure to be followed. The appellant argued extensively that the judge was wrong.

[24] In my respectful view no point would be served by examining the details of the appellant's arguments because I am convinced that the claim before the judge was not a disciplinary matter. As noted in the opening paragraphs of this judgment the Attorney General claimed an order that the name of the appellant "be struck off from the Roll." Neither in the fixed date claim form nor in the affidavits in support did the Attorney General make any complaint about professional misconduct. The claim by the Attorney General was no more than that the appellant was not qualified to be admitted to practice law when he sought and was granted admission to practice law.

[25] Fundamentally, as I have stated, the claim by the Attorney General was a claim that the appellant had obtained the order of the court admitting him to practice by fraud. The fraud alleged consisted both of falsely stating that the appellant possessed the necessary qualification and concealing that the appellant was disqualified by virtue of his criminal convictions for dishonesty and his bad character from being admitted to practice. It seems perfectly clear to me that, if the allegation of fraud is proved to be true, the court must set aside the order obtained by fraud. It has been stated that "Fraud is an extrinsic, collateral act which vitiates the most solemn proceedings of courts of justice" and Lord Coke said that fraud avoids all judicial acts.[11] The power of the High Court, in fresh proceedings brought for the purpose, to set aside an order obtained by fraud, is a matter of settled law.[12]. Counsel for the appellant conceded that the court had power to set aside an order obtained by fraud. In the event the court makes an order setting aside its earlier order it would make a consequential order that the name of the appellant be struck from the roll. There is no disciplining of an attorney-at-law involved in such a claim. The claim is that the person was never qualified to be an attorney-at-law.

[11] 16 Halsbury's Laws of England, fourth edition reissue (1992), at paragraph 1000
[12] see 26 Halsbury's Laws of England, fourth edition (1979) at paragraph 560.

[26] With the claim now identified as an allegation that the order of the court admitting the appellant to practice law was obtained by fraud it is unnecessary to do more than simply state that I can think of no more proper parties to advance such a claim than the Attorney General and the Bar Association. Accordingly, I would summarily dismiss the appellant's submissions that the Attorney General and the Bar Association were not proper parties to bring the claim.

[27] I have considered the impact on the fairness of the trial of the judge deciding what, in my respectful view, was entirely the wrong question, that the appellant ought to be disciplined by being struck off the rolls, rather than that the order that the appellant should be enrolled ought to be set aside for having been obtained by fraud. I do not see that it makes a practical difference or that the appellant was adversely affected. If anything he got the benefit of the criminal standard of proof rather that the lower civil standard. I think it right to view the procedural missteps as making no difference to the fundamental question: was the appellant properly admitted to practice or not?

Failure to give case management directions

[28] One unfortunate consequence of counsel for the appellant managing to persuade the judge that there were disciplinary proceedings before him is that the proceedings were not conducted as the civil claim that it was and, therefore, were not conducted in compliance with the relevant parts of the Civil Procedure Rules 2000. According to the appellant's submission the breach of natural justice of which he claims to be the victim, because he was not given an opportunity to present his case, began with the failure of the judge to give case management directions. Had the judge done so, counsel for the appellant submitted, the appellant would have had the opportunity to file an affidavit putting forward his defence. That not having been done the hearing proceeded solely on the case put forward by the respondent.

[29] The response of the Solicitor General was that the appellant never had any intention of presenting any defence in writing, whether in the form of an affidavit or a statement of case, and this was expressly stated by counsel for the appellant at various stages of the proceedings and can be gathered, as well, from the way in which the appellant conducted his case. Counsel for the appellant denied that he ever so stated. In the absence of a transcript I am in no position to decide what was said. However, there is this clear statement by the judge:

> "[59] The defendant did not put in any defence or swore (sic) any affidavit in answer. The reason he states is that he is facing criminal charges and anything he uses in his defence in this action may prejudice him in his criminal trial." [13]

[30] In his amended notice of appeal the appellant does not include that statement by the judge among the findings of fact that he challenges but he includes it in the findings of law that he challenges. Counsel for the appellant did not suggest in his opening submissions that the judge's statement was inaccurate but in his reply counsel for the appellant asserted that he never said that the appellant was not going to file a defence. This was in reply to the submissions of both the Solicitor General and counsel for the Bar Association that the appellant always had it open to him to file a defence and he deliberately chose not to do so.

[31] Even though there is no transcript from which to see exactly what was said I believe proper weight must be given to the clear statement by the judge that counsel for the appellant conveyed to the judge the reasons why the appellant had not filed a defence or affidavit and the implication that flowed from that statement. That position is strengthened by the fact that, in support of his challenges to the court's jurisdiction and to the granting of the injunction, the appellant filed three affidavits and studiously avoided touching on the merits of the case that had been brought against him. It would have been expected, had the appellant wanted to contradict the allegations made against him, that he would have done so in the affidavits that he was filing on his own initiative.

[13] At paragraph 59 of the judgment

[32] In these affidavits the appellant expressly recognized that it was open to him to state matters in denial of the allegations made against him and he expressly chose not to do so. Thus, in the first of these affidavits[14] the appellant stated:

> "2. I do not wish at this stage to comment or address the substantive matter, save that the allegation (sic) levied, without more, are denied.
> "3. The purpose of this affidavit is in respect of the injunction granted and is limited to the grant of the injunction only."

Further in this affidavit, in arguing for the discharge of the injunction, the appellant stated in a number of sub-paragraphs in his paragraph 5:

> "iii. That there is no injury caused to the Executive, in the exercise of the practice of the Respondent Attorney. That from the reading of the Claimant's affidavit it is clear that there was substantial prior knowledge of alleged misconduct which the Claimant was aware well before this (sic) proceedings;
> "iv. The nature of this Injunction is a restraint of trade and interferes with the Claimant's contractual obligations with his clients.
> "v. That what is being achieved now by the grant of the injunction is what is being sought to be achieved at the substantive stage;"

[33] It is remarkable that in the face of the very grave allegations that were made against him the appellant should have chosen to say only what he said. He was concerned to express his view about restraint of trade and interference with contractual obligations to clients but not concerned to express any assertion that his qualifications were genuine or the convictions were not against him. His statement in his paragraph 2 that he did not wish to comment on or address the substantive matter showed his clear recognition that he had the opportunity to comment and contradict.

[34] In my view it is put beyond doubt that the appellant never intended to file a defence or affidavit of fact and, therefore, was never denied the opportunity to do so when one looks at the following statement that appears in the appellant's amended notice of appeal as paragraph (C) (iii)

> "Counsel for the Appellant submitted that it was difficult in the circumstances to file a defence because the Appellant was facing

[14] Sworn and filed on 21st March 2006, p. 68 of the Record

> indictable criminal charges touching on the same matters before the Court and that it would have *affected the Appellant's rights to a fair trial, his right to silence and the right not to incriminate himself in the criminal proceedings.* The learned Judge without addressing that issue with directions as how that problem could have been dealt with proceeded to accept the evidence presented by the Respondents without paying any regard to the case for the Appellant, in particular, his witnesses that he may have wished to have called. In doing so, the learned Judge failed to temporarily stay the proceedings before him pending the outcome of the criminal trials and or failed to comply with Section 107 of the Evidence Act No. 5 of 2002." (Original emphasis).

[35] The appellant, it seems clear to me, is saying even now, on appeal, that what he wanted in the lower court proceedings was not an opportunity to have filed a defence (I am clear he had every opportunity) but, rather, was for the judge to have found for the appellant a way around the difficulties that arose from the appellant choosing to remain silent. The obvious solution, the appellant is advocating in this ground of appeal, was that the judge should have stayed the Attorney General's application to strike him off the roll.

[36] There was no refusal, in these proceedings, to stay proceedings and I would simply reject any attempt to now make that matter a ground of appeal. What is a ground of appeal is that the appellant was denied natural justice because he was not given an opportunity to put his defence. It is a contention that I would reject for the reasons I have given: the appellant had every opportunity to file a defence and to put forward a defence and he chose not to file a defence.

[37] The appellant's reference to section 107 of the Evidence Act is to a provision that allows a judge to protect a witness who "*objects* to giving evidence on the ground that the evidence may prove that the witness" has committed an offence. A judge may give a certificate that renders the evidence inadmissible in any proceedings against the witness. Counsel did not argue the point and I do not see how the point arises since it is nowhere stated that the appellant *objected* to giving evidence. Further, unless the appellant had been minded to admit the truth of the allegations I do not see what evidence, in the context of the particular case, he could have given that could have proved that he committed any offence.

[38] The appellant seems to have managed to assert, without justifying it, the contention that his right to silence and to not incriminate himself were at stake. He has presented no information or made no submission to this court to show that he could have been prejudiced, in relation to these rights, in defending himself against the allegations made against him. Either the allegations made against him are true, in which case the allegations provide a proper basis for criminal prosecution, or they are not, in which case it would be a complete defence to any criminal prosecution. If the allegations are true it does not matter if the appellant admits them or remains silent. He suffers no injustice or prejudice by doing either. If they are true, however, he is not permitted to say on oath that they are not true, because that would be perjury. I do not wish to believe that the appellant could think he can allege prejudice because he is not allowed to advance a defence based on perjury. On the other hand, if the allegations against the appellant are not true he cannot incriminate himself by saying they are not true.

[39] To return to the specific matter of failure to give case management directions, it is the fact that the judge did not give any case management directions and the proceedings were not conducted in accordance with CPR 2000, including the rules as to Fixed Date Claim Form procedure and the court's case management powers. This state of affairs was of the appellant's own engineering but this explains rather than validates the failure to properly manage the proceedings. There will be instances where the effect of the failure of a judge to actively manage a case will be to vitiate the subsequent proceedings but I do not think that that should be the effect in the present case for the following reasons

[40] As I have noted,[15] the judge told the parties before he went on to hear the substantive claim what procedure he would employ. From as early as 22nd March 2006, the return date for the injunction, the court had ordered that the substantive matter was going to be heard on 15th May 2006. If the appellant had any desire for further directions to be given he had the opportunity, on both of those occasions,

[15] At paragraphs [16] and [17], above

to have asked for the directions that he wanted. This observation is made not to cast the burden upon counsel to ask for directions but to recognise that counsel has a duty to assist the court in managing cases. I therefore conclude that the appellant had no desire for directions to be given and he suffered no disadvantage from the failure of the judge to give case management directions so that, while a serious procedural misstep, the failure to give directions did not result in an injustice to the appellant.

Admissibility of the evidence

[41] The appellant fully took the point in the court below that the material upon which the Attorney General relied to support his claim was inadmissible in evidence because it was all hearsay. Counsel challenged both the authenticity and the statutory admissibility of the material. The judge decided that section 55 of the Evidence Act[16] made admissible the information supplied by Peter Anthony Jones that the appellant had not passed the legal practice course and had not been awarded a practicing certificate by the Law Society. The judge also decided that extracts from the records of the Law Society and from court records, which spoke to the appellant's criminal record were admissible. He held admissible, as well, the letter from the Law Society marked AG 4 and the letter from the Faculty of Advocates marked AG 3.

[42] Section 55 of the Evidence Act, so far as material, reads as follows:

> "55. (1) A statement in a document is admissible in any proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if –
>
> (a) the document is or forms part of a record compiled by a person acting under a duty, from information supplied by another person, whether the other person was acting under a duty or not, who had, or may [be] reasonably supposed to have had, personal knowledge of the matters dealt with in that information; and
>
> (b) any condition set out in subsection (2) is satisfied.

[16] No. 5 of 2002

(2) The conditions mentioned in subsection (1)(b) are –

(a) that the person who supplied the information –

(i) is dead or by reason of his or her bodily or mental condition unfit to attend as a witness;

(ii) is outside Saint Lucia and it is not reasonably practicable to secure his or her attendance;

(iii) cannot reasonably be expected, having regard to the time that has elapsed since he or she supplied or acquired the information and to all the circumstances, to have any recollection of the matters dealt with in that information;

(c) all reasonable steps have been taken to identify the person who supplied the information but that he or she cannot be identified; or

(d) the identity of the person who supplied the information being known, all reasonable steps have been taken to find him or her but that he or she cannot be found.

[43] Counsel for the appellant submitted that before the material could have been received in evidence one or more of the conditions contained in section 55 had to be satisfied. It seems to me that the language of the section makes that clear. The judge set out the terms of section 55 (1) and (2)(ii) but he did not analyse the requirements of these provisions. It appears that the judge simply proceeded on the basis that since the affidavit of Peter Anthony Jones, the letters and the various records were made by persons in England or Scotland it followed that this was all information supplied by persons outside of St. Lucia and he must have presumed that it was not reasonably practicable to secure the attendance of the givers of this information in court in St. Lucia.

[44] It is regretted that counsel who appeared on this appeal did not share with us the benefit of their researches on how other courts have applied the equivalent of section 55 and other relevant provisions of the still new Evidence Act or the assistance available to counsel from academic writings. This court, therefore, derived no assistance from the submissions of counsel except for their own cursory views. This court must now consider and decide this appeal on legal material on which it has not had the submissions of counsel, which is distinctly unsafe.

[45] In the current edition of Phipson on Evidence,[17] in the chapter on hearsay in criminal proceedings, appears a helpful treatment of the relevant provisions in the English Criminal Justice Act 2003. The comparable provision is section 116[18] which, so far as necessary for comparison, reads as follows:

> "(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible in evidence of any matter stated if –
>
> (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter;
>
> (b) the person who made the statement (the relevant person) is identified to the court's satisfaction; and
>
> (c) any of the five conditions mentioned in subs. (2) is satisfied.
>
> (2) The conditions are –
>
> (a) that the relevant person is dead;
>
> (b) that the relevant person is unfit to be a witness because of his bodily or mental condition;
>
> (c) *that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;* (emphasis added)
>
> (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;
>
> (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

[46] It will be seen at once that the language of section 116 (2)(c) is identical (in material respects) to the language of section 55 (2) (ii) of the St. Lucia Evidence Act. The discussion in Phipson on Evidence[19] of this condition shows that absence abroad of the relevant person, by itself, is simply not good enough. There has to be evidence to satisfy the court that it is not reasonably practicable to secure the attendance of the relevant person. This means that someone will have to give evidence as to the efforts made to secure the attendance of the maker of the statement and that evidence will have to show that it was not reasonably

[17] 16th ed. (2005)
[18] Set out at paragraph 30-10 of Phipson
[19] Beginning at 30-16

practicable to do so. The point is made in Phipson that "When a court is asked to admit evidence under s. 116, the court should hear oral evidence on oath about the cause of the witness' unavailability."[20]

[47] In R. v De Arango[21] bare replies to telephone enquiries that two booking clerks employed by a travel agent in Bogotá, who made the statements that it was sought to admit, would not come to England was held to fall short of the required standard of proof that it was "not reasonably practicable to secure their attendance." They had not been asked why they could or would not attend and no effort had been made to contact their employers. In R. v Radak[22] it was accepted that it was not reasonably practicable to secure the witness' attendance but leave to adduce the statement was refused because the Crown, had it acted promptly, could have secured the evidence on commission.

[48] It is recognized that these examples, taken from Phipson on Evidence, both concern criminal proceedings and it may be open to argument that in civil proceedings there ought not to be quite so rigorous a test of whether the condition should be treated as satisfied. Assuming, for present purposes only, that such an argument is viable, the condition still needs to be satisfied to some degree and the Attorney General had an obligation to present some evidence of the steps taken to secure the attendance of the makers of the material statements and that it had not been reasonably practicable to secure their attendance. So far as the record of appeal reveals and according to what one gathers from the judgment there was simply no such evidence.

[49] The appellant further complained that there was no compliance with s. 57 of the Evidence Act, which provides that where it is desired to give a statement in evidence in accordance with s. 55 a certificate identifying the document containing the statement and describing the manner in which it was produced may be given. The appellant complained that certain requirements of the section were not met. It

[20] At 30-56; citations of authority omitted.
[21] (1993) 96 Cr. App. R. 399 (decided under the earlier legislation, the Criminal Justice Act 1988)
[22] [1999] 1 Cr. App. R. (S) 199 (decided under the earlier legislation)

is not necessary to consider the details of his complaint because his basic point is true – there was no s. 57 certificate.

[50] The appellant also contended that there was no compliance with sections 138 and 139 of the Evidence Act, which provide for proof of certain matters by affidavit and for the deponent to be called as a witness. The appellant emphasized that he desired to cross-examine "witnesses". The appellant also pointed to a passage in the judgment where the judge referred to the request of counsel for the appellant to cross-examine the signatories to the various letters exhibited to the first affidavit of the Attorney General and the judge said that he would return to that issue in the judgment[23] but never did so. The appellant submitted that the failure of the judge to allow him to cross-examine the persons he wanted to was "fatal".

[51] The final aspect of the appellant's challenge to the reception of the evidence was the complaint that s. 149 of the Evidence Act was not satisfied. That section provides that, among other documents, an affidavit deposed to outside of St. Lucia shall be received in evidence in any court if deposed to before a diplomatic or consular representative for St. Lucia, or before certain officials of the foreign country certified as such by a diplomatic or consular representative. The submission of counsel for the appellant was that this section stipulates how the documents coming from London should have been verified. Without that, counsel submitted, the documents could not have been introduced into evidence and the judge should have ruled the evidence inadmissible.

The new provisions for admissibility

[52] Section 55 of the Evidence Act is one of a number of provisions that significantly alter the former law relating to the admission into evidence of hearsay statements. It does not stand by itself either in effect or in operation. For example, under the heading "Waiver of rules of evidence", appear the provisions of section 143 that empower the court to dispense with provisions contained in section 55 if satisfied

[23] At paragraph 60 of the judgment

that the matter to which the evidence relates is not genuinely in dispute. I do not propose to consider how this discretion ought to have been exercised in this case because, it seems to me, section 128 of the Evidence Act provides for the admission of the documentary material showing the previous convictions and the bad character of the appellant that was admitted under section 55.

[53] Section 128 states:

> "128. A document that purports –
>
> (a) to be a copy of, or a faithful extract from or summary of, a public document; and
>
> (b) to have been –
>
> (i) sealed with the seal of a person who, or of a body that; or
>
> (ii) certified as such a copy, extract or summary by a person who might reasonably be supposed to have custody of the public document;
>
> shall be presumed, unless the contrary is proved, to be a copy of the public document, or a faithful extract from [or] a summary of, the public document, respectively.

[54] In section 2, the interpretation section, it is stated

> "public document" means a document that –
>
> (a) forms part of the records of –
>
> (i) the State;
>
> (ii) the government of a foreign country; or
>
> (iii) a person or body holding office or exercising a power or function under or by virtue of the Constitution or a law, whether of St. Lucia or of a foreign country;
>
> (b) is being kept by or on behalf of –
>
> (i) the State;
>
> (ii) the government of a foreign country; or

(iii) a person or body holding office or exercising a power or function under or by virtue of the Constitution or a law, whether of St. Lucia or of a foreign country; or

(c) …

[55] The Law Society of England and Wales is undoubtedly a body holding office and exercising a power and a function under and by virtue of the laws of Great Britain. Halsbury's Laws of England[24] shows that it is the body established by law to admit persons to practice law[25] in England. As stated at the outset, Mr. Peter Anthony Jones produced the documents that he did from the records kept by The Law Society. It is therefore the fact that The Law Society's records of the appellant's criminal convictions for dishonesty are public documents. Mr. Jones certified the documents to be copies and as the Deputy Head of The Law Society's Fraud Intelligence Unit clearly he would reasonably be supposed to have custody of the documents.

[56] Section 138 (3) of the Evidence Act provides that evidence that relates to a public document need not be given by affidavit but it is enough if the evidence is given by a statement in writing. The appellant's technical objection as to the form of an affidavit executed abroad (assuming it is correct and applicable) is therefore irrelevant. However, the appellant's complaint that he was not permitted to cross-examine Mr. Jones calls for consideration of section 138 (6) which provides that the party who tenders a statement shall call the maker of the statement if the other party so requests. Counsel for the appellant maintained that he requested, through the judge, that the makers of statements be called for cross-examination.

[57] I am not sure that a request to call the maker of a statement for cross-examination generally is a request that the sub-section contemplates. This is because section 139 defines "request" as meaning a request by the requesting party to the requested party to do one or more of a stated number of things. These include to

[24] Volume 44 (1) , fourth edition reissue, at paragraph 8
[25] Ibid at paragraph 59.

permit the requesting party to examine a document or thing; "to call as a witness a specified person believed to be concerned in the production or maintenance of a specified document or thing or a specified person in whose possession a document or thing is believed to be or to have been at any time;" to permit the requesting party to examine and test a document and the way in which it was produced and has been kept; to call the maker of a previous representation; and to call as a witness a person who gave evidence in proceedings in which a person had been convicted. It will be seen that the list does not include requiring that a person in whose custody a document is kept be called to prove that a copy is a true copy or that the contents of the original are true. Because I have heard no argument on the point I wish to leave it open for argument on another occasion but I am presently inclined to the view I have indicated.

[58] Even assuming that the request was a permitted one, the request also needed to have been a "reasonable request". In this regard the Solicitor General submitted that the appellant had the witness statement of Peter Anthony Jones from about 11th May 2006, when it was filed as an attachment to the Attorney General's third affidavit but it was not until the case for the Attorney General had been presented on 16th May 2006 that counsel for the appellant made the request to the judge that he be allowed to cross-examine witnesses. Counsel for the appellant confirmed that it was at that stage that he made the request.

[59] I agree with the submissions of the Solicitor General that this was not "a request given by a party to some other party"[26] and it was not a reasonable request. The procedure that the sections create is for a request to be made to a party before the trial and for the requested party to comply with the request unless he has reasonable cause for not complying. If there is non-compliance with the request the court may order the requested party to comply, or to produce a document, or call as a witness a specified person, or order that the trial be adjourned, or refuse to admit the evidence in relation to which the request was made. It seems to me that a request to cross-examine deponents made at the close of the claimant's

[26] Section 139 (1) of the Evidence Act

case, even if genuinely made, was nothing short of an application for an adjournment. No explanation has been given by counsel for the appellant for not making the application in proper time and I can see no reason why the judge should have adjourned the trial to accommodate the appellant's very late request.

[60] In reaching that decision I have considered the overall justice of the case and the effect that the denial of the opportunity to cross-examine deponents had on the appellant. Assistance in that regard was gained from section 139 (5) of the Evidence Act which directs the court as to the matters that it must take into account in deciding what order to make when a requested party fails to comply with a request without reasonable cause (which I have found was not the case). These matters frame the exercise of the court's discretion by identifying the factors that may make it appropriate to make or not to make one of the orders mentioned in the preceding paragraph. The point, for present consideration, is that if there is no real adverse impact, when these matters are considered, upon the party whose request was not complied with, the court may simply decide that the failure to comply was of no moment. The matters are:

> "(5) …
>
> (a) the importance in the proceedings of the evidence in relation to which the request was made;
>
> (b) whether there is genuine dispute in relation to the matter to which the evidence relates;
>
> (c) whether there is reasonable doubt as to the authenticity or accuracy of the evidence or of the document the contents of which are sought to be proved;
>
> (d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered;
>
> (e) in the case of a request in relation to evidence of a previous representation, whether there is a reasonable doubt as to the accuracy of the representation or of the information on which it was based;
>
> (f) in the case of a request as mentioned in paragraph (1)(e), whether some other person is available to give evidence about the conviction or the facts that were in issue in the proceedings in which the conviction was obtained;
>
> (g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable; and
>
> (h) the nature of the proceedings."

[61] The compelling feature of the documentary evidence against the appellant was that it was all quintessentially a matter of public record. The High Court and Court of Appeal in England are called courts of record by which is meant that their proceedings are preserved in its archives, called records, and are conclusive evidence of that which is recorded therein.[27] Copies of actual transcripts of the court proceedings were produced, in this case. In the absence of any evidence from the appellant or even a statement by his counsel I am unable to see that there is any genuine dispute in relation to the matter of the appellant's previous convictions. I am similarly unable to see that there is any reasonable doubt as to the authenticity or accuracy of the documents or their contents. It is this feature of the evidence that makes me satisfied, beyond any doubt, that the appellant suffered no injustice, even on as grave a charge as fraud, by the reception into evidence of the material from The Law Society without having the opportunity of cross-examining Mr. Jones.

Breach of natural justice

[62] Although the appellant alleged breach of natural justice as a discrete ground of appeal, in the form of a complaint that the court shut the appellant out from presenting his case by failing to rule on the appellant's application to cross-examine those who had sworn affidavits against him, I believe the issue has been fully addressed in the consideration of the appellant's challenge to the admissibility of the evidence relied on by the Attorney General.

Order set aside

[63] None of the grounds of appeal and challenges succeeded, in my view, and I would dismiss the appeal. I would order that the Order entered on 9th August 2004, in St. Lucia Claim No. SLUHCV2001/0800, that Leonard Ogilvy be admitted to practice as a barrister-at-law of the Eastern Caribbean Supreme Court, be set aside as

[27] R v Tyrone JJ [1917] 2 IR 437

having been obtained by fraud. I would direct that the name of the appellant be struck from the roll of attorneys-at-law. I would make no order as to costs. If the parties indicate to the Chief Registrar a wish for reasons for the departure from the usual rule that costs follow the event, for which decision reasons should normally be given, I will provide reasons.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal