SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCVAP 2007/017

BETWEEN:

OTHNEIL SYLVESTER

Appellant

and

[1] FREDERICK BRUCE-LYLE
[2] KENNETH BENJAMIN
(The Disciplinary Tribunal)

Respondents

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mde. Indra Hariprashad-Charles	Justice of Appeal [Ag.]

Appearances:

Mr. James Guthrie Q.C., Mr. Emery Robertson and Ms. Nicole Sylvester for the Appellant
Mr. Stanley Marcus S.C., Mr. Bertram Commissiong Q.C., and Ms. Mira Commissiong for the Interested Party

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2008: October 7,
November 10.

Civil Appeal – Barrister – Solicitor – professional misconduct – disciplinary proceedings –natural justice – whether breached by tribunal's failure to admit affidavit evidence – jurisdiction of disciplinary tribunal to order payment of compensation – sections 76 and 78 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, Cap. 18.

The appellant is a Queen's Counsel. The respondents are judges of the High Court who sat as a disciplinary tribunal. The Danish Foundation ("the interested party") was the "person aggrieved" by the actions of the appellant, who had acted as the legal practitioner for the interested party some years earlier. The actions of the appellant were the subject matter of a disciplinary complaint made

by the interested party and the latter was permitted by an order of the court to participate in the appeal as an interested party.

The appellant, as the interested party's legal practitioner, had recommended the formation of five companies for the purpose of enabling the interested party to acquire Orange Hill Estates in Saint Vincent and the Grenadines and thereby, lawfully, avoid the requirements of the **Aliens (Landholding Regulations) Act, Cap. 235**. The companies were incorporated as recommended; the appellant, his law clerks and three Danish nationals working in Saint Vincent becoming subscribers to the memoranda of association. The interested party paid the full purchase price for the Estates, all government fees and stamp duties and the appellant's fees. Without the interested party's knowledge or consent, the appellant issued shares in the principal company to his wife, his son, his daughter and three law clerks and thereafter took full control of the companies to the exclusion of the Danish nominees.

In 1985, the Government compulsorily acquired the Estates and the appellant represented the interested party at boards of assessment and in litigation challenging the quantum of the award. In 1993, the appellant received, into his clients' account, the sum of EC$6,697,500.00 from the Government as compensation for the Estates. The interested party was not informed of the receipt of these monies and learnt of it by reading a newspaper circulating in Saint Vincent in 1996. After numerous demands, the appellant paid EC$1,485,000.00 to the interested party and refused to pay the balance. In February 2004, the interested party commenced a civil action against the appellant to recover the money paid by the State as compensation and instituted the complaint proceedings.

The complaint was scheduled to be heard by the tribunal on 12th July, 2004 by agreement of the parties. In March 2004, the appellant requested an extension of time to file affidavit evidence, which was granted with the consent of the interested party. No affidavit was in fact filed. The appellant instead filed an application for stay or dismissal of proceedings, which was refused. He appealed this decision, which appeal was also dismissed. These proceedings were characterised by adjournments and delay. The complaint was scheduled to be heard on its merits in the week commencing 23rd October, 2006 but was adjourned to 5th February, 2007 on the ground of the appellant's medical condition. The tribunal made it clear that the matter would proceed on that date whether or not the appellant was present, his attendance not being compulsory. The appellant sought to rely at the hearing on affidavits he served on the 2nd and 5th February, 2007. The tribunal refused to allow counsel for the appellant to use the affidavit and proceeded with the hearing.

The tribunal delivered its decision on 29th May, 2007 disbarring the appellant, ordering him to pay compensation to the interested party in the sum of EC$5,212,500.00 with interest and costs. The appellant appealed on the ground that the tribunal's refusal to allow the appellant to rely on the affidavits amounted to a breach of natural justice and that the tribunal had no jurisdiction to order the payment of compensation.

Held: dismissing the appeal, affirming the order of the tribunal and awarding the costs of the appeal to the interested party:

(1) There was no breach of natural justice for the tribunal had properly taken account of and given due weight to the fact that the standing and reputation of the appellant were at stake and to the consequences of refusing to admit the affidavits, including the implications for

the appellant's defence and the effect that allowing the affidavits would have on the timely hearing of the complaint. The tribunal was also entitled to reject the asserted illness of the appellant as a justification for the delay as no medical certificate had been provided to establish any illness subsequent to 22nd September, 2006.

(2) The courts in England have jurisdiction at common law to order a solicitor to pay compensation where professional misconduct is established. This common law jurisdiction has been distinctly preserved by the law and practice in force in England relating to solicitors. Section 78 of the **Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, Cap. 18** extends to Saint Vincent and the Grenadines the law and practice in force in England relating to solicitors, which includes the common law jurisdiction. The tribunal accordingly had jurisdiction to order the payment of compensation.

(3) This jurisdiction to award compensation exists notwithstanding the fact that the person aggrieved has obtained judgment in a separate proceeding against the solicitor to recover the money payable to it. In the present circumstances, the interested party has not obtained judgment in its claim seeking recovery of the money owed so that it was all the more necessary and just for the tribunal to exercise the power to order the appellant to pay the money he has dishonestly withheld from the interested party.

In the matter of the Solicitors Act 1974, B Brandon v The Law Society [2008] EWCA Civ 967 considered.

In Re Grey (1892) 2 QB 440 applied.

JUDGMENT

[1] **BARROW, J.A.**: This appeal is by a Queen's Counsel against the decision of two judges of the High Court of Saint Vincent and the Grenadines, sitting as a disciplinary tribunal, ordering that the appellant be struck off the Court Roll forthwith, pay compensation and pay costs to the interested party. The appellant argues that the tribunal had no jurisdiction to order the payment of compensation and that the tribunal's refusal to allow the appellant to rely in his defence on two affidavits amounted to a breach of natural justice for which the decision should be set aside.

The nature of the proceeding

[2] The interested party is a private Danish foundation. The interested party commenced proceedings by a notice of application filed in February 2004, applying for a rule to issue to

the appellant to show cause why his name should not be struck off the Roll of Barristers and Solicitors or why he should not be suspended from practicing as a Barrister and Solicitor in Saint Vincent and the Grenadines. By order of the master dated March 17, 2006, it was ordered that the rule should issue and that the respondent should show cause why he should not be suspended or struck off the Court Rolls. The rule was stated to be on the basis of ten charges of professional misconduct.

[3] The tribunal stated in its written decision[1] that the High Court of Saint Vincent and the Grenadines is empowered to supervise and control the conduct of barristers and solicitors. Such jurisdiction is conferred by Section 76 of the **Eastern Caribbean Supreme Court Act (Saint Vincent and the Grenadines) Act**[2], (the **Supreme Court Act**), which provides:

> "Any two judges of the High Court may, for reasonable cause, suspend any barrister or solicitor from practicing in Saint Vincent and the Grenadines during any specified period, or may order his name to be struck off the Court Roll."

[4] The procedure to be followed is provided in regulations made under the Act in Rule 4 of the **Barrister and Solicitors Rules, Booklet 4**. That rule reads:

> "(1) Proceedings to suspend or strike a barrister or solicitor off the roll shall be commenced by an application to a judge in chambers for a rule to issue to the barrister or solicitor named to show cause why he should not be suspended or struck out the roll.
> (2) Such application may be made by the Attorney-General or by the person aggrieved by the action of the barrister and solicitor complained against.
> (3) In the event of a rule being granted, further proceedings thereunder shall be in open court."

[5] At an earlier point in the course of the underlying proceedings it was clarified by this court, on an interlocutory appeal,[3] that disciplinary proceedings against a barrister and solicitor[4] are neither criminal nor civil proceedings. This was established in this jurisdiction by this court's decision in **Hansraj Matadial v John Bayliss Frederick**.[5] It followed, because there is no claimant and defendant in such proceedings, because there are no parties

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[1] St. Vincent and the Grenadines Claim No 86A of 2004, decision delivered 29 May 2007
[2] Chapter 18 of the Laws of Saint Vincent and the Grenadines Revised Edition 1990
[3] St. Vincent and the Grenadines Civil Appeal No. 4 of 2005, at paragraph [10] (judgment delivered 20th February 2006)
[4] The profession in St. Vincent and the Grenadines is fused and legal practitioners are admitted to practice as solicitors; sections 71 – 73 of the Supreme Court Act, Cap.18 of the Laws of Saint Vincent and the Grenadines Revised Edition 1990
[5] St. Vincent and the Grenadines Civil Appeal No. 23 of 2001.

since there is no litigation, that the Foundation was properly to be regarded as the applicant or "the person aggrieved", in the language of the Rule. Consistent with the nature of the proceedings, the proper respondents to an appeal by an affected practitioner are the judges who made the decision and not the aggrieved person, whom the appellant need not make a party to the appeal.[6] It was for this reason the Foundation found it necessary to seek an order of the court to participate in the appeal as an interested party and it was so ordered.[7]

The facts underlying the complaint

[6] A helpful summary of the facts asserted by the interested party and accepted by the tribunal in the absence of any admitted contradictory evidence from the appellant is contained in the written submissions filed by counsel for the interested party, which I paraphrase.

[7] The appellant recommended the formation of five companies for the purpose of enabling the interested party to acquire the Orange Hill Estates in Saint Vincent and the Grenadines.

[8] The appellant advised the interested party that it could avoid the requirements of the **Aliens (Landholding Regulations) Act,**[8] which restricted foreigners in the ownership of land, by incorporating a local company to purchase the Estates and incorporate four other companies to hold shares in the principal company. The amounts payable to the State of St. Vincent and the Grenadines ("the State") under the said Act would also be avoided and be a saving. The appellant advised that this arrangement was legal and would not violate any law. The interested party would have been the beneficial owner of the shares in the principal company, Windward Properties Limited ("WPL").

[9] The appellant advised that it would be lawful to have the memoranda of association subscribed by three Danish nationals working in Saint Vincent together with law clerks of

[6] ibid, at paragraph 8
[7] Transcript of Trial Proceedings, Court of Appeal Sitting, 30th October, 2007, p 7, lines 13 - 19
[8] Chapter 235 of the Laws of Saint Vincent and the Grenadines Revised Edition 1990

the appellant. The interested party stated that so far as it was aware the appellant acted in accordance with the plan he devised and incorporated the companies.

[10] The interested party paid the full purchase price of EC $5,646,900.00 for Orange Hill Estates, as well as US $31,500.00 professional fees to the appellant, and US $52,500.00 being 2.5% of the purchase price, charged by the appellant as his fee for the saving of the 10% Aliens' Landholding Licence fee. The interested party also paid all government fees and stamp duties payable in respect of the purchase of the land and the incorporation of the companies.

[11] On 22nd February, 1985 the appellant, without the knowledge or consent of the interested party, issued shares in Windward Properties Limited to himself, his wife, his son, his daughter and 3 of his law clerks. The appellant acted similarly in respect of the other companies. The appellant thereafter took full control of the companies and excluded the Danish nominees of the interested party.

[12] On 30th April, 1985 the Government of Saint Vincent and the Grenadines compulsorily acquired Orange Hill Estates.

[13] The appellant represented the interested party before the boards of assessment and in litigation, including appeals challenging the quantum of the award, in respect of which the interested party paid the appellant his professional fees, as well as those for counsel appearing in the Privy Council.

[14] On 15th December, 1993 the appellant received from the Government of Saint Vincent and the Grenadines the sum of EC $6,697,500.00 as compensation for Orange Hill Estates.

[15] The appellant never informed the interested party of this. The interested party read of it in a newspaper circulating in St. Vincent and the Grenadines, in February 1996. The appellant's bankers confirmed receipt and payment into the appellant's clients' account of this sum since 1993.

[16] Despite the numerous demands made by the interested party, the appellant initially failed to pay the interested party any part of the compensation. In May 1997 the appellant paid the interested party EC $1,485,000.00 and has refused to pay the interested party the balance of EC $5,212.500.00.

[17] The appellant disclaimed liability to pay the sum received or the sum claimed on several grounds. Indeed, the appellant even denied the relationship of legal practitioner and client existed between himself and the interested party.

A chronology of the proceeding

[18] As indicated, the appellant contends on this appeal that it was a breach of natural justice for the tribunal to refuse to consider the appellant's affidavits on which he wished to rely. A fair consideration of that contention requires a considerably more detailed statement of the history of this proceeding than is given in the laconic concession by counsel for the appellant that: "[t]he appellant, despite ample previous opportunities over a period of three years, sought to introduce detailed affidavits before the Disciplinary Tribunal at the commencement of the hearing on 5th February 2007." Again, I am indebted to counsel for the interested party for providing a summary, from which the following is digested.

[19] On *13th February, 2004* the interested party instituted Claim No. **86 of 2004** ("the civil action") seeking to recover the money the State had paid as compensation.

[20] On *16th February, 2004*, the interested party instituted the instant proceeding ("the complaint"), designated as Claim No. 86A of 2004. The first hearing date for the complaint was *12th March, 2004* when it was adjourned. After consultation and agreement by both sides, the registrar of the Court fixed *12th July, 2004* for hearing the complaint.

[21] Pursuant to a request made by the counsel for the appellant on *18th March 2004* for an extension of time to file an affidavit in reply to that filed on behalf of the interested party,

lawyers for the interested party consented to an extension of time to *17th May, 2004* for the appellant to file his affidavit (as well as his defence in the civil action, No. 86 of 2004).

[22] The appellant did not file his affidavit (or defence). Instead, approximately 2 months after requesting the extension, on *14th May, 2004* the appellant filed an application seeking an order staying or dismissing the complaint on the grounds that (a) the procedure was irregular; (b) no charge against the appellant was stated; and (c) the complaint constituted an abuse of process. The appellant did not file any affidavit giving his version of the facts in response to the facts alleged by the interested party nor did he otherwise state his case on the merits.

[23] The hearing of the appellant's interlocutory application which had been fixed for hearing on 12th July, 2004 had to be adjourned because the appellant's lead counsel would not be available. In response to a notice from the registrar of the Court dated 14th September, 2004 setting down the appellant's interlocutory applications for hearing on 18th October 2004, attorneys for the appellant by letter dated 7th October 2004 informed the court that they had received a medical report stating that the appellant was "not fit to be in court either as advocate, or witness or in any other capacity" and that his situation would be reviewed in December, 2004 for further report.

[24] The application was heard on 29th November, 2004 and the master gave his decision dismissing it on *16th February, 2005*. The appellant obtained leave to appeal but difficulties arose in fixing a hearing date suitable to lead counsel for the appellant. Although counsel for the appellant indicated that they were available from 10th to 23rd November, 2005 for the hearing, when the registrar fixed 22nd November, 2005 for hearing the appeals that date was stated to be inconvenient for them. The appeal was heard by the Court of Appeal on *19th December, 2005* and dismissed on *20th February, 2006*. The appellant did not appeal the decision.

[25] Thereafter, Attorneys-at-law for the interested party and court personnel sought to get the complaint heard on its merits. Counsel for the interested party states this proved difficult

because consistent with the history of the proceeding most dates suggested were inconvenient to leading counsel for the appellant. The order for the appellant to show cause in the disciplinary proceeding was served on the appellant personally on *5th May, 2006* and the hearing before the Disciplinary Tribunal was fixed for the week commencing *23rd October, 2006*. A copy of the original complaint with the affidavit in support was again served on the appellant on 23rd September, 2006.

[26] By letter dated *22nd September, 2006* the Attorneys-at-law for the appellant advised the attorneys-at-law for the interested party that the appellant was undergoing medical attention and observation and that he was "not in a position to deal with any litigation matter until anytime after January, 2007".

[27] The registrar responded to the appellant's Attorneys-at-law, advising that after consultation with the tribunal she had been instructed to inform them that the matter would proceed on *23rd October, 2006* as scheduled.

[28] In fact counsel for the interested party were informed that the appellant left the island on *23rd September, 2006*. A written request by the Attorneys-at-law for the interested party to have the appellant examined by a doctor chosen by the interested party was refused by letter dated 12th October, 2006.

[29] On 23rd October, 2006, the day when the hearing was scheduled to proceed, counsel for the appellant sought and were granted an adjournment of the hearing to Monday *5th February, 2007* on the ground of the appellant's medical condition. The tribunal, however, made the point that the appellant's presence was not compulsory and that in the event he was still ill on 5th February, 2007 the matter would proceed. Counsel for the interested party observes that at no time, and in particular not on the scheduled date of hearing, did the Attorneys-at-law for the appellant seek an extension of time for the appellant to file his affidavit. It is not disputed that the appellant accordingly had opportunity from *13th February 2004* (the filing of the complaint) to *23rd October, 2006* to file his affidavit. He further had from *23rd October, 2006* to some reasonable time before 5th February 2007 to file affidavits.

[30] At 4.05 p.m. on *2nd February, 2007* (the Friday before the scheduled Monday's hearing) the appellant served the attorneys for the interested party with an affidavit purporting to be the appellant's reply to the affidavit of Poul Jorgensen filed just short of 3 years earlier, on *16th February, 2004*.

[31] On the morning of *5th February, 2007*, the actual date of the hearing, the appellant served a second affidavit on the interested party's Attorneys-at-law.

[32] The application of counsel for the appellant to use the affidavits was refused and the hearing continued. The principal witness for the interested party presented himself for cross-examination on his affidavit, but counsel for the appellant declined to cross-examine him, stating that it was his intention to address the tribunal on the evidence contained in the affidavit of Poul Jorgensen and to make submissions on the law. At the conclusion of the hearing the tribunal reserved its decision.

[33] The tribunal notified counsel that it would deliver its decision on 29th May, 2007. On 25th May, 2007, the appellant applied for an order staying delivery of the tribunal's decision pending the hearing and determination of the civil claim, No. 86 of 2004. This application was refused and the tribunal delivered its decision on 29th May, 2007 disbarring the appellant, ordering him to pay compensation in the sum of EC$5,212,500 with interest thereon at the rate of five per cent per annum from December 15, 1993 to the date of payment, and costs.

The natural justice ground

[34] Mr. Guthrie QC argued that the decision was unfair and ought not to be allowed to stand because the tribunal did not properly conduct the necessary balancing exercise in deciding whether to admit the affidavits. Counsel identified the matters referred to by the tribunal that weighed in the scales against the appellant as being inordinate delay; the previous hearing on 23rd October 2006; the fact that the appellant's illness did not preclude him from filing; and the need to avoid protracted adjournments. Counsel accepted that such matters may have been legitimate considerations on one side of the scales, as would have been the fact that Mr. Jorgensen had come from far away.

[35] However, counsel submitted, the tribunal did not mention, and even if they did consider they did not give proper weight to, a number of matters in the appellant's favour including the difficulties caused by his serious illness as described by leading counsel for the appellant before the tribunal; the fact that the appellant was prepared to accept an Order for any costs thrown away; the fact that the appellant is a senior member of the Bar of long standing and his reputation was at stake; the fact that he had - albeit at the eleventh hour - sworn detailed affidavits in defence of the claims against him which were available then and there; and the fact that if the evidence was not admitted his case would inevitably be lost by default. Also, counsel submitted, any adjournment would have been minimal; the case was listed for 4 days, it took two and a half, and it is unlikely that new dates would have been required.

[36] The last submission is extravagant. The proceeding that was listed for four days was a proceeding in which the appellant had filed no affidavit or defence. What was listed for four days was therefore a proceeding that contemplated uncontradicted testimony. In its brief oral ruling disallowing reliance on the affidavits the tribunal twice stated that the case management orders it made, when it granted the appellant an adjournment of the hearing on 23rd October 2006, "were made on the basis that no affidavit was forthcoming".[9] The hearing took two and a half days because the witness for the interested party was not cross-examined and the appellant presented no evidence and so was not cross-examined. A fully contested hearing that would have involved cross-examination of two flatly contradicting witnesses, as would then have been inevitable if the appellant's affidavits had been received as evidence, would probably have required a much longer hearing.

[37] However, the number of days that the hearing took and a projection of how long it would have taken to hold a fully contested hearing are immaterial. This is because it was obvious and all present at the hearing accepted it, that counsel for the interested party would have needed an adjournment to study the appellant's affidavits, take instructions and file an affidavit in response. Counsel for the interested party told the tribunal they would need

[9] Transcript of proceedings on Monday 5th January 2007, 10:21 until 12:23, at p 12; see also Transcript of proceedings for the afternoon session, at p 7

"some considerable time to look at this matter".[10] Counsel for the appellant took it is as given that there would have to be an adjournment if the affidavits were allowed and offered to pay costs.[11] In ruling on whether to allow reliance on the affidavits Benjamin J stated, "the obvious effect of allowing affidavits at this stage would be that inevitably there would be an adjournment"[12] and, he was clear, it would be "protracted adjournments".[13] In my view there is simply no gainsaying the tribunal's conclusion. Mr. Guthrie overreaches in contending, contrary to the accord of everyone who participated in the hearing, that there would have been need for only a minimal adjournment and suggesting that the hearing could likely have been held in the course of the scheduled dates.

[38] As regards counsel's submission that the tribunal failed to mention in its reasons that the appellant is a senior member of the bar of long standing whose reputation was at stake and that if his evidence was not admitted his case would inevitably be lost by default, it was suggested to counsel in argument that these factors were so overarching that they must have been included in the tribunal's consideration of whether to admit the affidavits. Quite properly, counsel did not insist that the tribunal should be taken as having failed to consider these factors but he submitted that if the tribunal did consider these factors they failed to give the factors proper weight.

[39] In my view these proceedings were so exceptional that as a matter of human contemplation and judicial experience it is inconceivable that two judges who were conducting a hearing into whether to disbar a Queen's Counsel, who had served with them temporarily on the High Court bench, could have failed to give proper weight to the fact that the standing, reputation and fate of the appellant weighed in the balance of their decision. It seems to me, as a matter of reasonableness, that the tribunal was not required to mention, in delivering its oral decision, that it had adverted to the consequences of deciding against the appellant, when those consequences were so obvious from the very nature of what was to be decided. It achieved nothing but unkindness to submit that the judges did not appreciate that if they excluded the affidavits the appellant would be unable

[10] Transcript of proceedings on Monday 5th January 2007, morning session, at p 9
[11] Transcript of proceedings on Monday 5th January 2007, morning session, at p 10
[12] Transcript of proceedings on Monday 5th January 2007, morning session, at p 12
[13] Transcript of proceedings on Monday 5th January 2007, morning session, at p 13

to offer any evidence and advance a positive case to resist the call for his disbarment. I find no merit in the submission that the tribunal failed to consider or give proper weight to the consequences of refusing to admit the affidavits.

[40] The remaining argument that I consider necessary to specifically address is that the tribunal did not mention in its reasons for decision the difficulties caused by the appellant's serious illness as described by leading counsel for the appellant before the tribunal. It is simply impossible to accept that the tribunal failed to properly consider this factor when it was the very basis of leading counsel's attempt to justify the late filing of the affidavits and the sole explanation for the delay. In three instances in very short addresses to the tribunal counsel relied on this difficulty,[14] going so far in one instance as to tell the tribunal that "this is a case in which I can honestly say that the illness of the defendant has affected counsel's ability to undertake our normal duties to the Court within the time frame necessary."[15]

[41] In its ruling the tribunal dealt specifically with the matter of the appellant's illness. After examining the chronology of the proceedings the tribunal noted that the illness of the appellant was first introduced on the record by a letter of 22nd September 2006, to which was attached a medical certificate of May 8th. On the basis that the appellant became ill around that date, May 8th, this meant the appellant had had a period of three months after the court of appeal gave its ruling in February 2006, during which he was not ill, to prepare his affidavit. The tribunal concluded:

> "it seems to us that there should have been some explanation as to the failure to file an affidavit in response during that window of opportunity, but alas we have not been graced with any explanation."[16]

Because the appellant had not explained the delay the tribunal refused to condone the late filings because of the protracted adjournment that would have resulted.

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[14] Transcript for Monday 5th January 2007, morning session, at p 5 lines 7 to 9, at p 7 lines 14 to 20, and at p 7 lines 21 to 24.

[15] Transcript for Monday 5th January 2007, morning session, at p 7 lines 21 to 24

[16] Transcript for Monday 5th January 2007, morning session, at p 12 line 25 to p 13 line 3

[42] It seems to me the tribunal was entitled to reject the asserted illness of the appellant as a justification for the delay. There was no medical certificate to establish any illness subsequent to 22nd September 2006. The interested party clearly did not accept that illness prevented the appellant from preparing for the hearing. Indeed, the interested party requested that their own medical expert be permitted to examine the appellant and this was refused. The appellant would have needed to produce a fresh medical certificate, convincing in its particulars and specifics, to explain why the appellant was unable, during the period 23rd October 2006 and say early January 2007, to give instructions for the preparation of the two affidavits that he eventually presented. When the appellant sought and was granted an adjournment of the hearing on 23rd October 2006 his eminently led team of legal advisers knew exactly what material to provide to justify the adjournment. On this occasion, as the tribunal expressed it, they were not "graced with any explanation". It would have been capricious for the tribunal to permit the appellant to rely on his unexplained delay and procure an unjustified, protracted adjournment of the hearing. In my view there was no error in the tribunal's decision. I would dismiss this aspect of the appeal.

Jurisdiction to order payment

[43] Counsel for the appellant submitted that section 76 of the **Supreme Court Act**[17] conferred jurisdiction on any two judges of the High Court to suspend any barrister or solicitor from practicing or order his name to be struck off the court roll but did not confer jurisdiction to do anything else, such as to fine him or order him to pay compensation. It is settled law, counsel argued, that where powers are conferred by statute there can be no recourse to jurisdiction that existed at common law. Counsel said the matter was very recently considered by the Master of the Rolls in England (who has the statutory power of disciplinary control over solicitors in appeals from decisions of the Law Society).

[44] **In the matter of the Solicitors Act 1974, B Brandon v The Law Society**[18] was a case in which the Solicitor's Regulation Authority imposed conditions on a solicitor's practising certificate and the solicitor appealed. He argued that the Master of the Rolls had an

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[17] See paragraph [3], above

[18] [2008] EWCA Civ 967, at paragraphs 7 – 10

inherent jurisdiction to deal with all regulatory and disciplinary matters concerning solicitors, and that such authority was wide enough for the Master of the Rolls to prohibit the SRA from acting as they had. The Master of the Rolls rejected the argument that he had inherent jurisdiction over solicitors of the kind suggested. On the contrary, His Lordship stated, his jurisdiction was a creation of the **Solicitors Act 1974** and its statutory predecessors. The jurisdiction was in that context an appellate and supervisory one, and went no wider than that. The Master of the Rolls, however, did note that section 50 of the 1974 Act preserved the jurisdiction exercisable over solicitors before the enactment of the **Supreme Court of Judicature Act 1873** but said there was nothing in that summary jurisdiction that assisted the solicitor in regard to what he sought on his appeal.

[45] Nothing in this country's Supreme Court Act preserved the common law jurisdiction, Mr. Guthrie argued, and he denied that was the effect of section 78 of the **Supreme Court Act**. Section 78 provides:

> "78. Subject to rules of court, the law and practice relating to solicitors, taxation and the recovery of costs in force in England shall extend to and be in force in Saint Vincent and the Grenadines and apply to all persons lawfully practising therein as solicitors of the court."

[46] Counsel argued that this section did not confer jurisdiction to award compensation and, further, that where there is a specific provision such as section 76 of the **Supreme Court Act** it is not derogated from by a provision such as is contained in section 78.

[47] Mr. Marcus QC argued for the interested party that section 76 is only a procedural provision and it is in section 78 that the jurisdiction to discipline solicitors is found. It seems to me sections 76 and 78 were intended to do in St. Vincent and the Grenadines what is done in England by section 50 of the **Solicitors Act 1974**, to which the Master of the Rolls referred in **Brandon v The Law Society**.[19] Section 50 provides:

> "(1) Any person duly admitted as a solicitor shall be an officer of the Supreme Court;…
> (2) Subject to the provisions of this Act, the High Court, the Crown Court and the Court of Appeal respectively, or any division or judge of those courts, may exercise the same jurisdiction in respect of solicitors as any one of the superior courts of law or equity from which the Supreme Court was constituted might have

[19] [2008] EWCA Civ 967

> exercised immediately before the passing of the Supreme Court of Judicature Act 1873 in respect of any solicitor, attorney or proctor admitted to practice there.
> (3) An appeal shall lie to the Court of Appeal from any order made against a solicitor by the High Court or the Crown Court in the exercise of its jurisdiction in respect of solicitors under subsection (2)."

[48] It was accepted by Mr. Guthrie that section 50 of the **Solicitors Act 1974** preserved the disciplinary jurisdiction of the courts over solicitors that existed at common law. In fact that section does two things: it preserves the jurisdiction (or recognizes its continued existence) and it identifies who is to exercise the jurisdiction. Under the local Supreme Court Act section 76 specifies who is to exercise the jurisdiction to suspend or strike off the roll but this section does not preserve the jurisdiction over solicitors that existed at common law nor does it expressly recognize its continued existence (although it may be argued that it implies or assumes the existence of that jurisdiction.) Section 78, however, specifically extends to St. Vincent and the Grenadines the law and practice relating to solicitors in force in England and gives force locally to that law and practice. The same section states that such law and practice shall apply to all solicitors of the court. The law and practice relating to solicitors in force in England undoubtedly includes the preserved common law jurisdiction. Section 78, therefore, extends to this country the common law jurisdiction of the courts over solicitors that is preserved in England.

[49] There was no need for counsel for the interested party to refer in oral argument to the other statutory provision on which they relied in their written submission, which was Section 4 (1) of the **Application of English Law Act**.[20] This section reads:

> "Subject to the provisions of subsection (2), without prejudice to the provisions of any Act of the Parliament of Saint Vincent and the Grenadines and in particular the provisions of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, the common law and the rules of equity from time to time in force in England shall be in force in Saint Vincent and the Grenadines in so far as they may be applicable to the circumstances thereof and subject to such modifications thereto as the circumstances may require, save to the extent to which such common law or any such rule of equity may be excluded by any Act of the Parliament of Saint Vincent and the Grenadines."

[20] Chapter 8 of the Laws of Saint Vincent and the Grenadines Revised Edition 1990

[50] Although the written submissions for the appellant argued the contrary and this position was maintained in Mr. Guthrie's opening address, in the end counsel seemed to accept that the courts in England had jurisdiction to order a solicitor to pay compensation. The case of **In Re Grey**[21] on which Mr. Marcus principally relied establishes beyond any doubt that the courts in England, and hence the tribunal, have jurisdiction to order a solicitor to pay compensation. In that case the appellant retained a solicitor to bring an action for goods sold and delivered on his behalf and judgment was recovered by the appellant for a certain amount. The solicitor received the money under the judgment. He claimed to retain the amount so received by him in respect of a bill of costs of greater amount delivered by him to the appellant. The appellant, however, alleged that he was not indebted in respect of the full amount of the costs claimed because of a special fee arrangement that had been made between him and the solicitor. The appellant brought an action against the solicitor to recover the balance the appellant claimed was due to him. The solicitor counter-claimed the amount of his bill of costs. The appellant, in his reply, set up the special arrangement. The jury found a verdict in favour of the appellant and judgment was entered thereon. Execution was issued on the judgment, but proved ineffective. The appellant applied at chambers for an order that the solicitor should pay over the amount of the judgment debt to him but the application was refused by the master, whose refusal was affirmed on appeal by the judge at chambers. The Divisional Court, on appeal to them, thought that they were bound by authority to hold that, judgment having been recovered for the amount of the debt, they had no jurisdiction to make the order for payment in the exercise of their summary jurisdiction over the solicitor as an officer of the Court.

[51] The Court of Appeal decided that where a solicitor has committed a breach of professional duty in failing to pay over money received by him for his client, the fact that the client has brought an action against him and recovered judgment for the money does not take away the disciplinary jurisdiction of the Court summarily to order payment of the money to the client. Lord Esher M.R. stated:[22]

> "It seems to me that the true way of dealing with this case is to deal with it according to the principle which was laid down by this Court in In re Freston [FN6:

[21] (1892) 2 Q B 440
[22] At 443

11 Q.B.D. 545], and recognised and approved of in In re Dudley. [FN7: 12 Q.B.D. 44] The principle so laid down is that the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore, be affected by anything which affects the strict legal rights of the parties. Such was the principle laid down in the cases to which I have referred, and which were decisions of the Court of Appeal, and therefore are binding on us till overruled by the House of Lords. So, if a solicitor obtains money by process of law for his client, quite irrespective of any legal liability which may be enforced against him by the client, he is bound, in performance of his duty as a solicitor, to hand it over to the client, unless he has a valid claim against it. If he spends it, or if, still having it, he refuses to hand it over, he commits an offence as an officer of the Court, which offence has nothing to do with any legal right or remedy of the client. Here the solicitor does not deny that he received this money, but he sets up a claim in respect of it, which, if valid? would have relieved him from the charge of a breach of his duty as solicitor. It has been decided against him by a jury that he had no valid claim to a large part of it, and, if the finding of the jury, which, I think, we cannot now question, is true, it follows, from such finding, that in keeping this money he did that which was contrary to his duty as a solicitor. The client had, no doubt, a legal remedy for recovery of the money, viz., by an action for money had and received. But the two things, the breach by the solicitor of his duty as such, and the legal right of the client, are quite separate and distinct. The client had a legal right to the money, but the Court has a right to see that its own officer does not act contrary to his duty. The client here brought an action and recovered judgment for the money, which, no doubt, changed the client's right. The debt has become a judgment debt, and, so far as the client's legal remedies are concerned, that alters the state of things. He can no longer sue for the original debt, and is relegated to his remedies on the judgment; but the conduct of the solicitor has not been altered. Anything, that may have been a breach of his duty as a solicitor on his part before the judgment, remains a breach of duty after it. Whether, if after the judgment the solicitor had paid the amount, the Court would still have jurisdiction, it is immaterial in this case to consider. I believe it still would have had the same jurisdiction as before, but it would have been exercised in a different way. I think that even then the matter might have been brought before the Court by the Incorporated Law Society; and, if they thought the case a bad case, though the money had been paid, the Court could strike the solicitor off the rolls or suspend him. It was suggested that the right of the client has been altered, and that there are other means of proceeding against the solicitor for any breach of duty which he may have committed; but the fact of there being such other means does not take away the jurisdiction to make the order for payment of the money. Of course, it would not be exercised cumulatively in addition to such other means, but the Court may take whichever course it thinks right. It appears to me that we can make the order asked for on the ground that the power of the Court which is invoked is a punitive, disciplinary power to prevent breaches of their duty by its

> officers, quite distinct and separate from the client's legal right, and therefore unaffected by any alteration of such right."

[52] The opinion of Bowen LJ[23] was equally incisive; he stated:

> "I am of the same opinion. The solicitor in this case is in a situation which presents two aspects, involving a double responsibility. He was a debtor, who owed a legal debt. He also owed a duty to his profession, and the Court of Justice whose officer he was, to pay over the money which belonged to his client, and of which he had possession through the confidence placed in him in his professional capacity, and as an officer of the Court. There are in such a case two wholly distinct rights, the right of the client at law to be paid his debt, and his right to apply to the Court as a person whose confidence has been abused by a person who is an officer of the Court, and whom he would not have trusted unless he had been such an officer."

[53] The extract from the opinion of Lord Esher M.R. contains the clear answer to the contention of the appellant that the interested party had commenced a separate proceeding against the appellant claiming to recover the money payable to it by the appellant and therefore the interested party should be left to pursue recovery in that claim. As Lord Esher M.R. stated, even the obtaining of judgment in a claim brought against a solicitor who wrongfully withholds money from a person entitled to it does not affect the court's ability to order the solicitor to pay that money to the person entitled. In the instant situation the interested party has not obtained judgment in claim No. 86 against the appellant so it was all the more necessary and just for the tribunal to exercise the power to order the appellant to pay the money he has dishonestly withheld from the interested party.

[54] Counsel for the appellant argued only that the tribunal did not have jurisdiction to make the order; he did not argue that if the tribunal had jurisdiction there was any good reason why the tribunal should not have ordered the appellant to pay the money. I can think of none. I would therefore affirm the order of the tribunal in all respects.

[55] I would award the costs of this appeal to the interested party. This court did not hear counsel on the costs regime that is applicable to this proceeding or otherwise on costs. In the circumstances it may be helpful to make a provisional award using the prescribed costs regime, in the sum of $26,667.00 being two thirds of the costs awarded by the

[23] At 447

tribunal. However, I would permit either 'party' to apply within 30 days to be heard on costs or to permit them to agree on costs.

Denys Barrow, SC
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]