DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

COMPLAINT No.59/2005

BETWEEN	**JOHN GREWCOCK**	**COMPLAINANT**
AND	**LORD ANTHONY GIFFORD**	**RESPONDENT**

PANEL: MR. CHRISTOPHER BOVELL
MR. ALLAN S. WOOD
MS. LILIETH DEACON

PARTIES: Mr. Richard Small for the Complainant
Mr. Walter Scott and Miss Ayisha Robb for the Respondent

Hearing Dates: 10th & 11th December 2007,
16th & 26th March 2008

1. At the outset of this decision the Panel wishes to thank the Counsel for the parties and particularly, Mr. Walter Scott for the assistance given in the course of the hearing of this Complaint.

2. By his Affidavit in Support of the Complaint, the Complainant alleged that:-

a) The Respondent failed to provide him with all information as to the progress of his business with due expedition although he had reasonably required him to do so;

b) The Respondent had not dealt with the Complainant's business with all due expedition; and

c) The Respondent had acted with inexcusable or deplorable negligence in the performance of his duties.

3. The Legal Profession (Canons of Professional Ethics Rules) 1983 Canon IV (r) and (s) (hereinafter called "the Canons") provide:-

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

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

4. Both the Complainant and the Respondent gave evidence at the hearing of the Complaint and were subjected to cross-examination and Bundles of the relevant documents were put into evidence without objection. Having regard to the documentary evidence, Mr. Scott in the course of his closing submissions forthrightly conceded that there had been a breach by the Respondent of Canon IV (r) in that the Respondent had failed to respond to numerous letters that had been written to him by the Complainant seeking information as to the progress of his business and particularly during the period January to July 2002, when the Complainant sought information as to the handling and progress of his case and raised a number of concerns to which there had been no adequate response by the Respondent. However, Mr. Scott submitted there had been no negligence or want of expedition by the Respondent in the handling of the Complainant's business and there was certainly no negligence or neglect that could properly be described as inexcusable or deplorable so as to amount to professional misconduct and a breach of Canon IV (s).

5. The Respondent is an advocate who resides in Jamaica and carries on a practice both in Jamaica and in England. The work undertaken by the Respondent for the Complainant which gives rise to the Complaint included not merely the conduct of the matter as an advocate but also the responsibility for enforcement of a judgment, as to which it is fair to say that the Respondent would not have been accustomed by training or in his practice as a barrister. The fact that the Respondent assumed responsibility for work commonly entrusted to an instructing solicitor (or in Jamaican parlance an instructing attorney), would not absolve the Respondent from exercising reasonable care in respect of the work undertaken. Notwithstanding that the Respondent was not accustomed to practicing as an instructing attorney, having undertaken responsibility for such work it is an elementary principle that the Respondent owed the Complainant, his client, a duty of care commensurate to that of a reasonably competent practitioner in that field.

6. The questions which have arisen for determination in this case are:-

i) Whether there has been a breach of duty of care owed by the Respondent to the Complainant; and

ii) If so, whether that breach can properly be characterised as "inexcusable or deplorable" so as to amount to professional misconduct and a breach of Canon IV (r).

7. The Panel is guided by the decision of the Court of Appeal in Witter v Roy Forbes (1989) 26 JLR 129 at 132 to 133, where Carey JA noted that in promulgating the Canons, the General Legal Council had taken a practical approach, no doubt appreciating that where an attorney conducted a busy practice some slips would inevitably occur that could be labelled as negligence or neglect, but as this was the expected (unavoidable) consequence of a busy practice, the attorney ought not to be penalised for same as having committed professional misconduct. The proper remedy would be to seek redress by way of an action in the Court for negligence and not to penalize the attorney for an act of professional misconduct. Nevertheless, there was a level of neglect or negligence which no reasonably competent attorney would be expected to commit and this is what Canon IV (r) addressed as being professional misconduct by attaching the label "inexcusable or deplorable". It is for the Disciplinary Committee to determine whether the attorney had gone beyond an acceptable level of negligence or neglect into the realm of what is "inexcusable or deplorable". Carey JA stated:-

> "The Council is empowered to prescribe rules of professional etiquette and professional conduct. Specifically, rule (s) of Canon IV is concerned with professional conduct for Attorneys. It is expected that in any busy practice some negligence or neglect will occur in dealing with the business of different clients. But there is a level which may be acceptable, or to be expected, and beyond which no reasonable competent Attorney would be expected to venture. That level is characterised as 'inexcusable or deplorable'. The Attorneys who comprise a tribunal for the hearing of disciplinary complaints, are all in practice and therefore appreciate the problems and difficulties which crop up from time to time in a reasonably busy practice and are eminently qualified to adjudge when the level expected has not been reached. I cannot accept that the determination of the standard set, will vary as the composition of the tribunal changes. The likelihood

of variation is in the sentence which different panels might impose but that, doubtless, cannot be monitored by the Court or the Counsel itself.
What I have said in regard to Canon IV(s) applies equally to Canon IV (r) on the ground the phrase 'with due expedition' is not certain and positive in its terms."

8. Carey JA also made mention of the difficulties that had arisen from the fusion of the legal profession where persons qualified as barristers had engaged in solicitors' work with which they were largely unfamiliar and which had created problems of one kind or another: see his observations at page 130 (A). Those comments resonate in the present case.

9. Clearly a single act of negligence in the course of a matter would not normally be regarded as inexcusable or deplorable negligence so to amount to professional misconduct within Canon IV (s). At the other end of the scale one need only refer to the facts of Witter v Roy Forbes (supra) which justified a finding of inexcusable or deplorable negligence or neglect, there being a consistent failure in attending to the client's business for a significant duration of time, in that the attorney had received a settlement proposal on 27th January 1979 which had a deadline for acceptance by 30th September 1979 and the attorney failed to communicate the proposal to his client until October 1980, well after the deadline had passed.

10. Similarly in the case of Re A Solicitor [1972] 2 All ER 811 the failure by a solicitor to discharge his duty in having his books of account written up for a period of 3 years was similarly found by the English Court of Appeal to justify a finding of inexcusable negligence or neglect amounting to professional misconduct (see in particular the judgment of Lord Denning MR at page 815e-h).

11. Having outlined the legal principles to be applied, the Panel now turns to set out the facts. However, in its consideration of the evidence it ought to be stated that it is well established that the applicable standard of proof is greater than the civil standard and akin to the criminal standard. That has been affirmed in the case of Campbell v Hamlet [2005] UKPC 19. Accordingly where a complaint of professional misconduct is made, the Disciplinary Committee must be satisfied beyond reasonable doubt that the complaint has been established.

12. The genesis of the matter was that the Complainant, a Chartered Loss Adjuster had been retained

to assist a company called S&T Limited and its director Anthony Simmons who were pursuing a claim against West Indies Alliance Insurance and others. Through the Complainant's assistance, S&T obtained a significant judgment of $63 million inclusive of interest. However, the Complainant had no express agreement with S&T or Mr. Simmons, who apparently took the approach that the Complainant had rendered his services free of cost. The Complainant did not agree and in 1998, he consulted the Respondent who assisted him in formulating a claim against S&T on a quantum meruit basis. After having pursued fruitless correspondence with the attorneys for S&T and Mr. Simmons, the Respondent filed an action on 23rd August 1999. Day to day conduct of the action was entrusted by the Respondent to his junior associate, Miss Brown. An appearance was entered on behalf of S&T on 29th May 2000, but no defence was filed. As a consequence on 7th November 2000 judgment was entered in favour of the Complainant against S&T for the sum of $5,368,562.16 with interest thereon of 6 percent from 23rd August 1999 and costs to be taxed.

13. One basis of the Complaint to which Mr. Small opened was that in addition to bringing the action against S&T, the Respondent was negligent in failing to join its director John Simmons to the action. It is clear that the Respondent treated the engagement of the Complainant as an engagement by S&T and not an engagement by its directors or shareholders. The Panel does not regard it as fair to second guess the Respondent's approach to the action with the benefit of hind sight. The Panel would not describe the failure to join John Simmons to the action as negligent much less inexcusable or deplorable negligence.

14. The Respondent conceded in a letter to the General Legal Council dated 17th October 2003 that there had been some delay in applying for the default judgment for which he apologised while stating that in his view that delay of approximately 6 months made no difference to the outcome. The Panel agrees that such delay in entering the default judgment would not amount to inexcusable or deplorable negligence or neglect. While being evidence to support a degree of neglect, the Panel nonetheless finds that such delay in entering judgment does inevitably occur in a busy practice and certainly could not be described as inexcusable or deplorable.

15. The Panel's concern with the Respondent's conduct of the matter relates to the period after judgment was obtained. It appears from the evidence that following upon entry of judgment on 7th

November 2000, the next step taken to enforce the judgment was to obtain a Writ of Seizure and Sale which was sought by a praecipe signed by Miss Brown filed on 5th March 2001 (Bundle Exhibit 2 page 46). That was a further delay of some 4 months between entry of judgment and the first application to enforce same. The Writ was issued by the Registrar on 26th June 2001 (Bundle Exhibit 2 pages 47 to 48).

16. At this point it is of importance that the Panel digresses from the narrative of facts to set out its understanding of the relevant processes to enforce judgment. At the relevant time in 2001, the applicable procedure for enforcement of judgment was governed by the Judicature (Civil Procedure Code) Act (CPC) which has since been replaced by Civil Procedure Rules 2002 (CPR) that came into effect on 1st January 2003. Under the provisions of the CPC, what was known as a Writ of Seizure and Sale was the typical means to enforce judgment by seizure and sale of the judgment debtor's goods. It was not the appropriate procedure to enforce judgment against a debt owed or a chose in action in which the judgment debtor had a beneficial interest such as money in the judgment debtor's bank account. The judgment debtor S & T had through the efforts of the Complainant obtained a judgment of $63 million against its insurer and the choice of process to execute judgment was a matter of importance.

17. The process for obtaining a Writ of Seizure and Sale under the CPC was governed by section 604 which made it quite clear that such a writ authorises seizure and sale of the judgment debtor's personal property. This remains so under the CPR Part 46 which has changed the nomenclature to abandon the use of the word "Writ" and to substitute the word "Order" of Seizure and Sale. The procedure to attach money, goods or chattels in which the judgment debtor has beneficial interest, and commonly known as garnishee proceedings, is a different procedure by Writ of Attachment governed by CPC section 624 and now CPR Part 50 which has changed the nomenclature to "Attachment of Debts Order". It is clear that where the judgment debtor's property comprises money in a bank account, the proper procedure to execute judgment against such assets was by way of Writ of Attachment and not a Writ of Seizure and Sale of Goods, the latter being a wholly inappropriate method incapable of enforcing the judgment against money in a bank account. Moreover in giving a report on the recovery or lack of recovery under a Writ of Seizure and Sale, it would not be within the Bailiff's purview to report on whether the judgment debtor had money standing in a bank account. Quite simply to enforce a judgment against money in the judgment

debtor's bank account, which is a debt owed by the Bank to the judgment debtor, the appropriate procedure was by a Writ of Attachment not a Writ of Seizure and Sale.

18. Returning again to the evidence, in the course of his cross-examination the Respondent stated that he thought that the Writ of Seizure and Sale was indeed the appropriate process to execute judgment against S &T's bank account and in response to a comment by the Panel that the Writ of Seizure of Sale could only lead to seizure of goods and was not the appropriate measure to recover money in a bank account the Respondent's answer was "I was advised by my associate that it was." This was a critical error on the part of the Respondent and his associate, for having sent out the Writ of Seizure and Sale, the Bailiff's report and return dated 21st January 2002 was "nulla bona" which signified that S&T had no goods on which to levy. However, the Respondent took this report from the Bailiff to mean that the judgment debtor S&T had no money in its account and that all the assets had flown. As stated by the Respondent in cross-examination by Mr. Small, it was his belief that after the lapse of four years between filing of action and steps taken to enforce judgment, the company no longer had the money. The following exchange in the cross-examination of the Respondent was important, Mr. Small having referred to a letter dated 5th May 2002 from the Complainant to the Respondent (as to which letter we shall hereafter refer in more detail) :-

"Small: You forgot about this letter. On reflection, Mr. Simmons through his attorney believed that he engaged Mr. Grewcock's services free of cost to recover $62m and Mr. Simmons' wife was apprehensive about what would be done to recover ..... do you agree?

Gifford: No, because I took the view that after four years had elapsed – the company no longer had the money.

Small: Mr. Gifford, you are saying that is the view you have taken after reading Grewcock's letter?

Panel: What were you saying?

Gifford: I thought once the bailiff gave his report, I thought the money was gone and there was nothing I could do.

Small: Despite the information that the court had sought to protect the $62m?

Gifford: That is the view I took.

Small: That is the honest view you took?

Gifford: Yes."

19. The Panel accepts that the foregoing evidence reflected the Respondent's genuine belief at the material time but finds that it was a belief founded upon a hopelessly mistaken view of the Bailiff's report. As hereinbefore explained, the Bailiff would not have investigated whether S&T had money in a bank account. The Writ of Seizure and Sale gave him no such authority and the Bailiff simply had no means to conduct such an investigation. The perfunctory step taken to enforce the judgment by issuing a Writ of Seizure and Sale was to say the least wholly inadequate.

20. However, no doubt as a consequence of that step taken to execute the judgment, S&T activated itself by retaining new attorneys, Hart Muirhead & Fatta who promptly applied to set aside the default judgment on 6th March 2002. As Mr. Small submitted, and the Panel agrees, this certainly was indicative that S&T might have some assets which it wished to protect by setting aside the judgment. By this time in March 2002, the Complainant had become quite concerned about the matter and there followed a series of letters from him to the Respondent enquiring as to the progress of the matter which begat, as conceded by Mr. Scott, no adequate response from the Respondent.

21. By letter 8th April 2002, the Respondent wrote to the Complainant assuring him that there was no need for agitation and reporting on the taking out of the Writ of Seizure and Sale and the steps that would be taken to resist the application to set aside the judgment. There followed a most important letter from the Complainant to the Respondent dated 5th May 2002 and which included the following statement - "S&T Limited received J$63 million in settlement from West Indies Alliance Insurance Company Limited (Royal Sun Alliance). The money was placed in a joint deposit account when his estranged wife Sandra Simmons was awarded an injunction against him." That was followed by a letter from the Complainant to the Respondent dated 9th May 2002 requesting an update as to the application to set aside the judgment that had been listed for the previous day and requesting a response to an earlier letter dated 24th April 2002. There was no reply and a further letter followed from the Complainant dated 3rd June 2002 requesting some response. By letter dated 12th June 2002 Miss Brown responded by writing the Bailiff requesting a written report on the execution/non-execution of the Writ of Seizure and Sale dated 5th March 2001, which letter

was copied to the Complainant. That was a meaningless response for the reason that 6 months before, on 21st January 2002 the Bailiff had given his report and nulla bono return to that Writ.

22. After further letters to the Respondent from the Complainant querying such matters as amendments to the judgment that are of no relevance to the Complaint, by letter dated 21st January 2003 the Complainant wrote the Respondent as follows:

> "I refer to my letter dated 26th August 2002 in connection with the above and note from my file that you have not replied. The judgment was handed down in 1998 and still (4years plus later) I have nothing. What is going on with the case?"

The letter dated 21st January 2003 in referring to the judgment handed down in 1998 was obviously referring to the judgment obtained by S&T against its insurer. Certainly that letter overstated the delay as the relevant judgment was that in favour of the Complainant against S&T obtained by default in November 2000. Nevertheless a most relevant question was posed as to what was going on with his case. The answer was quite obviously nothing whatsoever, for in the erroneous belief that the Bailiff's nulla bona return dated 21st January 2002 signified that the company's assets had flown, the Respondent made no further attempt to enforce the judgment. The entire $63million received by S&T may well have flown as the Respondent believed but regrettably he had no reliable basis for that conclusion which was simply an ill-founded conclusion drawn from a Bailiff's report that S & T had no goods on which to levy. Thereafter the matter was left to languish until a Notice of Change of Attorneys was entered on 10th June 2005 on the Complainant's behalf in the action against S&T by Garth McBean & Co. The Complainant led no evidence as to what steps, if any have been taken by his new attorneys to enforce the judgment but there can be no doubt that any measures so to do would have been rendered much more difficult and expensive after the lapse of so many years since the entry of the judgment.

23. Notwithstanding the fact that the Respondent is a barrister by training and an advocate of eminence, he had assumed responsibility in this matter to enforce the Complainant's judgment which is work customarily undertaken by a solicitor/instructing attorney. The Respondent having adopted what was to say the least an inappropriate method in the circumstances to enforce the Complainant's judgment, the evidence discloses that after receiving the Bailiff's report of 21st

January 2002, there was no further step whatsoever to enforce the judgment despite the series of letters written by the Complainant to the Respondent over a period of the next 6 months requesting information, with increasing agitation. The failure to take any step that could effectively enforce the judgment against money in a bank account held for S&T remained the position until a notice of change of attorneys was filed on the Complainant's behalf on 10th June 2005, more than 3 years after the Complainant's letter to the Respondent dated 5th May 2002 that informed the Respondent that S&T had received $63m from its insurer that had been placed in a joint deposit account.

24. Notwithstanding the Respondent's obvious inexperience, the discharge of his responsibilities must be judged in accordance with the standard of an attorney-at-law reasonably competent in that field. The Panel is of the view that the Respondent's discharge of his responsibilities fell far short of what could reasonably be expected of a competent attorney after making allowances for the slips and omissions that can occur in a busy practice. We find that the Respondent's conduct in the discharge of his responsibilities to enforce the judgment crossed the line that constitutes inexcusable and deplorable negligence and neglect. In coming to the view that the Bailiff's report dated 21st January 2002 on the Writ of Seizure and Sale signified that the $63 million judgment paid to S&T had been dissipated and to rely on that report as the basis for not pursuing other enforcement measures up to the time of being replaced in June 2005, and despite the Complainant having pointed out by his letter of 5th May 2002 that the $63 million that S&T had received from its insurer had been placed in a joint account consequent on an injunction obtained by the estranged wife of Mr. Simmons, was negligence on the part of the Respondent that went beyond what was acceptable and beyond which no reasonably competent attorney would have been expected to venture even with the demands of a busy practice. That degree of negligence was simply inexcusable and deplorable and constituted professional misconduct in breach of Canon IV(s).

25. Based on that finding of professional misconduct, the Panel turns to consider the remedy or sanction which ought to be imposed. In conceding that there had been a breach of Canon IV(r) by the Respondent not acting with all due expedition in failing to provide the Complainant with information as to the progress of his business when reasonably required to do so, Mr. Scott submitted that the appropriate order ought to be a reprimand and an order for costs. However, in his submissions that inexcusable or deplorable negligence or neglect had been established, Mr. Small submitted on behalf of the Complainant that it would be appropriate to award restitution

being the amount of judgment entered against S&T less the contingency fees that would have been payable to the Respondent.

26. In considering the appropriate order which ought to be imposed, where there is a finding of professional misconduct as in the instant case, the Disciplinary Committee is guided by the principle that the purpose for the imposition of a penal order is primarily to maintain the reputation of the Legal Profession and to sustain public confidence in the integrity of the profession: See Bolton v Law Society (1994) 2 ALL ER 486 at 492. Save in the most exceptional circumstances such as where there is an element of dishonesty or sharp practice, a finding of inexcusable or deplorable negligence would not give rise to a consideration of suspension or striking off and no such consideration arises in the present case. However, it would, in the Panel's view, be appropriate to consider the imposition of a fine having regard to its findings as to the inexcusable or deplorable nature of the Respondent's negligence sustained over a considerable period of time. Moreover, by section (12)(5) of the Legal Profession Act the salutary power is conferred upon the Disciplinary Committee to order, where appropriate, that such a fine be paid to the Complainant in full or partial satisfaction of damage caused to the Complainant by the act of default. By that provision, the Legislature thereby conferred on the Disciplinary Committee wide power to impose a fine which would achieve the two-fold purpose of imposing a sanction upon the attorney for the misconduct as necessary to sustain public confidence as aforesaid and which would also be applied as compensation for loss where the Complainant has undoubtedly suffered loss, but which is not capable of precise calculation.

27. The judgment which was obtained against S&T in favour of the Complainant was $5,368,562.16 with interest thereon at 6 percent from 23rd August 1999. In event of full recovery, the principal amount that would have been recoverable by the Complainant amounted to $3,580,830.96, after deduction of the contingency fee due to the Respondent. That net sum with interest would be the measure of full loss if judgment had indeed been recoverable and had been lost by reason of the Respondent's default. In light of its findings that there has been inexcusable or deplorable negligence by the Respondent's failure to take proper steps with regards the enforcement of the judgment it is clear that some loss would have resulted to the Complainant. The judgment languished with the Respondent until June 10, 2005 when the Respondent was replaced by Garth McBean & Co who filed Notice of Change of Attorneys: (Bundle Exhibit 2 page 90).

Notwithstanding the lapse of almost five years between entry of judgment in November 2000 and the Respondent being replaced as the attorney on Record, it is difficult for the Panel to conclude with complete assurance that by reason of that delay, the judgment had been rendered fruitless and that nothing can now be recovered as a result. Certainly no evidence was led by the Complainant as to what steps had been taken by the Complainant's new attorney to recover judgment after assuming conduct of the matter in June 2005, nor did the Complainant in giving evidence amplify and explain the basis upon which he had stated in his letter dated May 5, 2002 that the $63 million received by S&T was held in a joint deposit account consequent to an injunction obtained by the wife of Mr. Simmons. When was that money paid into the account, with what Bank was the account kept and did the money remain on account on 5th May 2002? These are also questions that ought to have been asked by the Respondent on receipt of the letter dated 5th May 2002.

28. If evidence had been led to establish that the Respondent's delay up to June 2005 in taking the appropriate steps to enforce the judgment had caused the fruits of judgment to be lost, then the Panel would agree with Mr. Small that an order for restitution in the net amount of the judgment less fees would be an appropriate order. However, that evidence was not led though it was in the Complainant's power so to do. The Panel has to be mindful of the possibility that even if the Respondent had acted with all due expedition and had taken the appropriate measures by way of garnishee proceedings to execute judgment against any money held to S &T's account, by the time the judgment had been obtained and garnishee proceedings taken with all due expedition, recovery might not have been straightforward for the money may indeed have flown by that date as it is quite clear that S&T was intent on resisting payment. In that event, any recovery would have depended on further litigation possibly by way of proceedings to wind up S&T and to hold the directors personally liable for dissipation of the assets. This was not a matter in which the Complainant had considerable resources to expend in pursuing S & T and its directors as is supported by the fact that minimal fees had been paid to the Respondent at the commencement and thereafter the Respondent had undertaken the action on the basis of a contingency fee arrangement where no money was advanced by the Complainant, it being agreed that the Respondent would be remunerated by a share of the sums recovered.

29. Having regard to these considerations and the difficulty in coming to any settled view as to the full extent of loss caused by the Respondent's default, the Panel's conclusion is that in all the

circumstances it is appropriate to impose a fine upon the Respondent commensurate to 30 per cent of the net principal amount of the judgment after deduction of the 33.3 per cent contingency fee. That figure is rounded out to $1,100,000.00. We further direct that such fine is to be paid by the Respondent to the Complainant pursuant to section (12)(5)(a) of the Legal Profession Act in partial satisfaction of any damage caused to him by the default giving rise to the Complaint .

30. It is accordingly ordered:

i. That the Respondent is to pay a fine in the sum of $1,100,000.00 to the Complainant within 30 days of the date hereof. Further, that in event of the Complainant instituting proceedings in any Court against the Respondent for negligence in respect of any matters that give rise to this Order, the Complainant is to give credit by way of deduction from any award of damages made in such proceedings in the amount of the sum paid pursuant to this Order.

ii. The Respondent is to pay costs to the Complainant in respect of these proceedings which costs are fixed at $200,000.00.

DATED THE 23rd DAY OF June 2008

CHRISTOPHER BOVELL

ALLAN S. WOOD

LILIETH DEACON