DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL
COMPLAINT NO. 11/2003

BETWEEN	MARNOL LIMITED NOEL JUMPP	COMPLAINANTS
AND	HERBERT W. GRANT	THE ATTORNEY

Panel: Mr. Allan Wood - Chairman
Mrs. Merlin Bassie
Miss Lilieth Deacon

In attendance: Mr. Noel Jumpp
Mr. Herbert W. Grant, Mrs. Denise Kitson and Mrs. Andrea Benjamin for him.

Hearing Dates: 1st April, 3rd and 14th June, 4th and 27th October, 18th November, 13th December 2004, 8th January & 17th January 2005

1. By Affidavit sworn on 23rd February 2003, Marnol Limited, by its managing director, Mr. Noel Jumpp made the following complaint against Mr. Herbert W. Grant (hereinafter called the "Attorney"):

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

(b) He has not dealt with my business with all due expedition;

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

Canon IV(r) and (s) of the Legal Profession (Canons of Professional Ethics) Rules (the Canons) provide:

"(r) An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably required by his 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."

2. Mr. Jumpp who is a shareholder and the Managing Director of Marnol Limited (Marnol) gave viva voce evidence in support of the complaint and thereafter, following dismissal of a no case submission on 14th January 2004, the Panel heard evidence from the Attorney and Mr. Keith Arnold Senior, who is the former Managing Director of Eagle Merchant Bank Jamaica Limited (the Bank).

3 The complaint concerns allegations that the Attorney failed to prosecute an action which had been instituted on behalf of Marnol against the Bank by Writ of Summons, filed on 23rd November 1994. We accept the submission of learned Counsel for the Attorney that in disciplinary proceedings such as in the instant case the burden of proof is greater than a mere balance of probabilities applicable in civil proceedings. This is because disciplinary proceedings have a penal element whereby a finding of professional misconduct may carry grave and weighty consequences to the attorney and it is therefore fitting and proper that a higher standard of proof be applied to proceedings which may affect a person's ability to carry on professional practice.

4. The somewhat unusual feature about the complaint was that both Mr. Jumpp and the Attorney throughout the proceedings professed to hold each other in the highest regard and indeed Mr. Jumpp stated that in pursuing the complaint it was not his intention to cause the Attorney any professional harm. Notwithstanding this continued protestation of regard, Mr. Jumpp made clear that the Attorney had failed to protect Marnol's interests and the purpose of the Complaint was to substantiate this point and to obtain appropriate redress.

5. To recount the facts which give rise to the complaint in brief, -

i. Mr. Jumpp is a former banker. In his years as banker, and specifically as manager of the branch of National Commercial Bank (Jamaica) Limited on Red Hills Road, Mr. Jumpp became acquainted with the Attorney and this grew into a cordial relationship. The Attorney was trained as a solicitor and specialized in conveyancing and is the senior partner of the firm now known as Grant Stewart Phillips & Co.

ii. Eventually Mr. Jumpp left banking and formed Marnol, a property development company. Upon going into business, the Attorney became the Company's legal adviser, acting in real estate matters. The

relationship was close and we accept Mr. Grant's evidence that it was customary for them to communicate by telephone often at his home in the early morning, and that Mr. Jumpp became well known to the staff in his office.

iii. In 1990, Marnol acquired 27 Carlisle Avenue, in the parish of Saint Andrew and commenced the development of that property by building twenty-three flats. The development was subject to the provisions of the Real Estate (Dealers & Developers) Act.

iv. To finance the development of 27 Carlisle Avenue, Marnol borrowed $3.5 million from the Bank which was secured by a mortgage over the property. In accordance with the provisions of the aforesaid Act, an escrow account was established with the Bank and payments received from prospective purchasers paid into this account.

v. There came a point when the project was substantially complete and a certificate was obtained to that effect from the quantity surveyor and Marnol sought the release of funds held in the escrow account. It is not necessary to set out the provisions of the Act, save to say that in order to access the funds held in the escrow account a pari passu mortgage in favour of the Real Estate Board had to be granted. To do so the release of the title held by the Bank as first mortgagee had to be obtained. The Bank refused even though the funds to be released would have been utilized to complete repayment of the mortgage.

vi. In 1994, a meeting was held between representatives of the Bank, Mr. Jumpp and the Attorney to secure the Bank's permission as first mortgagee to have the pari passu registered. This meeting was to no avail. The Attorney advised Mr. Jumpp that he felt there was a good cause of action against the Bank, but recommended that before filing action, the opinion from a senior counsel should be obtained. The Attorney further recommended that the opinion be obtained from Mrs. Benka-Coker Q.C. and Mr. Jumpp agreed. The Attorney thereupon instructed Queen's Counsel. By an opinion dated 29th July 1994, Queen's Counsel expressed opinion that Marnol had a right in law to institute action against the Bank.

vii. Following receipt of opinion, there is no dispute on the evidence that Mr. Jumpp again consulted with the Attorney who recommended that action should be filed and that Mr. Walter Scott, who was then a partner in his firm, should have conduct of the matter. Mr. Jumpp agreed. Action was instituted against the Bank by Writ of Summons dated 23rd November 1994, which reflects that the endorsement

was settled by Mr. Walter Scott and the Writ signed on behalf of the firm by the Attorney.

viii. There is no complaint concerning the conduct of the action up to the year 1997 and there can be none. The Panel finds that the action was pursued with reasonable expedition by the filing of pleadings and thereafter the obtaining of an order for directions on 7th May 1996 and the filing of an Affidavit of Documents on 9th July 1996. Also by letter dated 7th May 1996 signed by Mr. Scott on behalf of the firm, the Registrar was requested to place the action on the cause list and that letter bears the stamp of the Supreme Court dated 9th May 1996 with a further stamp "Entered on the Cause List for 7 days, advise attorney." By notice dated 10th October 1997, the Registrar confirmed that the case had been placed on the Cause List, as requested.

ix. Thereafter from October 1997, there can be no gainsaying that the case fell into abeyance with no further step taken to bring same to trial. Mr. Scott left the firm in 1999 and on the evidence of the Attorney, the file was handed over to Mr. Kipcho West in his firm's litigation department.

x. On attending at the Supreme Court in January 2001 to ascertain the status of the matter Mr. Jumpp was advised that the matter was not on the list for trial as no certificate of readiness had been filed.

6. Mr. Jumpp complains with some justification that there was no correspondence from Mr. Grant or any other member of his firm updating him on the matter or even advising him that the file had been assigned to Mr. West. In response to the lack of written communication the Attorney maintained that Mr. Jumpp was kept fully updated as to the status of the matter in their frequent telephone conversations. He also gave evidence that it was his advice to Mr. Jumpp that it made no sense pursuing the action and that a settlement of the matter should be pursued through negotiations, which he volunteered to do; a course which Mr. Jumpp rejected. This advice was given to Mr. Jumpp after he attended a meeting with Mr. Jumpp and representatives of Finsac in 2000 at which time he discovered that Mr. Jumpp had borrowed a further $12 million from Eagle Permanent Building Society and that with the interest, the debt amounted to approximately $40 million at the time of meeting. This was admitted by Mr. Jumpp in cross-examination, who went on to state that the current debt could be as much as $80 million.

7. Though admitting the state of his indebtedness, which it seems had been assigned to Finsac, Mr.

Jumpp maintained that if the Bank had allowed the initial request for a pari passu mortgage in order to release funds in the escrow account, Marnol would have had sufficient liquidity to carry on business without further borrowing and that all losses incurred including the further borrowings flowed from the Bank's refusal. It is clear from this account that the Complainants had the expectation of recovering by way of damages in the action a sum which would have been more than sufficient to clear all financial obligations and even perhaps to restore Marnol's profitability and this expectation was transferred to recovering compensation from the Attorney for his alleged acts of professional misconduct.

8. Learned Counsel for the Attorney submitted that he never assumed a personal professional responsibility for the litigation and that liability for professional misconduct could not be imposed for the misconduct of others. It was further submitted that without a specific statutory provision to that effect, the Attorney could not be made liable for the professional misconduct of his partner or associate and that on perusal of the Canons, it is evident that there was no provision to impose by way of disciplinary proceedings a vicarious liability for the negligent acts or omissions of others. The Panel does not agree with these submissions. The Legal Profession Act s 5(1)(c) provides that

> "Every person whose name is entered on the Roll shall be known as an attorney- at- law (hereinafter in this Act referred to as an attorney) and... when acting as a lawyer, be subject to all such liabilities as attach to a solicitor."

Further par. 2 of the Canons, promulgated pursuant to the Act, defines attorney as including a firm. Canon VIII(c) provides:

> "Where no provision is made herein in respect of any matter, the rules and practice of the legal profession which formerly governed the matter shall apply in so far as practicable, and a breach of such rules and practice (depending on the gravity of such breach) may constitute misconduct in a professional respect"

Section 5(1)(c) of the Legal Profession Act, coupled with par. 2 and Canon VIII(c), in our view, has the effect that in the absence of express provisions to the contrary, attorneys-at-law are governed by the law as to professional misconduct as applicable to solicitors prior to the promulgation of the Act. It has been held at common law that a solicitor can be found liable for professional misconduct even though the negligence or other misconduct was committed by another person, where the solicitor has

ratified the improper or illegal acts; to constitute ratification by the solicitor the acts must have been done for and in the name of the solicitor and there must be proved full knowledge of what those acts were or such unqualified adoption that the inference may properly be drawn that the solicitor intended to take on himself responsibility for such acts: Marsh v Joseph [1895-9] All ER Rep 977 (CA). Further an attorney has been found liable for professional misconduct in failing to honour a professional undertaking given by a partner, which is but a further example of vicarious liability which results in the imposition of professional misconduct upon each partner of the firm: see The National Housing Trust v Mendez and Allen, Complaint 148/2000 decision dated 6th December 2003. The Panel therefore sees no reason why the principle of vicarious liability should not be applicable in an appropriate case to result in a finding of professional misconduct under the Legal Profession Act.

10. The Panel need not indulge further in what would be an esoteric discussion as to the possibility of imposing vicarious liability by way of disciplinary proceedings. This is so because the Panel also rejects the first submission that the Attorney did not assume a personal professional responsibility to the Complainants in respect of the action filed against the Bank. To the contrary, the evidence discloses that the Attorney had assumed throughout professional responsibility by his personal involvement from the very inception, so that even prior to the filing of action, he advised that there was a cause of action against the Bank, he recommended that Counsel's opinion be obtained, he instructed Counsel, and after Counsel's opinion was furnished he recommended that action should be filed and that other Counsel in his firm should have conduct of same. Prior to the filing of action he issued a final letter to the Bank and thereafter signed the Writ which initiated the action.

11. True it was that the Attorney specialized in conveyancing, and did not assume day-to-day conduct of the litigation, but nonetheless it is clear from the evidence that he continued to be involved, giving guidance and supervision where necessary. Most importantly, there is no evidence that the Attorney advised the client that his personal role in the matter had come to an end with the filing of suit and that he would not accept personal responsibility in the matter. To the contrary, the Attorney signed the Writ of Summons which clearly connoted that he had a professional role as the instructing attorney in the matter albeit not as Counsel. It is clear that after Mr. Scott's departure from the firm in 1999, the

conduct of the action remained with the Attorney's firm and the Attorney would therefore continue to have a personal professional responsibility in the sense of giving supervision and guidance whether to the client or to other attorneys in his firm to whom day to day conduct of the action was assigned.

12. The question which therefore arises is whether the Attorney is guilty of professional misconduct in failing to perform his duties to the client? It is clear that by 1997 the point was reached when there was a loss of interest in pursuing the litigation and certainly by 2000 after the meeting with Finsac, we accept that the Attorney advised Mr. Jumpp that there was no point in pursuing the litigation. However, the Panel finds that the Attorney did not take the professionally prudent step of advising the Complainants of this view in writing and thereafter of formally withdrawing from the matter. Such a course of action would have meant abandoning Mr. Jumpp and it is therefore somewhat understandable why the Attorney did not do so having regard to the close personal relationship which had arisen between himself and Mr. Jumpp and which was manifested in the course of hearing the Complaint.

13. The substantive issue that has to be considered is whether the failure to pursue the action against the Bank after 1997 amounts to professional misconduct, and if so does that give rise to an order for compensation. Why was an action pursued with alacrity up to 1997 thereafter left in abeyance? The reason obviously lies in the situation of the Bank in 1997, a matter for which public notice can be taken, but which was detailed in the evidence of Mr. Keith Senior, the former Managing Director the Bank. As recounted in Mr. Senior's evidence, by September 1996, the Commercial Bank which was then owned by the Eagle Merchant Bank had chalked up an overdraft with the Bank of Jamaica of $1.6 billion which led to the making of a stand still agreement in that month with the Central Bank whereby the Directors of the Bank agreed that no further business or deposits would be accepted. From that point the Bank's position was simply to realise loans and to repay depositors. By March 1997, six (6) months later, the overdraft had increased to $7 billion, which led to the formal intervention of Government through Finsac, which assumed ownership of the Bank for the nominal sum of $1.00. By March 1997, any networth of the Eagle Group had been completely wiped out and was in the negative to the tune of $700 million. By 1999, losses stood at $1.75 billion and stockholders' deficit stood at

$1 billion. Mr. Senior's evidence was confirmed by the Audited Financial Statements, which were tendered in evidence.

14. The evidence of Mr. Senior further recounted that in 1999 Eagle Commercial Bank was amalgamated with others to form the Union Bank, while Eagle Merchant Bank (the entity against whom the action had been instituted) was simply left as a shell. He further stated that the Eagle Merchant Bank would not have been in a position to honour the claim made by Marnol in 1997 nor, barring a ruling from the Court, would it have been able to do so after September1996 by reason of the stand still agreement. The Panel accepts Mr. Senior's view that Eagle Merchant Bank was insolvent from September 1996.

15. The action which had been instituted by Marnol against the Bank was by no means a simple or straightforward action for the reason that the mortgage in favour of the Bank contained an express covenant at Clause 1(h) which precluded Marnol from creating any other mortgage over the premises without the mortgagee's previous consent and further, by covenant 1(i), the mortgagor was precluded from creating any charge or lien over the property ranking pari passu with the mortgage without the Bank's consent. The mortgage contains no express provision that the Bank's consent to the creation of any further mortgage should not be unreasonably withheld. This issue was not canvassed in argument and may still be the subject of proceedings in the Supreme Court and therefore the Panel will not venture to express a final view on the merits. However it is safe to say that Marnol would have had to establish in its action that there was a duty imposed on the Bank as mortgagee to grant its consent to the registration of a pari passu mortgage in favour of the Real Estate Board, which obligation ought to be implied as a term of the mortgage granted by the Bank. The implication of a term in a registered mortgage is a difficult thing.

16. There is no suggestion that Marnol's action could have been brought on for trial by the year 1997. Though the details and extent of the insolvency of the Bank at the time of the assumption of control of that institution by Government may not have been known by members of the public, nonetheless the fact of its insolvency and its take-over in 1997 was widely publicized. In cross-examination Mr. Jumpp stated that on hearing of the takeover of the Bank in 1997 he adopted a wait and see approach,

although he expected the Attorney and his firm to continue to protect his interests. The Panel finds that Mr. Jumpp by reason of his experience as a former banker and businessman would have been aware from 1997 that any prospect for a successful outcome to Marnol's action against the Bank had been dealt a fatal blow.

17. Mr. Jumpp submitted however that there was prospect of recovery by joining the Government/Finsac to the action as the shareholder of the Bank and that the Attorney was asked to research and advise on this aspect, which he failed to do. It is trite law that a shareholder is not liable for the debts of a company and we find that as a banker and as a businessman Mr. Jumpp would have been aware of this basic principle. In very exceptional circumstances it is permissible to go behind the corporate veil to impose liability on the shareholder. Without being exhaustive, examples of such circumstances are where the company is used by the shareholder as a mere façade, or where the company acts as the agent for a shareholder. There is nothing in the takeover of the Bank which could suggest that Government/Finsac could be made liable to Marnol for the pre-existing claim made against the Bank.

18. We accept the submissions made on the Attorney's behalf that it is not every negligent act or omission on the part of an attorney which gives rise to a finding of professional misconduct, even though such act or omission could ground a cause of action in the Supreme Court for negligence. This is so because the exercise of a disciplinary jurisdiction against attorneys-at-law has a penal element whereby the conduct of the attorney must be such as to warrant being described as unbecoming of a professional and meriting reproof or as captured in the wording of Canon IV (s) of the Legal Profession (Canons of Professional Ethics) Rules the negligence or neglect of duty must be such as to be described as "inexcusable or deplorable."

19. Inherent in the use of the epithet "inexcusable or deplorable" is that there can be a category of conduct which though amounting to negligence or neglect, nonetheless does not ipso facto come within the category of "inexcusable" or "deplorable". It also follows that although the Disciplinary Committee is given powers to direct payment by way of restitution for acts of professional misconduct, such power is but an adjunct to the disciplinary jurisdiction and is for that reason distinguishable from

the jurisdiction of the Supreme Court to award damages for loss or injury caused by negligence simpliciter.

20. In support of the above propositions, Mrs. Kitson, Counsel for the Attorney, cited the case of R & T Thew Ltd v Reeves (No 2) [1982] 3 ALL ER 1086 and particularly a passage from the judgment of Lord Denning MR at 1089, which we adopt: -

> "What conduct is sufficient?
>
> This compensatory jurisdiction still retains, however, a disciplinary slant. Just as officers in the services are subject to military discipline (see ss 64 and 69 of the Army Act 1955), so are solicitors, as officers of the court, subject to judicial discipline. If they are guilty of any act, conduct or neglect to the prejudice and good order and [judicial] discipline or which is 'unbecoming the character of an officer and a gentleman', causing loss or damage to another, they can be ordered personally to compensate him. The cases show that it is not available in cases of mistake, error of judgment or mere negligence. It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof. In Myers v Elman [1939] 4 ALL ER 484 at 490, 498, 509, [1940] AC 282 at 292, 304, 319 Viscount Maugham put it as 'a serious dereliction of duty', Lord Atkin spoke of 'gross negligence', and Lord Wright said that 'gross neglect or inaccuracy' may suffice. Lord Wright's definition included 'a failure on the part of a solicitor ... to realise his duty to aid in promoting, in his own sphere, the cause of justice'. Lord Porter said that the solicitor there had been 'grossly negligent' (see [1939] 4 All ER 484 at 522, [1940] AC 282 at 338). Useful illustrations are to be found in Edwards v Edwards [1959] 2 ALL ER 179 at 193, [1958] P 235 at 258 (holding the solicitor liable to pay the costs of the other side because of his 'oppressive procedure') and Mauroux v Sociedade Comercial Abel Pereira da Fonseca SARL [1972] 2 ALL ER 1085, [1972] 1 WLR 962 (holding the solicitor not liable for an 'oversight')."

21. Similarly, in the case of Leslie L. Diggs-White v George R. Dawkins [1976] 14 JLR at 196 in delivering the Judgment of the Court of Appeal Graham-Perkins JA stated: -

> "I now ask the further question: Ought the 'gross neglect or negligence' found by the majority of the division herein be held to amount, on the background of the findings at (7), (8) and (9), *supra,* to professional misconduct? I think not. Nearly ninety years ago, in a judgment which I respectfully commend as a constant reminder to every attorney-at-law in this Island, Lord Esher MR, with his accustomed and commendable clarity, emphasised the true distinction between negligence and dishonourable conduct. In Re Cooke (5) ((1889), 5 T.L.R. at pp. 407-408) the learned Master of the Rolls said:
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> > 'But in order that the court should exercise its penal jurisdiction over a solicitor it was not sufficient to show that his conduct had been such as would support an action for negligence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable in his profession. A professional man, whether he were a solicitor or a barrister, was bound to use his utmost honour and fairness with regard his client. He was bound to use his utmost skill for his client... If an attorney were to know the steps which were the right steps to take and were to take a multitude of wrong, futile, and unnecessary steps in order to multiply the costs, then if there were both that knowledge and that intention and enormous bills of course resulted, the attorney would be acting dishonourably. A solicitor must do for his client what was best to his knowledge, and in the way which was best to his own knowledge, and if he failed in either of those particulars he was dishonourable.'
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> The foregoing criteria, *inter alia*, as to professional misconduct by an attorney-at-law in relation to his client are, I think, as valid today as they were in 1889. They point to the true standards and practices by reference to which professional

misconduct by members of our profession is to be judged when complaints are made by lay clients to the Disciplinary Committee of the General Legal Council."

22. It is clear from the summary of the evidence that the Attorney, though not having day-to-day conduct of the litigation nonetheless, in our view, owed the Complainant a professional duty as their attorney-at-law to advise them of developments in the action and to provide his best guidance. This was particularly so after Mr. Scott's departure from the firm. Though it may have been clear to all concerned that it was impractical to continue the action after 1997, we find that the Attorney ought to have advised in writing and thereby to provide the Complainants with the opportunity to seek alternate representation if they so desired. We find that the Attorney did not discharge his duty until the year 2000, following upon the meeting with Finsac. The Panel finds that there was unreasonable delay on the part of the Attorney in providing his clients with information as to the progress of their business and that he failed to deal with the Complainant's business with all due expedition in breach of Canon IV(r) of the Legal Profession (Canons of Professional Ethics) Rules.

23. However, notwithstanding the failure to act with all due expedition, the Panel finds that the Attorney is not guilty of inexcusable or deplorable negligence or neglect for the reasons which we have set out already in detail. The Panel is sympathetic to the financial plight of the Complainants but we are satisfied that the Attorney is neither to be blamed for that condition nor should the Attorney be burdened with that condition. In summary the Panel finds: -

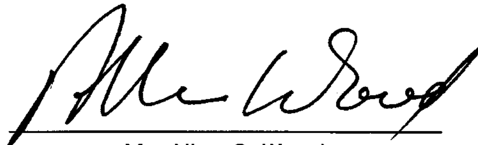
- The Attorney is not guilty of inexcusable or deplorable negligence or neglect in the performance of his duties, as it was quite clear that from 1997 there was no point in pursuing the action against Eagle and no prospect of successful recovery of damages either from that Bank or from Government that had taken over the failed Bank.
- The Attorney's conduct cannot be described as inexcusable or deplorable within the intendment of Canon IV(s) of the Legal Profession (Canons of Professional Ethics) Rules.
- The Attorney's conduct does not give rise to loss or warrant the award of any compensation to the Complainants for the reason that his failure to advise with expedition was not the cause of any loss whatsoever to the Complainants and in this respect it appears from the evidence that no legal fees

were charged to the Complainants for the period after 1997.

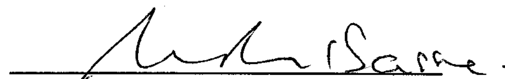
- Although there has been a finding of professional misconduct against the Attorney by failing to act and to provide the Complainants with information with all due expedition, there is nothing in the Attorney's conduct in the matter which can be described as unbecoming or involving moral turpitude. In the circumstances it is sufficient to enter a reprimand.
- There will be no order for costs in light of the fact that much of the time spent in hearing the complaint was devoted to the hearing of the issue of negligence on which the Attorney has succeeded.

It is ordered that the Attorney, Herbert W. Grant is hereby reprimanded.

Dated the 21st day of February 2005



Mr. Allan S. Wood



Mrs. Merlin Bassie

Miss Lilieth Deacon