DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

COMPLAINT NO. 5/97

BASIL WHITTER
At the instance of
Monica Whitter — COMPLAINANT

A N D

BARRINGTON EARL FRANKSON — RESPONDENT

PANEL - PAMELA E. BENKA-COKER Q.C. - CHAIRMAN
MARGARETTE MACAULAY
ANDREW RATTRAY

JOHN GRAHAM and NAUDIA SINCLAIR appearing for the Complainant

MAURICE FRANKSON appearing for the Respondent.

HEARING DATES - 31ST JANUARY 1998, 21ST FEBRUARY 1998, 10, 11TH AND 12TH MARCH 1998, 5TH AND 11TH AUGUST 1998.

The Respondent attorney-at-law (hereinafter referred to as the Attorney) is a partner in the firm of attorneys-at-law Messers Gaynair and Fraser with offices at 9 – 11 Church Street in the parish of Kingston. Prior to in or around 1989, the attorney practiced under the name of B. E. ~~Barrington~~ Frankson & Co. until he joined the firm of Gaynair and Fraser.

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

Monica Whitter is the former wife of Slydie Joseph Whitter. Since her divorce from Slydie Whitter she has since re-married and has been variously referred to as Monica Samuels and Monica Longmore. However for the sake of clarity, Monica Whitter will hereinafter be referred to as the "complainant" and Basil Whitter will be referred to by name.

Slydie Joseph Whitter and the complainant are both Jamaican Nationals. During the period of their marriage they resided in England and indeed the complainant still resides there.

After the breakdown of her marriage to Slydie Joseph Whitter, the complainant was desirous of pursuing certain claims against him in order to secure for herself a share in property which they had acquired during their marriage.

By letter dated the 13th of October 1986, the complainant wrote to the attorney seeking to retain his services in pursuing her claims against Slydie Joseph Whitter. The attorney replied to

her by letter dated the 12th of November 1986. The correspondence between the attorney and the complainant will be reviewed in greater detail later in this Judgment. Suffice it to say, the attorney, agreed to act on behalf of the complainant. A contingency agreement formed the basis on which the attorney would recover fees from the complainant for work done by him on her behalf. It was agreed that the complainant would pay the attorney "25% of all sums on properties received." More felicitously expressed, the contingency agreement was that the attorney would be paid 25% of all sums recovered in relation to the properties against which a claim was successfully established.

The complainant also retained the attorney's services to sue Slydie Joseph Whitter for the repayment of a loan of ten thousand pounds.

By Originating Summons dated the 2nd of June 1987, and intituled suit No. E 176 of 1987 the attorney instituted proceedings against Slydie Joseph Whitter in the Supreme Court of Judicature of Jamaica, claiming on behalf of the complainant, half share in the former matrimonial home known as "Cromarty" and situated at Fairfield in the parish of St. James. This property is registered at Volume 1080 Folio 372 of the Register Book of Titles and the complainant and Slydie Joseph Whitter were the joint registered proprietors.

The substance of the complainant's claim was that she was entitled to a half share in the said property and that it should be partitioned and sold. The attorney also issued a Writ of Summons on behalf of the complainant in the Supreme Court of Judicature of Jamaica against Slydie Joseph Whitter and another defendant, seeking a refund of the loan of L10,000.00. This was by way of suit No. C.L. W166.87.

The Originating Summons in relation to the property known as "Cromarty" was heard by Mr. Justice Panton, who inter alia ordered that the said property be sold and that the proceeds be divided equally between the complainant and Slydie Joseph Whitter. This order was made in January of 1988.

The defendant Slydie Joseph Whitter appealed against the decision at first instance. The Appeal was heard, and was dismissed on the 7th March 1989. The Court of Appeal did however vary the order of Mr. Justice Panton.

In particular the Court of Appeal ordered that the property be "valued" and sold and that the proceeds thereof be divided equally between the parties after the deduction therefrom of the

assessed increased value of the property directly referable to any improvement effected by the appellant subsequent to the 13th June 1984".

The Court of Appeal also made detailed orders as to how the accounts between the parties were to be taken.

Costs of the Appeal were awarded to the Respondent, who had also been awarded costs at the hearing before Mr. Justice Panton. The Appellant, Slydie Joseph Whitter appealed to the Privy Council but this Appeal was not pursued. His attorneys at no time obtained a stay of execution of the Judgment at first instance or of the Court of Appeal.

The attorney did not seek to enforce the Judgment of the Court of Appeal by securing a sale of the premises and a division of the proceeds. The attorney did not lay the bill in relation to costs awarded to the complainant at first instance and on Appeal.

The attorney did none of the acts specified in the order of the Court of Appeal, namely;

(a) The parties never agreed on the appointment of an accountant and valuator.

(b) He did not obtain a valuation of the property as of June 13th 1984.

(c) The expenditure on improvements and out goings by the Appellant was never ascertained.

(d) The amount due by the Respondent for half maintenance of the property and property tax since 13th June 1984 was never quantified.

(e) The profits, that is half the estimated rent of the property was not obtained from a valuator from June 13th 1984 up to the time of the sale.

The attorney did obtain a valuation of the property in March of 1988. The complainant determined the attorney's retainer in June 1991.

By suit No. C.L.F 141 of 1993, the attorney instituted proceedings against the complainant for recovery of fees he alleged were due to him from her. By way of a Writ of Summons specially endorsed with the Statement of Claim, the attorney sought to recover the sum of one million seven hundred and eighty eight thousand, sixty nine dollars and forty seven cents. ($1,788,069.47) that total was computed as follows;

25% of all sums received on the property.

(a) being 25% of her share of the appraised value of the property - $1,750,000.00

(b) 25% of the appraised value of the rent payable to the defendant from the 13/6/84 - 25/6/93 and continuing - $38,069.47.

The Writ of Summons is dated the 20th September 1993. It is alleged that the Writ of Summons was personally served on the complainant, the defendant in the suit No, C.L.F. 141 of 1993 in which the attorney was the plaintiff.

At the time of the service the Complainant was residing in London and continues to do so. However the complainant did not enter an Appearance in the suit nor did she file a defence.

The attorney, on the 10th of June 1994, owing to the procedural default of the complainant, entered a Judgment in default of Appearance seeking to recover the sum purportedly due to him as fees and as stated in the Statement of Claim.

The attorney then issued a "Summons for Sale of Realty relating to the said premises Cromarty" in relation to which the complainant had been determined to be entitled to half share of the legal and beneficial interest.

The re-listed Summons for the sale of the Complainant's share in the property called "Cromarty" came up for hearing before Mr. Justice Reid on the 20th and 23rd of June 1995. At the hearing of this Summons the defendant in the suit, namely the complainant was unrepresented. The "attorney was represented by Mrs. Margaret Forte instructed by the firm of Gaynair & Fraser. Slydie Joseph Whitter was represented by Miss Nancy Anderson instructed by Messers Crafton Miller & Co.

It is important to note that on the 9th of March 1995, the attorney had obtained on order from the master of the Supreme Court of Judicature that "Personal Service of the Summons for the Sale of Realty be dispensed with and leave was granted to the "attorney" to serve the complainant a copy of the Summons for the Sale of Realty and the affidavit in support and all subsequent proceedings by registered post."

At the hearing of the re-listed Summons for the sale of Realty it was ordered, that a Writ of Sale be issued for the sale of the land known as "Cromarty". It was also ordered, among other things that the property be sold by Public auction or by private treaty, that the Registrar of the Supreme Court be empowered to sign the relevant transfer and other documents relating to the sale and Transfer of the property on behalf of the defendant (the complainant) and most importantly that the attorneys-at-law Messers. Gaynair and Fraser have carriage and conduct of sale.

A second Summons for the sale of Realty came up for hearing before Mr. Justice Courtney Orr on the 4th and 5th of September 1996. At the hearing, Miss Nancy Anderson

appeared for Slydie Joseph Whitter, Mr. Earl Witter instructed by Messers Gaynair and Fraser appeared for the "attorney" and the complainant was unrepresented.

In the order made by Mr. Justice Orr, Slydie Joseph Whitter was given the right to enter into an agreement to purchase the Complainant's interest in "Cromarty" at a price of $7,875,000.00. If this sale failed, the attorney, in satisfaction of the Judgment debt obtained under the default Judgment was at liberty to dispose of the property by public auction.

It does not appear as if any of the orders made by Mr. Justice Reid on the hearing of the first Summons for the sale of realty was inconsistent with those made hy Mr. Justice Orr.
By Agreement for Sale dated the 30th September 1996, the Registrar of the Supreme Court, acting for and on behalf of the Complainant, entered into an Agreement for Sale with Slydie Joseph Whitter, whereby it was agreed to sell to the said Slydie Joseph Whitter, the complainant's half-share in the land "Cromarty" for a purchase price of $7,875,000.00 under the said agreement for sale. The firm of attorneys-at-law of Gaynair and Fraser had carriage of sale. It was a term of the agreement that a deposit of two million dollars was payable on the signing of the agreement and the balance on completion. Completion was scheduled for the 30th of September 1996. It is undisputed that the sum of two million dollars was paid to the firm of Messers. Gaynair and Fraser prior to the signing of the agreement for sale. This sum represented the deposit payable. The balance due under the sale, inclusive of half costs payable by the purchaser were paid under cover of letter dated the 27th September 1996 to the firm of Gaynair and Fraser. This is in the amount of $6,136,995.00. It follows therefore that the firm of Gaynair and Fraser, received the sum of $8,136,995.00 on account of the transaction of the sale of the "complainant's" land to Slydie Joseph Whitter.

Sometime in 1995, before the agreement for sale had been entered into between Slydie Joseph Whitter, and the Registrar of the Supreme Court, Basil Whitter, acting on the instructions of the complainant had met with the attorney in an effort to discover what was happening with the complainant's business. At one of the meetings the attorney advised Basil Whitter that he was suing the complainant and that he could no longer represent the complainant in her suit against. Slydie Joseph Whitter. The attorney also suggested to Basil Whitter that he would recommend an attorney-at-law to him whose services could be secured to protect the complainant's interests. An effort was made to retain the services of Michael Hylton Q.C. to act

on behalf of the complainant in her suits against Slydie Joseph Whitter. These efforts bore no fruit and Michael Hylton Q.C. really never came into the picture.

The attorney also introduced Basil Whitter to attorney-at-law Earl Witter, with a view to his acting on behalf of the complainant, but this also came to nought.

After the funds re the sale of the complainants half-share in "Cromarty" were collected by the firm of Gaynair and Fraser, in which "the attorney" was a partner since in or around the year 1989, neither the attorney nor the firm advised the complainant that a sale had been concluded and monies received representing her half-share in "Cromarty".

Basil Whitter did not receive any information from "the attorney" about the sale until he himself inquired of the attorney about what was happening in relation to his mother's affairs. The attorney did not give Basil Whitter, any information as to a break down of the sums received by the firm of Gaynair and Fraser for and on behalf of the complainant. He did not tell him the sum which he alleged represented his fees, nor did he tell him the amount received as a consequence of the sale of the complainant's half share in Cromarty. Absolutely no accounting was provided for Basil Whitter by the attorney. He was not informed of the financial institution if any in which the funds had been placed.

By letter dated the 10th of November 1996, the complainant wrote to the attorney telling him that she was aware that he was holding her portion of the proceeds of sale of "Cromarty", and making certain inquiries of him.

She wanted to know whether or not some of the monies could be released to her now and she assumed that the monies had been placed in an interest bearing account. She wanted to know what her position was, she also asked the attorney to communicate with her son Basil Whitter about these matters as she had previously advised.

The attorney did not respond to this letter. In fact the attorney never gave the complainant any information whatsoever about the sums received on her behalf and the manner in which they may have been disbursed.

Towards the end of 1996, the complainant retained the services of John Graham, attorney-at-law to act on her behalf and to protect her interest in the sums received by the firm of Gaynair and Fraser representing the proceeds of sale of her half-share in Cromarty.

John Graham of the firm of Patterson Phillipson and Graham, wrote to the "attorney" and W.B. Frankson Q.C. another partner in the firm of Gaynair and Fraser advising them that he had

been retained to act on behalf of the complainant in the matters of Whitter v. Whitter and Whitter v. Frankson seeking a meeting to discuss all the issues affecting the complainant. John Graham was particularly concerned about the fact that the monies belonging to the complainant may not have been placed in an interest bearing account. In one of the letters directed to W.B. Frankson Q.C. John Graham specifically instructed that the sums due to the complainant be paid into an interest bearing account at C.I.B.C. Knutsford Boulevard. Neither the attorney, nor W.B. Frankson Q.C. responded in writing to any of the letters sent by John Graham. In fact in his letter dated the 8th January 1997 directed to the attorney, John Graham listed specific matters about which he sought information from the attorney. For example, he wanted to know how much money was collected on behalf of the complainant, on what dates were the monies collected, in what bank were the monies being held and most importantly John Graham sought information from the attorney as to why the attorney was holding all the monies on the sale when all of the monies could not possibly be due to the attorney as fees.

Eventually, the complainant, having had no response from "the attorney or the firm in which he was a partner, instituted proceedings before the Disciplinary Committee of the General Legal Council against the attorney by way of complaint dated the 7th day of February 1997. Because of the import which it will have later on in our Judgment, it is important to note the following. At all material times the attorney was a partner in the firm of Gaynair and Fraser. The other partners were W.B. Frankson Q.C. Margaret Forte Q.C., Maurice Frankson and "the attorney". The attorney was the partner having conduct of the matter of Whitter v. Whitter suit No. E176 of 1987. Apparently W.B. Frankson Q.C. acted as Counsel for the complainant, at some point in the proceedings.

The firm of Gaynair and Fraser represented, the attorney in his suit against the complainant, namely suit No. C.L.F 141 of 1993. Margaret Forte Q.C. appeared for the attorney at one stage or the other in the proceedings as his Counsel. The said firm of Gaynair and Fraser was given carriage of sale under the agreement for sale dated the 30th September 1996, by Mr. Justice Reid when he adjudicated on the Summons for "Sale of Realty" taken out by the "attorney".

THE COMPLAINT In the affidavit in support of the complaint, Basil Whitter, alleges seventeen different bases on which he is asserting that the attorney is guilty of misconduct in a

professional respect. It is alleged "inter alia" that the attorney knowingly conspired to defraud and conceal monies and failed to give answers to a number of questions, for example;

1. Why had he collected all monies on behalf of Monica E. Samuels when he knew that her son Basil Joseph Whitter had power of Attorney.
2. Why did he fail to give dates when monies were received from Crafton Miller.
3. Why did he fail to notify M. E. Samuels or Basil Whitter of settlement.
4. Why did he cause the loss of interest and fail to disclose what bank or in whose account the money was held.
5. The reason for withholding that portion of money which could not possibly have been on account of the attorney's fees.
6. The reason for the attorney refusing to pay over to Monica Samuels that portion of the money which was indisputably hers.
7. Why had the attorney failed to respond to the requests of Basil Whitter her attorney's and herself for information about her business.

The substantive charges are as follows;

(a) That the attorney charged fees that are not fair and reasonable.

(b) The attorney had not provided the complainant with all information as to the progress of her business with due expedition although reasonably required to do so.

(c) The attorney has not dealt with the complainant's business with all due-expedition.

(d) The attorney has acted with inexcusable negligence in the performance of his business.

(e) The attorney has not accounted to the complainant for all monies in the hands of the attorney for the complainant's account or credit although the complainant reasonably required him to do so.

In keeping with the provisions of Rule 17 of the fourth Schedule to the Legal Profession Act the panel permitted an amendment of the affidavit in support of the complaint.

Paragraph 2 of the affidavit was amended to read "Failure to give dates when moneys were received and failure to give amount to Monica Samuels.

THE EVIDENCE ON BEHALF OF THE COMPLAINANT

Only Basil Whitter gave oral evidence on behalf of the Complainant. In his evidence he stated that he lived at Rio Blanco in the parish of St. Mary and he was a businessman and the son of the Complainant who was once Mrs. Whitter but is also called Samuels. He advised that the complainant resides in London England but over the period of 1987 to now, she had resided in the United States of America.

He, the witness, had been living in Jamaica since 1992. He knew the "attorney". He first met the attorney in England in the late 1980's when the attorney married his cousin.
He knew of the client/attorney-at-law relationship between the complainant and the attorney from in or around 1987. The complainant did not know of the situation re her case which the attorney was handling so his mother asked him to act as a go between, between the attorney and herself.

As a consequence of the complainant's request, he contacted the attorney in or around late 1995. He spoke to him and he also had a meeting with him. At this meeting he asked the attorney about the complainant's case. The attorney advised him that he was suing the complainant for legal fees and he could not represent her but he could use his case on her behalf by obtaining a judgment in his case against the Complainant.

At a second meeting early in 1996, the attorney advised him that he would recommend a fellow barrister to protect the complainant's interests and recommended Michael Hylton. Basil Whitter met Michael Hylton at his offices, to which offices the attorney escorted him.

A letter dated 26th May 1996 was admitted with evidence as exhibit 1. This is a letter from Michael Hylton to the Complainant advising her of the terms on which she could engage his services.

The witness, in continuing, said that the attorney introduced him to a second attorney Earl Witter, to act on his mother's behalf. The attorney was also present when he met Earl Witter. Indeed, the attorney had recommended to Basil Whitter that the complainant use Earl Witter and not Michael Hylton as the fees being charged by Michael Hylton were too high. Earl Witter did not act for the Complainant nor did Basil Whitter speak to him again.

In about October 1996 he became aware that his mother's half interest in "Cromarty" had been sold. He telephoned the attorney seeking information about "Cromarty" and the attorney told him that there had been a settlement but that the attorney had no figures or information. The attorney did promise to give him figures and information.

After a conversation with the Complainant, Basil Whitter advised her to send a "fax" to the attorney this she did. Basil Whitter then spoke to the attorney by telephone. The attorney advised him that because of the state of Jamaica, he would not put the money on an interest bearing account. The attorney did not tell him the amount of his fees. The witness also suggested to the attorney, that of the sum received belonging to his mother, he should put 3 million dollars on an interest bearing account until his fees had been settled. This the attorney refused to do.

In fact the attorney told Basil Whitter, that no money could be released until the taxation Court had assessed his fees. The attorney had said that the earliest date he could get for taxation was January 1997. No accounting was ever given by the attorney to Basil Whitter re the sale of "Cromarty". He never received any information as to where the complainant's monies were being held, He never received any response to letters to Gaynair and Fraser dated the 26th November 1996, and 10th December 1996. He checked the Court file in the suit of Frankson against the complainant to see whether any monies had been paid into Court. He discovered that no monies had been paid into Court. He did receive written instructions from the complainant to bring these proceedings.

At this point in the proceedings both Counsel agreed that a bundle of documents presented to the Tribunal on behalf of the complainant be tendered as exhibit 2

A supplemental bundle was also agreed to be admitted in evidence on behalf of the complainant as exhibit 2A

The witness was then shown documents at pages 93,94, and letters at pages 95-99 of exhibit 2. The witness said that he gave all the letters at pages 95 –99 of exhibit 2 to the attorney. He also stated that he had telephone contact with the attorney. The first time he heard that the complainant's half share in Cromarty had been sold was in or around November of 1996. He telephoned the attorney and the attorney told him to come to his office to see him. He did so. That was the first time he heard that Cromarty had been sold. The attorney told the witness that the figures in relation to the sale were with the accounting department. He, the attorney did not have any figures. He did not give the witness a copy of the agreement for sale on that occasion or at any time at all. He requested a statement of account re the sale from the attorney but never received one. The attorney never showed the complainant the agreement for sale, nor did he ever give her a statement of account. When the witness inquired as to whether or not the monies had

been placed on an interest bearing account, the attorney said that he had spoken to W. B. Frankson and he had said that they could not take the risk of putting the monies on an interest bearing account.

The attorney also said that he could not release any of the money until the Court had assessed the fees due to him. At no time did the attorney refuse to discuss the transaction with the witness.

Under cross-examination, the witness was asked about the relationship between his mother (the complainant) and his father (Slydie Joseph Whitter). He was asked when the relationship between himself and the attorney had developed. He admitted that he visited the attorney at his home and at his office. He first became aware that the attorney was suing his mother for fees in or around 1995. The attorney did not tell him that the complainant had terminated his services. He denied having taken the letter from the attorney written by the complainant terminating the attorney's services and read it. He never saw this letter. When the attorney introduced the witness to Michael Hylton, the attorney was present throughout that meeting and was a part of the discussions. It was the attorney who advised him not to use the services of Michael Hylton but to use those of Earl Witter.

The witness stated that he only became aware of the fact that the attorney had obtained judgment against the complainant after the John Graham had come into the picture. The witness confirmed that the attorney told him that he had received the monies representing the proceeds of sale of Cromarty.

The witness in response to suggestions put to him by the Maurice Frankson denied that the attorney gave him detailed information with regards to the attorney's suit against his mother.

He also said that it was not true that at no time did the attorney refuse to give him information with regards to his mother's action against his father.

The attorney never at any time told him that the proceeds of sale representing his mother's half share in Cromarty were in the client's account of Messers Gaynair and Fraser, nor did he tell him the location of the client's account.

It should be noted that Exhibit 3, a bundle representing documents presented on behalf of the attorney was tendered by consent.

The case for the complainant was then closed.

Maurice Frankson did not open to the case for the attorney and declined to do so when advised of his right to so do by the panel.

The respondent attorney then gave evidence on his behalf.

In examination in chief, the attorney admitted that he was a partner in the firm of Gaynair and Fraser with offices at 11 Church Street in the parish of Kingston. He knew the complainant known as Mrs. Whitter or Monica Samuels. He entered into a relationship with her when she wrote to him.

He entered into an agreement with her whereby he agreed to institute proceedings under the Married Women's Property Act against her husband, the complainant was then residing in London and her husband in Jamaica. The agreement reached was that he the attorney would retain 25% of whatever he recovered on the complainant's behalf.

The attorney agreed that the letters at pages 8,9 and 12 of exhibit 3 reflected the terms of the agreement between the complainant and himself. Pursuant to this agreement he filed two actions, one was under the married Women's Property Act and the other at Common Law to recover ten thousand pounds L10,000.00. He retained the services of W.B. Frankson Q.C. to act as counsel for the complainant. The proceedings under the Married Women's Property Act resulted in an order being made by Mr. Justice Panton for division of the property (Cromarty). He did not seek to enforce the order of Mr. Justice Panton, there was an appeal but at all material times he advised the complainant of the status of the proceedings.

The Appeal against the judgment of Mr. Justice Panton was not successful, and efforts were made to settle the issues without either party to the action going to the Privy Council. He conducted negotiations with Crafton Miller who appeared for the husband.

The complainant at one point went to reside in the United States of America and had ceased communication with the attorney.

Details of the negotiations were sent to the complainant as well as a copy of the valuation report relative to "Cromarty". The complainant wrote back to say she did not agree with the valuation report. The attorney secured an alternative valuation which he thinks was also sent to the complainant. After this, the attorney did not hear from the complainant again, Slydie Joseph Whitter or his attorney-at-Law Crafton Miller. The Appeal to the Privy Council was not pursued by Slydie Joseph Whitter. In or around the year 1991, the attorney received a letter from the complainant determining his retainer thereby terminating his service.

Prior to that, the common law suit which the attorney had instituted on behalf of the complainant against Slydie Joseph Whitter had reached the stage where it had actually come up for trial.

Having received the letter from the complainant terminating his services, the attorney stated that he waited for a period of two to two and a half years and he still had not heard anything from the complainant. During that period Basil Whitter had come to reside in Jamaica with his wife and children.

At some time in 1993 having not heard from the complainant, the attorney decided to take steps to recover his fees. He was of the view that an attempt was being made to cheat him of his fees.

Apart from sending the complainant copies of the valuations, the attorney had also written to her and advised her that she should make an effort to buy out Slydie Joseph Whitter's half share of Cromarty. After the complainant had terminated his services, W.B. Frankson Q.C. wrote to her advising her that she was obliged to pay to the attorney fees of 25% based on the agreement, and that they would be lodging a caveat against her property to protect the fees. This letter is dated the 9th of July 1991. In fact a caveat was lodged against the property "Cromarty".

The attorney by way of Suit No C.L. 141 of 1993, filed suit against the complainant for recovery of the fees he alleged were due to him under the contingency agreement that he had entered into with the complainant. The attorney further stated that the complainant was personally served with the Writ of Summons and Statement of Claim in England. The Complainant did not enter an Appearance so he proceeded to enter Judgment in default against the complainant. Having entered the Judgment the attorney stated that he now took steps to enforce the Judgment by applying to sell the complainant's half interest in Cromarty.

At that time, Margaret Forte Q.C. was acting on his behalf when the Judgment in default of Appearance was obtained, efforts were made to serve the complainant personally with Notice of the Judgment. These efforts failed and an application was made to the Court for an Order for substituted service against the complainant. Mrs. Forte dealt with the Summons for the sale of Realty, as he the attorney was not familiar with these kinds of proceedings.

Slydie Joseph Whitter had sought to intervene in the proceedings. An order for the sale of the Realty was made on the 5th of September 1996. Pursuant to the Order for the sale of Realty, an agreement for sale was entered into with Slydie Joseph Whitter for sale of the complainant's half

share in Cromarty to Slydie Joseph Whitter. A deposit of 2 million dollars was paid and this sum was put into the client's account of Gaynair and Fraser.

The attorney did admit seeing and speaking to Basil Whitter about the complainant's business. He did tell Basil Whitter that he had sued the complainant for fees and so he could not act for her re her transactions with his father. However he would recommend an attorney-at-law to him. He did introduce Basil Whitter to Michael Hylton at Myers Fletcher and Gordon. Sometime after Basil Whitter told the attorney that he would not be using Michael Hylton.

The attorney further stated that Basil Whitter did know about the sale of Cromarty and from time to time Basil Whitter did inquire of him when the funds would be available to the complainant and he told him that he was not in a position to say as he would have to tax his bill of costs first. At the request of Basil Whitter, he introduced Basil Whitter to another attorney-at-law, Earl Witter, to act in the common law suit for the recovery of L10, 000.00.

After, this, an application was made by the complainant to set aside the Judgment in default that he had obtained, this application was made by John Graham of Messers Patterson, Phillipson & Graham. After the proceeds of sale of the half interest of Cromarty had been paid over to Gaynair and Fraser, he proceeded to prepare his bill of costs for the action he had filed against the complainant. The bill of costs was laid in or around October 1996, he received a telephone call from John Graham. This was after he had received the proceeds of sale. In that telephone conversation, John Graham identified himself to him and told the attorney that he was calling on behalf of the complainant and Basil Whitter, and that he was calling in respect of money the attorney had for them. There was further discussion about Earl Witter and Michael Hylton. He also told John Graham that he was the plaintiff in the matter, and that his attorney-at-law was W.B. Frankson and he should speak to him John Graham wrote at least two letters to the firm, there was no response to these letters either by the attorney or by the firm.

He did not think that he should have responded to those letters, as he didn't know which attorney-at-law was acting for the complainant. John Graham visited the offices of the attorney and spoke to him about the monies being held by Gaynair and Fraser as a consequence of the sale of the complainant's half interest in Cromarty. John Graham made inquires about correspondence he had sent to the attorney and W.B. Frankson and asked that balance proceeds of sale be paid over to him. The attorney told him that he could not do that because a final account had to be made after his bill of costs had been taxed and that the bill of costs had been

laid for taxation. He also brought to John Graham's attention the fact that there were other costs due to him in the other suit.

The attorney, continuing in his examination, in chief was of the view that the fees charged by him were fair and reasonable. He denied that he had failed to provide the complainant with information about all her business with due expedition when reasonably required to do so. Exhibit 4 was tendered in evidence by consent. Exhibit 4 is a copy of the affidavit sworn to by the attorney in suit No. C.L. 141 of 1993, the attorney v the complainant for the recovery of his fees.

The attorney further denied that he had not dealt with the complainant's business with due expedition, or that he had acted with inexcusable or deplorable negligence in the conduct of the complainant's business. He stated that he had dealt as competently as he could with the complainant's business and in a diligent manner. He said that he was prepared to give an account to the complainant when his bill of costs was taxed. It was the attorney's expressed opinion that he had no monies in his hands as the attorney-at-law for the complainant as he had no funds in any matter in which he acted for her. He did admit that he collected funds in respect of the complainant's half share in Cromarty, he had never given to John Graham, Basil Whitter, or Monica Whitter a statement of account in relation to the proceeds of sale which he had collected as he was not in a position to do so.

Under cross-examination by John Graham the attorney gave the following pertinent responses. He on no occasion attended the taxation of the bill of costs which he had laid. He admitted that he did not supply John Graham with the documents he had requested to enable him to represent the complainant at the taxation. All the documents that John Graham requested had been sent to the complainant by registered post. The attorney was of the opinion that it would not have been appropriate for him to have sent the documents to John Graham as John Graham was not on the Record as representing the complainant.

He did not place the balance of the proceeds of sale in an interest bearing account because it was not up to him to do so. He was of the view that he had a lien on all the complainant's funds until all his costs and the debt were satisfied.

The attorney was asked why he did not put the sum due to the complainant on an interest bearing account in keeping with John Graham's request to him by letter dated the 10th December 1996, (p. 109 exhibit 2) The attorney responded as follows;

(1) John Graham was not the attorney-at-law on the Record.

(2) This bill of costs had not yet been taxed.

(3) There were other accounts to be made for which sums of money were due to the attorney from the complainant.

(4) There was no authority from the complainant to pay over the money to John Graham.

(5) The attorney knew that Basil Whitter would mislead anybody to lay his hands on the money.

The attorney recognised that it was his duty to provide the complainant with the balance of proceeds from the sale but only after he had taxed his bill of costs. The attorney also admitted that he had a duty to get the best price for the property and that he had to communicate with the complainant about the sale in a timely manner.

He said that W.B. Frankson Q.C. was his attorney and Margaret Forte Q.C. was his counsel, on the 5th September 1996 he was represented by Earl Witter as his counsel. Up to the 4th and 5th of September 1996 the complainant had no attorney-at-law representing her. He made no inquires as to whether or not the complainant had been served with the Summons for the sale of Realty, he gave no instructions that she should be so served. He gave no instructions that the complainant be communicated with but agreed that it was desirable that the complainant be informed. The attorney was of the opinion that he had no obligation to inform her. Gaynair and Fraser prepared the agreement for sale, and Gaynair and Fraser had carriage of sale. The agreement for sale was presented to the Court by Earl Witter.

W. B. Frankson, Miss Nancy Anderson and the attorney agreed to the terms of the agreement for sale. The attorney later in his evidence said that he was mistaken when he had said that he also agreed to the terms of the agreement.

The attorney admitted that it was the duty of an attorney-at-law not to retain without the express authority of his client money received for and on behalf of his client for an excessive period of time. He was also of the opinion that he should have insisted that Gaynair and Fraser not retain the complainant's money for an unnecessarily long period. The attorney reiterated his position that he was entitled to retain all the complainant's monies until his costs, including his costs in other matters were paid, he had not sent the complainant a bill.

The attorney confirmed that between 1987 and 1991 he did not take any steps to sell Cromarty in keeping with the order of the Court although there had been no stay of execution in place. He never advised the complainant that he was awaiting the outcome of the appeal before proceeding.

Section 22 of the Legal Profession Act was brought to the attention of the attorney. He had not sent a bill to the complainant. He was not aware of section 22 of the Legal Profession Act when the letter dated 9th July 1991 was sent to the complainant.

He did not see any conflict of interest in the firm of Gaynair and Fraser acting for him, and acting for the complainant in having carriage of sale under the agreement as he was the Judgment creditor. He knew Emmanuel Olasimoe, he was a client of W. B. Frankson and that is how he met him. He assumed that Mr. Olasimoe was a licensed Realtor. He admitted that Mr. Olasimoe and himself and others had entered into an agreement to purchase the Oceana Hotel. It is quite possible that he the attorney contacted Mr. Olasimoe to auction Cromarty. In a sense he stated, he was actively involved in the sale of the property. The firm of Gaynair and Fraser never paid Mr. Olasimoe a fee although his fees were included in the bill of costs laid.

He did admit that he did not feel that Mr. Olasimoe was entitled to his fee as he had not negotiated the sale. He was asked many questions by John Graham in relation to his inclusion of Mr. Olasimoe's fees in the bill of costs laid. The attorney stated that he had been practicing for 23 years. The attorney did not think that he ought to have sent the documents to John Graham, as his name was not on the Record. He did not tell any of the attorneys-at-law in Patterson Phillipson and Graham of his position. Having received the proceeds of the Judgment, the attorney admitted making payments out of it.

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

On the resumption of the hearing before this Tribunal, the attorney continued his evidence under cross-examination. He had not sent a statement of account to the complainant. As the person who had carriage of sale he considered it his duty to have sent it to her. He did not send it to her because his bill of costs had not been taxed. He was not of the opinion that he should have paid

the proceeds of sale into the Treasury. He insisted that he was entitled to hold on to all the complainant's money because he had a lien on it.

He agreed that he was still holding money for the complainant. He had not placed these monies in an interest bearing account nor had he provided the Registrar of the Supreme Court with a statement of account. He had no intention of paying the net proceeds of sale to either John Graham or Basil Whitter. He intended to pay the net proceeds into Court after his bill of costs was taxed.

He did not lay any bill of costs to be taxed for and on behalf of the complainant between 1987 and 1991.

The attorney was asked detailed questions about the accounting procedure in the firm of Gaynair and Fraser. The attorney said he did not know much about the accounting department. However, he knew that all details of accounts were kept on the relevant file, the attorney did not, when asked, state how many client's accounts his firm had. There was a partnership account from which the firm's expenses were paid.

The following documents were tendered in evidence by consent.

Agreement for sale, Stamp Commissioner's receipt and two statements of account one to Slydie Joseph Whitter and one Monica Whitter were tendered as exhibit 5

Nine cheques drawn on the Gaynair and Fraser client's account were tendered as exhibit 6. These cheques represented payments made by the attorney from the proceeds of sale received for and on behalf of the complainant by the firm of Gaynair and Fraser.

Nine supporting vouchers were tendered as exhibit 6A.

A letter with attached Bill of Costs directed to Monica Whitter was tendered as exhibit 7

A receipt for 3 million dollars was tendered as exhibit 8

Letter dated 9th July 1998 from John Graham to W.B. Frankson Q.C. was tendered as exhibit 9

Record of Civil Appeal M13 of 1998 was tendered as exhibit 10

The documentary evidence in the complaint was voluminous but only those documents which are relevant to the complaint and to the decision will be reviewed and evaluated by the Committee.

In continuing his evidence under cross-examination, the attorney was asked to look at exhibit 5, the Agreement for sale. He agreed that it was dated 30th September 1996. He could not explain why it was so dated, he could only guess. He did not know when the Agreement for

sale was signed by the Registrar of the Supreme Court. He did not know when Gaynair and Fraser sent it to her for her signature. He did not know when the purchaser signed the Agreement for sale. The attorney was then referred to the cheques exhibit 6 by John Graham. He agreed that there was a cheque.

(a) Dated the 6th September 1996 in the amount of $500,000.00 made out to W.B. Frankson, this cheque is numbered 781216.

He was asked what did the cheque represent. He said it represented fees paid out to W.B. Frankson that there was an agreement between W.B. Frankson and himself, that whatever fees came into the attorney's hand, he W.B. Frankson would be entitled to one half of these fees. W.B. Frankson acted as Counsel for the complainant. At the time this arrangement was made by the attorney with W.B. Frankson, he the attorney was practising by the name of B. E. Frankson & Co.,

The attorney admitted paying over to W.B. Frankson the sum of $500,000.00 before the agreement was signed.

The attorney was asked about cheque No. 781218 made payable to one Junior Rowe in the sum of $50,000.00 and dated the 6th September 1996. The attorney stated that this sum represented a portion of his fees. He had asked his bearer Junior Rowe to encash the cheque.

The attorney was then asked about cheque No. 781217 in the sum of $450,000.00 dated the 6th September 1996 made payable to the attorney. He said that that cheque represented fees payable to him.

When asked why he would authorise the payment of fees of 1 million dollars on the 6th of September 1996 when there was not yet even an Agreement for Sale in place, the attorney responded that this amount was not due to the complainant as the agreement was not yet signed, besides he had received the funds under a debt. He was a Judgment creditor.

Cheque No. 781257 payable to Earl Witter in the sum of $20,000.00 was not paid from the proceeds of sale of the complainant's half interest in Cromarty.

Cheque No. 781256 in the sum of $500,000.00 dated the 1st October 1996 and payable to W. B. Frankson was brought to the attention of the attorney. The attorney admitted that this sum represented a further advance in fees paid to W.B. Frankson in keeping with their fee arrangement.

Cheque No. 781255 in the sum of $500,000.00 dated the 1st October 1996 and made payable to "the attorney" (B.E. Frankson) represented a further advance on his fees.

Cheque No. 781305 dated the 3rd October 1996 in the sum of $271,687.50 made payable to the Gaynair and Fraser Partnership Account may represent the fee for the transfer paid to Gaynair and Fraser.

There was also a cheque in the sum of $39,375.05 made payable to the Registrar of Titles and numbered 781277 and dated the 10th October 1996.

There was also a cheque in the sum of $1,023,70.00 made payable to the Stamp Commissioner and dated the 4th October 1996.

The attorney admitted that there were nine cheques produced in evidence all of which were paid out of the proceeds of sale of the complainant's half interest in Cromarty to Slydie Joseph Whitter.

The attorney was also asked about the fact that he had sworn in his affidavit exhibit 4 that he had at one point collected the sum of $2,035,760.35 under the Judgment debt in suit No. C.L.F 141 of 1993. The attorney said that he had not in fact collected the $35,000.00, but 1 million was paid to himself for fees and 1 million to W.B. Frankson for fees.

The attorney made the following admissions;

1. That as a partner in the firm of Gaynair and Fraser in law, he was a trustee for client's monies in his possession.
2. That as a trustee, one of his duties was to ensure that proper books of account are kept to show the dealings with client's money with particulars and information as to the monies received.
3. The attorney also agreed that the accounts should distinguish monies received on behalf of the client.
4. The attorney also agreed that the accounts should distinguish the monies being held for each client.
5. He also admitted that client's monies should be clearly distinguished from partner's monies
6. He admitted that it was his duty to respond to clients when they inquired where there money was.

The attorney however insisted, when asked that all information had been made available to the client (the complainant)

He then gave answers, which were not very coherent as to who should know where the money was being kept. The attorney even said that John Graham should have known where the money was being kept. He also said he did not respond to the complainant's inquires because his bill of costs was being taxed. When pressed under cross-examination by John Graham, the attorney said that the time was not right for him to render an account.

When asked why the firm had not produced the bank statements relevant to the monies being held by Gaynair and Fraser on behalf of the complainant, the attorney categorically stated "My company is not going to give me permission to show what is in their bank account, when the time has come Gaynair and Fraser will pay the money."

When reminded of the fact that he had been served with a sub-poena duces tecum to produce the bank statements. The attorney's response was that he didn't know which law firm showed their bank account to clients.

In re-examination, the attorney was asked about his own interpretation of section 609 of the Judicature Civil Procedure Code Law. Exhibit 10 was also produced at this stage. The attorney's case was closed and it was agreed that both sides would present written closing submissions. This was subsequently done. Both counsel were also permitted by the Tribunal to expand orally on the Written Submissions. Both Counsel availed themselves of that opportunity and made extensive oral Submissions.

The review of the evidence by this tribunal is a summary of the material evidence given and is not a verbatim account of all that was said.

BURDEN OF PROOF It is Trite law that the burden of proof is on the complainant to establish her case to the standard of proof required in law.

STANDARD OF PROOF The allegations of impropriety and misconduct alleged against the attorney in these proceedings are extremely grave and seek to impugn the moral and professional integrity of the attorney. In these circumstances, this Tribunal is of the opinion that in evaluating the evidence and arriving at its conclusions, the standard of proof applied in criminal cases is applicable here. The evidence here will have to rise [redacted] to a standard of "proof beyond reasonable doubt" in order to satisfy this Tribunal that the attorney is guilty of misconduct in a professional respect.

We rely for this conclusion on the following cases.

The Privy Council decision of BHANDARI V ADVOCATES COMMITTEE reported at 1956 3 All England Reports p. 742 and the Judgment of Lord Tucker at p.744 paragraph I "We agree that in every allegation of professional misconduct, involving an element of deceit or moral turpitude, a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities."

Re: A SOLICITOR 1992, 2 All England Reports p. 335 and the statement of Lord Lane at paragraph d "It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the Criminal and Civil Standards. We conclude that at least in areas such as the present, where what is alleged is tantamount to a criminal offence, the Tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or put another way, proof beyond reasonable doubt."

EVALUATION OF THE EVIDENCE Basil Whitter's evidence as it related to the material issues in the case was not discredited under cross-examination. Indeed many of the allegations of Basil Whitter were admitted by "the attorney". For example, the attorney admitted that he did not respond to any of the letters written by the complainant or by John Graham over the period October 1996 – January 1997 where information was being sought from him about the monies held by his firm on behalf of the complainant.

Basil Whitter's demeanour was calm and dispassionate, and at no time did he display any anger or resentment even when being asked peripheral questions, for instance about his relationship with his father Slydie Joseph Whitter, and even when his own integrity was being challenged. His evidence was also corroborated by documentary evidence produced in this complaint. He was a credible witness on whose evidence this tribunal may place considerable reliance.

The attorney on the other hand, although confident, at times, on important issues gave confusing and incoherent evidence. His evidence as to the accounting system in the firm of Gaynair and Fraser is not easily understood. His answers as to why he held on to all the monies in his custody to the account of the complainant are untenable in law. His reasons for not responding to John Graham or the complainant cannot stand up to careful scrutiny. Indeed the

attorney did not seem to appreciate the gravity of the proceedings, and too often responded disdainfully and obtusely.

The attorney was not an impressive witness. Under the searching and penetrating light of cross-examination, the legal stance that he had adopted with regards to this complaint appeared to disintegrate. In fact, it is correct to say that our decision will turn to large extent, on the view we have of the law applicable as many facts are indeed undisputed.

UNDISPUTED FACTS

1. The attorney used to practice under the name of B.E. Frankson and Co.
2. In or around the year 1989, the attorney become a partner in the firm of Messers Gaynair and Fraser.
3. At all material times the partners in that firm were W.B. Frankson Q.C. Margaret Forte Q.C., the attorney and Maurice Frankson.
4. In 1986 the attorney was written to by the complainant asking that he act for her in matrimonial and other civil proceedings against Slydie Joseph Whitter.
5. The attorney wrote to the complainant agreeing to act as she had requested.
6. The fee arrangement put in place between the attorney and the complainant was one on a contingency basis.
7. The attorney instituted suit by way of Originating Summons, suit No. E. 176 of 1987 on behalf of the complainant against her husband seeking partition and sale of the former matrimonial home known as Cromarty, being land registered at Volume 1080 Folio 372 of the register Book of Titles.
8. The attorney also instituted suit No. C.L.W 166/1987 on behalf of complainant against Slydie Joseph Whitter and another for the recovery of L10,000.00.
9. The case under the Married Womens Property Act was heard and an order made by Mr. Justice Panton in ~~July~~ January 1988 adjudging that the complainant was entitled to a half share in the legal and beneficial interest in the property Cromarty and that the property should be partitioned and sold and the proceeds of sale divided between the complainant and Slydie Joseph Whitter.
10. This decision was appealed from by Slydie Joseph Whitter, and March in of 1989 the Appeal was dismissed, although the order was varied in terms of effecting the sale and other consequentials.

11. This decision was appealed from by Slydie Joseph Whitter but the appeal to the Privy Council was not pursued.

12. There was never any Stay of Execution in relation to either the order of the Court of first instance or the Court of Appeal.

13. The attorney never laid any bills of cost to be taxed for and on behalf of the complainant.

14. The attorney made no effort to effect the sale of the property in keeping with the Judgment of Mr. Justice Panton and the Court of Appeal, and the acts stated at page 3 of this Judgment.

15. The attorney's services were terminated by the complainant in June of 1991.

16. In September 1993, the attorney instituted suit No. C L F 141/1993 against the complainant for the recovery of fees purportedly due to him as a consequence of the orders in suit No. E176 of 1987.

17. No Appearance was entered to this suit by the complainant.

18. Judgment in default of Appearance was entered against the complainant by the attorney in suit No. C L F 141/1993 on the 10th day of June 1994.

19. The attorney took out a Summons for Sale of Realty to enforce the said Judgment under which he was to recover the sum of $1,788,069.47 dollars with costs to be agreed or taxed.

20. The attorney obtained an order of the Supreme Court to serve the documents on the complainant in relation to the Sale of the Realty by way of substituted service.

21. Three Orders for the sale of the complainant's half share interest in "Cromarty" were made by the Supreme Court, one by Mr. Justice Reid in June of 1995, another by Mr. Justice Reid in May of 1996, and another by Mr. Justice Courtney Orr in September of 1996.

22. An Agreement for Sale entered into by the Registrar of the Supreme Court as vendor acting on behalf of Monica Whitter and Slydie Joseph Whitter as purchaser was approved by the Court and executed by the parties on the 30th September 1996.

23. The purchase price for the complainant's half interest in Cromarty was $7,875,000.00.

24. A deposit of 2 million dollars was payable on the signing of the Agreement and the balance on completion.

25. Messers Gaynair and Fraser, in particular W.B. Frankson Q.C. had carriage of sale under the Agreement and Messers. Crafton Miller and & Co. acted for the purchaser.

26. The agreement for sale was signed on behalf of the complainant by the Registrar of the Supreme Court.

27. A deposit of 2 million dollars was paid to Messers. Gaynair and Fraser by the purchaser on the 5th September 1996.

28. The cheque representing the deposit was lodged to the client's account of Gaynair and Fraser held at the National Commercial Bank, Harbour Street, Kingston.

29. Before the date stated on the Agreement for sale, cheque Nos. 781216, 781217 and 781218 totalling one million dollars, and drawn on the said clients' account of Gaynair and Fraser were paid out of the deposit which represented part proceeds of the sale of the complainant's half interest in Cromarty.

30. All three cheques represented alleged fees payable to the attorney in the amount of $500,000.00 and alleged fees payable to W.B. Frankson Q.C. in the amount of $500,000.00.

31. These fees are alleged to have been due to the attorney and W.B. Frankson Q.C., for work done in suit No. E. 176 of 1987, the complainant against Slydie Joseph Whitter.

32. By letter dated the 27th September 1996, Crafton Miller to Messers Gaynair and Fraser, Crafton Miller forwarded cheque No. 584413 in the sum of $6,136,995.00 representing balance purchase price of $6,116,995.00 and a sum of $20,000.00 of Court costs.

33. A total of $8,116,995.00 was paid to Messers Gaynair and Fraser, representing the total purchase price and half transfer costs for the sale of the complainant's half interest in Cromarty.

34. That cheque also was lodged to the clients' account of Messers. Gaynair and Fraser.

35. On the 1st October 1996 cheque nos. 781255 and 781256 totalling 1 million dollars were drawn on the said client's account and made payable to the attorney and to W.B. Frankson.

36. That sum was also alleged to represent fees payable to the attorney and W.B. Frankson by the complainant.

37. On the 10th of October 1996, cheque No. 781264 payable to the stamp Commissioner in the sum of $1,023,740.00 was paid out of the proceeds of sale of the complainants half interest in Cromarty.

38. Cheque No. 781277 payable to the Registrar of Titles in the amount of $39,375.00 was also paid out from the sale proceeds. This cheque is dated the 10th October 1996.

39. Cheque dated the 30th October 1996 and payable to the Gaynair and Fraser Partnership account in the amount of $271,687.50 was also paid from the sale proceeds. This cheque numbered 781305.

40. Cheques at paragraphs 37 and 38 above represented Transfer costs payable on the sale. All other cheques represented fees payable to the attorney, W.B. Frankson and the firm of Gaynair and Fraser.

41. All the above sums were paid from monies received to the account of the complainant by the firm of Gaynair and Fraser.

42. All the cheques referred to above had the attorney's signature on them along with one or other partner of the firm of Gaynair and Fraser, authorising payment in these sums.

43. A total of $2,271,687.50 was paid out of monies held to the account of the complainant by Messers Gaynair and Fraser as fees to the attorney, W.B. Frankson Q.C. and the firm of Gaynair and Fraser.

43 a. The attorney, laid to be taxed a bill of costs in the amount of $1,285,242.10 in suit No. C.L.F 141/93 in or around October 1996.

44. The complainant has received no monies from the sale of the proceeds of her half interest in Cromarty.

45. The attorney has not provided the complainant with any Statement of Account as to how her monies have been disbursed, nor as to where the balance of her monies is being held.

46. The attorney has not provided John Graham with any statement of account as to how the complainant's monies have been disbursed or were any balance is being held.

47. Pursuant to a Summons taken out by the complainant in Suit No. C L F 141/1993, Mr. Justice Ellis on the 14th day of July 1998 ordered that the attorney account for and pay into the Treasury, all the sums received from the sale of the complainant's interest in Cromarty in accordance with section 609 of the Judicature Civil Procedure Code Law.

48. In partial satisfaction of this order, the firm of Gaynair and Fraser paid in an amount of 3 million dollars into the Treasury see Exhibit 8.

49. The attorney has appealed against this Order see exhibit 10 Civil Appeal No, M. 13 of 1998.

50. DISPUTED ISSUES OF FACT There are not many disputed issues of Fact pertinent to the complaint and in many instances where they do arise they are issues which are not germane to the complaint. However it is disputed.

1. Whether or not the attorney kept the complainant informed about the progress of her business.
2. Whether or not the attorney kept Basil Whitter informed of the progress of the complainant's business.
3. Did the attorney send any documents to the complainant re the taxation of the bill of costs in suit No. C L F 14/1993.
4. Has the attorney failed to respond to faxes and letters sent by the complainant.

It is true to say that the Findings and Conclusions at which this Tribunal arrives will depend on our interpretation of the law relevant to the determination of the issues. Wide-ranging and comprehensive submissions were made by Counsel for the complainant and the attorney. We will concentrate on those issues that are relevant.

THE MATERIAL ISSUES OF LAW

1. Was the fee agreement between the attorney and the complainant a contingency fee agreement?
2. What are the documents which constitute the agreement?
3. What are the material terms of the agreement?
4. Did the agreement permit the attorney to sue for the full percentage of his fee?
5. Was the attorney obliged to comply with section 22 of the Legal Profession Act before being able to sue for his alleged fee?
6. What were the obligations of the attorney in relation to the sale proceeds of the complainant's half interest in Cromarty firstly (a) to the Court and (b) to the complainant.

7. Did the attorney act as the attorney-at-law for the complainant even after his retainer had been terminated?

8. Did the attorney have a lien over the monies collected re the sale of the complainant's half interest in Cromarty?

9. What is the extent of the lien, at common law of an attorney-at-law?

10. Were the funds held by the attorney for and to the account of the complainant Trust Funds?

11. What does the term "to account" mean under the Canons of the Regulations made under the Legal Profession Act?

12. Was the complainant Basil Whitter a duly appointed agent of the complainant.

DETERMINATION OF ISSUES OF LAW

1. It is our considered opinion that the fee agreement between the attorney and the complainant was a contingency fee agreement under section 21 of the Legal Profession Act.

2. Letter dated the 13th October 1986, the complainant to the attorney, letter dated the 12th November 1986, the attorney to the complainant letter dated the 6th December 1986, the complainant to the attorney, and letter dated 9th April 1987, attorney to the complainant contain the terms of the contingency agreement. See exhibit 4, attachments to the attorney's affidavit dated 11th July 1997.

3. The material terms of this agreement are;

   (a) The attorney agreed to act for the complainant with respect to property claims against her former husband Slydie Joseph Whitter.

   (b) The attorney agreed to pursue the claims on behalf of the complainant on a contingency fee basis. He agreed to take 25% of all sums on properties received.

   (c) The complainant agreed to these terms of 25% of all sums on properties received on condition that no further fees were payable by her during and after the case, the attorney agreed to this.

4. The attorney was not in law permitted to sue the complainant for the full gross percentage of any fee allegedly due to him under the agreement as he had not completed the work he agreed to do. The recovery of sums due to the

complainant as against Slydie Joseph Whitter was a condition precedent to the attorney being entitled in law to the agreed percentage fee.

5. The attorney was obliged to comply with section 22 of the Legal Profession Act and was not entitled in law to commence any suit for the recovery of any fees due to him "until the expiration of one month after he had served on the party to be charged a bill of those fees."

6. Under the orders for the sale of the Realty, the attorney was obliged to obey the terms of those orders. See pages 83, -88 of exhibit (3) in particular, under the order dated the 20th and 23rd June 1995, the attorney was required to have " an account taken" of what was due to him as Judgment creditor. The Court should have been advised at all times of the progress of and conduct of the sale, as the sale was ordered by the Court and the Registrar of the Supreme Court was the agent of the complainant under the sale.

7. Gaynair and Fraser had carriage of sale under the Agreement for Sale, the attorney is a partner in Gaynair and Fraser, consequently the attorney was the attorney for the complainant and was responsible for taking steps to ensure that the funds of the complainant were handled with strict and scrupulous care, and within the boundaries of the law.

The attorney was obliged to give full and complete information to the complainant, and to her authorised agent about each and every matter concerning her affairs and withholding nothing. The complainant was entitled to know where her monies were being held, and how they were being spent. She was entitled to the balance of the proceeds of sale excluding only an amount due for fees and expenses legitimately incurred by the attorney. The attorney was not entitled to hold on to the monies of the complainant indefinitely on the basis that he had to wait for his bill of costs to be taxed. The attorney could be entitled to no more costs than those for which his bill had been laid.

8. The attorney did not at common law have a lien over any of the proceeds of sale re the sale of the complainant's half interest in Cromarty. We rely here on the statement of the law of by the Learned authors of the text "Corderey's" Law relating to Solicitors, the 7th Edition p. 273.

"The retaining lien is founded in the general law of lien and springs from possession and is in general governed by the same rules as other cases of possessory lien".

"It is a right at common law depending (it has been said) upon implied agreement. It has not the character of an encumbrance or an equitable charge. It is merely passive and possessory. That is to say the Solicitor has no right of actively enforcing his demand. It confers upon him merely the right to withhold possession of the documents or other personal property of his client or former client." Per Lord Evershed M. R in Barratt v. Gough-Thomas reported at 1950 2 All E.R 1048 and at p. 1053. Further the lien attaches only to personal property which comes into the possession of the Solicitor with the sanction of his client. In any event, even if a valid lien existed the lien would attach to only the actual amount due and no more. See Miller v. Atlee 1849 3. Exch. 799

Paragraph 9 of the Order on the Summons for the Sale of Realty dated the 2nd and 9th of May 1996 stated as follows,

" That the costs of and incidental to this Summons and this order be agreed and are to be a charge on the property sold"

This charge, on a proper interpretation of the order, would only relate to the costs of the Summons and nothing else, and certainly did not extend to the entire proceeds of sale of the complainant's half interest in Cromarty.

9. The funds held by the attorney for and on behalf of the complainant were trust funds see The Judgment of Harman J in the first instance case of LOESCHER V. DEAN reported at 1950 1 CH .p 491 and at p. 493

10. Under the Canon VII (b) (ii) of the Legal Profession (Canon of Professional Ethic) Rules of 1978, an attorney is required to account to his client for all monies in the hands of the attorney for the account or credit of client whenever reasonably required to do so." It is our considered opinion that the attorney in these circumstances is not only obliged to provide a written Statement of account to the client, but is

obliged to deliver all funds in his hands due to the client when reasonably required to do so".

After a very careful analysis and consideration of all the evidence, oral and documentary, and being mindful of the high standard of proof required, this Tribunal makes the following findings of fact and mixed law and fact in keeping with the provisions of section 15 of the Legal Profession Act.

FINDINGS OF FACT AND MIXED LAW AND FACT

We find as follows:

1. All the facts listed in paragraphs 1 – 49 under the sub-title "undisputed facts" as proven, and the admissions of the attorney at page 20 of this Judgment.
2. The attorney had not completed all the work for and on behalf of the complainant which he had agreed to do when his retainer was terminated.
3. The attorney was not therefore due 25% of any sums recovered for and on behalf of the complainant as he had recovered no such sums.
4. The attorney was not entitled in law to sue for the sum of money for which he sued in September 1993 by way of suit No.C L 141 of 1993.
5. The attorney never submitted a bill for work done to the complainant prior to instituting suit against the complainant for fees alleged to be owing to him.
6. At all material times the attorney, although the plaintiff in the suit, actively participated in and had conduct of the transaction concerning the institution of proceedings against the complainant in the Supreme Court, and the Sale of her half-share in Cromarty. The complainant under the sale was the client of the attorney no matter what was represented on the agreement for sale.
7. The proceeds of the sale of the complainant's half interest were sent to the firm of Gaynair and Fraser, but the attorney controlled the use and disbursement of the funds at all material times. All nine cheques produced in evidence as exhibit 6, and deducted from the said proceeds of sale were signed by the attorney.
8. All supporting vouchers tendered as exhibit 6A were signed by the attorney.
9. Although a Judgment creditor under the suit, the attorney was also trustee of the proceeds of the complainant's half-interest in Cromarty.

10. The attorney was not entitled to pay himself fees prior to the signing of the agreement for sale, or prior to the completion of the sale.

11. The attorney was not entitled to pay fees to W.B. Frankson, prior to the signing of the agreement for sale or prior to the completion of the sale.

12. The attorney had no lien at a common law over any of the proceeds of sale.

13. The charge under paragraph 9 of the order of May 1996 related only to the costs of the Summons for the sale of Realty.

14. Even if the attorney had had a valid lien, over the proceeds of sale of the complainant's half-interest in Cromarty, this lien would have extended to only what was legitimately due to the attorney, that is to say the sum of the Judgment debt and the sum for which the bill of costs was laid.

15. The attorney was not entitled to hold on to all the proceeds of sale pending any taxation of his alleged bill of costs.

16. The attorney ought to have paid to the complainant, the balance of the proceeds of sale of Cromarty forthwith having deducted the amount due under the Judgment debt and costs.

17. The attorney was wrong in failing to place the complainants share of the proceeds of sale on an interest bearing account as directed by her in her letter to him dated the 11th November 1996 – see exhibit 2 p. 98 and John Graham's letter to the attorney dated the 10th December 1996. See exhibit 2 p. 109

18. The attorney has failed to account to the Court as to his conduct of the Sale of the complainant's half interest in Cromarty.

19. The attorney has failed to account to the complainant for all the monies in the hands of the attorney for the account and credit of the complainant although reasonably required so to do.

20. The attorney has failed to produce to this Tribunal books of account, bank statements or other documents showing where the complainant's money was held, and how it was spent.

21. The attorney has failed to produce to this Tribunal any books of account, bank statements or other documents showing where the money to which the complainant is entitled is now held.

22. The attorney has failed to produce to this Tribunal any books of account, bank statements or other documents showing that he does indeed hold the balance of proceeds of sale for and on behalf of the complainant.

23. The attorney has not discharged his professional duties with integrity, probity and trustworthiness, and embarked on a deliberate course of conduct in which he misapplied the complainant's funds.

24. The attorney did not charge the complainant fees which were fair and reasonable in the circumstances, in that he had not completed the work he had agreed to do.

25. The attorney after March 1989, did not deal with the complainant's business with all due expedition.

26. After March 1989 when the Appeal was determined by the Court of Appeal, the attorney acted with inexcusable or deplorable negligence in the performance of his duties.

27. Basil Whitter had a right in law to institute this complaint as the duly authorised agent of the complainant. See Cheshire, Fifoot & Furmston's Law of Contract 13th Editions p. 485.

CONCLUSIONS This Committee, after careful consideration of all the facts, careful perusal of the law, a careful consideration of all the circumstances has arrived at the conclusion that the conduct of the attorney is in breach of Canons, IV (f) (iii), (iv), and VII (b) (ii) of the legal Profession (Canons of Professional Ethics Rules of 1978, namely the attorney did not charge fees which were fair and reasonable, he at one point in time did not deal with his client's business with all due expedition, and he did not provide his client with all information as to the progress of his clients business with all due expedition, he also acted with inexcusable or deplorable negligence or neglect in the performance of his duties.

The gravest breach of the "attorney's" duties, and the one with the most far reaching consequences is his failure to account to the complainant for all the monies in the hands of the attorney for the account and credit of the complainant. We find the conduct of the attorney viewed as a whole, totally unacceptable. We do not understand what could have prompted him to conduct himself in the manner in which he did. We cannot understand what could have convinced him that he had a "right in law to use the funds of the complainant in the manner in which he did, and then not pay a single cent to the complainant representing any balance of the

proceeds of sale due to her since October 1996. The preceding interpretation is put in its most favourable light, but in our considered opinion, on the facts of this case, the attorney was not entitled to deduct or retain any fees, as he had failed to act pursuant to section 22 of the Legal Profession Act We are of the view that the attorney has failed to maintain the honour and dignity of the Profession, and has acted in a manner which tends to discredit the profession. The attorney has conducted himself in a manner which does not promote confidence in the integrity of the administration of Justice and the integrity of the Legal Profession.

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

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

Further, we are at a loss to understand how Messers. Gaynair and Fraser, attorneys-at-law, could have been allowed to have carriage of sale of the agreement dated the 30th September 1996, when the said firm had acted for the attorney in the suit under which he claimed fees, and the attorney had acted for the complainant in her suit against Slydie Joseph Whitter and was a partner in the said firm of Gaynair and Fraser. There was on the face of it, a clear conflict of interests.

Perhaps, if the Court had been made aware of the true facts, if a great deal of the history of the case had not been suppressed by the utilisation by the attorney of a Writ specially endorsed with the Statement of Claim to reveal a bare debt, the Court would not have made these orders, orders which were the vehicle through which the complainant was deprived of her rights and millions of dollars to which she was lawfully entitled.

We are satisfied, beyond a reasonable doubt that the attorney is guilty of misconduct in a professional respect.

SANCTION It is now our undoubtedly difficult task to impose the appropriate sanction in these circumstances. We are painfully aware that the attorney is a fairly young man with a family. Being an attorney is the means by which he earns a livelihood, but we cannot permit these factors to deter us from doing what is right in these circumstances.

The important consideration in determining adequate punishment is to maintain the honour and dignity of the profession, to protect its collective reputation, and to maintain public confidence in the profession as a whole.

Sir Thomas Bingham M.R. had this to say in the English Court of Appeal case of Bolton v. Law Society reported at 1994 2 All E.R. p 486 and at p. 492 paragrapb C when dealing with the issue of an appropriate sentence against a Solicitor who had been found guilty of professional misconduct. "In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes, one is to be sure that the offender does not have the opportunity to repeat the offence. The second purpose is the most fundamental of all, to maintain the reputation of the Solicitor's profession as one in which every member of whatever standing may be trusted to the ends of the earth."

Having found the attorney Barrington Earl Frankson guilty of professional misconduct of the gravest kind, conduct by which he misused and misapplied the funds of the complainant, conduct which strikes at the very heart of public confidence in the integrity of the profession, we are of the unanimous opinion that the name of Barrington Earl Frankson be struck from the roll of attorneys-at-law entitled to practice in the several Courts of the Island of Jamaica and we so order.

Further, pursuant to section 12(4)© of the Legal Profession Act, this Committee also orders that the attorney Barrington Earl Frankson make restitution to Monica Whitter of the full sum of monies received representing the purchase price of her half share interest in the property known as "Cromarty" less vendor's cost of sale and transfer.

After such deduction, the attorney is to pay interest on the balance at the rate of interest paid by the National Commercial Bank Harbour Street on savings accounts from the 31st day of October 1996 until payment.

These orders are made under section 12 (4) of the Legal Profession Act.

Costs to be Complainant the agreed or taxed

Dated the 1st day of May 1999.

PAMELA E. BENKA-COKER Q.C.

MARGARETTE MAY MACAULAY

ANDREW RATTRAY