

**DECISION OF THE DISCIPLINARY COMMITTEE  
OF THE GENERAL LEGAL COUNCIL**

COMPLAINT NO. 79/96

BETWEEN	OWEN FERRON	COMPLAINANT
A N D	GRESFORD JONES	RESPONDENT

The Complainant was represented by Mr. Joseph Jarrett, attorney-at-law. The Respondent was represented by the Honourable David Coore, Q.C., and Miss Nancy Anderson.

This matter had many trial dates, 24<sup>th</sup> October, 1999, 29<sup>th</sup> October 1999, 19<sup>th</sup> February 2000, 28<sup>th</sup> April 2000, 24<sup>th</sup> June 2000, 1<sup>st</sup> July 2000, 15<sup>th</sup> July 2000, 25<sup>th</sup> September 2000, 26<sup>th</sup> September 2000 and 17<sup>th</sup> October 2000. At the end of the hearing on the 17<sup>th</sup> October 2000, the parties were permitted thirty (30) days to deal with certain apparent inconsistencies with regard to the Agreement for Sale of the property in Barbados and a further Affidavit was filed by the Respondent in relation thereto on the 16<sup>th</sup> day of November 2000.

It will be noted that the hearing dates of the matter meandered over a period of one (1) year, which was due in the main, to difficulties experienced in trying to arrange dates convenient to both counsel representing the parties, and to the continuing submission of Affidavits and documents on both sides as will be seen hereafter.

We also apologise for the late delivery of the judgment but must state that the ad hoc and unwieldy manner in which the documents on which each party wished to rely were submitted to the Panel, did not help when the committee finally adjourned *cur adv vult*, and endeavoured to deliberate on the matter. There were also a plethora of lengthy authorities submitted, several of which were entirely irrelevant and which only served to consume unnecessary time and effort, as the committee felt that all matters submitted to it should at least receive our consideration.

In this matter, the parties agreed that they would proceed by way of Affidavit evidence and would rely on sundry documents, some of which were submitted by agreement. In the course of the hearing an Affidavit was filed on behalf of the Complainant by Dennis Fuller and the Respondent requested that he make himself available for cross-examination and this was done on the 28<sup>th</sup> April, 2000. Detailed written submissions were made and we hereby express our thanks to counsel on both sides for their industry in this regard.

### THE PROCEEDINGS

This complaint commenced by way of the Form of Application being filed by Owen Anthony Ferron on the 22<sup>nd</sup> day of May 1996 when Mr. Ferron complained that Mr. Gresford Jones, Attorney-at-Law of 5 Duke Street, Kingston, Jamaica should be required to answer allegations set out in the Affidavit in support of the application in that the matters deponed to therein constituted conduct unbecoming his profession in his capacity of an Attorney-at-Law.

The Affidavit in support of the complaint was sworn to on the 28<sup>th</sup> day of July 1999. It was filed with accompanying correspondence between the attorneys representing the Complainant and the offices of the General Legal Council and the responses from the Respondent. The allegations are set out in the Affidavit of the Complainant and are as follows:-

The Complainant alleged that he engaged the services of Mr. Gresford Jones, Attorney-at-Law in April 1988 to conduct probate and stamping of his late father's estate.

He further deponed that he subsequently engaged Mr. Jones' services to assist in the sale of a property in Barbados. He stated that he paid certain sums to Mr. Jones, to wit, J\$600.00 by August 1988, paid £500 on the 25<sup>th</sup> June 1989, paid £450 on the 1<sup>st</sup> March 1990 and paid £350 on the 1<sup>st</sup> May 1990. Mr. Ferron further complained that by way of several items of correspondence to the Respondent he had made inquiries in respect of obtaining his money due from the estate. No proper or accurate response was received. The Complainant further stated that during the probate of the estate, "it turned out" that there was a property in Barbados. The property was sold in January 1994 for Barbadian

\$50,000.00 and the client has seen none of the money despite repeated requests.

In the above circumstances the complaints made against the Respondent were as follows:

- (i) that he charged fees that were not reasonable
- (ii) he had not provided all information on the progress of his business with due expedition although the Complainant had reasonably required him to do so.
- (iii) he had not dealt with this business with all due expedition
- (iv) he had not accounted to the complainant for all moneys in his hands for his account or credit, although the Complainant had reasonably required him to do so.

The above complaints ground the charges which fall under Canon IV(f), (r) and VII(b)(ii) of the Legal Profession (Canons of Professional Ethics)(Rules) as set out hereunder. It is not in issue that these charges fall to be considered under the canons set out above.

The documents filed on behalf of the Complainant were as follows:

1. Complaint dated May 22, 1996 and First Affidavit of Owen Ferron sworn to on the 28<sup>th</sup> day of July, 1996;
2. Affidavit of Owen Ferron sworn to on the 18<sup>th</sup> day of June 1998 with 78 pages of exhibits;
3. Affidavit of Owen Ferron sworn to on the 13<sup>th</sup> day of April, 1999 with 314 pages of exhibits;
4. Affidavit of Owen Ferron sworn to on the 19<sup>th</sup> day of April 1999;
5. Affidavit of E. Drayton sworn to on the 13<sup>th</sup> day of April 1999 with 15 pages of exhibits;
6. Affidavit of Dennis Fuller sworn to on the 14<sup>th</sup> day of April 1999 with 4 letters attached;
7. Second of Affidavit of Dennis Fuller sworn to on the 28<sup>th</sup> day of September 1998
8. Fourth Affidavit of Owen Ferron

9. First Affidavit of Cordella C. King
10. First Affidavit of Eloise B. Ferron
11. First Affidavit of Jeremiah Davis
12. First Affidavit of J. Mohammed
13. Written Submissions
14. Supplemental Submissions
15. Response to Respondent's Submissions

The documents filed on behalf of the Respondent were as follows:

1. List of Documents dated the 18<sup>th</sup> day of June 1998
2. Letter from Messrs. Joseph Jarrett & Co., to Mr. Gresford Jones d/d the 16<sup>th</sup> day of September 1998
3. Letter from Messrs. Joseph Jarrett & Co., to Mr. Gresford Jones d/d the 28<sup>th</sup> day of September 1998
4. Affidavit of Gresford Jones sworn to on the 28<sup>th</sup> day of October 1998
5. Affidavit of Gresford Jones sworn to on the 12<sup>th</sup> day of April 1999
6. List of Documents from Mr. Gresford Jones d/d the 12<sup>th</sup> day of April 1999
7. Letter from Mr. Gresford Jones d/d the 23<sup>rd</sup> day of August 1999 with documents attached
8. Affidavit of Gresford Jones sworn to on the 14<sup>th</sup> day of October 1999
9. Affidavit of Gresford Jones sworn to on the 15<sup>th</sup> day of October 1999
10. Affidavit of Gresford Jones sworn to on the 22<sup>nd</sup> day of October 1999
11. Affidavit of Gresford Jones sworn to on the 31<sup>st</sup> day of March 2000
12. Affidavit of Gresford Jones sworn to on the 13<sup>th</sup> day of July 2000
13. Affidavit of Cherry Brady-Clarke sworn to on the 13<sup>th</sup> day of July 2000
14. Affidavit of Gresford Jones sworn to on the 16<sup>th</sup> day of September 2000
15. Respondent's Submissions d/d the 24<sup>th</sup> day of September 2000
16. Affidavit of Gresford Jones sworn to on the 26<sup>th</sup> day of September 2000
17. Summary of Respondent's Submissions

18. Reply to Complainants Submissions

19. Affidavit of Gresford Jones sworn to on the 16<sup>th</sup> day of November 2000

An Agreed Bundle of Documents was also filed.

On the 1<sup>st</sup> day of July 2000 the Complainant made an application to amend the complaint which was granted.

The following additional ground of complaint was permitted which fell under Canon I(b) of the Legal Profession (Canons of Professional Ethics)(Rules).

The complaint was

- (vi) That his general conduct in dealing with the beneficiaries and the Applicant has been unbecoming of an attorney-at-law contrary to Canon I(b) of the Legal Profession Rules.

The Complainant's claim

- (v) That he has not complied with the provisions of Legal Profession (Accounts and Records) Regulations 1999 merely by his failure to account for interest on money he has held since January 1994, safe guarding the money in a trust account, etc

was not allowed as those regulations were promulgated subsequent to the commencement of the relationship between the Complainant and the Respondent, and the filing of the subject complaint. However that does not preclude a liability for interest on the funds held.

The Respondent made two (2) preliminary objections which the Committee will deal with first. They are as follows:

- (1) With regard to complaint 1 (fees being charged not fair and/or reasonable) the objection was that this complaint did not fall within the jurisdiction of a disciplinary tribunal established under the Legal Profession Act.
- (2) With regard to complaints 2, 3 & 4 (not providing information expeditiously although requested, not acting with due expedition, and failing to account for moneys to the account and/or credit of the complainant although requested to do so) that these Canons relate to professional conduct which is based on a contractual relationship

existing between the parties, that is, attorney and client . The Respondent stated that the duties which the Complainant claimed were owed to him, were owed to the executor, who was the attorney's client and not the Complainant, and the executor was not a party to the complaint.

It was the Respondent's contention that if his submissions were correct in respect of either of the above, then the complaint should be dismissed.

#### THE ISSUE OF JURISDICTION

This submission is based on a particular interpretation given s.12(1) & (2) of the Legal Profession Act.

It was submitted that the complaint was made by 'a person alleging himself aggrieved by an act of professional misconduct'. It was further submitted that the section (s.12) also envisaged applications by the Registrar and any member of Council and in those circumstances, the application was in respect of

- (a) misconduct in any professional capacity (including conduct which, in pursuance of rules made by the Council under this Part, was to be treated as misconduct in a professional respect); and
- (b) any such criminal offence as may for the purpose of this provision be prescribed in rules made by the Council under this Part.

It was submitted that the matters at (a) & (b) applied to the Registrar and a member of Council solely and that the jurisdiction in relation thereto was wider than that applicable to a "person alleging himself aggrieved."

The further submissions on behalf of the Respondent were that the complaint in respect of the fees charged by the attorney as being unfair and unreasonable falls under Canon IV(f) and that Canon VIII(d) sets out the particular canons, the breach of the provisions of which shall constitute misconduct in a professional respect and which breach would be subject to the orders contained in s.12(4) of the Principal Act. The provisions listed did not include Canon IV(f).

The Respondent therefore concluded that the provisions in Canon IV, not included in Canon VIII(d) do not come within the jurisdiction established under s.12 of the Act in respect of complaints by aggrieved persons.

The Respondent further contended that s.12(7) of the principal Act gives support to his interpretation of s.12 of the Act as stated, as it empowers the Council "to prescribe standards of professional etiquette and professional conduct for attorneys and may by rules made for this purpose direct that any specified breach of the rules shall for the purpose of this Part constitute misconduct in a professional respect."

The Respondent also relied on s.21 of the Act, Part V which deals with the recovery of fees.

Section 21 of the Act provides that an attorney may agree the amount and manner of payment of his fees with his client for the work to be executed by him. He shall not in relation to those matters charge more than has been agreed, but in any suit for recovery of the fees the Court can reduce any amount payable under such an agreement if the Court considers the same to be unfair and unreasonable. Those fees agreed are not subject to taxation.

Counsel submitted that any matter relating to fees should fall within this part of the Act and be dealt with under this section (s.21) in particular as the issue of fees ought not to ground a disciplinary action and/or complaint.

Counsel for the Respondent made reference to the fact that counsel for the Complainant in his submissions stated that although a breach of Canon IV(f) was professional misconduct he conceded that it could not however attract the orders set out in section 12(4) of the Act.

The Committee concludes as follows:

S.12 cannot be given the restrictive interpretation accorded it by the Respondent.

We agree with the Master of Rolls Lord Esher, when he stated

In my opinion, the rule has always been this, if the words of the Act admit of two interpretations then they are not clear and if one interpretation leads to an absurdity and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity and will adopt the other interpretation @ v City of London Court [1982] 1 QB, 273 @ 290)

It could not be nor have been the intent of the legislature that when "a person allegedly aggrieved" made application to the Disciplinary Committee, that application could only relate to an act of professional misconduct, which bore no relationship to "misconduct in a professional respect" as set out in s.12(a) of the Act. It could also not be nor have been the intent of the legislature that only breaches of any of those provisions set out in Canon VIII(d) can be considered misconduct in a professional respect. It appears that the draughtsmen wished to make it clear that breaches in relation to certain provisions of certain canons 'shall constitute' 'misconduct in a professional respect' but the other provisions of the canons not so stated, may, in certain circumstances amount to professional misconduct or misconduct in a professional respect, and subject to the orders of s.12(4). There are several provisions which are not stated in Canon VIII(d) of the Act. They are important provisions, the breaches of which should be subject to a hearing of the Disciplinary Committee and to any of the orders set out in s.12(4). A purposive interpretation of s. 12 of the Act would suggest that those provisions in the Canons having been promulgated pursuant to s.12(7) fall under the rubric "misconduct in a professional respect" stated in s.12(1)(a) (not included in the parenthesis) and therefore although not given the strict liability specification as set out in Canon VIII(d) can be found to be so at the end of a hearing.

S.21 of the Act deals with the recovery by Attorneys for fees pursuant to an agreement entered into between the attorney and the client. That section, with respect is not relevant to this aspect of the matter.



The Committee concludes therefore that it has jurisdiction to deal with an allegation relating to breach of the provision of Canon IV(f) and we will do so accordingly.

The first preliminary point therefore fails.

THE ISSUE OF WHETHER THE ATTORNEY/CLIENT RELATIONSHIP EXISTS BETWEEN THE COMPLAINANT AND THE RESPONDENT

The Respondent contended that the Complainant was not the client of the Respondent. Counsel submitted on his behalf that Canon IV(r) and VII(b)(ii) required a relationship of attorney and client to exist and failing the establishment of that fact, the complaint should be dismissed.

The Respondent contended that the relationship of attorney and client must be established by contract. It was based on an agreement, which could be in writing or oral.

The Respondent then set out certain facts on which he relied to show that the 'client' in the transaction was the executor solely. The Complainant's response was that the Complainant had *locus standi* to bring the complaint as a "person alleging himself aggrieved" and he relied on *McCalla v Disciplinary Committee and the General Legal Council [1993] 43 WIR, 213*, in this regard, referring to the Honourable Mr. Justice Rattray's statement on the wide application to be given to that definition. The House of Lords case of *White v Jones [1995] 1 All ER, 691* would also have given the Complainant assistance in this respect as the attorney in acting for the executor, and recognizing the fact that the Complainant had undertaken to pay his fees would have "assumed the responsibility" of the risk of effecting the work properly, and owed him a duty of care in that regard, in which case the Complainant would have jurisdiction under s.12 depending on the matters raised in the complaint.

That however was not the real issue, as the matters complained of are enunciated in certain canons, and specifically refer to the duty existing based on the relationship of attorney and client, which must therefore be proved. In this instance, the record is replete with statements made by the Respondent which confirm that that was how he viewed the

Complainant. It may be because the Instrument of Retainer, recognised him as a beneficiary and as one of the persons to whom the Respondent should look to for his fees. But over and above that there is no indication whatsoever that the Respondent obtained any instructions and/or directions in respect of the conduct of administering his estate from anyone other than the Complainant and/or his sisters. The executor signed the necessary documents, when called on to do so. That was clear. But two (2) important matters call for comment. The first is that the Respondent although he has claimed before this Committee that the Complainant is not his client, has refrained from doing any work on this estate from as far back as 1995 when he received instructions from the Complainant to desist from prosecuting the matter of administration of the estate of Peter A. Ferron. He has not indicated to the Committee that subsequent to that event he endeavoured to obtain contrasting or confirmatory instructions from the executor his client.

The second point, is that the executor appears to have died whilst the matter was before the Committee. That information did not seem to be known by the Respondent, who seems to have abandoned all efforts to communicate, or to stay in consultation with and to obtain instructions from the executor, in relation to the conduct of the administration of the estate.

As counsel for the Complainant stated, the Respondent cannot claim that the Complainant is his client when it suits him and then deny that he is, when it does not.

Indeed the case of *Adams v London Improved Motor Coach Builders Ltd [1921] 1 KBD, 495* is instructive. In that case the Plaintiff was a member of a Trade Union and one of the benefits of being a member of the Union was legal aid for members in connection with their employment. The Plaintiff had a claim against his employer for wrongful dismissal. The Union instructed solicitors on his behalf. The fees in respect of the solicitors were paid from a fund made available for that purpose. The Plaintiff had no written retainer with the solicitors, but there was no agreement with the solicitors that the Plaintiff was not liable to them for their costs. The Court held that in these circumstances, the Plaintiff was entitled

to judgment with costs. The solicitors although engaged by the Union were acting on the Plaintiff's behalf and the solicitors thereby became his solicitors, and he was liable to them for payment of their costs, there being no agreement that they were not, and the liability was not excluded upon the assumption that the Union also undertook to pay the solicitors costs. LJ Banks found on these facts, that the Union in engaging the solicitors to act for the Plaintiff, were acting as agents of the Plaintiff. The solicitors were not engaged to act for the Union, but to issue suit for and on behalf of the Plaintiff, which they did and the Writ was so endorsed. The terms of their engagement included an undertaking for the Union to pay the solicitors but did not exclude an obligation on the part of the Plaintiff to pay these fees, the solicitors being engaged to represent the Plaintiff.

Although the facts are not the same as in the instant case, the principles are applicable. The Respondent, when retained, and accepting that the Complainant would pay his fees in our view undertook the responsibility for administering the estate on behalf of the executor and the beneficiaries. It is not in dispute that he agreed to look to the beneficiaries for his fees. The parties conducted themselves in a manner which confirmed that he looked to them for his instructions also. The beneficiaries were in fact his clients and all the parties acted accordingly.

The definition of client in the Webster's Unabridged Dictionary is

"A person or company in its relationship to a lawyer, accountant, etc, engaged to act on its behalf." - or loosely, a customer.

The definition of client in the Legal Profession (Accounts and Records) Regulations, 1999 is stated as follows:

"Clients include any person from whom or on whose behalf an attorney in connection with his practice receives money or other property."

which although promulgated in March 1999 subsequent to the commencement of these proceedings can give guidance especially when it is consistent with the literal dictionary definition.

It is our considered opinion, that all the facts suggest that the position was that the Complainant, through what can be described as a joint retainer, and the clear understanding of all the parties as disclosed by their conduct and the written documentation, and their actions, was the client of the Respondent and can therefore lay the complaint pursuant to Canon IV(r) and VII(b)(ii) and we so rule accordingly.

With regard to a further preliminary issue under Canon VII(b)(ii) with regard to the question of to whom must the "funds be paid" or does the Respondent have a duty to account to the client with regard to funds which the Respondent has to the credit of the Complainant, we make the following observations.

Let us first say categorically, that the Committee is of the opinion that the net realisable funds of the estate are payable to the executor, only or to his personal representative in the event of his death.

We accept the *ratio decidendi* in the following leading House of Lords & Privy Council cases and shall address each one individually.

(i) *Lord Sudeley & Others v The Attorney General [1897] A.C., 11*

In this House of Lords case, the testator who died domiciled in England, by his will gave the residue of his real and personal estate to his executors, in trust for his wife, for life and by a codicil gave one-fourth of his "said residuary real and personal estate" to his wife absolutely. The husband's estate included mortgages in New Zealand. The wife died before the husband's estate had been fully administered. The clear residue had not been ascertained. It was held "that the right of the wife's executors was, not to one-fourth or any part of the mortgages in specie but to require her husband's executors to administer his real and personal estate and to receive from them one-fourth part of the clear residue, that this was an English asset of the wife's estate and that probate duty was therefore payable under her will upon one-fourth part of the value of the New Zealand mortgage."

Lord Halsbury made it clear at pages 15 & 16

"The thing that the legatee was entitled to was one-fourth share of the residuary estate, consisting, it may be of many things... It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things - it may consist of only a sum of money - and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to go and say "I will have this or that part of the estate."...

"Now, if the only thing that the legatee is entitled to is the fourth share of an ascertained residuary estate, I say that to my mind it is impossible to maintain that the character of any part of that estate can be ascertained so as to make it possess a specific locality until that has happened; it is a condition precedent to know what the residuary estate is, and until that has been ascertained you cannot tell of what it will consist. The right of the person to bring an action or to insist upon the performance of the trust may be one thing; but I want to know what the thing is and until I ascertain that, and until the thing comes into existence, it appears to me the question does not arise."

Lord Herschell confirmed these pronouncements at pages 18 & 19 of the judgment

"I agree with my noble and learned friend on the woolsack that the whole fallacy of the argument on behalf of the appellants rests on the assumption that Mrs. Tollemache, or they as her executors, were entitled to any part of these New Zealand mortgages as an asset - she in her own right, or they as executors of their testatrix. I do not think they have any estate, right, or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate. What she had a right to - what they as executors had a right to - was one-fourth of the clear residue of Mr. Tollemache's estate - that is to say, what remains of his estate after satisfying debts and legacies; and a bequest to them of one-fourth part of his residuary estate does not seem to me to vest in them or in her a fourth part of each asset of which that estate consists, as contended for on the part of the appellants. It seems to me, as my noble and learned friend has pointed out, that until the estate is fully administered it is impossible to say of what assets the residuary estate will consist; we do not know how much the amount of the debt remaining unpaid was in the present case, and there was only one legacy unpaid. But the argument would be precisely the same if there has been a large amount of debt and many legacies still unpaid, that could not have made any difference in point of legal effect. Well, in that case how would it be possible to say that any one of the residuary legatees could point to any part of the assets of the testator and say, "This is a part of my estate," when it depends entirely on the method of administration by the trustees in what form the residue becoming divisible will exist when the administration is at an end?'...

In truth, the right she had was to require the executors of her husband to administer his estate completely, and she had an interest to the extent of one-fourth in what should prove to be the residuary estate of the testator, Algernon Tollemache."

And in the closing speech, Lord Davey reiterated their statements at page 21

"My Lords, I am of opinion, on the facts of this case, that Mrs. Tollemache at the time of her death had no right of property in or right to claim any part of the mortgages in specie and that the appellants, her executors, acquired only a right to have the estate duly administered and to enforce that right by an action for the purpose, but had no right *virtute officii* to have any part of the New Zealand mortgages appropriated to the estate of their testatrix in specie."

(ii) *Dr. Barnardo's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Act [1921] A.C., 1*

In this case the issue before the House of Lords was whether certain income tax deducted at source from funds in the hand of the executors of the estate, would be repaid to the charitable institution the ultimate beneficiary as sums belonging to them were not subject to the payment of tax. It was held that until the date when the residue was ascertained the institution has no property in any specific investment forming part of the estate or in the income therefrom, thus the payment by way of income tax deduction was not made on behalf of the institution and therefore the institution was not entitled to repayment of the sum.

The principles enunciated in *Lord Sudeley's case* were reiterated and applied. Viscount Finlay stated on page 8 that,

"It was pointed out in that case (*Lord Sudeley's case*) that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate property administered and applied for his benefit when the administration is complete. The income from which this income tax was deducted was not the income of the charity. It was then income of the executors."

Viscount Cave confirmed on page 10

"When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration."

Lord Atkinson in also endorsing the decision of *Lord Sudeley's case* at page 11, stated that

"That case conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses, etc., have been satisfied the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained."

In the Privy Council case from Australia,

(iii) *Commissioner of Stamp Duties (Queensland) v Hugh Duncan Livingston [1965] A.C., 604,*

The issue was whether the estate of a widow who had been bequeathed one-third of the testator's estates absolutely, but who had died before the testator's estate had been fully administered was liable to pay succession duty and administration duty in respect of her share of the assets of the testator on the ground that her death conferred a succession on those becoming entitled to her estate, it was held

"1. That could only be payable if she died owning a beneficial interest in those estates.

2. That in the case of an unadministered estate the assets as a whole were in the hands of the executor, his property and until administration is complete, it could not be said of what the residue would consist or what its value would be. At the date of the widow's death there was no fund or any particular item of property in which one could claim a beneficial interest on her behalf.

"The interest of a next of kin in the estate of a testator is an undefined and intangible interest, that is a right merely to have the estate converted to money and to receive a payment in money after the debts and expenses are discharged."

In a general way it may be said that a residuary legatee has an interest in the totality of the assets, but has no beneficial/equitable interest in any particular one of those assets."

It is a chose in action capable of being invoked for any purpose connected with the proper administration of the estate.

Applying these principles, as a preliminary point in the instant matter, Mr. Ferron and the other beneficiaries are next of kin in the estate of Peter A. Ferron, deceased, and as such would not be beneficially entitled to any particular part of the estate, but would have an interest in the totality of the residue of the estate once ascertained.

This is relevant, because there is much correspondence throughout this matter wherein the Complainant and his sisters were requesting payment of the proceeds of the sale of the property in Barbados. No funds would be payable to the Complainant and his sisters as beneficiaries until the residue had been ascertained, although it is the understanding of the Committee that funds were advanced from the proceeds of the sale of the Barbados property in order to obtain probate so that transfer of the property in Barbados could be lawfully effected to the purchasers. The only remaining issue therefore was the payment of estate duty on death in relation to the Golden Spring property which became the subject

of much debate as to its correct value at the date of death of the testator.

In fact a cheque had been sent to the Stamp Commissioner but a further assessment had been made by the Commissioner indicating an increased value which may have accelerated the fall out between the parties as the numbers kept moving and caused suspicion, particularly when the attorney's fees were an unknown quantity and kept increasing also. The situation was further exacerbated when the Respondent acted as though the net proceeds of the estate could be paid over to the beneficiaries and the executor at a time when the residue of the estate had not yet been ascertained and this was done without any caveat, although this plan was later withdrawn.

The fact however, that there is no entitlement to the residue until it is ascertained does not in any way affect the Complainants entitlement to an accounting of funds held to his credit, as a client and beneficiary, of the estate.

And we so rule accordingly.

With regard to Canon IV(r)

We wish to state that the attorney owes a duty to inform the client of the progress of the transaction which he is handling on the client's behalf, for if he fails in this duty the client would suffer loss, and in such circumstances it is unlikely that any defence to an action for negligence would succeed. A client needs to know the status of his matter so that he can decide whether he shall give further instructions modify or vary instructions already given or depending on the information received take an entirely different course of action.

With regard to Canon I(b)

This canon requires the attorney at all times to maintain the honour and dignity of the profession and to abstain from behaviour which may tend to discredit the profession of which he is a member. It is one of the canons that is listed in Canon VIII(d), the breach of



which shall constitute misconduct in a professional respect. It has a wide application. It relates to the conduct befitting the attorney in relation to the Court, the regulatory body governing the profession, the law practice, the client, colleagues and certain other persons.

In relation to this matter, the issues would relate to the conduct of the Respondent acting for and on behalf of the executor and the beneficiaries in a matter that commenced in 1988 and is still to be completed in circumstances where funds have been received in the course of the administration of the estate and which still remain in the custody of the Respondent, although the Respondent has ceased to act since 1995.

## ANALYSIS OF FACTS

### COMPLAINT #1:

#### Fees charged not fair and reasonable - Canon IV(f)

The Complainants contention is set out below:

- (i) The fee of 10% being charged by the Respondent is not fair since:
  - (a) It was never agreed between the Respondent and the Complainant although the Complainant had undertaken in writing to be responsible for the payment of fees;
  - (b) the said fee was based on an agreement which varied the original agreement of payment and to which the Complainant was not a party;
- (ii) The fee was not reasonable since the fee was based on a gross value of the real estate of \$3,000,000.00 although:
  - (a) this value was in respect of an unauthorized appraisal secured by the Respondent in 1988;
  - (b) an original valuation done in 1988 the year when the Complainant's father died had valued the property for \$334,000.00.
  - (c) the Respondent had submitted an inventory to support the Probate application showing the value to be \$200,000.00;
  - (d) the Respondent had used a value of \$334,000.00 to fix the executor's

commission;

- (e) the Stamp Commissioner had used a value of \$550,000.00 in 1995;
  - (f) the gross value which was advised by the Respondent to the Complainant in letter dated October 23, 1995 was - Jamaican property \$334,000.00 and Barbados property \$718,000.00.
- (iii) The Respondent is bound by a fee of Jamaican \$7,500.00 for the Probate in accordance with letter dated 24th August, 1988 from the Respondent to the Complainant quoting that figure and stating that such fees for Probate were based on the Jamaican Bar Association Scale.
  - (iv) That work apart from the application for Probate should be subject to the Jamaican Bar Association Scale of not more than 3% of the gross value of the estate.
  - (v) That the gross value of the real property in the estate which should be used should be that given by the Respondent by letter dated 23rd October, 1995.

The Respondent's contention is set out below:

The fees should be 10% of the value of the estate in accordance with an agreement dated March 1995 duly executed by the Executor (by his mark) specifying this fee.

THE FACTS

- (1) A retainer agreement exists dated 18th April 1988 which states at paragraph 2 "it must be fully understood that all Attorneys fees and other expenses in connection with the estate are to be paid by Cordella King and Owen Ferron both of whom are in Jamaica on a short visit and Eloise Ferron, who is still in England, three of the beneficiaries herein and Mr. Owen Ferron has countersigned these instructions not only on his behalf but as the lawful and duly authorized agent of his two sisters."
- (2) An Agreement exists signed by the executor authorizing the payment of a fee of 10% to the Respondent.
- (3) A letter is to hand dated 24th August, 1988 from the Respondent to the Complainant setting out the disbursements and fees on Probate and stating -" I may

mention that the Attorneys fees for the application for Probate of the said Will based on the Jamaica Bar Association Scale of fees limited to the Probate of the Will solely is \$7,500.00 however this does not include the fees for obtaining the re-sealing of the Grant of Probate in Barbados, correspondence preparing notices to creditors and Revenue Affidavit. Furthermore, if the Probate is granted I will have to prepare the transmission application for the signatures of the executors so that their names can be endorsed on the Certificate of Title in that capacity and thereafter, the preparation of the appropriate transfer of the real estate to give effect to the wishes of your late father as set out in his Will."

It must also be noted that mention was made in that letter of the fact that the Attorney will have to attend on the Stamp Commissioner and that transmission and transfer will have to be effected as well as the possible re-sealing of the Grant of Probate in order to complete this transaction. No specific amounts are given in the letter by the Respondent in respect of the assignments in relation to either disbursements or Attorneys fees.

Two distinct issues therefore arise.

- (a) the clarification concerning what fees are in fact due and applicable and thereafter the correct procedure of computing those fees;
- (b) whether if a percentage is to be used it is to be that intimated in the letter of 24th August 1988 or the subsequent agreement with the executor.

With regard to (a) above a review of the Jamaican Bar Association's publication which advised recommended charges for the administration of Estates in the Supreme Court at that time sets out what it considers to be the normal work which would be required in a matter concerning administration of estates. (Note 3) Further this publication makes it quite clear that the percentage fee quoted is in respect of the application for the administration and final winding up of an estate which does not include "any work for which a charge is provided in the Scale of Charges for conveyancing work of the Jamaican Bar

Association, for example, on transmission of lands... nor assent to devise nor transfer to beneficiaries (which may be charged for under the said scale of charges as transfers or conveyances for consideration equal to the value of the land) nor cash disbursements." It also states that where more work is involved than indicated - "the charge may be increased to such greater percentage as shall be appropriate according to the circumstances. (Note 5).

The section in respect of Transmission directs that the fees in respect of land shall be "assessed on the value of lands as on a transfer of registered land" and the fee stipulated under the heading of transfer quotes the fee as being as a percentage of the value of the land.

The scale is therefore quite clear as to how the fees are to be computed and it is also quite clear as to what work attracts which fee. So, the fee for the administration of estates includes the application for grant of Probate, but does not include the registration on transmission and transfer and the sale of an asset of the estate. The suggestion is that these are three distinct transactions attracting three distinct fees.

In respect of the Probate the Respondent states in his letter that the relevant percentage in 1988 was 3% and he advises that percentage. Further, the facts indicate that the work done falls within the scope of note 3 in respect of the applicability of the prevailing percentage charge.

Cognizance should be taken however of note (5) of the Schedule in relation to the administration of estates and the fact that:

- (i) The Respondent had to re-do the documents to ground the application for the Grant of Probate owing to the death of one of the executors;
- (ii) The Respondent had to go beyond the call of duty in respect of contacting the executor when he was required;
- (iii) Communication in this matter would have required even more written communication considering that the Complainant resided outside of Jamaica, and this therefore should also be taken into account.

With regard to (b) above no evidence was given in respect of the fact that the Complainant who was a party to the initial agreement in respect of the payment of fees was either made aware of the Respondent's intention to vary the agreement or of the fact of the actual variation, despite the copious correspondence between the Respondent and the Complainant, and it is therefore the Panel's decision that the subsequent arrangement cannot stand. Since the Respondent had accepted that he would look to the Complainant for the payment of fees and since he had indicated that he would have been bound by the Jamaican Bar Association's Scale and since there had been no objection to this by the Complainant, we direct that the guidelines as set out by the Schedule at that particular time be adhered to, and accordingly we find that the fees which ought to have been charged are as set out hereunder.

Probate fee at 3% of \$334,000.00	\$10,020.00
Fees for transmission 1.25% of \$334,000.00	\$ 4,175.00
Fees for Assent to devise 1.25% of \$334,000.00	\$ 4,175.00
Fees for Barbados transaction 2.5% of \$718,500.00	<u>\$17,962.50</u>
TOTAL FEES	\$36,332.50

**COMPLAINT #2:**

Non-provision of information, reasonably required, as to the progress of the business, with due expedition - Canon IV(r)

- (1) The facts show that during the life of this matter the Respondent was not delinquent in communicating in writing with the Complainant. Indeed, there seems to be well over twenty odd letters from the Respondent to the Complainant to substantiate this fact. In contrast, there is less than a dozen letters from the Complainant to the Respondent. However, the Complainant's letters though few, seem to have a common thread and that is their fervent desire to have a proper understanding of the fees and disbursements and their computation, and while the Respondent's letters are detailed in respect of what the process in its entirety would have required

in relation to work, there is a deficiency in relation to advising a clear demarcation between the actual procedures, the fact that they could be considered components of the whole but distinct components nevertheless, and the fact that they would have attracted their own disbursements and fees even if the fees were collectively bound together and charged as one. We do not get the impression therefore that the Complainant recognized that there was a first step, that is the application for the grant of Probate, a second step, the notation on transmission in respect of the Realty asset and the transfer or assent to devise and thirdly, in the event of any sale of the property, the sale itself. Indeed correspondence shows that sums were requested ostensibly for one thing which when obtained were used for something else, though not necessarily to the detriment of the estate, for example, a sum which was sent pursuant to a request for the payment of fees and stamp duty seems to have been used to obtain a valuation of the property in Barbados. This could have proven confusing.

- (2) The facts indicate non-provision of information in relation to the agreement signed by the executor in relation to the varying of the payment of fees although the Complainant had been a party to an initial document specifying that fees were to have been his responsibility. His advice was not sought at the time of the variation nor was he advised once the new agreement had been made. Furthermore at the time that this agreement was signed, the Executor was ailing, had to have assistance to move from his home to the Respondent's offices, and could no longer see, as he signed by making his mark. In the circumstances it was entirely inappropriate for the Respondent to seek to vary the original instructions in this way.
- (3) The facts indicate non-provision of information in respect of the fact that the valuation which the Complainant had personally obtained in respect of the Golden Spring property was not used for the application to the Stamp Commissioner which would have been contrary to the purpose of having obtained this valuation.

### COMPLAINT #3

#### Failure to deal with business with any due expedition - Canon IV(r)

The Complainants contention is set out below:

- (a) Failure of the Respondent to pay stamp duty in October 1995 although he had funds since October 1993, resulted in an unreasonable delay which led to unnecessary interest being imposed by the Stamp Commissioner;
- (b) The Respondent had received sufficient funds to expedite the Probate prior to the sale of the Barbados property;
- (c) Even when the Respondent had funds from the sale of the property in Barbados he failed to act expeditiously;
- (d) The Respondent used a value in the Inventory for the Jamaican property of \$200,000.00 rather than the valuation figure of \$334,000.00. This raised the Stamp Commissioner's suspicion and resulted in delay, since the Stamp Commissioner felt obliged to acquire a new valuation, which ultimately was much higher.

The Respondent's contention is set out below:

Any delay was caused by:

- Pre 1994 (i) the failure of the Complainant to provide the necessary funding
- After January 1994 (ii) the tardiness of the Supreme Court's Registry
- After November 1995 (iii) owing to the Complainant's adamant stance that the Respondent should have nothing further to do with the matter and he having acted in accordance with the Complainant's express wish.

The facts as outlined chronologically are as follows:

**April 1988** - Respondent retained.

**By June 1988** - The estate documents were (twice) prepared and investigations were being made in Barbados in relation to the sale of the Barbados property. The Complainant was advised of the Stamp duty and fees by the Respondent.

1989 - Appraisal and negotiation of Barbados property. The Respondent communicated with the Attorney in England in relation to the Barbados property

1988 - October 1993 - 5 years. Despite many letters the Respondent was still demanding money which remains to be paid in full. The Complainant remitted some funds intermittently but seemed confused as to how the money was being spent.

October 1993 - Loan from payments on account of sale in Barbados sent to the Respondent.

By January 1994 - Purchase Price paid in full to the Respondent.

June 1995: Barbados transaction completed.

September 1995 - Probate obtained. Transfer and Transmission documents prepared and sent for signing.

October 1995 : Complainant then requested payment of part of the Purchase Price.

October 1995: An initial letter was sent promising to send funds. The funds were not sent - Respondent sent statement and letter stating not enough money in hand. Complainant challenged and pointed out error in statement - suspended the retainer.

The facts enunciated above indicated that the Respondent was retained in April 1988 and by June 1988 the Probate documents were prepared and investigations had begun in respect of work to be done in Barbados. Thereafter, there was a lapse between that time and the actual application but we note that circumstances did not permit the submission of the application at that time. We further note that once the circumstances changed by virtue of the receipt of the initial proceeds from the Barbados property, work then proceeded so that the proceeds having been received in January 1994 despite several administrative delays, the Probate was obtained by September 1995. The facts indicate also that the work done in respect of the sale of the property in Barbados seem to have been done with reasonable alacrity.

One must put on record however an area of delay. That is the application to the Stamp Commissioner. This area would seem to fall within the ambit of the complaint filed. On the



whole, however, we cannot state that the facts support that the business was not conducted with due expedition generally.

#### **COMPLAINT #4**

Failure to account for sums in hand for account or credit - reasonable requisitions having been made - Canon VII(b)(ii)

The Complainant's Contention is set out below:

- (1) The Respondent failed to acknowledge the receipt of and to advise the Complainant of the money received from the sale of property in Barbados until two years after such receipt, and also the Respondent failed to advise the Complainant of the first sum described as a loan to complete the Probate.
- (2) Respondent failed to provide an accurate statement of account.
- (3) The Complainant has never received sums due to him or the estate

The Respondent's Contention is as follows:

- (1) The Respondent admits that a vital statement of account rendered to the Complainant was inaccurate but states that this has now been remedied, subsequent to the filing of the Complaint.
- (2) The Respondent states that payment could not have been made earlier owing to the terms on which the proceeds were sent to him.
- (3) The Respondent contends that he considers the correct position to be that he must deal with the monies only in accordance with the directions of the executors not the beneficiaries.

#### THE FACTS

These are the facts as presented:

- (a) Between 1988 and 1990 the Complainant paid to and the Respondent acknowledged the receipt of Jamaican \$12,874.40;

(b) Between 1993 and 1994 the Respondent received two sums from Barbados in relation to the sale of the property there, viz;

(i) By letter dated 25th October, 1993 the sum of US\$9,809.69 (Barbados equivalent \$20,000.00) was remitted to the Respondent by the Attorney in Barbados;

(ii) By letter dated 28th January, 1994 the sum of US\$10,398.42 (Barbados equivalent - \$21,200.00) was sent to the Respondent.

The Respondent does not dispute receiving both those sums

(c) Communication by the Respondent advising of the receipt of these sums took place by way of letter dated 13th September 1995;

(d) Between October 1993 when the first sum was received and September 1995 when the parties were apprised of the receipt of the sums the Respondent and the Complainant had been in communication by way of:

(i) a letter from the Complainant's to the Respondent dated December 1993 requesting a break-down of fees and directing that the Purchase Price from the sale of the Barbados property be held in foreign currency;

(ii) the attendance of the Complainant's in person at the office of the Respondent

These facts support No. (1) of Complainant's contention.

#### Statement of Account

By letter dated 16th September 1998 the Respondent purports to give a detailed account of sums received, disbursed and in hand. The Jamaican equivalent of sums are used and a Jamaican balance of \$58,289.07 is noted, although the money was received by the Respondent in US currency and despite:

(a) a request by the Complainant's to preserve money in foreign exchange; and

(b) the Respondent's assurance that the proceeds of the sale would be paid in British Pounds. The balance does not include a payment for interest. The statement also recites fees in accordance with an agreement which is in dispute.

## CONCLUSION

It is obvious that the Respondent expended much time, thought, work and vigor in the pursuance of this matter. Documents were prepared promptly, advice was sought where necessary in a timely manner and he was unstinting in relation to the number and the length of his letters.

However, there are areas of concern which revolve around:

- (a) communicating clearly and precisely amounts which were due and payable or could have become due and payable for fees;
- (b) a failure to communicate the receipt of funds received on behalf of the estate, which by its very nature forms a pivotal part of the transaction and which suggests a serious dereliction of duty;
- (c) the practice of effecting changes without the consent of those concerned for the Respondent's benefit even if to the detriment of the estate as in:
  - (i) varying the agreement to pay, external to the knowledge of the person who had undertaken to pay;
  - (ii) using a value not stated in the valuation obtained for that particular purpose;
  - (iii) irreconcilable responses to similar situations - for example, the Respondent demanded that sums being sent to him for use in Jamaica by the Complainant be in foreign currency and remain in foreign currency to protect the integrity of the value. Yet funds received by him, the residue of which was to be sent abroad in foreign currency (as advised by him to the Complainant) are not confirmed by his statement of account to have remained in the foreign currency received. This disregard to maintain the integrity of the estate funds as opposed to the concern for his funds is troubling, as it could be viewed as a callous disregard of ensuring that the maximum benefit is afforded the proceeds of the estate.
- (d) the Respondent's failure to acknowledge by his actions the possibility that the non-disclosure to the Complainant of the receipt of the proceeds of sale for such a long time, coupled with the cavalier way in which the funds seemed to have been held,

that is:

- (i) apparently not in the foreign exchange in which it had been remitted; and
  - (ii) not in an interest bearing account especially in relation to the second payment from which it could have reasonably been expected that delivery of sums would have been made to the estate, would have ultimately been to the detriment of the estate.
- (e) a seeming indifference to the best welfare and maximum use of the proceeds of the estate as opposed to a vigorous vigilance to protect the Respondent's own interest all of which amount to a breach of the Canons I(b), IV(f), IV(r) & (VII)(b)(ii).

### DAMAGES

The Complainant claimed damages against the Respondent on the basis of the trauma and distress, that Mrs. Ferron the deceased's wife has been put through, not being able to return to Jamaica at a desired time and the frustration of the Complainant not being able to complete this long outstanding matter.

During the hearing, the Committee indicated to counsel for the Complainant that the Committee was empowered only to make the orders set out in s.12(4) and none other, once it has been established that the attorney-at-Law was guilty of misconduct in a professional respect. These orders are listed as follows:-

- "4. On the hearing of any such application the Committee may as they think just make any such order as to
- (a) striking off the Roll the name of the attorney to whom the application relates, or suspending him from practice on such conditions as they may determine, or imposing on him such fine as they may think proper, or subjecting him to a reprimand;
  - (b) the payment by any party of costs or of such sum as they may consider a reasonable contribution towards costs;
  - (c) the payment by the attorney of any such sum by way of restitution as they

ought to be \$604,918.40 (being monies in hand) less \$36,332.50 (fees ascertained) and other disbursements of \$101,428.19, plus interest at the rate of 24% up to 1999 and thereafter at the rate of 12% until the date hereof, and continuing until payment as set out above. We set out hereunder our calculations of the sums due and payable on the principles adumbrated herein.

	Bal b/f	\$ 36,332.50
Disbursement & Duties		<u>\$101,428.19</u>
		\$137,760.69
Amounts paid in:		
(a) by direct payment	\$ 12,874.40	
(b) by deposit for sale	\$287,400.00	
(c) by balance for sale	<u>\$304,644.00</u>	
		\$604,918.40
	LESS	<u>\$137,760.69</u>
		\$467,157.71
Principal balance		\$467,157.71
Interest at 24% (1.4.94 - 31.12.99)		\$644,677.60
Interest at 12% (1.1.00 - 31.1.02)		<u>\$296,797.77</u>
		<u>\$1,408,633.08</u>

Accordingly we find that the Complainant has proved his case in relation to Canon I(b), IV(f), IV(r) & VII(b)(ii) of the Legal Profession (Canons of Professional Ethics) Rules beyond reasonable doubt. In the circumstances we find that the Respondent has acted in breach of s.12(1) of the Legal Profession Act and is guilty of misconduct in a professional respect.

#### ORDERS

Pursuant to s.12(4) of the Legal Profession Act we order

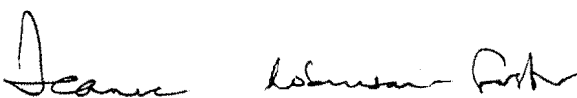
- (1) That the Respondent be fined \$300,000.00; \$100,000.00 to be paid to the General Legal Council and \$200,000.00 to be paid to the Complainant.
- (2) That the Respondent pay over to the Executor's personal representative the sums determined pursuant to paragraph entitled Payment of Funds in Hand supra, to wit \$1,408,633.08 by way of restitution and deliver up to the said representative the documents of Title and all documents relating to the estate. That in the event that

no personal representative of the Executor has been appointed or until such other person is duly appointed to administer the estate of Peter Ferron deceased, the sums herein mentioned be placed forthwith in an escrow account in the name of the Estate of Peter Ferron deceased.

- (3) That the Respondent pay costs in the sum of J\$250,000.00 towards the Complainant's legal fees.

Dated the 30<sup>th</sup> day of January 2002

  
\_\_\_\_\_  
Hilary Phillips, Q.C.

  
\_\_\_\_\_  
Jeanne Robinson-Foster

  
\_\_\_\_\_  
Helen McLean