DECISION OF THE DISCIPLINARY COMMITTEE OF

THE GENERAL LEGAL COUNCIL

COMPLAINT 203/2001

BETWEEN	A. E. BRAGG	COMPLAINANT
AND	ARLENE GAYNOR	THE ATTORNEY

PANEL: MR. ALLAN S. WOOD
MRS. GLORIA LANGRIN
MS. LILIETH DEACON

Dates of hearing: 20th March, 3rd December , 2003, 24th April & 20th May, 2004

The complaint against Miss Arlene Gaynor was instituted on 26th September 2001. The Complainant represented himself at the hearing and gave oral testimony. In addition to the Complainant, the Panel heard oral testimony from Mr. Albert Morgan, the attorney who had acted for the Complainant in the transaction and from Miss Arlene Gaynor. Miss Gaynor (hereafter also referred to as "the Attorney") was represented at the hearing by Lance Cowan Jnr.

A summary of the principal matters of complaint made on the Complainant's affidavit in support are:

i. That CIBC Bank had issued an undertaking which had expired in the month of April and that after the date of expiry of the undertaking and after the Complainant had cancelled the contract, the Attorney had attempted to obtain funds from the Bank to close the sale on the property when she was no longer authorised by her clients to act;

ii. That despite having been dismissed, the Attorney had not only attempted to obtain money from CIBC as aforesaid but at the same time continued to retain the money paid by the Complainant and had not refunded any of the money paid;

iii. The Attorney had not informed the Complainant or his attorney that there was a caveat lodged on the property until approximately three weeks prior to the Complainants' cancellation of the contract to purchase the property;

iv. The Attorney was instructed by her clients (the Vendors) to close on the said property without going to Court with Mr. Garland Ferguson but refused to do so;

v. That there was a shortfall reflected in her financial statement and that the Complainant had not received any cash from the Attorney.

It is plain from the above summary that the complaint was prepared by a layman, and the full picture of the transaction was revealed in the course of evidence, which in addition to the oral testimony, also included a number of documents that were tendered in evidence.

The Panel was impressed with the Complainant and his witness, Mr. Albert Morgan. Mr. Morgan particularly struck the Panel as a frank and candid witness and where he considered himself to be fault in the conduct of the transaction he readily said so, as will be hereinafter set out. The Panel was not impressed with the Attorney who appeared to be ill-prepared and evasive on some critical issues. The Panel was not impressed with her demeanour and it seemed that her approach to the proceeding was somewhat casual. There were discrepancies in areas of her testimony and inconsistencies with the testimony of the other witness as well with the documentary evidence. In the circumstances, the Panel accepts the testimony of the Complainant

and Mr. Morgan as truthful and prefers their account insofar as the Attorney's testimony was inconsistent or discrepant.

THE FACTS

By an agreement in writing which is dated 12th February 2001 (exhibit 1), the Complainant and his wife (the Purchasers) agreed to purchase from Leonie Woodbury and James Woodbury (the Vendors), premises known as Lot 42 Torado Heights, registered at Volume 995 Folio 616 of the Registered Book of Titles for the sum of $8,000,000.00. Mr. Albert Morgan, attorney-at-law, of Albert S Morgan & Company acted for the Purchasers and Miss Arlene Gaynor (the Attorney) of Williams & Gaynor had carriage of sale for the Vendors.

The agreement required that the sale be completed within thirty days and Condition 9 expressly made time of the essence. The agreement also stipulated that $1,200,000.00 was payable by the Purchasers on signing with the balance payable on completion. It is of some significance that the Vendors resided abroad and their signatures to the agreement were witnessed by a notary public on February 12, 2001.

The agreement signed by the Purchasers with the payment of $1.2 million was forwarded by letter dated 5th January 2001, from Mr. Morgan to the Attorney (exhibit 2). That letter also stated that a letter of undertaking was expected from Canadian Imperial Bank of Commerce (CIBC) in the coming week and Mr. Morgan requested Miss Gaynor to let him have a copy of the duplicate Certificate of Title.

Mr. Morgan and Miss Gaynor both gave testimony that prior to the signing of the agreement by the Purchasers, in December 2000 Mr. Morgan had a telephone discussion with the Attorney to settle the terms of the proposed agreement and in that conversation she made mention of two problems which might affect completion namely that proceedings were being pursued for

recovery of possession of the premises from a tenant and that there was an encroachment by a boundary wall upon a road reserve. Mr. Morgan's evidence was that upon receiving this information, he consulted with the Purchasers' agent who indicated that the Purchasers would be prepared to proceed.

In fact, however, the Attorney did not disclose that she was acting for the Vendors in legal proceedings against Garland Ferguson, the son-in-law of the Vendors, who had lodged a caveat claiming an interest in the property. These legal proceedings had been instituted in the Supreme Court, Suit E-188 of 1997 to remove that caveat. Miss Gaynor explained that she had initially succeeded in removing the caveat in May 2000, she then proceeded to advertise the premises for sale and transacted a mortgage with VMBS which was registered. That the agent Mr. Roman advised her in December 2000 that a purchaser had been found and thereafter late in 2000 she discovered that Garland Ferguson had obtained an ex parte mareva injunction on 27th September 2000, restraining the sale of the premises and had reinstated the caveat. These matters were not disclosed in December 2000 to Mr. Morgan or in January 2001 when he forwarded the Agreement and she did not respond to Mr. Morgan's request for a copy of the title made in the letter of January 5, 2001 (exhibit 2).

Following upon the letter exhibit 2, the firm of Williams & Gaynor was thereafter provided with a letter of undertaking dated 16th February 2001 from CIBC in the sum of $6,800,000.00 (exhibit 3). The letter of undertaking expressly provided that it expired on 12th April 2001.

Miss Gaynor then provided a closing statement dated 6th March 2001 (exhibit 4), which was forwarded by letter dated 6th March 2001, addressed to Mr. Albert Morgan & Co. (exhibit 5). That letter stated: -

"Re: Sale of Land, Lot #42 Torado Heights – Woodbury to Bragg

We refer to the captioned matter and advise that we are now in a position to close.

Enclosed is our Statement of Account. Kindly let us have your cheque in the sum of $243,995.00, being the shortfall between the amount due as per our statement and the Bank's Undertaking."

It was plainly untrue for Miss Gaynor to have stated in the letter (exhibit 5) that "we are now in a position to close" as the injunction and the caveat in favour of Garland Ferguson were known to her and had not been vacated. Miss Gaynor in her evidence, sought to justify the making of that representation by explaining that at the time of writing the letter, she was confident that the Vendors would have been in a position to close by the completion date, as she had been in negotiations with Miss Gibson-Henlin, the attorney representing Garland Ferguson, and had every reason to believe that Garland Ferguson would agree to vacate the mareva injunction at the hearing of an application fixed for April 2, 2001 in exchange for the sum of $1,000,000.00 being paid into an escrow account pending the trial of his claim. A copy of the application to vacate the injunction was tendered as exhibit 30. Miss Gaynor conveniently ignored the fact that April 2, 2001, the date when she expected that the injunction would be discharged by consent, fell after the date specified in the agreement for completion, i.e. within 30 days of February 12, 2001.

Miss Gaynor's account in evidence was that Garland Ferguson having reneged on the understanding that the mareva injunction would be discharged by consent on 2nd April 2001, she then made an application to discharge injunction, which was listed for hearing on 26th July 2001.

The Panel does not accept that the Attorney's belief or confidence that the injunction would be discharged on 2nd April 2001 justified what was in the circumstances a misrepresentation

contained in her letter dated 6th March 2001 (exhibit 5) that her clients were in a position to close, particularly when there had been no disclosure of the true facts to Mr. Morgan.

By letter dated 13th March 2001 (exhibit 6), Mr. Morgan forwarded the balance purchase price, which had been requested by Miss Gaynor in the sum of $243,995.00 and reminded her that he was still awaiting copies of the duplicate Certificate of Title and the Sale Agreement (exhibit 6).

By letter dated 28th May 2001 (exhibit 8), Mr. Morgan again wrote to Miss Gaynor repeating that he had still not received the duplicate Certificate of Title and Sale Agreement, and that his clients were quite perturbed about the delay and were considering canceling the sale. Mr. Morgan was frank in admitting that, as the purchasers' attorney, he ought by that date to have obtained a copy of the title for himself at the Titles Office and to have carried out a title search for caveats. This he did in June 2001and contemporaneously in that month he also met Garland Ferguson and these matters were the subject of a letter to Miss Gaynor dated 12th June 2001 (exhibit 10).

The Complainant gave evidence that on May 31, 2001 he happened to be passing by the premises and saw that it was vacant and that there was water running from the premises. It appears that Garland Ferguson had been occupying a part of the premises. He happened to meet Garland Ferguson at the premises, had discussions with him and was told about the caveat. The Complainant and Garland Ferguson subsequently went to see Mr. Morgan.

Mr. Morgan's evidence was that when Garland Ferguson came to see him with the Complainant, Mr. Ferguson indicated that he had removed from the premises and had sold his furniture to the Complainant. Mr. Ferguson presented a copy of a facsimile letter from the Vendors to Miss Gaynor stating that they were prepared to settle Mr. Ferguson's claim by paying him $1.5 million from the sale proceeds. Mr. Morgan then wrote to Miss Gaynor by letter dated June 12, 2001 to

explain this and to request possession and to bring to her attention the caveats which he had by then discovered on his title search. The letter 12th June 2001 (exhibit 10), stated as follows:

> **"Re: Sale Lot –42 Torado Heights, Saint James**
>
> **C.T. 995/616 – Woodbury to Bragg**
>
> Mr. Bragg attended our offices today (2/6/01) and advised us that the premises, the subject matter of the captioned transaction, are now vacant.
>
> A Mr. Ferguson who was the occupant of the ground floor accompanied Mr. Bragg and confirmed that he had sold the furniture in the apartment to Mr. Bragg and was no longer living there.
>
> The Purchasers are seeking immediate possession, effective today.
>
> Mr. Bragg has proposed that he will do the repairs to the damage we advised you of in our letter of May 31, 2001 and forwarded receipts to you thereafter.
>
> We are also to advise that we have secured a copy of the Title from the Titles Office and have observed that there are two (2) Caveats noted thereon as well as a Mortgage.
>
> We must also express our concern about your failure to supply us with a copy of the Sale Agreement and the Title despite our repeated requests."

That letter (exhibit 10) begat a "without prejudice" letter in response from Miss Gaynor dated 13thJune 2001 (exhibit 11) wherein she stated:

> **"Re: Sale of Lot 42 Torado Heights**
>
> We refer to the captioned matter and to your letter dated June 12, 2001 and advise as follows: -
>
> 1. The property is indeed vacant and I have changed all the locks and are in possession of the keys

2. The Title does have two (2) caveats lodged against it and same were lodged by the Registrar of Titles to protect the right of Mr. Ferguson pursuant to an Injunction granted by the courts, ex-parte.
3. We are currently dealing with the discharge of the Injunction.
4. We cannot give your client possession at this time, as same would be in breach of the Court's Order and could put our client at risk of being in contempt of court.
5. In relation to the outstanding Mortgage we are in possession of the Stamped Discharge and same will be lodged with the Transfer to your client.

We ask your clients forbearance in this matter as we expect the discharge of the Injunction to be settled within thirty (30) days. In the interim enclosed is a copy of the Stamped Agreement for Sale and copy Title."

In her testimony Miss Gaynor contradicted the evidence of Mr. Morgan that she had not advised of the caveat up to June 2001, when he wrote to her by the letter exhibit 10. To the contrary Miss Gaynor's evidence was that she had informally advised Mr. Morgan of the injunction and the caveat prior to her letter exhibit 11. She was however unsure of the precise date when this information had been informally given to Mr. Morgan, but she maintained that after the break down of the application to discharge the injunction on April 2, 2001, she had kept Mr. Morgan fully updated.

The Panel rejects Miss Gaynor's account that she had informally advised Mr. Morgan of the injunction and the caveats prior to writing the letter exhibit 11. The Panel observes that in the letter of 13th June 2001 (exhibit 11) Miss Gaynor advised at paragraph 2 of two caveats lodged against the title to protect the right of Mr. Garland Ferguson pursuant to an injunction and she made no suggestion that she had advised Mr. Morgan of these facts at any time prior to the

writing of that letter. We accept Mr. Morgan's evidence that there was no communication from Miss Gaynor of such facts prior to her letter of 13th June 2001 (exhibit 11).

Interestingly, in giving evidence, Mr. Morgan was of the view that Garland Ferguson who had lodged the caveat, and who had occupied part of the premises, was the tenant of the premises against whom recovery of possession was being sought by the Vendors, as mentioned to him by Miss Gaynor in December 2000. However, in her testimony, Miss Gaynor dispelled this notion, as her evidence was that the claim for recovery of possession against the tenant was an entirely different matter from the litigation involving Garland Ferguson, who was never a tenant but rather was claiming a proprietary interest in the property. That Mr. Morgan was not clear on this issue up to the time of giving evidence, in our view, lends some support to the finding that there had not been full and frank disclosure by Miss Gaynor of the proceedings involving her clients and Garland Ferguson.

Mr. Morgan's evidence was that some days after receiving the letter of June 13, 2001, exhibit 11, he met Miss Gaynor in Court and she indicated that she did not wish to breach the injunction but that the Purchasers could be allowed into possession by a rent free lease which she promised to prepare and forward to him.

By letter dated 27th June 2001 (exhibit 12) Mr. Morgan wrote to Miss Gaynor proposing in writing that the purchasers be given a rent-free lease so as to enable them to take immediate possession, as follows:

> "Re: Sale Lot 42 Torado Heights –Woodbury et ux to Bragg et ux
>
> Further to or conversation yesterday (26/6/01), I trust that you have now seen the written instructions from our clients that I am advised were sent to you by facsimile transmission on Friday June 22, 2001.

> Our clients would like to take possession of the premises immediately, and I am expecting the receipt of the lease making them rent-free tenants today in keeping with our discussions.
>
> It is our understanding that the Purchasers are being given the lease in order to protect your clients from being in contempt of Court."

There was an error in the first paragraph of Mr. Morgan's letter exhibit 12, insofar as it referred to written instruction from "our" clients. That should have read "your" clients. The Vendors had initiated steps to clear the way for the sale to be completed by agreeing to pay Garland Ferguson $1.5 million and instructions to that effect by a letter dated 22nd June 2001 (exhibit 16) were faxed to Miss Gaynor, with a copy provided to Mr. Morgan bearing the Vendors' notarized signatures, stating as follows:

> **"To Ms. Arlene Gaynor**
>
> **Attorney-at-Law**
>
> **Please Note**
>
> After reconsidering the frequency of these court trials and their cost regarding Mr. Garland Ferguson's injunctions, and the delay in closing the sale of the property, we have jointly agreed to award Mr. Garland Ferguson the sum of $1.5 million Jamaican Dollars to clear the latest injunction so as to have a speedy closing of property located at Lot 42 Torado Heights, St. James."

By June 27, 2001 therefore, all that was left was for Miss Gaynor to confirm that the purchasers could take possession by a rent free lease. The document was not forthcoming. Miss Gaynor's explanation in evidence was that she remained reluctant to authorise her client to hand over possession, as she feared that this would be a breach of the injunction. Interestingly however

she appeared not to have regarded the execution by her clients of the agreement for sale in February 2001 (exhibit 1) as involving a breach of the injunction.

Miss Gaynor's stated reason for failing to hand over possession was that the she feared that giving of possession might be regarded as a breach of the injunction. It is more likely that she was confident that the application to the Court to discharge the injunction would succeed on 26th July 2001, and in that event the premises could be transferred without the necessity of having to pay anything to Garland Ferguson. However that application on July 26, 2001 was adjourned without the injunction being discharged.

Further, by her account in evidence Miss Gaynor stated that following upon receipt of the written instructions from the Vendors to settle with Garland Ferguson for $1,500,000.00 (exhibit 16) she spoke by telephone with Mrs. Leonie Woodbury and upon being advised of the net balance that she would receive after payment to Garland Ferguson, Mrs. Woodbury was crying and told her to proceed with the Court application, thereby countermanding the written instruction to settle with Garland Ferguson. Miss Gaynor was unable to produce any written record of this conversation such as a file note, nor did she ever respond to Mr. Morgan's letter dated 27th June 2001 exhibit 12, which referred her to exhibit 16, to advise him that her instructions had been countermanded verbally by Leonie Woodbury.

Having failed to obtain possession of the premises despite having made every attempt to amicably conclude the matter with the Vendors and with Garland Ferguson, the Purchasers elected to cancel the agreement for sale and this decision was communicated by letter 2nd July 2001 (exhibit 14) from Mr. Morgan to Miss Gaynor. Miss Gaynor responded by letter dated 3rd July 2001 (exhibit 15) faxed to Mr. Morgan, in which she rejected the cancellation for the reason that a notice to complete was required. That was plainly incorrect as the agreement had expressly made time of the essence and in the circumstances there was nothing in the Purchasers' conduct

which would have led Miss Gaynor or her clients to believe that the Purchasers had waived that provision. Indeed Mr. Morgan's letter of May 28, 2001 exhibit 8 had warned that the Purchasers were perturbed at the delay and were considering cancelling the sale. There having occurred a misrepresentation as to the state of the title and a failure to disclose the injunction and the caveats which prevented transfer, the Purchasers after failing to obtain possession, were justified, we find, in cancelling the sale by the letter from Mr. Morgan dated 2nd July 2001 (exhibit 14). Mr. Morgan affirmed this cancellation by letter to Miss Gaynor dated 9th July 2001 (exhibit 18) which demanded that all sums paid by his clients be refunded with interest.

The next significant date was 30th July 2001, when two things occurred. Firstly, Mr. Morgan received a package which he was told by Miss Gaynor contained the keys to the premises and a letter of possession. Secondly on the same day, Mr. Morgan received a copy of a letter dated July 30, 2001 bearing the notarized signatures of the Vendors addressed to Miss Gaynor (exhibit 22) whereby the Vendors authorised their daughter, Yvonne Ferguson to act on their behalf and terminated Miss Gaynor's services with immediate effect, as follows:

> "Re: Suit #E118 of 1997 James & Leonie Woodbury v Garland Ferguson
>
> We, the Woodbury's hereby authorise our Daughter Yvonne Ferguson to act on our behalf in respect to the above captioned.
>
> We are terminating your services in this matter with immediate effect.
>
> We will send our agent, Mr. Phillip J. Walters to pick-up our file and the keys to the property.
>
> We give our undertaking that any outstanding fees will be paid from the proceeds of sale of the property located at 42 Torado Heights, St. James."

Mr. Morgan stated in evidence that he was confused by these inconsistent acts and returned the package with the keys to Miss Gaynor under cover of letter dated 31st July 2001 (exhibit 23).

The daughter of the Vendors, Yvonne Ferguson, referred to in exhibit 22, was the wife of Garland Ferguson who had lodged the caveat and it is quite clear that the act of the Vendors in authorizing their daughter to act as their agent and in terminating Miss Gaynor's retainer enraged Miss Gaynor. Her evidence was that she did not accept the termination of her retainer at the time on the basis that the Vendors' signatures might be forged and this despite the fact that the Vendors signatures were witnessed by a notary public. Undoubtedly Miss Gaynor could have checked with the Vendors to ascertain that the document exhibit 22 was genuine but she gave no evidence of doing so. Instead Miss Gaynor in defiance of her clients' clear instructions, terminating her services, proceeded to return the keys to Mr. Morgan.

By letter dated 3rd August 2001 (exhibit 26), the Vendors daughter, Yvonne Ferguson wrote to Mr. Morgan confirming that Miss Gaynor's services had been terminated as follows:-

> "As per my fax transmission of July 30th 2001, Miss Gaynor was sent the same. However, she refuses to acknowledge this. The hard copy was sent to her by Registered Mail. She has yet to advise us that your Client is no longer interested in purchasing the property.
>
> Her services in this matter have been terminated, effective July 30th, 2001.
>
> Since the keys are in your possession, we will send out agent Mr. Philip J. Walters to pick-up same.
>
> We gave our undertaking to Ms. Gaynor that any outstanding fees will be paid from proceeds of the sale of the property, however we have yet to receive an itemized statement of account from her even though this was requested in June 2001.
>
> I hope this might clarify any confusion in the matter."

By volunteering to collect the keys, the Vendors were acknowledging that the sale had been cancelled. Miss Gaynor however was yet to do so.

Miss Gaynor's next step in continued defiance to the termination of her services was to call on CIBC to pay to her the sum of $6,800,000.00 pursuant to the letter of undertaking which had been given on January 2001 (exhibit 3) and which had expired on 12th April 2001. Miss Gaynor's letter to CIBC dated August 16, 2001 calling upon the undertaking was admitted as exhibit 20 and is as follows:-

> **"Re: Lot 42 Torado Heights in the parish of St. James**
>
> **Certificate of Title – Registered at Volume 995 Folio 616**
>
> We refer to the captioned matter and to your letter dated January 16th 2001.
>
> We have not forwarded to you the duplicate Certificate of Titles registered at Volume 995 Folio 616 in the name of Anthony Bragg et al because the transfer is being held up by a caveat lodged against the said Title by Garland Ferguson.
>
> We now have instructions from our client the Registered proprietor Leonie Woodbury to settle with Mr. Ferguson and will do so from the proceeds of the transaction.
>
> Consequently, we are requesting that you forward to us your cheque in the sum of Six Million Eight Hundred Thousand Dollars ($6,800,000) pursuant to your undertaking date January 16, 2001. Upon our undertaking to forward to you the duplicate Certificate of Title Registered at Volume 995 Folio 616 in the name of Emanuel Bragg and Aldith Bragg."

Clearly, there was again an express misrepresentation in the letter to CIBC insofar as Miss Gaynor stated that she had instructions from her client, Leonie Woodbury to settle with Garland Ferguson

and would do so from the proceeds of the transaction, as that representation was inconsistent with her account in evidence of a telephone conversation in June 2001with Leonie Woodbury in which she stated that Leonie Woodbury was crying when she heard the balance she would receive after settling with Garland Ferguson and then instructed her to proceed with the application to court which was listed for 26th July 2001 to discharge the injunction. Miss Gaynor could not explain this inconsistency and it is plain that Miss Gaynor was not speaking the truth.

More importantly by 16th August 2001, when she called on the undertaking of CIBC, Miss Gaynor was no longer authorised to act in the transaction that had in any event been cancelled and the cancellation accepted by her clients, as evidenced by the letter 3rd August 2001, from the Vendors' agent and daughter, Yvonne Ferguson (exhibit 26) who had promised to collect the keys for the premises from Mr. Morgan.

By letter 24th August 2001, Miss Gaynor finally came round to accepting that her services had been terminated by the Vendors and on that date she wrote to Mrs. Leonie Woodbury (exhibit 32) confirming that she would be happy to hand over her files in the following words: -

> "Re: **(1) Suit Woodbury vs. Ferguson**
>
> **(2) Sale of Property 42 Torado Heights**
>
> We refer to the captioned matters and advise that we have received your letter dated July 30, 2001 and advise as follows:-
>
> 1. We are as happy to part with your file, as you are to receive same as your ungrateful nature makes us sick.
> 2. Regrettably however suitable arrangements needs to be made for the fees and moneys owed to this office.
> 3. Your undertaking is not worth the paper it is written on. We suggest you retain the services of a reputable Attorney whose undertaking we are prepared to accept and to whom we will hand our your file, in exchange

for a Certified cheque for what is owed to us or a Banker's Guarantee for same.

4. Mr. Ferguson's Attorney is not willing to settle the matter on the terms suggested by you (ie. Out of court) and is insisting that Judgment be entered against you in the amount of One Million Five Hundred Thousand Dollars ($1,500,000.00). Enclosed herewith is a copy of their last correspondence.
5. We await hearing from your Attorney in respect of them filing a Notice of Change of Attorney in the suit currently pending in the Supreme Court or failing which we will take the necessary steps to have our names removed from the record. In the meantime we will forward any correspondence received from or sent to Mr. Ferguson's Attorney.
6. In respect of the Sale we will also forward to you any correspondence we receive or send.

We await hearing from your Attorney."

Despite berating her former clients, Miss Gaynor continued to hold their file and refused to make refund to the Purchasers in respect of the money in her hands after the payment of transfer tax and stamp duty. We accept Mr. Morgan's evidence that it was not until March 2002, when he brought to her attention that the premises were being advertised for sale, that Miss Gaynor forwarded to him on 25th March 2002 the refund amounting to $380,005.00 together with the stamped agreement. No interest was paid on the amount refunded. It should be noted as well that the refund was made approximately six months after the complaint had been laid against her.

THE DUTY OF GOOD FAITH

Counsel for the Attorney submitted that she owed no duty to advise Mr. Morgan of the caveats and the injunction. The Panel rejects that submission. The fundamental duty of an attorney-at-

law is to act with honesty and integrity in the discharge of his/her professional responsibilities. This duty is not limited to being honest in dealings with one's client but extends generally to being honest in dealings with and making representations to one's colleagues. Indeed **Canon VI (a) of the Legal Profession Canons of Professional Ethics Rules 1978** provides inter alia that "An Attorney's conduct towards his fellow Attorneys shall be characterized by courtesy and good faith..." Good faith imports honesty and candour in an attorney's dealings with a colleague acting in a transaction.

The Guide to the Professional Conduct of Solicitors 8th Ed, 1999 page 359 at para 19.01 published by the Law Society for England and Wales, spells out the duty of good faith as follows:

> "19.01 Duty of good faith
>
> A solicitor must act towards other solicitors with frankness and good faith consistent with his or her overriding duty to the client
>
> 1. Any fraudulent or deceitful conduct by one solicitor towards another will render the offending solicitor liable to disciplinary action, in addition to the possibility of civil or criminal proceedings.
>
> 2....
>
> 3. A solicitor must maintain his or her personal integrity and observe the requirements of good manners and courtesy towards other members of the profession or their staff, no matter how bitter the feelings between clients.."

In delivering the judgment of the Scottish Court of Session in the case of **Re Petition of McMahon & Ors, [2002] ScotCS 36** (unreported judgment 12th February 2002) the duty which in our view was owed by the Attorney was put in the following way by the Lord Justice Clerk (Lord Cullen) at para 18:

"Membership of the legal profession is a privilege. Those who exercise that privilege undertake a duty throughout their professional lives to conduct their clients' affairs to their utmost ability and with complete honesty and integrity. Clients and colleagues should be able to expect these qualities of every solicitor as a matter of course. If the public is to give the profession its respect and trust, it must be assured that when solicitors fail in these duties, they will be suitably dealt with by the profession's disciplinary system.

In such cases the Tribunal's decision should be one that both vindicates the reputation of the profession and protects the public against risk of repetition..."

SUMMARY OF FINDINGS

The Panel finds that the evidence establishes beyond reasonable doubt that the attorney was guilty of professional misconduct and that she has failed to act with honesty and integrity in the discharge of her professional duties as follows:

i. Prior to the signing of the agreement for sale by the Purchasers, the Attorney had a discussion in December 2000 with Mr. Albert Morgan, who acted for the proposed Purchasers, and the Attorney disclosed to him two matters which constituted defects in her clients' title and/or which might impede completion. The matters disclosed were proceedings against a tenant to recover possession and an encroachment by a boundary wall upon a road reserve. The Panel finds that that disclosure was not however the complete truth as known to the Attorney.

ii. In giving evidence, the Attorney admitted that in December 2000 the Attorney knew that there were pending proceedings in the Supreme Court in which she represented the Vendors and in which a mareva injunction had been obtained by Garland Ferguson in September 2000 against her clients restraining the sale of the premises and pursuant to which caveats had been re-lodged against the title. The Attorney failed to disclose these facts to Mr. Morgan.

iii. By failing to disclose the existence of the injunction and the caveats the Attorney misled Mr. Morgan in December 2000 and thereby induced :

a) the Purchasers to execute and submit the sale agreement with a part payment of purchase price in the sum of $1.2 million by letter from Mr Morgan dated January 5, 2001 (exhibit 2), and

b) the Purchasers to have the Bank, CIBC submit an undertaking dated January 16, 2001 (exhibit 3) to pay the sum of $6.8 million in the belief that the vendors were in a position to transfer title within 30 days.

iv. Thereafter the Attorney, by letter dated 6th March 2001 (exhibit 5), further misrepresented that her clients were in a position to close the sale when she knew that at that date the injunction had not been discharged and that it was therefore not possible at that time for her clients to complete.

v. The latter misrepresentation thereby induced the Complainant to pay $243,995.00, being the balance purchase price remaining after taking account the sum which would be paid by CIBC .

vi. As at March 6, 2001, the true position as well known to the Attorney was that there was a mareva injunction and caveats lodged against title that precluded

her clients from completing the sale. The Panel finds that the Attorney wrongfully made no disclosure of those facts whether orally or in writing up to that time.

vii. Further the Attorney improperly failed to respond to Mr. Morgan's repeated requests for a copy of the title; see letters to the Attorney dated January 5, 2001 (exhibit 2), January 23, 2001 (exhibit 7), March 13, 2001 (exhibit 6) and May 28, 2001 (exhibit 8). True it was that the Complainants' attorney, Mr. Morgan ought to have carried out a title search immediately upon his clients indicating that they wished to proceed with the sale agreement. This he did not do until June 2001, no doubt acting upon the unjustified belief that the Attorney had been honest and truthful in her dealings and representations to him.

viii. The Panel finds that Mr. Morgan's failure to carry out a title search was no excuse for the misrepresentations committed by the Attorney and her failure to make full and frank disclosure of the state of title and the existence of the injunction as known to her.

ix. The Attorney completely failed to act with good faith in her dealings with Mr. Morgan. Rather the Attorney indulged in misrepresentations as to the ability of her clients to complete the sale while failing to disclose the existence of the mareva injunction and caveats, until the caveats were discovered by Mr. Morgan and he confronted her with that information by letter dated June 12, 2001 (exhibit 10).

x. By June 22, 2001 the Attorney's clients were willing to settle with the caveator, Garland Ferguson by agreeing to pay $1.5 million out of the purchase price in order to have the sale completed and so instructed the Attorney (exhibit 16). The Complainant had also by that date met Mr Ferguson and had arrived at agreement with him to purchase the furniture in the premises. The Panel finds that there was therefore no reason why the Attorney should not in those circumstances have permitted the Purchasers to have possession as rent free tenants pending the discharge of the injunction and removal of the caveats, as proposed by Mr. Morgan by letter dated June 27, 2001 (exhibit 12).

xi. However, the Attorney made no effort to hand over possession, until after the Purchasers had cancelled the sale by letter from Mr. Morgan dated July 3, 2001 (exhibit 14).The Attorney's conduct can aptly be described as a display of lack of good faith coupled with intransigence. Certainly by such conduct, the Attorney did her clients a grave disservice, as her lack of candour and good faith undoubtedly created mistrust and ill-will, which ultimately, must have contributed to the Purchasers' decision to cancel the sale agreement.

xii. Thereafter despite clear instructions from her clients, by letter dated July 30, 2001 (exhibit 22) terminating her services and her authority to act, the Attorney improperly chose to ignore her instructions by continuing to act and by letter dated August 16, 2001 (exhibit 20), improperly called on the undertaking given by CIBC to pay $6.8 million. It is only to the Attorney's good fortune that the undertaking from the Bank had expired and therefore no payment was made to her by the Bank.

xiii. The Attorney thereafter wrongly failed to refund the sums paid by the Complainants for six months after complaint had been laid against her and despite the fact that her former clients had accepted the cancellation of the sale and had dispensed with her services.

xiv. In all the circumstances, the Attorney failed to act with honesty and integrity in conducting the sale transaction on behalf of the Vendors; she misled the Complainant's attorney and in her dealings with him she failed to conduct herself in good faith in breach of **Canon VI (a) of the Legal Profession (Canons of Professional Ethics) Rules.**

xv. By her conduct as aforesaid, the Attorney has failed to maintain the honour, dignity and integrity of the profession and her behaviour has discredited the legal profession of which she is a member in breach of **Canon I (b) of the Legal Profession (Canons of Professional Ethics) Rules**.

SANCTIONS FOR MISCONDUCT

The primary purpose of the orders made by the Disciplinary Committee in sanctioning professional misconduct is not to punish the offender, although punishment may undoubtedly be a consequence of such an order. Rather such orders are intended to protect the public and to maintain and vindicate the trustworthiness, reputation and integrity of the legal profession by clearly communicating that such conduct is unacceptable and to dissuade repetition.

The inflexible standard to which the legal profession must subscribe is that the members of the profession must at all times, in the discharge of their professional duties and responsibilities, act with honesty and integrity, for it is only by adhering to such standards that the trust and confidence of the public will be maintained. Where the conduct of an attorney, such as in the

instant case, reveals lack of adherence to the standard of honesty and integrity, then the sanction may quite appropriately involve disbarment of such an attorney. These principles were quite rightly enunciated by Sir Thomas Bingham MR in **Bolton v Law Society [1994] 1 WLR 512**. Though this decision has been repeatedly cited and relied upon by the Disciplinary Committee, nonetheless that Judgment at page 518, letters A to E warrants repetition as follows:-

> "It is required of lawyers practicing in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness. That requirement applies as much to barristers as it does to solicitors. If I make no further reference to barristers it is because this appeal concerns a solicitor, and where a client's moneys have been misappropriated the complaint is inevitably made against a solicitor, since solicitors receive and handle clients' moneys and barristers do not.
>
> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties.
>
> In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation.

> If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case.
>
> Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension."

In considering the appropriate sanction the Panel also bears in mind that portion of the judgment in Bolton v The Law Society (supra) at 519 B to E, where it was stated:

> "Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic.
>
> Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real

efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered.

But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.

Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so, the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right."

In delivering the opinion of the Judicial Committee of the Privy Council, sitting on appeal from the United Kingdom General Medical Council, in Gupta v The General Medical Council (PC No 44 of 2001, (unreported judgment December 21, 2001) Lord Rodger of Earlsferry also stated at par 21:

"It has frequently been observed that, where professional discipline is at stake, the relevant committee is not concerned exclusively, or even primarily, with the punishment of the practitioner concerned. Their Lordships refer, for instance, to the judgment of Sir Thomas Bingham MR in Bolton v Law Society [1994] 1 WLR 512, 517H – 519E where his Lordship set out the general approach that has to be adopted. In particular he pointed out that, since the professional body is not primarily concerned with matters of punishment, considerations which would normally weigh in mitigation of punishment have less effect on the exercise of this kind of jurisdiction. And he observed that it can never be an objection to an order

> for suspension that the practitioner may be unable to re-establish his practice when the period has passed. That consequence may be deeply unfortunate for the individual concerned but it does not make the order for suspension wrong if it is otherwise right. The Master of the Rolls concluded at p 519H:
> 'The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.'"

In considering the appropriate sanction, the Panel takes into account the fact that the Attorney has been in practice since 1994 and has, so far as we are aware, no record of any other disciplinary offence. This good record, which is taken in mitigation, has to be weighed against the fact that by reason of her length of practice, the Attorney ought to have been well aware of the appropriate standards of conduct and that she was departing from same when she perpetrated a misrepresentation/deception upon her colleague who was acting for the Purchasers in the sale transaction. At the hearing the Attorney displayed no remorse for such conduct, nor did she seem to appreciate the gravity of her misconduct. Rather at the hearing of the complaint she attempted to justify her conduct to the very end. However also in mitigation the Attorney's misconduct did not involve dishonesty in the handling of the money held by her and some leniency can therefore be shown.

In all the circumstances a fine or some lesser sanction is, in our view, inappropriate and a period of suspension is required to maintain the reputation of the profession and to make clear that such conduct will not be countenanced. In the final analysis the Panel is of opinion that the Attorney has failed to conduct herself with honesty in her professional dealings with her colleague who represented the Complainant in the transaction and she embarked upon a course of conduct which misled her colleague and the Complainant.

Having weighed all factors, the Panel is of the opinion that it is appropriate to impose a suspension for a period of six (6) months. In order to permit arrangements to be made for alternate representation of the Attorney's clients during her suspension, the period of suspension is to commence on July 1, 2004. The Attorney must also pay interest by way of restitution upon the sum of $380,005.00 which was refunded to the Complainant on 25th March 2002 at the rate of 12 per cent per annum computed from January 5, 2001 to 25th March 2002 and which was held by the Attorney during that period. By our computation, the interest payable amounts to $55,220.25.

Pursuant to section 12(4) of the Legal Profession Act, it is hereby ordered that:-

(i) The Attorney, Miss Arlene Gaynor is suspended from practice for a period of six (6) months with effect from July 1, 2004 to December 31 2004;

(ii) By way or restitution, the Attorney Miss Arlene Gaynor is to pay to the Complainant the sum of $55,220.25.

(iii) The Attorney, Miss Arlene Gaynor is to pay the Complainant's costs fixed at $40,000.000.

DATED THE 12th Day of JUNE 2004

ALLAN S. WOOD

GLORIA LANGRIN

LILIETH DEACON