DECISION OF THE DISCIPLINARY COMMITTEE OF
THE GENERAL LEGAL COUNCIL

COMPLAINT NO: 176/2006

BETWEEN	SAMEER YOUNIS	COMPLAINANT
AND	LANZA TURNER-BOWEN	RESPONDENT

Panel: Allan S. Wood
Lincoln Eatmon
Lilieth Deacon

Appearances: Sameer Younis represented by Sherry-Ann McGregor
Lanza Turner- Bowen represented by Carol Davis

Hearing Dates: 4th, 25th October 2008 and 12th February 2009

BACKGROUND

1. This Complaint is the sequel to legal proceedings in the Supreme Court and the Court of Appeal between Hopefield Corner Ltd. and Fabrics deYounis Ltd wherein on 14th June 2005 Beckford, J. set aside an Order of Cole-Smith, J. made on 20th February 2004 in favour of Hopefield Corner Ltd modifying restrictive covenants on property 3 Hopefield Avenue registered at Volume 288 Folio 35 of the Register Book of Titles. The Order of Beckford, J. was affirmed by the Court of Appeal (Harrison, P., Cooke and McCalla, JJA) on 24th October 2008. The Respondent is a partner in the firm Jennifer Messado & Co who presented the application to modify the restrictive covenants.

THE COMPLAINT OF PROFESSIONAL MISCONDUCT

2. As particularised by Counsel for the Complainant in the opening address, the Complaint against the Respondent is that she had breached the Legal Profession (Canons of Professional Ethics Rules) paras V (o) and VI (cc) which provide:-

"V(o) An Attorney shall not knowingly make a false statement of law or fact.

VI(cc) An Attorney shall not knowingly represent falsely to a Judge, a Court or other tribunal or an official of a Court or other tribunal that a

particular state of facts exists."

3. It is alleged that the Respondent had breached the aforesaid Canons specifically by filing an Affidavit sworn to on 9th November 2004 where she deponed at paragraph 8 that:

> "Further to my Affidavit filed 7th October 2004, at paragraphs 8 and 10 and to the best of my knowledge, information and belief, the Legal Notices which were sent by registered mail to the applicant pursuant to the order of the Court had not been returned unclaimed to date."

EVIDENCE OF THE COMPLAINANT

4. The Complainant in these proceedings is the managing director of Fabrics deYounis Ltd. Fabrics deYounis Ltd is the registered proprietor of 1 Hopefield Avenue registered at Volume 203 Folio 69 which adjoins 3 Hopefield Avenue and the Complainant resides at 1 Hopefield Avenue. The title for 1 Hopefield Avenue was transferred to Fabrics deYounis Ltd on 17th July 1981 and the endorsement of the transfer on the title gives the address of Fabrics deYounis Ltd as 151 Harbour Street, Kingston. The evidence of the Complainant was that 151 Harbour Street ceased to be the office of that Company more than 10 years ago and the Complainant exhibited a notice of registered office filed with the Registrar of Companies dated 6th October 1993 giving the registered office of Fabrics deYounis Ltd as 7-7½ Constant Spring Road, Kingston 10.

5. Having observed activity on 3 Hopefield Avenue the attorneys-at-law for Fabrics deYounis Ltd, Messrs. Nunes, Scholefield, DeLeon & Co wrote to Hopefield Corner Ltd on 31st May 2004 inter alia requesting that they be advised that the intended construction complied with the restrictive covenants which prevented subdivision of the land. On or about 31st May 2004, Nunes, Scholefield, DeLeon & Co received a letter from attorneys-at-law, Jennifer Messado & Co signed by Mrs. Jennifer Messado for Hopefield Corner Ltd which indicated that an Order had been made by the

Supreme Court on 20th February 2004 in Claim HCV 0961/2003. By that Order the restrictive covenants for 3 Hopefield Avenue had been modified on application made by Hopefield Corner Ltd. The Complainant was advised by his attorneys that an Affidavit of Service filed on behalf of Hopefield Corner Ltd asserted that Fabrics deYounis Ltd had been served with the application to modify the restrictive covenants by notices served by registered post addressed to 151 Harbour Street. Fabric deYounis Ltd denied that it had been served and made application to set aside the Order of the Court modifying the covenant.

6. Hopefield Corner Ltd resisted that application and alleged in Affidavits including two Affidavits by the Respondent sworn on 26th October 2004 and 9th November 2004 that the Notices served by registered post had not been returned. It was however subsequently confirmed by the Post Master General that the notices of the application to modify the covenants which had been posted to Fabric de Younis Ltd, 151 Harbour Street had been returned, these being registered item number 790639 which was picked up from the Half Way Tree Post Office by Bernard Ewers on 16th March 2004 consequent on notice sent to Jennifer Messado & Co on 19th February 2004 and registered item 790472 which was collected by Denzil Manning on January 20, 2004 consequent to notice to Jennifer Messado & Co sent on 2nd January 2004. Both Bernard Ewers and Denzil Manning are bearers employed to Jennifer Messado & Co and the registered items were delivered pursuant to a notation instructing delivery to bearer which was signed by the Respondent. At a meeting held at the office of the Post Master General on 3rd February 2005 attended by the Respondent and Jennifer Messado it was confirmed that the notices had been returned as aforesaid.

7. Also admitted into evidence were a bundle of documents including the notice of application to set aside the Order modifying the restrictive covenants for 3 Hopefield Avenue and the Affidavits filed in the course of the proceedings to set aside the Order modifying the restrictive covenants.

8. Mr. Younis also gave evidence that that there had been a prior application on behalf of the previous owner, Arderne Ltd to modify the restrictive covenants for 3 Hopefield Avenue and that Fabrics deYounis Ltd had filed objection dated 15th September 1995 to that application. That there had also been discussions with Kenneth Benjamin who had an interest in Hopefield Corner Ltd in which Mr. Younis had advised Mr. Benjamin that he intended to object to the modification of the covenant.

EVIDENCE OF THE RESPONDENT

9. The evidence of the Respondent was:-

i) That in 2003, her partner Mrs Jennifer Messado was instructed by Hopefield Corner Ltd to apply to modify the covenants on the title for 3 Hopefield Avenue.

ii) That the Fixed Date Claim Form and Affidavit in support were prepared by Lauren Boyd an associate and that the addresses with respect to the proprietors of adjoining parcels to be served with notice of the application were ascertained from the titles to the respective parcels.

iii) The title for 1 Hopefield Avenue revealed that the registered proprietor was Fabrics deYounis Ltd of 151 Harbour Street. That address was accordingly used.

iv) That the Respondent attended the first hearing of the Fixed Date Claim Form on 27th July 2003 when directions from the Court were made for the service of the adjoining owners including Fabrics deYounis Ltd at 151 Harbour Street.

v) That Lauren Boyd prepared the relevant legal notice and effected service of same before leaving the firm in 2003 and that it was Lauren Boyd who caused same to be sent by registered post.

vi) That thereafter the Respondent prepared the Affidavit of Service attaching the registered slips in proof of posting. The Court ordered re-service of the legal notices and this was done again by registered post to the addresses given in the affidavit in support of the application.

vii) That returned mail is picked up by the bearers employed to the firm and that returned notices addressed to Fabrics deYounis Ltd were never brought to her

attention.

viii) That in January 2005, she became aware of an Affidavit filed by Mr Younis alleging that the notices had been returned to her firm and exhibiting the correspondence from the Post Master General to that effect. She attended the office of the Post Master-General and saw that she had signed on the back of the documents entitled Notice of Arrival of Registered Mail. Those are the slips sent to notify of returned registered mail. When she signed the back of the slips she would not have known what document was being referred to or what document was expected to be returned from the Post Office as the slips merely contain a reference number to the registered item.

ix) The task of picking up mail at the Post Office is done by a bearer. It is usual that a batch of slips for collection of mail at the Post Office would be given to the Respondent for signing authorising the bearer to collect the document. Mail that is so collected from the Post Office is sorted by a filing clerk and filed for the attention of the relevant attorney.

x) The returned mail being the notices to Fabrics deYounis Ltd were never brought to her attention. Within the firm the matter would have been regarded as Mrs Messado's file since she was the partner first instructed. She had spoken to Mrs. Jennifer Messado and Mrs. Messado informed her that she had not seen any returned mail for Fabrics deYounis Ltd.

xi) The Respondent made enquiries of the bearers, Denzil Manning and Bernard Ewers, and neither could recall what had been done with the particular correspondence regarding Fabrics deYounis Ltd.

xii) The Respondent also caused a thorough search of the offices of the firm and the returned mail has not been located.

DISCUSSION OF THE SUBMISSIONS AND AUTHORITIES

10. On behalf of the Complainant the point made was that the enquiries which the Respondent had made of her bearers and of her professional client Mrs Messado were made after she had been confronted with the evidence from the Post Master General

that the registered items had been returned. The investigation ought to have preceded her Affidavits of 9th November 2004 and 7th October 2004. Counsel for the Complainant submitted that for the Respondent to have deponed *"to the best of her knowledge, information and belief"* there had to be some source for that information and that if there was none, she would have deliberately misled the Court. That in short the Respondent could not have had any honest belief in the absence of enquiry and search. That on the evidence of the Respondent, there had been no such enquiry up to November 2004 as her Affidavit filed in these proceedings on 3rd October 2008 reveals that it was only after becoming aware of Mr. Younis's Affidavit in January 2005 and after the subsequent meeting with the Post Master-General that she conducted a thorough search in her offices and made enquiries of her bearers and of her partner Mrs Messado.

12. Counsel for the Respondent directed the Panel to the fact that in disciplinary proceedings, the criminal standard of proof beyond reasonable doubt is applicable: In Re A Solicitor [1992] 2All ER 335. The Panel accepts that that is so. The judgement of the Privy Council in Campbell v Hamlet [2005] UK PC 19 has in our view settled the point that in disciplinary proceedings such as in the instant case it was not desirable that there should be any uncertainty as to the applicable standard of proof and that the relevant standard should be the criminal standard to be applied in all disciplinary proceedings applicable to the legal profession. In that case Lord Brown stated at paras 17-22:

> "That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt. If and insofar as the Privy Council in *Bhandari v Advocates Committee* [1956] 1 WLR 1442 may be thought to have approved some lesser standard, then that decision ought no longer, nearly fifty years on, to be followed. The relevant passage from Lord Tucker's opinion on behalf of the Board in *Bhandari* at p.1452 reads:
> 'With regard to the onus of proof the Court of Appeal [for East Africa] said: 'We agree that in every allegation of professional misconduct

involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities.' This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee and there is no reason to think that either the Committee or the Supreme Court applied any lower standard of proof.'

It has, of course, long been established that there is a flexibility in the civil standard of proof which allows it to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters. Lord Bingham of Cornhill CJ pointed this out in the Divisional Court in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 353-4 and continued, at para 31 (p 354):

'In a serious case such as the present [concerning the making of a sex offender order] the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition ... is fulfilled, a Magistrate's Court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard.'

The same approach has been taken in later cases. In the Court of Appeal in *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213, Lord Phillips of Worth Matravers MR held with regard to the serious consequences of making a banning order under the Football Spectators Act 1989:

'This should lead the Justices to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard' (para 90 at p 1243).

Most recently, in the House of Lords in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, Lord Steyn agreed (para 37 at p812) with what Lord Bingham had said in *B* about 'the heightened civil standard and the criminal standard [being] virtually indistinguishable' and concluded: 'In my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 [of the Crime and Disorder Act 1998, providing for anti-social behaviour orders] apply the criminal standard'. Lord Hope of Craighead (para 83 at p 826) similarly recognised that in all these cases 'the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard' and held that 'the standard of proof that ought to be applied in these cases to allegations about the defendant's conduct is the criminal standard'.

Perhaps more directly in point, however, is the decision of the Divisional Court in *In Re A Solicitor* [1993] QB 69, concerning the standard of proof to be applied by the Disciplinary Tribunal of the Law

Society. Lord Lane CJ, giving the judgment of the Court, referred to the Privy Council's opinion in *Bhandari* and continued at p 81:
'It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standard. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or, to put it another way, proof beyond reasonable doubt. This would seem to accord with decisions in several of the Provinces of Canada.'
A little later in the Court's judgment Lord Lane referred to the provision in the Bar's Code of Conduct requiring the tribunal to apply the criminal standard of proof and observed at p.82: 'it would be anomalous if the two branches of the profession were to apply different standards in their disciplinary proceedings'. This last observation, of course, clearly warranted the Law Society Disciplinary Committee thenceforth applying the criminal standard in all cases rather than merely in those, earlier referred to, 'where what is alleged is tantamount to a criminal offence'.
Their Lordships would add that, even had they concluded that the criminal standard should apply only in disciplinary cases where what is alleged is tantamount to a criminal offence, that, at least arguably, would include the present case. This was certainly no mere contractual dispute. The appellant accordingly makes good this first stage of his argument."

13. However there was also an important observation at para 24 of the judgment of the Privy Council where, in rejecting the argument that the Committee had applied the incorrect standard in that case, Lord Brown made the following observation as to the standard of proof of factual sub-issues that lead to the ultimate conclusion that a charge has been established beyond reasonable doubt as follows:

> "Their Lordships are unimpressed by these arguments. In the first place there is nothing in the Committee's own determination to suggest that it applied a lower (still less a materially lower) standard of proof than that of beyond reasonable doubt. On the contrary, the final paragraph of the Committee's determination quoted in para 10 above suggests rather that they applied a high standard. Even moreover so far as the Court of Appeal's judgment is concerned, the reference to 'a balance of probabilities' is a slender basis upon which to found a

contention that such was the standard of proof applied in deciding the central allegation of professional misconduct. It is noteworthy that immediately after reference to 'a balance of probabilities' the Court of Appeal's conclusion was that something (the making of the disputed phone call) 'was far more likely'. The fact is that all the quoted expressions used throughout the Court of Appeal's judgment related, not to the critical final issue as to whether the allegation of professional misconduct was made out, but rather as to how a number of factual sub-issues fell to be resolved. To find this complaint proved it was not necessary for the Committee or the Court of Appeal to find each and every sub-issue proved beyond reasonable doubt. A sufficient number of strong probabilities (or even mere probabilities) can in aggregate amply support a finding of proof beyond reasonable doubt. That, indeed, is how many a criminal case is proved in reliance principally upon circumstantial evidence."

14. Further, Counsel for the Respondent pointed out that both Canon V (o) and VI (cc) used the word "knowingly." It was submitted that the use of the word "knowingly" in its ordinary meaning indicates that the legislature intended that the attorney must have actual knowledge of falsity before the Canons could be said to be breached. Further, if the legislature intended that either grossly negligent or reckless disregard for the truth should be sufficient, words to that effect would have been used. The case of R v Taaffe [1984] 2 WLR 326 was cited which concerned the Customs & Excise Management Act (1979) (UK) S170 (2). The defendant had been charged with being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cannabis resin. The defendant advanced that he had mistakenly believed that he had been importing currency, which he mistakenly believed was prohibited but actually was not. The Recorder ruled that he would be obliged to direct the jury to convict on the defendant's version of the facts whereupon the defendant changed his plea to guilty. On appeal as a point of public general importance, the Court of Appeal allowed the appeal against conviction and on further appeal by the Crown it was held that the words "knowingly concerned" involved not merely knowledge of a smuggling operation but also knowledge that the substance in question was one the importation of which was prohibited; that, when a man's state of mind and knowledge were ingredients of the offence charged, he was to be judged on the facts that he

believed them to be.

15. In delivering judgment for the House, Lord Scarman adopted the reasoning of Lord Lane, CJ in the Court of Appeal as follows:

> "Lord Lane C.J. construed the subsection under which the respondent was charged as creating not an offence of absolute liability but an offence of which an essential ingredient is a guilty mind. To be 'knowingly concerned' meant, in his judgment, knowledge not only of the existence of a smuggling operation but also that the substance being smuggled into the country was one the importation of which was prohibited by statute. The respondent thought he was concerned in a smuggling operation but believed that the substance was currency. The importation of currency is not subject to any prohibition. Lord Lane C.J. concluded, at p. 631:
> '[The respondent] is to be judged against the facts that he believed them to be. Had this indeed been currency and not cannabis, no offence would have been committed.'
> Lord Lane C.J. went on to ask this question:
> 'Does it make any difference that the [respondent] thought wrongly that by clandestinely importing currency he was committing an offence?'
> The Crown submitted that it does. The court rejected the submission: the respondent's mistake of law could not convert the importation of currency into a criminal offence: and importing currency is what it had to be assumed that the respondent believed he was doing.
> My Lords, I find the reasoning of the Lord Chief Justice compelling. I agree with his construction of section 170(2) of the Act of 1979: and the principle that a man must be judged upon the facts as he believes them to be is an accepted principle of the criminal law when the state of a man's mind and his knowledge are ingredients of the offence with which he is charged."

16. The House of Lords subsequently considered and explained R v Taaffe in R v Forbes [2002] 2 AC 512 where a conviction for attempting to import two films that were child pornography was upheld. The House of Lords affirmed the correctness of a direction to the jury that the prosecution had to establish that the defendant knew that he was importing prohibited material but not that he knew "the very films" he was carrying. It was explained that the acquittal in Taaffe turned on the fact that the contraband item the defendant believed that he was carrying actually

was not a prohibited item. In Forbes it was held that it was sufficient for the prosecutor to prove that a defendant knew that the operation on which he was engaged involved prohibited goods and was designed to evade a prohibition on their importation, and it was not necessary also to prove that the defendant knew the exact nature of the goods in question; a defendant was to be judged on the facts as he believed them to be, so that a defence was available to him where he believed that the goods he was carrying, in fact and contrary to his belief, were not subject to prohibition (the situation in Taaffe). Accordingly, since the trial judge had correctly directed the jury on the matters to be established by the prosecution and on the defence on which the defendant had relied, and since the defendant's conduct at both the foreign and domestic airports had pointed clearly to his knowing involvement in the evasion of a prohibition against importation, the jury had been entitled to disbelieve the defendant's account that he was not knowingly involved in the evasion. The speech of Lord Hope in R v Forbes (supra at page 521 paras 29-31) put the matter clearly after reviewing the authorities including R v Taaffe (supra) as follows:

> "In the present case the appellant's defence was based on the decision in *R v Taaffe*. He said that he did not know that the video cassettes contained indecent photographs of children. His explanation for his highly suspicious behaviour at Amsterdam Airport was that he believed that the video cassettes contained the films 'The Exorcist' and 'Kidz' and that these films were, contrary to the fact, prohibited in the United Kingdom. The trial judge left it to the jury to decide whether they believed the appellant's explanation. He made it clear that they should judge the appellant's knowledge of the facts as he believed them to be, and that unless they were sure that his defence was untrue they should find him not guilty. Plainly they did not believe his explanation, because they convicted him.
> The appellant nevertheless says that he was wrongly convicted because the trial judge ought not to have directed the jury that what the prosecution had to establish was simply that he knew that he was importing prohibited material. He maintains that he should have directed them that the prosecution had to prove not only that he knew that the videos contained indecent photographs but also that they were indecent photographs of children. I would reject that argument. In my

> opinion the direction by the trial judge was in accordance with the law as laid down in *R v Hussain* [1969] 2 QB 567.
> It was, of course, open to the appellant to say, if this was the fact, that he believed the videos to contain indecent photographs of adults and that he acted as he did because he believed, contrary to the fact, that they were prohibited. The line of defence which was approved in *R v Taaffe* [1984] AC 539 ensures the acquittal of people who genuinely believe that they are importing indecent photographs of adults which are not obscene, when they are in fact photographs of children. But it is for the defendant to put forward that defence. The prosecution does not have to prove what the accused knew the goods were which he was seeking to import knowing that they were prohibited goods."

FINDINGS

17. On the totality of the evidence presented by the Respondent it is clear that there were gross deficiencies in the manner which the application to modify the restrictive covenants on the title for 3 Hopefield Avenue was presented to the Court, beginning with the failure to have a search made at the Companies Registry to ascertain the current registered office of Fabrics deYounis Ltd. To say the least that was a serious omission and to rely on an entry made on the Certificate of Title for 1 Hopefield Avenue entered in July 1981 as providing the current address of Fabrics deYounis Ltd in 2003 was irresponsible. Even the most inexperienced attorney would know that such an entry dating back more than a decade could not be relied on as providing the current address for service of process on a registered proprietor.

18. Companies change registered offices and the Companies Registry is the proper place to ascertain the public record of the registered office. Nor could such an entry on title be relied on to ascertain the current address of a proprietor who is an individual, as it is usual that where an individual is acquiring property that will become the new place of abode after acquisition, the endorsement on the title for the property being acquired will probably reflect an address that will cease to be used upon completion of the acquisition. Further the premises at 1 Hopefield Avenue owned by Fabrics deYounis were occupied by its managing director who was known to her client and it would have been a simple matter to deliver copies of the notices to that address in addition to

formal service by registered post. The failure to take these elementary steps to ascertain the correct address for service and to ensure that the proceedings were brought to the attention of Fabrics deYounis Ltd certainly supports an inference that there was no bona fide intention to effect service by the person or persons responsible for that task.

19. To compound the initial irregular approach to ascertaining the correct address of Fabrics deYounis Ltd for service of notice of proceedings, the fact that two notices of the application sent to Fabrics deYounis Ltd to an incorrect address were returned by the Post Office collected by two different bearers employed to the Respondent's firm and that the returned notices were not brought to the Respondent's attention after she had signed the slips authorising the returned items to be delivered to the respective bearers is remarkable and at the very least evidences gross negligence in the handling of such important documents. It was the Respondent who signed the slips to instruct the Post Office to deliver the returned items to her bearers and it is reasonable to expect that the bearers and/or the filing clerk would have accordingly brought the returned the items to the Respondent's attention. It strains credulity that there should be no trace within the Respondent's office of the notices returned to the bearers when the Respondent subsequently investigated upon being presented with irrefutable evidence of the Post Master-General's record of the notices being returned to her bearers. It certainly seems that there was mischief afoot within the Respondent's office. Having regard to these facts, it is the view of the Panel that the service of the notices by registered post upon Fabrics deYounis Ltd was made with reckless disregard for whether the notices were being sent to that company's true address and/or not caring whether the address given as 151 Harbour Street was true or false and indeed that there was an intent on the part of some one within the Respondent's firm to deceive the Court that Fabrics deYounis Ltd had been duly served with notice of the application to modify the covenants imposed on 3 Hopefield Avenue when the truth was that the notices had been returned .

20. However, it was not the complaint made against the Respondent that she had falsely represented the address for service of Fabrics deYounis Ltd to the Court and in that regard the Respondent's evidence was not challenged that she took instructions from her partner Mrs. Messado who was the attorney first instructed by Hopefield Corner Ltd and that the papers including the affidavit in support of the application which set out the addresses of the interested persons to be served including Fabrics deYounis Ltd were prepared by an associate Lauren Boyd. The Respondent's evidence was not challenged that it was Lauren Boyd who prepared the relevant legal notice and effected service of same in 2003. That Mrs Messado continued to have an active role in the matter after the proceedings to modify the covenants were being conducted by the Respondent is supported by the evidence that it was she who responded to the letter from the attorneys for Fabrics deYounsis Ltd on 31st May 2004 (see paragraph 5 supra) and she also attended the meeting at the office of the Post Master General on 3rd February 2005 (paragraph 6 supra). Rather, the gravamen of the fraud alleged against the Respondent was that she deponed to subsequent affidavits after Fabrics deYounis Ltd had applied to set aside the Order of the Court.

21. It was in the course of the application to set aside the Order modifying the restrictive covenants that the Respondent filed an affidavit sworn on 9th November 2004 affirming the truth of a previous Affidavit sworn on 7th October 2004 that "*to the best of my knowledge, information and belief* the legal notices which were sent by registered mail to the Applicant pursuant to the Orders of the Court have not been returned unclaimed to date." In fact, both the legal notices sent to Fabrics deYounis Ltd had by that date been returned to the Respondent's bearers in compliance with the instructions to that effect on the slips signed by the Respondent that were presented at the Post Office. If this were a civil case of fraud, those facts might well justify an inference that the Respondent, having made her affidavit without any or any proper investigation, was therefore grossly negligent and/or reckless to the point of being complicit in a fraudulent representation to the Court that the notices sent by registered post to Fabrics deYounis Ltd addressed to 151 Harbour Street had been duly served

and had not been returned.

22. However, this Complaint is not to be determined on the civil standard of proof nor, as conceded by Counsel for the Applicant, was gross negligence and/or reckless disregard of the truth or falsity of a representation the appropriate test as those words have been omitted from Canons V (o) and VI (cc). In all the circumstances the Panel is of the view that on the language of Canons V (o) and VI (cc), which are plain and unambiguous, it must be established beyond reasonable doubt that the Respondent actually knew that the notices had been returned when she deponed to the Affidavits of 7th October 2004 and 9th November 2004. Even if one accepts that the Respondent had failed in her duty to carry out an investigation prior to making those Affidavits and/or that she had given the Affidavits recklessly, the fact remains that her unchallenged evidence summarised at sub-paragraphs 9vii) to 9xii) hereof is that her subsequent investigation revealed no trace of the returned notices and that neither her bearers or her instructing partner could account for same. A prior investigation would not therefore have made any difference. The authorities establish that the Respondent has to be judged on the facts as she believed them to be, provided that the Panel, as the judge of fact, believes her account.

23. Given the strictures of the language in Canons V (o) and VI (cc) and having regard to the fact that actual knowledge of the falsity of the representation must be established to the standard of a criminal case beyond reasonable doubt, the Panel is of the view that ultimately the Respondent should be given the benefit of the doubt. Although we accordingly acquit the Respondent on the charges of breach of Canons V(o) and VI (cc), it is hoped that the Respondent now recognises that as the attorney having conduct of the presentation to the Court of the application for modification of the covenants, she cannot avoid sharing responsibility for the serious deficiencies in the manner in which the application to the Court to modify the covenants imposed on 3 Hopefield Avenue was presented and in particular the failure to adopt the appropriate steps to ascertain the true address of the proprietor of the adjoining land entitled to the

benefit of the covenants who ought to have been notified of proceedings and the further deficiency in her firm whereby registered items returned as per her written instructions to her bearers could have disappeared without a trace and without being brought to her attention. If that has not already been done, we trust that the Respondent shall immediately implement the necessary measures to correct such deficiencies in her practice in order to avoid the recurrence of such an unfortunate incident which caused an Order of the Supreme Court to be irregularly obtained, with the regrettable result that an innocent third party was put to the trouble and expense of contested proceedings in the Supreme Court and the Court of Appeal to affirm that the Order had to be set aside.

DATED THE 9th DAY OF April 2009

ALLAN S. WOOD

LINCOLN EATMON

LILIETH DEACON