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

**COMPLAINT NO: 41/2009**

**BETWEEN** **MARINE WILDLIFE PUBLICATIONS LIMITED** **COMPLAINANT**

**AND** **JERMAINE R. SIMMS** **RESPONDENT**

**PANEL:** ALLAN S. WOOD, Q.C.
JOHN GRAHAM
DAVID BATTS

**Hearing Dates:** 18th September, 23rd, 25th October, 10th November and 2nd December 2010

## The Complaint

1. The Complaint dated 22nd December 2008 by Marine Wildlife Publications Limited (the Complainant) against the Attorney, Jermaine Simms (the Respondent), is that he has breached his professional undertaking given to Messrs. Dabdoub Dabdoub & Co (hereafter called the Firm), the attorneys-at-law acting for the Complainant to pay the Firm the sum of US $32,500.00 on the 30th September 2008 to settle the indebtedness in respect of the use and occupation of the Complainant's premises at 68 Norbrook Drive by Carlos Hill.

## Application to withdraw Complaint

2. The Complaint was fixed for hearing on 18th September 2010. By letter dated 13th September 2010 the Firm wrote to the General Legal Council advising as follows:

> "Please be advised that our client wishes to discontinue his claim against Mr. Jermaine Simms. Accordingly, we advise that we wish to cancel the hearing previously scheduled for Saturday, September 18, 2010, before the General Legal Council.

Please feel free to contact us should you have any questions or concerns regarding this matter."

3. On 18th September 2010 Mr. Jalil S. Dabdoub, a partner of the Firm appeared for the Complainant. The Respondent was represented by Mrs. Ann-Marie Bishop-Hearne, attorney-at-law holding for Mrs. Arlene Harrison-Henry. The Panel referred to the letter dated 13th September 2010 and enquired why the Complainant wished to discontinue the complaint. The attorney for the Complainant advised that: *"The Complainant is saying that whatever decision is made here they are not going to recover their money, only costs would be incurred and all they want is their full compensation."* Given the basis advanced on behalf of the Complainant, the Panel refused the application for the withdrawal.

**Allegation of Bias and Unfairness**

4. In written submissions filed under cover of letter dated 10th November 2010 recusal of the Panel was sought by the Respondent alleging bias inter alia in that the Panel had made itself the complainant by reason of the refusal to permit withdrawal of the Complaint. The Panel found that there was no basis for such an allegation and no good reason to warrant its recusal. Applying the test of apparent bias laid down in Porter v Magill [2002] 2 AC 357at 494 (HL) it was found that no fair minded and informed observer considering the facts would conclude that there was a real possibility that the Panel was biased nor could it be said that the Panel had become party to the Complaint by reason of its refusal to grant the application for withdrawal. Without repeating its ruling the Panel will enlarge on its reasons for refusing to permit the withdrawal of the Complaint.

5. The withdrawal of a complaint is governed by The Legal Profession (Disciplinary Proceedings) Rules (the Rules) set out in the Fourth Schedule of the Legal Profession Act. Par. 15 of the Rules provides as follows:

> "No application shall be withdrawn after it has been sent to the secretary, except by leave of the Committee. Application for leave to withdraw shall be made on the day fixed for hearing unless the Committee otherwise directs. The Committee may grant leave subject to such terms as to costs or otherwise as they think fit, or they may adjourn the matter under rule 16 of these Rules."

6. The application which is referred to in par. 15 of the Rules is of course the complaint that an attorney has committed an act of professional misconduct. There are good reasons why a complaint should not be withdrawn without the leave of the Committee. The role of the Disciplinary Committee is to ensure the maintenance of professional standards of conduct by attorneys-at-law in protection of the public and in order to maintain the good reputation of the profession.

7. In Georgette Scott v General Legal Council SCCA 118/2008, judgment 30th July 2009, the appellant had acted for the complainant in the sale of his apartment and a cheque made payable to the complainant for the balance of purchase price due to him was dishonoured. A complaint was laid against the appellant. After the hearing had commenced, an application was made to withdraw the complaint on the basis that the appellant had made payment arrangements. The Panel rejected the application on the basis of the serious nature of the complaint. The Court of Appeal affirmed the decision and the order striking off the appellant, holding that having regard to the serious nature of the allegations it would have been wrong to have granted leave for the complaint to be withdrawn. Panton P. stated at page 13 par. 18, as follows:

> "Mrs. Minott-Phillips submitted that the complaint was sufficiently grave to warrant an answer from the appellant even if the complainant wished to withdraw the matter. The Committee, she

> submitted, as an instrument of the General Legal Council is vested by statue with the responsibility of upholding the standards of professional conduct, and the Supreme Court and Court of Appeal were charged with the responsibility of safeguarding the public interest in the maintenance of the standards of the legal profession, as attorneys are officers of the court. She referred the Court to the comments of Pollock, C.B. in the case *Re- (an Attorney) [1863] Law Times Reports [Vol. 1X., N.S. – 299]*. When that case was called on, there was no one appearing on either side. Apparently, this was by arrangement between the parties. The learned judge did not think kindly of the situation and delivered himself thus:
>
> 'This is an application against an attorney, an officer of this court. The application was grounded upon alleged misconduct disclosed in certain affidavits filed, and which have been very carefully perused by one of my learned brothers. Grave charges are made against the attorney, which must be answered by him, and if not answered, he ought to be punished. If the charges are not properly and fully explained, the attorney is a fit subject for prosecution in some way. The court will therefore not discharge the rule which has been obtained, neither will it be struck out. If those whose duty it is to be here and proceed with the matter forget their duty, the court will not forget its duty, but take care that such steps are taken as will prevent a private settlement of the proceedings by smothering it and so getting rid of the matter. A rule with such charges as the present shall not be disposed of at the will of the parties themselves, and we hope these observations will be conveyed to the parties concerned in the rule.'
>
> The words of Pollock, C.B. are relevant to the instant situation. The nature of the allegations was such that it would have been clearly wrong for the complainant to have been permitted to withdraw the complaint. This ground of appeal is, in my view, misconceived."

8. In the present case, the Complaint concerns the alleged failure by the Respondent to honour a professional undertaking made to the Complainant's attorneys to pay the sum of US$32,500.00 to the Firm on Tuesday, 30th September 2008 in full and final settlement of what was owed to the Complainant for arrears of rent in respect of the occupation of premises 68 Norbrook Drive, Kingston 8 by Carlos Hill. There was no suggestion by the Complainant that any commitment had been given by the Respondent to remedy the breach of the undertaking. Rather, the basis for

the application to withdraw was that the Complainant was of the view that to proceed with the Complaint would be an exercise in futility as it would not result in the recovery of the money. The Panel did not regard the reason given as a good basis for the exercise of its discretion to permit withdrawal of the complaint.

9. Further, having regard to the paramount objective of such proceedings which is to ensure that in protection of the public and maintenance of the reputation of the Legal Profession, attorneys discharge their professional obligations with integrity, probity and complete trustworthiness, the Panel does not agree that the hearing of the complaint would be an exercise in futility. Accordingly in the view of the Panel a basis on which it could properly exercise its discretion to permit the withdrawal of the complaint was not established.

10. The allegation of bias was also supported by reference to the following allegations:-

a) The evidence of Jalil P. Dabdoub was not taken;

b) The Affidavit of the Complainant was not served on the Respondent;

c) Service of the affidavit was not proved;

d) The Complainant's affidavit was not referred to by either witness nor was it identified, and there was no opportunity to cross examine the Complainant;

e) There were no affidavits from the witnesses, none filed and none served;

f) None of the documents relied on were ever served on the Respondent or his Counsel;

g) Exhibits were produced without prior notice;

h) Despite two (2) directions of the Chairman of the Panel for the notes of evidence to be provided to the Respondent with copies of the exhibits, this had not been done up to the 10th November, 2010;

i) The staff had refused to provide Respondent's attorney with the exhibits on two (2) occasions and impeded the preparation of the defence;

j) The notes of evidence taken on the 18th September, 2010 came to the Respondent's attorney's attention on the 13th October, 2010 for a hearing on the 14th October, 2010;

k) The Respondent's attorney was without the exhibits admitted in evidence when preparing submissions for the 10th November, 2010;

l) Cumulatively the above referenced matters denied the Respondent adequate time and facility to prepare his defence and denied him a fair and impartial trial.

11. The Respondent's written submission contains the following:

> "The staff did not and could not take decisions as to when the notes and exhibits should be served. There is a might [sic] coincidence that both sets of documents were served the afternoon of the day before the hearing.
>
> This morning when the exhibits came to Counsel's attention Miss Richards was called to explain why the exhibits were sent yesterday and no other time. Her explanation was that Mr. Wood had called her yesterday and he told her to send the exhibits.
>
> This is the common practice in this case and a manifestation of the Disciplinary Committee and its agents bias to 'get Simms'. As a consequence the Constitutional guarantees and safeguards in respect to fairness to which all citizens are entitled were denied and we so complain and express our deepest disappointment with the manner in which one set of professional colleagues would wish to treat another colleague.
>
> For what are we to do with these exhibits at this stage when I was in the country yesterday and only saw them this morning. Althea Richards I contend did not act on her own."

12. The Panel has carefully reflected on its conduct of this hearing and the chronology of events. We are satisfied that the allegation of bias or apparent bias is baseless. The allegations at (a) to (d) in paragraph (10) above do not establish a basis in law for dismissal of the Complaint. This is dealt with in detail at paragraphs 39 to 45 below of this decision. Suffice it to say that the affidavit in support of the complaint was not relied on as evidence at the hearing of the Complaint. Therefore, no prejudice resulted from the Respondent not being afforded an opportunity to cross examine Mr. Jalil P. Dabdoub who was not called as a witness.

13. As regards the allegations of unfairness the record will demonstrate that:

a) On the 18th September, 2010 when this matter commenced, only the evidence in chief of Mr. Jalil S. Dabdoub was taken. Two documents were admitted namely the Respondent's letter of undertaking (**exhibit1**) and a letter dated 10th March 2009 from the Firm to the Respondent (**exhibit 2**). Both documents were admitted without objection. At the conclusion of the hearing on 18th September, the Panel gave a specific direction that copies of notes of evidence were to be sent to the Respondent or his attorneys and the hearing was adjourned part heard to 14th October 2010. Notwithstanding the aforesaid direction, the Respondent was present and represented on the 18th September, 2010 and it is counsel's duty to make their own notes in any event.

b) The hearing on 14th October 2010 was adjourned to 23rd October 2010. There was no complaint that the notes of evidence for 18th September 2010 had not been provided.

c) The hearing resumed on the 23rd October, 2010. No protest was made about non-receipt of notes or affidavits. Jalil S. Dabdoub was cross examined. Mr. Abraham Dabdoub also gave evidence on that date and in the course of his testimony further documents were admitted by consent (**exhibits 3 to**

**10**). He was also extensively cross examined. The hearing was further adjourned to the 25th October, 2010.

d) On the 25th October, 2010 the Respondent gave evidence. In the course of his testimony he referred to his file copies of the relevant exhibits. There was on this occasion no complaint by the Respondent or his attorney about non-receipt of exhibits or affidavits. Mr. Dabdoub did not cross examine the Respondent. At the conclusion of his testimony, counsel for the Respondent indicated there were no other witness and that she wished to do written submissions. Mr. Dabdoub made brief oral submissions on behalf of the Complainant. The matter was adjourned to the 10th November, 2010 by which date the Respondent's attorney was to file written submissions and on which date she would also be allowed to make oral submissions. The Panel made a specific order that copies of exhibits were to be provided to the Respondent's counsel on the 26th October, 2010.

e) On the 9th November, 2010 the Chairman of the Panel by telephone enquired whether the copies of the exhibits had been delivered to the Respondent's attorney and was told they had not been. By letter dated 9th November, 2010 (**exhibit 11**) to the Chairman of the Disciplinary Committee the Chairman of the Panel expressed displeasure at the delay by the Secretariat of the Committee in complying with the Panel's direction.

f) On the 10th November, 2010 the Respondent's counsel tendered written submissions. The Panel brought to her attention the letter of the 9th November, 2010 (**exhibit 11**) and the fact that we too were displeased that the copies of the exhibits were not delivered promptly. The Panel voluntarily adjourned the matter to the 2nd December, 2010 in order to allow the Respondent's counsel more time to prepare her address.

g) On the 2nd December, 2010 the Respondent's counsel relied upon the written submissions already filed and then made detailed oral submissions. The hearing adjourned at 5:15 p.m. for the Panel to consider its decision.

14. It is manifest that the allegation of bias is baseless and without foundation. Furthermore, the allegation of unfairness is also unsustainable. In the first place the Respondent was present and represented on each and every day of the hearing. At no stage when exhibits were tendered was objection taken because for example, the Respondent was taken by surprise. Indeed, most of the documentary evidence went in by consent and the Respondent had file copies to which he made reference during his testimony. The Respondent in evidence admitted writing and/or receiving each of the documents and he referred to his file copies of same in the course of giving testimony. Secondly, the hearing was adjourned from day to day over several months and weeks. Therefore, any alleged prejudice was certainly remedied. On the 10th November, 2010 the Respondent's attorney's complaint was satisfied as further time was given to peruse the exhibits in order to conclude her submissions. It is significant that no application was made for further cross examination or for the re-opening of the Respondent's case to allow the presentation of other documents or the calling of other witnesses.

15. This Panel is therefore satisfied that the Respondent received a fair hearing and the conduct of his defence was not adversely affected by the delay of the office in reproducing the exhibits for his attorney. Indeed any handicaps were compensated for by the several adjournments and in particular the adjournment on the 10th November, 2010 to the 2nd December, 2010. Further and in any event when regard is had to the admitted documentary evidence (of which the Respondent had his file copies) and to the admissions made by the Respondent when giving oral evidence this Panel finds it difficult to understand the complaint of unfairness and in particular how the Respondent's defence could have been improved upon when regard is had to the law as it relates to professional undertakings by Attorneys-at-Law.

**The Evidence**

16. In support of the complaint, *viva voce* evidence was given by Jalil S. Dabdoub and Mr. Abraham Dabdoub, both partners in the Firm to whom the Respondent's undertaking was given. Evidence was also given by the Respondent. There is no dispute that the Respondent did give an undertaking in writing dated 13th September 2008 to pay to the Firm the sum of US$32,500.00 on Tuesday, 30th September 2008.

17. In turning to consider the evidence, in summary, the testimony of Jalil S. Dabdoub was that:

    i. At all material times as a partner in the Firm, he acted for the Complainant who was the registered proprietor of 68 Norbrook Drive, Kingston 8.

    ii. The property had been leased to a company part of the Cash Plus Group of Companies, called Cashmart and was occupied by Carlos Hill and his family. Payment of rent fell into arrear and the premises fell into a state of disrepair.

    iii. The Firm was instructed by the Complainant to recover possession of the premises and an action for recovery of possession was filed in July 2008. By that time, the Cash Plus Group was in liquidation and DunnCox, the attorneys acting in the liquidation, advised that the Liquidator had no interest in continuing the Lease.

    iv. Mr. Jalil S Dabdoub proceeded on leave in August 2008 leaving the file with Mr. A J Dabdoub, the senior partner in the Firm. While the witness was on leave, the Firm received a letter of undertaking dated 13th September 2008 from the Respondent which was tendered in evidence as **Exhibit 1**.

    v. The letter Exhibit 1 undertook *inter alia* on 30th September 2008 to pay US$32,500.00 to the Firm in settlement of the outstanding rent which undertaking was arrived at in discussions with Mr. A J Dabdoub, the

Respondent and one of Mr. Hill's attorneys, Yvette Sterling. This undertaking was not honoured.

vi. There was also an undertaking given that Mr. Hill would vacate the premises on 16th September 2008 which was complied with and an undertaking that the cost of repairs would also be paid. No attempt was made to pursue the latter undertaking for the reason that the cost of repairs had not been quantified.

18. The evidence of Mr. Abraham Dabdoub was that he was the senior partner of the Firm and had dealings with the Respondent concerning the undertaking. He dealt with the Complainant's matter while Mr. Jalil S Dabdoub was away from the Island and while doing so he received a telephone call from the Respondent on 12th September 2008 at his home. Also on the call was a Ms. Casie Jean Graham who had acted for Mr. Hill. In that call it was requested that Mr. Hill be allowed to remain in occupation of the premises until 16th September 2008 and that a planned eviction on Saturday, 13th September 2008 not be pursued. In that call, Ms. Graham stated she was no longer acting for Mr. Hill and the Respondent had been asked to deal with the matter by Yvette Sterling who at the time, according to Ms. Graham was in New York. In that initial conversation, Mr. Dabdoub refused the request. That was followed by a subsequent call from the Respondent who enquired if an undertaking from Mr. Hill would be accepted to which Mr. Dabdoub responded that that would depend on what the undertaking looked like. Following that conversation, Mr. Dabdoub sent the Respondent his e-mail address (**Exhibit 3**) and there began e-mail correspondence between them.

19. By e-mail dated 12th September 2008 (**Exhibit 4**) the Respondent forwarded a proposed undertaking dated 12th September 2008 addressed to the Firm, which explained that the Respondent's intervention was at the request of Carlos Hill and followed on consultations with him in the following terms:

"For the Kind attention of Mr. Dabdoub
Attorneys-at-Law

Dear Counsel:

Re: Repossession of premises at 68 Norbrook Drive,
Kingston 8 in the parish of Saint Andrew

We write in reference to our several telephone conferences of today's date, September 12, 2008.

Jermaine Simms, the undersigned is instructed by the Criminal Complainants in the Cash Plus Matter, Miss Yvette Sterling is the principal Attorney for Messr. Carlos Hill and Miss Casie Jean Graham is instructed by Messr. Carlos Hill with respect to the captioned premises.

Messr. Simms intervention was requested by Messr. Hill after the said Messr. Hill was informed by Counsel, Miss Casie Jean Graham of the impending recovery of possession of the named premises. Today, Messr. Carlos Hill requested Mr. Simms to intervene following the dislocation to all of the Criminal and Civil Complainants who have matters with the said Messr. Hill and Cash Plus Limited and the arrangements that have been put in place for settlement. Following consultations with Messr. Hill, our instructions are that Mr. Hill, his Servants, Subjects and Agents will formally vacate the premises on or before September 20, 2008.

Messr. Carlos Hill has given his Attorneys-at-Law, his formal assurance and undertaking that he will vacate the premises as stated above. In the interim, with your agreement, arrangements are being put in place for the inspection of the property and the satisfaction of all rent in arrears.

Please feel free to contact me at 704-2401, 541 6770, 296-6827 or e-mail at jrsimms1@gmail.com and Miss Casie Jean Graham at 908 - 2739, 885-2086 or e-mail at cjgrahamlaw@gmail.com.

Should there be any further difficulties, please feel oblige to contact Miss Yvette Sterling at 1 609 284 7518 (mobile) or 1 609 5262 333 (office).

> We trust that we shall be able to resolve this matter amicably. We look forward to hearing form you with urgency.
>
> Yours faithfully,
> Jermaine R. Simms, Esq. ” (emphasis added)

20. The proposed undertaking dated 12th September 2008 (**Exhibit 4**) was roundly rejected by e-mail from Mr. Abraham Dabdoub dated 13th September 2008 sent at 10:22 (**Exhibit 5**) to the Respondent in the following terms:

> “Dear Mr. Simms
> This is not a joking matter. The undertaking you promised is not acceptable. Did you really expect that I would accept an undertaking in which you are purporting to give a hearsay undertaking from your client who has never kept his word?
>
> Further, I made it clear that your client must vacate the premises immediately as he is now a trespasser. The Companies are in receivership and Liquidation and both the Receiver and the Liquidator have advised us in writing that we are free to proceed to evict as the Receiver had notified us that the tenancy was at an end.
>
> WE WILL BE PROCEEDING TO EVICT YOUR CLIENT WITH IMMEDIATE DISPATCH.
>
> Dabdoub, Dabdoub & Co.
> per Abe Dabdoub”

21. Mr. Abraham Dabdoub further recounted that the e-mail of 13th September 2008 (**Exhibit 5**) was followed by a call to him from the Respondent who connected a person identified as Yvette Sterling who stated she was in New York. At the time of this conversation Mr. Abraham Dabdoub stated he was aware that there were persons at the premises retaking possession. In the conversation with the Respondent and Yvette Sterling, he made clear that in order to halt the eviction an irrevocable undertaking would have to be given:

i. To have the premises vacated by a certain date;

ii. To pay the balance of rent due after the deduction of the security;

iii. An irrevocable undertaking to pay the costs of any repairs to restore the premises to the original state.

22. Mr. Abraham Dabdoub recalled that in the course of the conversation, Yvette Sterling told the Respondent to give the undertaking and he recalled an assurance given by her that the Respondent would be put in funds to take care of it. At this point, the witness recounted that he told the Respondent that he should not give such undertaking unless he had the money in hand. Further, that he gave that advice to the Respondent under the impression that he was an inexperienced attorney.

23. Subsequently, on 13th September 2008 at 16:31 pm, Mr. Abraham Dabdoub received a reworded undertaking from the Respondent (**Exhibit 6**) as follows:

> "Dear Counsel
> Re: Undertaking concerning premises at 68 Norbrook Drive, Kingston 8
>
> We write in reference to our letter dated September 12, 2008. We are instructed by Miss Yvette Sterling the principal attorney for Mr. Carlos Hill, with respect to the captioned premises.
>
> We hereby formally undertake that Mr. Carlos O. Hill, his servants, guests, visitors and or agents will quit give up possession and vacate premises at 68 Norbrook Drive, Kingston 8 in the parish of Saint Andrew, the said premises on Tuesday, September 16th, 2008 by 6:30 pm in the evening of that day.
>
> Further, we hereby formally undertake to pay to you the sum of United States Thirty Two Thousand and Five Hundred Dollars (US$32,500.00) on Tuesday September 30th, 2008 in full and final settlement of Mr. Hill's indebtedness to you for rent in arrears, outstanding and due and payable to you.
>
> We also formally undertake to pay to you and have settled the costs for any repairs to be carried out for the restoration of the said premises and for the restoration of any fixtures and furniture

damaged during Mr. Hill's occupation of the said premises and after the said costs for any such work is mutually determined by yourself and attorneys for Mr. Hill in consultation with a reputable contractor jointly selected and agreed to by the parties herein.

Please feel free to contact me at 704-2401, 541-6770, 296-6827 or e-mail at jrsimms1@gmail.com and Miss Casie Jean Graham at 908-2739, 885-2086 or e-mail at cjgrahamlaw @gmail.com. You may also contact Miss Yvette Sterling at 1 609 284 7518 (mobile) or 1 609 526 2333 (office).

This is our solemn and irrevocable undertaking.

Yours faithfully,
Jermaine R. Simms, Esq." (emphasis added)

24. Apart from the rewording of the undertaking, it is to be noted that **Exhibit 6** now stated that the Respondent was instructed by Yvette Sterling, the principal attorney for Mr. Hill whereas his previous letter (**Exhibit 4**) had stated that he was instructed by "Criminal Complainants" in the Cash Plus matter and was intervening at the request of Mr. Hill. Clearly the statement in **Exhibit 6** and repeated in the final letter of undertaking (**Exhibits 1 and 8**) conveyed that the Respondent was now acting for Mr. Carlos Hill through instructions from Mr. Hill's attorney, Yvette Sterling. Further, that the "we" referred to as being "instructed by Yvette Sterling" was the Respondent.

25. The Respondent's proposed undertaking, **Exhibit 6** was followed by a further conversation on 13th September 2008 between Mr. Abraham Dabdoub and the Respondent wherein Mr. Dabdoub advised that the proposed undertaking was still unacceptable insofar it concerned the cost of restoration of the premises. The Respondent's letter proposed that these costs be determined by agreement between Mr. Abraham Dabdoub and the attorneys for Mr. Hill which was rejected and Mr. Abraham Dabdoub suggested that a quantity surveyor, such as Maurice Stoppi or Tommy Leow be nominated to determine the cost. Accordingly Mr. Abraham

Dabdoub altered the proposed letter of undertaking and forwarded same to the Respondent on 13th September 2008 at 16:47 (**Exhibit 7a**) and that e-mail was sent again at 16:51 (**Exhibit 7b**).

26. In response, on 13th September 2008 at 17:52 pm an e-mail was received from the Respondent which attached the final letter of undertaking (**Exhibit 8**) addressed to the Firm in the following terms:

> "Re: Undertaking concerning premises at 68 Norbrook Drive, Kingston 8
>
> We write in reference to our letter dated September 12, 2008. We are instructed by Miss Yvette Sterling the principal attorney for Mr. Carlos Hill, with respect to the captioned premises.
>
> We hereby irrevocably undertake that Mr. Carlos Hill, his servants, guests, visitors, and or agents will quit give up possession and vacate premises at 68 Norbrook Drive, Kingston 8 in the parish of Saint Andrew, the said premises on Tuesday, September 16th, 2008 by 6:30 pm in the evening of that day.
>
> Further, we hereby irrevocably undertake to pay to you the sum of United States Thirty-two Thousand and Five Hundred Dollars (US$32,500.00) on Tuesday, September 30th, 2008 in full and final settlement of Mr. Hill's indebtedness to your client being arrears of monies outstanding, due and payable to your client in respect of the use and occupation of the premises.
>
> We also irrevocably undertake to pay to you and have settled the full costs for any repairs carried out to restore the said premises to the condition it was in at the time of the commencement of occupation and for the restoration of any fixtures and furniture damaged during the occupation of the said premises. The cost of restoration to be determined by a qualified quantity surveyor Mr. Maurice Stoppi or Mr. Tommy Leow.
>
> Please feel free to contact me at 704-2401, 541-6770, 296-6827 or e-mail at jrsimms1@gmail.com. You may also contact Miss Yvette Sterling at 1 609 284 7518 (mobile) or 1 609 526 2333 (office).
>
> Yours faithfully,
> Jermaine R Simms, Esq." (emphasis added)

27. A letter of undertaking in writing in the same terms as **Exhibit 8** bearing the signature of the Respondent was subsequently delivered to 68 Norbrook Drive, Kingston 8 on the 13th September 2008, being **Exhibit 1** which had been tendered in evidence by Mr. Jalil S. Dabdoub in the course of his testimony.

28. Following upon that, on 26th September 2008 at 12:57 pm, Mr. Abraham Dabdoub received an e-mail addressed as coming from Arlene D M Beckford, attorney for and on behalf of Jermaine Simms, Esq., **Exhibit 9** as follows:

> "Re: Carlos Hill – 68 Norbrook Drive, Kingston 8
> We write in reference to the captioned matter. Please be advised that Jermaine Simms, Esq., Attorney-at-Law suffered a stroke on Thursday September 18, 2008 and has been hospitalized as a result. We have been advised that Mr. Simms before falling ill had provided you with a letter of undertaking on behalf of Mr. Carlos Hill, who is represented by Miss Yvette Sterling.
> In view of Mr. Simms illness, we kindly ask that you communicate with Miss Casie Jean Graham at 885-2026 or 908-2739 or by email @ cjgraham\w a gmail.com and Miss Yvette Sterling at 405-5826 or by email at ycsterling2@aol.com or Yvette@sterlignlaw.com.
> Yours faithfully,
> Arlean D. M. Beckford"

29. The undertaking to pay US$32,500.00 on 30th September 2008 was not honoured. In respect of the two additional undertakings, Mr. Hill did vacate the premises by 16th September 2008, while the undertaking to pay the cost of repairs was not pursued given that the condition precedent was not fulfilled by having the cost of repairs quantified by either of the quantity surveyors named in the undertaking.

30. On 6th October 2008 at 14:11 pm an e-mail dated 3rd October 2008 with an attachment (**Exhibit 10**) was received by Abraham Dabdoub. The e-mail was stated to be coming from Karen Smellie, personal assistant to the Respondent advising that the Respondent had suffered a mild stroke on 18th September 2008 and had been hospitalized on 23rd September 2008. It explained at length the tests and procedures that the Respondent had undergone between 19th and 22nd September, it advised that the Respondent was confined to bed and could not be contacted until he had fully recuperated and it concluded by requesting that no steps be taken within the next 21 days in prejudice of the Respondent as Counsel. No report was tendered from a qualified medical practitioner. Attached to that e-mail was a document issued by Montauk Financial Group of 338 Newman Springs Road, Red Bank, New Jersey reflecting that BJ & D Productions Inc had an account in the sum of US$110,040.60 during the statement period 08/01/08 to 08/31/08.

31. Mr. Abraham Dabdoub was cross-examined by Counsel for the Respondent and in the course of cross-examination he stated that in the three-way conversation between himself, the Respondent and Yvette Sterling, he recalled Yvette Sterling saying that she would put the Respondent in funds to satisfy the undertaking. It was suggested that the statement of account, **Exhibit 10** related to that conversation whereby Yvette Sterling undertook to provide Mr. Simms with funds to honour the undertaking. Mr. Abraham Dabdoub recalled Yvette Sterling saying she would put the Respondent in funds to satisfy the undertaking and she had also stated that she would send to the Respondent the proof that Carlos Hill's brother had money on deposit that would be the source of funding. It was suggested that **Exhibit 10** was sent to the Respondent to substantiate the source of funding. As pointed out however by Mr. Abraham Dabdoub in response, the statement from Montauk Financial Group (Exhibit 10) did not say that, though based on the earlier

conversation he assumed that the statement of account was sent to him to substantiate the source of funding but it came much later.

32. At the end of the cross-examination of Mr. Abraham Dabdoub, Counsel for the Respondent made an application that Yvette Sterling be either joined to the proceedings or be subpoenaed as a Respondent. Counsel thereafter withdrew the application. Initially the Complainant had also made a complaint against Yvette Sterling (Complaint No. 42 of 2009) but that complaint was dismissed by the Disciplinary Committee. Notwithstanding that dismissal, any party to a complaint has the right to obtain a subpoena to compel the attendance of any person to give evidence in course of the hearing of a complaint: see in that regard s14 (3) of the Act and the Rules par. 11. The form of subpoena is prescribed at Form 5 to the Rules and is issued by the Supreme Court at the instance of the party seeking same. Such a subpoena is issued as a matter of course by the Registrar of the Supreme Court. The Respondent was therefore entitled to subpoena Yvette Sterling to give evidence at the hearing of the complaint, but made no attempt so to do in the course of the presentation of his case.

33. The Respondent gave evidence in the course of which he explained that he acted for persons who had filed criminal and civil complaints against Carlos Hill. It was in the course of acting for such persons that he met Yvette Sterling, the principal attorney for Carlos Hill. He pursued ongoing negotiations with Mr. Hill and his attorney, Yvette Sterling meeting with them as much as 3 to 4 times per week. That when Ms. Sterling was outside of Jamaica he would speak to her daily and this occurred between the period June to September 2008 with increasing communications as the negotiations for settlement of the civil and criminal claims brought by his clients reached a sensitive stage. He explained that on 12th September 2008, Casie Jean Graham who also acted for Mr. Hill contacted him and as a result he met with her. She indicated to him that Dabdoub Dabdoub & Co

was taking steps to evict Mr. Hill from 68 Norbrook Drive, Kingston 8. She was aware of the Respondent's involvement in the sensitive negotiations and that there were confidential documents in the possession of Mr. Hill concerning his clients that would be compromised by the eviction of Carlos Hill on 13th September 2008. Accordingly, a letter to the Firm was jointly drafted by himself and Casie Jean Graham dated 12th September 2008 (**exhibit 4**). Though not stated in his oral testimony, clearly the Respondent's involvement in the giving of the undertaking was at the request and instructions of Carlos Hill, as set out in his letter **(exhibit 4**).

34. Further that in giving the undertaking dated 13th September 2008 to pay the sum of US$32,500.00 in order to satisfy the indebtedness in respect of arrears of rent, the Respondent's testimony was that he acted to protect his client's confidential documents and information which might have been compromised by the eviction of Mr. Hill from the premises and in doing so he relied on the assurance of Mr. Hill's principal attorney, Yvette Sterling that he would be put in funds to enable him to honour such an undertaking. The Respondent stated that he gave the undertaking "as a matter of courtesy to Ms. Yvette Sterling". He did not challenge the evidence of Jalil S Dabdoub or Abraham Dabdoub and in particular he did not challenge the evidence that he was warned by Abraham Dabdoub that he should not give such an undertaking unless he had the money in hand. The relevant bit of evidence is worthy of quotation:

> "Panel: Mr. Dabdoub said he cautioned you over the phone about giving an undertaking without the funds, is that true?
>
> Simms: Mr. Dabdoub's caution was in light of the fact that Mr. Hill had made promises and he did not believe Mr. Hill would honour them. However, having spoken to Ms. Sterling who I knew for a bit of time but knew her well and her being a member of the Jamaican Bar and she having been a relative of

> Donna McIntosh Brice Gayle who is a senior attorney, I did not believe there would be anything untoward in satisfying the undertaking."

35. That gratuitous warning or advice according to Mr. Dabdoub was given under the impression that the Respondent was a young inexperienced attorney but such is not the case. The Respondent stated that he was called to the Jamaican Bar in September 1998. That means that at the time of giving the undertaking he had 10 years standing at the Bar and must be taken to be well aware of the consequences of giving a professional undertaking.

**The Relevant Canons**

36. The consequence of the giving of an undertaking is spelt out in simple and clear language in the Legal Profession (Canons of Professional Ethics) Rules (1978) Canon VI (d)), as follows:

> "An Attorney shall not give a professional undertaking which he cannot fulfil and shall fulfil every such undertaking which he gives."

Canon VIII (d) also spells out that a breach of Canon VI (d) shall "constitute misconduct in a professional respect and an Attorney who commits such a breach shall be subject to any of the orders contained in section 12(4) of the Principal Act."

37. By advising and warning the Respondent that he should not give the undertaking before he had money in hand Mr. Abraham Dabdoub was simply reiterating one limb of Canon VI (d).

**Findings of Fact**

38. As a consequence of the foregoing, the Panel finds that:-

i. By letter dated 13th September 2008, the Respondent gave a clear and unambiguous professional undertaking stated to be irrevocable to pay the firm, Dabdoub Dabdoub & Co the sum of US$32,500.00 on Tuesday 30th September 2008 in settlement of outstanding indebtedness owed to the Complainant in respect of Carlos Hill's use and occupation of the Complainant's premises 68 Norbrook Drive, Kingston 8.

ii. The aforesaid undertaking was a professional undertaking given by the Respondent in his capacity as an attorney-at-law instructed by Yvette Sterling, the principal attorney for Carlos Hill.

iii. The Respondent's undertaking was given in a professional capacity as an attorney- at- law after Abraham Dabdoub had in correspondence dated 13th September 2008 **exhibit 5** rejected an undertaking that was worded as being given by Carlos Hill.

iv. Further the Respondent was warned by Abraham Dabdoub not to give such an undertaking if he did not have the money in hand.

v. In giving his professional undertaking to pay US$32,500.00 on Tuesday 30th September 2008, the Respondent did not have the funds in hand and chose to rely on the promise of Mr. Hill's principal attorney, Yvette Sterling that she would put him in funds.

vi. In giving the undertaking on 13th September 2008 to pay the sum of US$32,500.00 on 30th September 2008, the Respondent acted in breach of Canon VI (d) in that he gave a professional undertaking which he could not fulfil.

vii. The Respondent has failed to honour his professional undertaking to pay the sum of US$32,500.00 to the Firm on 30th September 2008 and despite the lapse of more than 2 years he has failed to pay any part of the sum owed on his undertaking. The failure to pay on the 30th September 2008 constitutes a breach of Canon VI (d) that requires an attorney to fulfil any undertaking which he gives.

viii. The attorney has up to the date of the hearing failed to pay the sum of US$32,500.00 or any part thereof.

**Failure to Call Deponent to the Affidavit in Support of Complaint**

39. In her closing submissions on behalf of the Respondent, Counsel for the Respondent adverted to the fact that although the Complaint was supported by an Affidavit sworn to by Jalil Peter Dabdoub, a director of the Complainant, the said Jalil Peter Dabdoub was not called as a witness to testify to the matters alleged in the Affidavit and to permit cross-examination. This she submitted was fatal to the Complaint. The Panel does not agree with that submission.

40. The scheme for making complaint is set out in the Legal Profession (Disciplinary Proceedings) Rules. Par. 3 of the Rules requires that a complaint is to be commenced by way of an application in accordance with a statutory form which is prescribed as Form 1 of the Schedule to the Rules supported by an affidavit by the applicant as prescribed in Form 2 of the Schedule to the Rules. The prescribed affidavit to support the complaint requires the complainant to set out in abbreviated form the relevant facts and allegations that support the complaint against the attorney. At this stage, the complainant is not required to set out the evidence that will be tendered at the hearing should the complaint be fixed for hearing. Rather, the purpose of the affidavit is to enable the Disciplinary Committee to determine whether there is a prima facie case of professional

misconduct in which event the Complaint must be fixed for hearing in accordance with pars. 4 and 5 of the Rules. Rules 4 and 5 are as follows:-

> "4. Before fixing a day for the hearing, the Committee may require the applicant to supply such further information and documents relating to the allegations as they think fit, and in any case where, in the opinion of the Committee, no *prima facie* case is shown the Committee may, without requiring the attorney to answer the allegations, dismiss the application. If required so to do, either by the applicant or the attorney, the Committee shall make a formal order dismissing such application.
> 5. In any case in which, in the opinion of the Committee, a *prima facie* case is shown the Committee shall fix a day for hearing, and the secretary shall serve notice thereof on the applicant and on the attorney, and shall also server on the attorney a copy of the application and affidavit. The notice shall not be less than a twenty-one days' notice."

41. However, as explained by the Court of Appeal in McCalla v The Disciplinary of the General Legal Council (1994) 49 WIR 213, the use of the term *prima facie case* in pars. 4 and 5 of the Rules is a misnomer and all that is actually required at that stage is that a case which is sufficiently serious must be shown on the application so that the attorney is not summoned to a hearing to answer charges that are frivolous, insubstantial, clearly unmeritorious or misconceived. In that regard, Rattray P. at page 230 (a to c) stated:

> "The appellant maintains that the finding of a prima facie case against him was not based on any or any sufficient evidence. In my view, all this rule provides is that before a date for hearing is fixed, a decision must be taken by the Disciplinary Committee based, not on evidence (since none is before it at this stage), but upon the nature of the allegations as to whether this is a matter on which the Committee should proceed. If the matter is trivial or frivolous there does not exist 'a prima facie case' for the Committee to proceed to trial. Frivolous allegations may be made against attorneys at law, the frivolity of which is evident and this provides for the Committee a process by which it can weed out insubstantial complaints and clear the list of matters unmeritorious."

42. It is to be noted that Rattray P quite clearly appreciated that the affidavit in support of the application was not to be equated with the evidence which had to be given at the substantive hearing of the complaint. The purpose therefore of the affidavit to support the complaint is to set out the relevant facts and allegations to substantiate that the complaint is not frivolous, plainly unmeritorious or misconceived. Once that is so, the complaint must be fixed for hearing at which *vive voce* evidence is given unless the Panel exercises its discretion to permit affidavit evidence to be used. It is only at the discretion of the Panel that the use of affidavit evidence may be permitted pursuant to par. 10 of the Rules as follows:

> "The Committee may, in their discretion, either as to the whole case or as to any particular fact or facts, proceed and act upon evidence given by affidavit:
> Provided that any party to the proceedings may require the attendance upon subpoena of any deponent to any such affidavit for the purpose of giving oral evidence, unless the Committee are satisfied that the affidavit is purely formal and that the requirement of the attendance of the deponent is made with the sole object of causing delay."

43. In the present case, the undertaking in issue was an undertaking given in writing to the Complainant's attorneys and it was made clear in the testimony of the attorneys, Jalil S. Dabdoub and Abraham Dabdoub, that their client, the Complainant and its director, Mr. Jalil Peter Dabdoub had no direct dealings or communications with the Respondent. At all material times, the Respondent communicated with members of the Firm and the alleged undertaking in writing was given to the Firm. Insofar as the affidavit in support of the complaint alleged as a fact that an undertaking had been given to the Complainant's attorneys and had not been honoured, those facts had to be established by evidence from attorneys who dealt with the Respondent. There was no need to call the director of the Complainant to give evidence at the hearing.

44. Further, at no stage of the proceedings up to closing argument did Counsel for the Respondent take issue with the affidavit in support of the Complaint. Neither did Counsel for the Respondent require the deponent to attend for cross-examination in accordance with Rule 10. Indeed, all the relevant documentary evidence including the Respondent's letter of undertaking dated 13th September 2008 (**Exhibit 1**) were admitted by consent and in the closing submissions on behalf of the Respondent, it was conceded that the Respondent had given a professional undertaking which he had not honoured. The undertaking remained outstanding and Counsel for the Respondent conceded that it was the honourable thing for the Respondent to pay the sum owed or to pay something and that that had not been done.

45. Given the totality of the evidence tendered by the attorneys, Jalil S. Dabdoub and Abraham Dabdoub both partners in the Firm who communicated and dealt with the Respondent on the Complainant's behalf, and given the evidence and admissions made on behalf of the Respondent, the Panel is of the view that there is no merit to the submission that the failure to call the deponent to the affidavit in support of the complaint is fatal to the complaint and we find that the complaint has been established beyond reasonable doubt.

**Guidance as to the Application of Sanctions**

46. It was urged by Counsel for the Respondent that in giving the undertaking he relied on the assurance of Yvette Sterling, the attorney for Carlos Hill that he would be put in funds and that in those circumstances, neither an order of striking off nor suspension is warranted. Where an attorney is to be sanctioned for professional misconduct, the Disciplinary Committee is guided by the relevant considerations set out in the case of Bolton v The Law Society [1994] 1 WLR 512 at 518 to 519, where Sir Thomas Bingham (as he then was) stated:

“It is required of lawyers practising 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 the 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.

It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him

again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

**Breach of Professional Undertakings not Excusable**

47. Similar considerations were mentioned in the judgment of Lord Donaldson MR in the case of United Bank of Kuwait v Hammond [1988] 1 WLR 1051 at 1066 a case concerning the importance of honouring professional undertakings:

> "I say nothing about the position of members of the Bar as being immaterial for present purposes, but the solicitor's role is much wider than this. They are, to use an old-fashioned expression, 'men of affairs.' The public would be wise to consult them, and does consult them, when faced with unusual problems which may or may not have hidden legal aspects and which do not clearly raise issues within the special expertise of some other profession. The great, and perhaps unique, value of the professional advice of solicitors is to be found in a combination of factors which those who consult them are entitled to expect, and usually get: total independence, total integrity, total confidentiality, total dedication to the interests of the client, competent legal advice and competent other more general advice based on a wide experience of people and their problems, both in a personal and in a business context. The need to maintain this

> enviable situation is, of course, the reason and justification for the unforgiving attitude adopted by the profession towards those of their number, and there will inevitably be a few, who fall below the standards required of them."

48. Where an attorney gives a professional undertaking, non-performance is not excused because the attorney relied on some other person, whether that person is a client, an employee, a partner or an instructing attorney. In Sylvester Morris *v* General Legal Council Ex Parte Alpart Credit Union (1985) 22 JLR 1, the appellant acting on behalf of a client in the purchase of property gave an undertaking to send the registered title to the credit union which advanced money for the purchase. The client obtained possession of the certificate of title from a clerk in the appellant's office when he was absent and used it to secure a separate loan from another mortgagee with the result that the loan from the credit union remained unsecured and the client refused to pay same. The Disciplinary Committee ruled that the conduct of the appellant amounted to misconduct in a professional respect and by way of restitution, the appellant was ordered to repay the client's unsecured loan. On appeal, it was held that where an attorney gave an undertaking in his professional capacity to a third party, he could not exonerate himself by pleading that he had delegated the performance of the undertaking to another person. The fact therefore that the title had been left in the possession of a member of staff at the appellant's office who delivered it to the client did not exonerate the attorney from liability.

49. In delivering the judgment of the Court of Appeal, Carey JA stated at pages 6 to 7:

> "Further, where an undertaking has been given, the question which should be asked is whether the undertaking was given by the attorney in his character of attorney in the transaction of the dispute. See *In Re Gee (1845) 2 Dow & L. 997.* There was no question in this case but that this undertaking was given in the appellant's character of attorney. Plainly as these cases show, it matters not whether some technical defence is open to a party or whether the attorney is guilty of any blameworthy conduct. An ordinary man is

expected to keep his word; a fortiorari an attorney. But if further authority was wanted to emphasize the rationale of the court's discretion to punish its officers, *Myers v Elman [1939] 4 ALL ER 484* is apposite. This case was not however concerned with an undertaking by an Attorney-at-Law but with conduct by the managing clerk of an attorney who had delegated his duties to his clerk. The House of Lords held that the managing clerk had knowingly prepared affidavits of documents which were inadequate and in the circumstances the respondents was guilty of misconduct. 'Professional misconduct' is not a Lord Atkin at p. 497 makes clear in his opinion, limited to those cases which involve – 'personal misdoing. After all, they only mean misconduct in the exercise of the profession'

In that case, which as shown, concerned misconduct in litigation proceedings, he was moved to assert at p. 497:

'From the time immemorial, judges have exercised over solicitors, using the phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceedings in the court itself… The duty owed to the court to conduct litigation before it with due propriety is owed by the Solicitors for the receptive parties, whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable… Nevertheless, as far as the interests of the court and the other litigants are concerned, it is a matter of no moment whether the work is actually done by the solicitor on the record or by his servant or agent. If the court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record shall be held responsible.'

It is no answer then to say as this appellant sought to do, that he had issued instructions for he had professionally pledged that he would deliver the certificate of title. It was an obligation or undertaking which he could fulfil because he had the document in his possession. So that even if the Canons were not extant, the appellant as an attorney could be punished by the court which has an inherent jurisdiction to punish its officers. The present Rules and those which predated them and relate to this appeal accept, that conduct which is in keeping with the traditions of the legal profession, has not been changed in any way…

It is necessary to point this out as there was some suggestion from Mr. Edwards that the Canons had altered those principles of common law which concerned barristers and solicitors. The Legal

> Profession Act sought among other things to fuse both branches of the profession which up to the passing of the Act were in existence in this country. The breach of an undertaking amounts to professional misconduct whether at common law or by the present statutory provisions."

50. Neither is a breach of undertaking excusable because the attorney had no instructions to give the undertaking see John Fox (a firm) v. Bannister King & Rigby's [1987] 1 All ER 737 in which the undertaking by the attorney was that he would hold a certain amount of money. On his client's instructions the money was disbursed. This authority demonstrates that it matters not the circumstances under which the undertaking was given and whether it was "a courtesy" to another as stated by the Respondent. Impossibility of performance does not release an attorney from liability for breach of an undertaking and its breach amounts to professional misconduct even though the attorney has not been guilty of dishonourable conduct, Udall v. Capri Lighting Ltd. [1987] 3 All ER. 262. In that case the court was concerned with the second of the 3 possible ways to remedy an attorney's breach of undertaking, these being:-

1) By action at law;
2) By application to court to exercise its inherent supervisory jurisdiction;
3) By disciplinary proceedings.

51. The Sylvester Morris Case (supra), the Bannister Case (supra) and the Udall Case (supra) did not involve an undertaking for the payment of money or the holding of money for another's account. Further Bannister and Udall involved applications to the court pursuant to its supervisory jurisdiction for enforcement or compensation.

52. In Beller v The Law Society (2009) EWHC 2200 (Admin) the appellant gave an undertaking to a Trust that he would hold money given to him to the order of the trustees. In breach of that undertaking, the appellant paid out substantial sums

amounting to £2.2m to a trusted client and was unable to honour his undertaking. The appellant admitted the breach of the undertaking and he explained that although he had paid out the money to his client, that without his permission the client, who he had no reason to distrust, had taken from his office securities which had been held to cover the undertaking. The Disciplinary Tribunal took the view that the facts were so serious that the only penalty they could impose was to remove the appellant from the Roll. That decision was upheld by the Divisional Court notwithstanding the fact that the client had stolen securities from the appellant's office that would have backed his undertaking and in circumstances where there was the mitigating factor that the appellant had pursued litigation against the client and had secured the funds so that ultimately no one had suffered loss. In the judgment of Thomas LJ it was stated at pars. 13-19:

> "13 .... The Disciplinary Tribunal took the view that those facts were so serious that the only penalty they could impose was the penalty of removing him from the Roll. It did so on the basis that the reputation of the profession depended upon solicitors honouring undertakings, and it was essential to the conduct of non-contentious business that people could repose trust in a solicitor performing undertakings, and a solicitor should, therefore, never put himself in a position where he would breach an undertaking.
> 14 It is clear, in my view, that by far the most serious part of the matters that were before the Tribunal related to the sum of £2.2 million which had been paid into the appellant's client account to be held to the order of a trust, and that the appellant had released the sum of money without the assent of the trust and merely upon being told by his client, Mr Scott Young, that it was all right to pay him the money. It seems to me that, unless there were wholly exceptional circumstances, such conduct alone would compel any responsible Disciplinary Tribunal to regard that, in itself, as sufficient to remove a solicitor from the Roll. It was the grossest breach of an undertaking involving a very substantial sum of money. It is no excuse, and no mitigation, to pay out to one client such an enormous sum of money on being told by that client that it was all right to pay, when there has been a breach of an undertaking to another client. The whole point of the undertaking to the other client was that the client had to have the solicitor's word that the money would only be transferred

upon his consent. By breaching that undertaking and not being in a position to perform that undertaking, there was, in my view, such a serious breach of the rules, and the potential of such damage to the profession, that unless there were wholly extraordinary circumstances, that was sufficient, of itself, for striking off the Roll.

15 We have investigated, because it was not clear from the circumstances set out in the decision, whether there were mitigating circumstances. It is not necessary for me to set out the facts as they have more clearly emerged before us. It is sufficient to say that there were, unfortunately, no mitigating circumstances that could explain such serious breaches of an undertaking.

16 The other matter that is of very serious concern, and which is relied upon as mitigation, is that the appellant said he could trust Mr Scott Young. It is now obvious from the matter relating to the £2.2 million, that Mr Scott Young is a man who is dishonest. It is also obvious, from the circumstances in which Mr Scott Young removed securities that had been placed with the appellant, totalling some £15 million, that Mr Young committed a further and grave act of dishonesty in taking them. Those acts of dishonesty by Mr Scott Young are relied upon by the appellant in saying that, until those two matters occurred, he had no idea that Mr Scott Young was dishonest, and no reason not to trust him. But a solicitor who gives to other people an undertaking must always act on the assumption that the persons to whom he gives an undertaking must be protected, and that he cannot rely upon the apparent trustworthiness of his client to see him right. He has to stand behind his undertakings himself and any attempt to say, 'Well I trusted my client, and therefore I could do what he asked me to do', would totally undermine, in a grave manner, the high-standing in which the solicitor's profession is held.

17 Furthermore, it seems to me that the Law Society were entitled to take a view that it is very important that solicitors realise, on pain of having their name removed from the Roll, that they must take great care in dealing with clients, particularly if they are sole practitioners, where clients ask them to do things which are not strictly in accordance with the rules. It would have been quite open to the Tribunal to regard this case as a case where there were further aggravating matters which plainly called for a deterrent sentence.

18 There is, of course, very substantial personal mitigation. As a result of the litigation undertaken by the appellant, all funds have been secured and no one has lost anything. That is much to his credit. He did not contest the charges; that again is much to his credit. He was suffering from severe ill health at the time of these events. His personal circumstances relating to his family are also

> strong mitigating factors. He has lost, personally, very substantial sums of money by making those available to make good the short-fall, and, as if that was not sufficient, his wife has also been defrauded by Mr Scott Young of some £200,000. All of that, of course, is most unfortunate, but all of that mitigation cannot in anyway mitigate a penalty that was inevitable for the grave failings committed by this solicitor. As I have already said, it is no defence to say that he was duped; he was plainly duped, but a solicitor who gives an undertaking must not put himself in a position where he is unable to perform the fundamental obligations he owes to others. Being duped by your own client is no excuse.
>
> 19 For those reasons, therefore, I, speaking for my own part, regard the decision of the Tribunal as one not only well within the range with which this court would not interfere, but one which, had they not made it, many would have regarded them as failing in their duty to protect the profession. The consequences are undoubtedly very severe to this appellant, but there can be no circumstances which would justify this court in interfering with the decision made. For those reasons, therefore, conscious though I am of the strong mitigation that this appellant has, and also conscious that there is no suggestion in the award of the Solicitors' Disciplinary Tribunal of any dishonesty, the appeal must be dismissed." (emphasis added)

**Conclusions**

53. In the present case the sum involved is far less than in the case of Beller v The Law Society but it is nevertheless significant (amounting to approximately J$2.79m at prevailing rates of exchange). The fact that the Respondent was instructed by Yvette Sterling, the principal attorney for Carlos Hill, to give the undertaking on her promise to put him in funds provides no excuse for the Respondent's failure to fulfil his undertaking. Yvette Sterling did not tell the Respondent that she personally had the funds in hand to remit to him. She was in no better position than the Respondent for the reason that according to the Respondent's testimony the basis for her promise to put him in funds was that the brother of Carlos Hill had the funds and what was produced was a statement of account (**exhibit 10**) purportedly issued by a company in the United States called Montauk Financial Group reflecting a balance owed to an entity named BJ&D

Productions Inc. There is no ostensible link to Carlos Hill or his brother or to Yvette Sterling.

54. The Respondent gave the undertaking notwithstanding the warning given by Mr. Abraham Dabdoub that he was not to give such an undertaking unless he had the money in hand. Having been warned, the Respondent took the risk and regrettably the risk has materialized. In all the circumstances of this case, we see no distinction between the giving of a professional undertaking to pay money when there are no funds in hand to back the undertaking and the giving of a cheque when there are no funds in the bank account to back the cheque (as in the case of Georgette Scott v General Legal Council supra). In both instances the conduct is dishonourable and unbecoming and is of such a nature as to bring the profession into disrepute.

55. A further factor that we take into account is that the Respondent has made no payment whatsoever in the period that has elapsed since 30th September 2008.

56. There are simply no mitigating circumstances to excuse the Respondent's dishonourable failure to comply with his professional undertaking. Such misconduct is not a matter which in our view can be countenanced given the damage to the profession that would result if it is allowed to pass without a deterrent order being made in addition to an order for payment.

**Order**

57. For the foregoing reasons, it is accordingly ordered as follows:

    1. Pursuant to section 12 (4)(a) of the Legal Profession Act, the name of Jermaine Ryan Simms is struck off the Roll of Attorneys-at-law entitled to practice in Jamaica;

2. Pursuant to section 12 (4)(f) of the Legal Profession Act, by way of restitution Jermaine Ryan Simms is to pay to the Complainant, Marine Wildlife Publications Ltd or their attorneys, Dabdoub, Dabdoub & Co the sum of US$32,500.00 together with interest thereon at the rate of 6% per annum computed from 30th September 2008 to the date of payment;

3. That the Respondent, Jermaine Ryan Simms is to pay costs to the Complainant in the sum of $100,000.00.

Dated the 19th day of February 2011

**ALLAN S. WOOD, Q.C.**

**JOHN GRAHAM**

**DAVID BATTS**