DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

COMPLAINT NO. 140/2009

In the Matter of ROBERT HENRY and LAWRENCE HAYNES, an Attorney-at-Law.

AND

In the Matter of the Legal Profession Act, 1971

Panel: Jerome Lee
Charles Piper (Chairman)
Daniella Gentles-Silvera

Appearances: The Complainant, Mr. Robert Henry, appeared in person.
Mr. Akin Adaramaja appeared for the Attorney, Mr. Lawrence Haynes.

Hearing: 17th July, 2010, 27th November, 2010 and 29th March, 2011, 4th May, 2013

COMPLAINT

1. The complaint against the Attorney-at-Law, Lawrence Haynes, (hereinafter called "the Attorney") as contained in Form of Affidavit sworn to on the 6th November, 2009 by Robert Henry, (hereinafter called "the Complainant") is that:

   (a) The Attorney has charged him fees that are not fair and reasonable;

   (b) The Attorney has not provided him with all information as to the progress of his business with due expedition although reasonably required to do so;

   (c) The Attorney has acted with inexcusable and deplorable negligence in the performance of his duties; and

(d) The Attorney has not accounted to him for all monies in his hands which are for his account/credit although reasonably required to do so.

THE ORAL EVIDENCE

2. The Complainant's evidence is that he retained the Attorney to represent him in an action in the Supreme Court brought by him against one Nal Taylor. The nature of those proceedings will be addressed later in this decision.

3. The complainant said that the Attorney was his final attorney, that he paid the Attorney for doing the work and that he has receipts showing that he paid the Attorney. He said further that although he does not have those receipts with him, he has the receipt showing that he paid the Attorney in connection with the Appeal.

4. He stated that the Judge was Mr. Justice Anderson and that he is in possession of a copy of the Judgment. A copy of the Judgment of Anderson J in Suit No. C.L. H 124 of 1984 was produced by the witness and was admitted in evidence as **Exhibit 1.**

5. He said that when he was informed by the Attorney that he should come to the Attorney's offices to hear what the Judge said, he "thought that we would get a notice to come to court".

6. However, said the Complainant, on the following day he went to the Attorney's offices at which time the Attorney read the contents of the Judgment to him. This, he said, was some time in 2008. He said that after requesting same he was unable to obtain a copy of the Judgment because the Attorney's "computer" (which we understood to refer to the Attorney's photocopying machine) was not working.

7. The Complainant said that he advised the Attorney that he wished to appeal the decision and was told by the Attorney that if he (the Attorney) was to file an appeal, the Complainant would have to pay $150,000.00 for the appeal and would have to pay down $75,000.00 so that the appeal could be filed.

8. Also in examination in chief, the Complainant said that he paid the sum of $75,000.00 and was given a receipt. The receipt was produced and was admitted in evidence as **Exhibit 2.**

9. Further, the witness said that going on for three months he was not provided with a copy of the appeal and when he asked the Attorney about it he was told by him that he (the Attorney) did not have time to speak to him (the Complainant) as he was going to be at court in St. Thomas. The Complainant said that he was told to return on the Friday morning and, when he did so, the Attorney was not pleased to see him and asked if he wanted some of his money back.

10. The Complainant said that he then enquired of the Attorney why he was being treated in that manner, and said that he would have to go to a consultant. However, he went to the Court of Appeal and spoke to someone at the Registry. As a result of this enquiry he learnt that no appeal had been filed. He said that he was then directed to the General Legal Council. After this he did not speak to the Attorney again.

11. Under cross examination, the Complainant said that he was not advised by the Attorney that he had been partially successful at the trial and that he only saw that the Attorney was saying this when he later saw a document or documents saying this.

12. The Complainant said that the Attorney should have filed the appeal because he took the funds to do so.

13. With respect to the action in the Supreme Court brought by him against Nal Taylor, the Complainant said that the Defendant, Taylor, claimed all three sections of certain lands delineated in a Surveyor's Diagram prepared by Mr. Philmore Stewart, Commissioned Land Surveyor. This Surveyor's Diagram was tendered and admitted in evidence as **Exhibit 3.**

14. He (the Complainant) said that the Defendant claimed all of the land while he (the Complainant) only claimed sections 1 and 2 on the said Diagram, but not section 3. He said that the Attorney did not point out to him that the Judge gave him (the Complainant) section 1.

15. The Complainant disagreed with many aspects of the Judgment of Anderson J and was unhesitant in stating his disagreement under cross examination. He did not recall if the date when he went to the Attorney's offices to be informed about the Judgment was March 14, 2008. He was however adamant that he told the Attorney to appeal because he felt that the Judgment had "too much flaws in it".

16. The Complainant denied that he was advised by the Attorney not to appeal because there was no merit in the appeal.

17. The Complainant said that the $75,000.00 was paid by him on the same day that he was advised by the Attorney of the Judgment. He was shown Exhibit 2 and agreed that it is dated May 29, 2008. He accepted that this is the receipt that he received.

18. In answer to a question from the panel, the Complainant said that he could not recall if the sum of $75,000.00 was paid on the same day that the Judgment was read and explained to him. However, in answer to further questions from Mr. Adaramajah he again asserted that that sum was paid on the same day that the Judgment was read to him.

19. He said that between the time that the Attorney read the Judgment to him and the time he went to the Court of Appeal, he had been back to see the Attorney on either one or two occasions. He denied that the Attorney told him that if he did not pay the funds he, the Attorney, would do nothing. He denied further that between the date when the Judgment was read to him and the date when the payment was made he had been to the Attorney's offices on at least two occasions.

20. The Complainant denied that there was any discussion with the Attorney about Ms. Vassell and he denied that the Attorney advised him that there was no prospect of succeeding in the appeal.

21. The Complainant said further that he paid the money on the same day that he was told what he had to pay. He said that he had walked with money on that day and that he had in excess of $100,000.00 on him because he knew that when the Attorney requested funds he required it quickly.

22. He denied that he owed the Attorney during the trial. He described the Attorney as being a strict man and said that "you have to pay him before the trial – before the case try." Later in cross examination, in maintaining that he did not owe the Attorney any funds in relation to the trial, the Complainant said to Counsel that he must produce a balance sheet to show that he owed a balance.

23. He denied that the Attorney threatened to withdraw from the case if he did not pay a part of the legal fees and he denied that it was when he was threatened that he paid. He asserted that the fees were paid before the case was tried.

24. He denied having a bad record of paying the Attorney and he denied having told the Attorney anything about getting money from the beneficiaries. He repeated his denial of the suggestion that the Attorney had informed him that if he did not pay the deposit he (the Attorney) would do nothing and he denied that the deposit of $75,000.00 on account of the cost of the appeal was paid 76 days after the Judgment.

25. In further cross-examination the Complainant denied receiving letter dated July 12, 2006 from the Attorney. This letter was marked 4 for identification and was later admitted in evidence as **Exhibit 4**. However, the complainant did accept that receipt dated September 15, 2006 for $80,000.00 related to a payment made in connection with the trial. This receipt was admitted in evidence as **Exhibit 5**. The Complainant also accepted that he paid a further sum of $20,000.00 on November 10, 2006. This receipt was admitted in evidence as **Exhibit 6**.

26. When asked further, the Complainant denied owing a balance after these payments. He could not recall if the case came on for trial in November, 2006 but recalled that it came before Beswick J and was adjourned because the Defendant, Nal Taylor, was reported to have been ill.

27. The Complainant could not recall if he made any payments between November 2006 and November, 2007 and he could not say whether the next payment was made in April, 2008.

28. The Complainant was shown receipt dated April 8, 2008 for $20,000.00 from the Attorney. He explained that it was after the visit to the locus in quo that he (referring

to the Attorney) charged for transportation. This receipt was admitted in evidence as **Exhibit** 7. The Complainant said further, that when he made that payment he had not at that time asked the Attorney to pursue the appeal.

29. He again denied that the Attorney advised him that if he did not pay the outstanding fees he would not look at the appeal. He however admitted that receipt dated April 17, 2008 from the Attorney for $60,000.00 related to a payment made in connection with the trial. Nevertheless, he again denied that the Attorney told him that he would not look at the appeal unless the deposit of $75,000.00 was paid.

30. He also denied that the Attorney told him that he had no confidence in the Appeal succeeding, neither was he advised to get a second opinion and he was not asked if he wished to have some of the deposit refunded.

31. The Attorney then gave evidence. He denied having neglected the appeal or having neglected to file the appeal. He said that historically, the Complainant had been reluctant to pay fees in a timely manner and that this reached a head in July, 2006 when the trial was scheduled for November 10 and 11, 2006. He wrote letter dated July 12, 2006 to the Complainant (Document 4 for identification) which he identified as being his document and which was admitted in evidence as Exhibit 4.

32. He said that at the date of the adjourned trial in November 2006, the Complainant still owed a balance of $80.000.00. He said that after the adjournment to the date when the matter came before Anderson J for trial in November 2007 the Complainant made no payments towards the outstanding balance. Before judgment was delivered the Complainant would visit the Attorney's offices and enquire about the judgment and when asked about the payment of the outstanding fees, the Complainant would say that he is waiting on the beneficiaries.

33. The Attorneys said that on or about March 12, 2008 he received a call that Anderson J would be delivering Judgment the following day, that he attended and received Judgment and that he telephoned the Complainant giving him a synopsis of the Judgment including the fact that he had been partially successful. The Complainant attended at his offices on March 14, 2008 and they discussed the Judgment. The

Attorney said that the Complainant told him to appeal even before they were finished discussing the Judgment.

34. The Attorney said that on March 14, 2008 he indicated to the Complainant that before he could look at the appeal he (the Complainant) would have to pay up the outstanding fees and deposit the sum of $75,000.00 towards the appeal. This request, says the Attorney, was repeated when the Complainant sought to persuade him "to put in the appeal".

35. On April 8, 2008 the Complainant paid the sum of $20,000.00 evidenced by Exhibit 7 and on April 17, 2008 he paid the further sum of $60,000.00. After that, the Complainant tried to persuade him to file the appeal but was told by the Attorney that he will not do so until the sum of $75,000.00 was paid.

36. On May 29, 2008 the sum of $75,000.00 was paid by the Complainant. Thereafter, the Attorney said that he looked at the file and went over the matter a number of times. He was mindful of the fact that "we" were out of time but felt that "if persuasive grounds appeared it could be pursued." The Attorney said that the Complainant attended about two weeks later and he (the Attorney) expressed his doubts. After some discussion about fear, the Attorney advised the complainant that it was not a matter about fear but that the appeal must have merit.

37. The Attorney said further that the Complainant returned about one week later by which time he had received a copy of Anderson J's Judgment. At this point the Attorney said that he invited the Complainant to seek a second opinion..

38. In answer to the panel the Attorney said that none of this advice to the Complainant had been put in writing.

39. The Attorney continued. He said that at this point a sort of tension developed between himself and the Complainant. He said that the Complainant was insisting that he pursue the appeal and that he (the Attorney) had no confidence in it. He said further that it came to the point that he asked the Complainant whether he wanted some of his money back and the Complainant said that he did not, he just wanted the Attorney to pursue the appeal.

40. The Attorney ended his evidence in chief by stating that he has been fair to the Complainant, that he did not mislead or overcharge him and neither did he neglect his matter. He said that in all of his dealings with the Complainant the latter did not request the return of his money and neither did he indicate that he, the Attorney, was unreasonable in respect of the fees that were charged. He said also that he is mindful of his obligations to bring proceedings in court which are meritorious.

41. Finally he said that he told the Complainant that the retainer would be $150,000.00 and that he would have to pay at least $75,000.00 before he (the Attorney) would look at the file. He said that at no time did he ever tell the Complainant that he had no time for him. He always had time for the Complainant.

42. The cross examination of the Attorney did not reveal much of significance. The Attorney said that he did not communicate with the Complainant by letter because they were accustomed to communicating with each other by telephone.

43. The Attorney denied that the Judgment of Anderson J was read to the Complainant on May 29, 2008. He said that this was done on March 14, 2008. He denied agreeing with the Complainant that the Judgment was flawed and he denied telling the Complainant that the appeal would cost $150,000.00. This, said the Attorney, was to be the retainer.

44. The Attorney also denied having told the Complainant that he would pursue the appeal and he denied that this was the first time that he was saying that he had no confidence in it. He denied further that this was the first time he was saying that he told the Complainant to get a second opinion. He said that he advised the Complainant that he had not filed the appeal.

45. In answer to the panel the Attorney said that he advised the Complainant of the time within which the appeal must be filed. He said that this was done within one month of March 14, 2008. He said that he did so in a discussion and that he does not know why this was not put to the Complainant. He said that this advice was not reduced to writing to the Complainant.

THE UNCONTROVERSIAL FACTS

46. The evidence reveals that issue is not joined between the Complainant and the Attorney on the following which we find as fact:

(i) The Complainant retained the Attorney to prosecute a claim against one Nal Taylor for the determination of the issue of ownership of certain lands part of Mount Charles in the parish of St. Andrew.

(ii) The action was tried before Mr. Justice Anderson in or about November 2007 and Judgment was delivered on March 13, 2008.

(iii) The Attorney advised the Complainant of the contents of the Judgment and was told by the Complainant to appeal the decision.

(iv) The Attorney advised the Complainant to pay a deposit of $75,000.00 on account of the appeal.

(v) On the Complainant's case the cost of the appeal was told to him as being $150,000.00. On the Defendant's case the sum of $150,000.00 was to be a retainer. We do not think that ultimately anything turns on whether or not the sum of $150,000.00 was to be a retainer or the cost of the Attorney doing the appeal. Both the Complainant and the Attorney agree that the sum of $150,000.00 was to be paid in connection with the appeal.

(vi) The sum of $75,000.00 was paid by the Complainant on May 29, 2008 and received by the Attorney as being "Legal fees: deposit for appeal Robert Henry v Nat Taylor". See exhibit 2.

(vii) None of the advice which the Attorney said that he gave to the Complainant was put in writing.

(viii) No appeal was filed.

(ix) The Attorney is still in possession of the sum of $75,000.00 paid by the Complainant in connection with the requested appeal.

THE DISPUTED FACTS

47. There are several disputed facts the most significant of which are as follows:

(i) Whether the Complainant attended upon the Attorney on March 14, 2008 or on some later date to have the Judgment read and explained to him.

(ii) Whether the Complainant had outstanding sums due to the Attorney at the time of the delivery of Judgment in connection with the trial of the action.

(iii) Whether the Complainant was advised by the Attorney that if he did not pay the outstanding sums including the sum required as a deposit in connection with the appeal, the Attorney would not look at the file with a view to pursuing the appeal.

(iv) Whether the Complainant was advised by the Attorney that he (the Attorney) had had no confidence in the appeal.

(v) Whether the Complainant was advised by the Attorney to obtain a second opinion regarding the possibility of successfully appealing.

(vi) Whether the Complainant made at least two visits to the Attorney's offices to see him between the date when the Judgment was read to him and the date when (a) he paid the sum of $75,000.00 and (b) he went to the Court of Appeal Registry.

(vii) Whether the Complainant received or was aware of the contents of Exhibit 4 – letter dated July 12, 2006 from the Attorney to the Complainant.

(viii) Whether the Attorney advised the Complainant of the time within which an appeal is required to be filed.

(ix) whether the Complainant paid the deposit of $75,000.00 for the appeal, on the 29th May, 2008;

(x) Whether the 29th May, 2008 was the date on which the Judgment was read by the Attorney to the Complainant.

RESOLUTION OF DISPUTED FACTS

48. We are assisted in the resolution of some of the disputed facts by reviewing the documented evidence against the background of the oral evidence. We accept the evidence of the Attorney that after receiving Judgment he contacted the Complainant, gave him a synopsis of the Judgment and invited him to attend for further discussions. Further, we accept the Attorney's evidence that discussions between the Complainant and the Attorney during which the Judgment was read and explained, took place on the 14th March, 2008 and not on the date when the sum of $75,000.00 was paid by the Complainant. The document, Exhibit 2 clearly shows that this sum was not paid until May 29, 2008.

49. Given the contents of Exhibits 4, 6 and 7 – letter dated July 12, 2006 and receipts dated April 7 and 17, 2008 respectively, we are satisfied that the Complainant received Exhibit 4, he knew that sums were outstanding in respect of the trial both after the trial had been completed and after Judgment had been delivered and that he attended and settled this outstanding balance on the dates indicated in exhibits 6 and 7.

50. The evidence of the Complainant and the Attorney was contradictory in many respects specifically in relation to when did the Complainant visit the Attorney for the reading of the Judgment; did the Attorney advise the Complainant of the time

frame for filing the appeal; did the Attorney advise the Complainant that his appeal had no merit and if so when, did the Complainant owe the Attorney money for the Supreme Court suit and did the Attorney threaten to remove his name from the record if the Complainant did not pay outstanding fees; did the Attorney tell the Complainant that if he did not pay the outstanding fees and deposit on the appeal that the Attorney would not look at the appeal and finally, did the Attorney tell the Complainant to get a second opinion from another Attorney with respect to the merits of the appeal.

ADDITIONAL FINDINGS OF FACT

51. Having seen and heard the witnesses and having perused the exhibits, the Committee makes the following additional findings of facts:

    (a) The Complainant visited the Attorney for the hearing of the Judgment on the 14th March, 2008 being the day after the Judgment was delivered and did not pay the Attorney any money on account of the appeal costs until the 29th May, 2008. The fact is that the Complainant could not be sure in giving evidence when exactly he visited the Attorney for the reading of the Judgment but he insisted at all times that it was the day when he paid the sum of $75,000.00 for the appeal and got the receipt which he acknowledged, was dated May 29th, 2008. In answer to a question in cross examination that payment was made 76 days after the Judgment had been given, he said *"Can't remember how much months or weeks after as he never had computer fixed up at the time"*. The fact that the Complainant insists that the visit and payment was on the same day which would be the 29th May, 2008 is more in keeping with the Attorney's evidence that the visit was before on the 14th March, 2008 and the payment was on the 29th May, 2008. It would be incredulous that the Attorney would have had the Judgment from the 13th March,

2008 and not read it to the Complainant until two and a half months later on the 29th May, 2008 when the money for the appeal was paid and also incredulous that knowing about this Judgment from March 2008, the Complainant would have wasted 2 ½ months after being told that the Judgment had been delivered to visit the Attorney to have the Judgment read to him. Further the Complainant in cross examination accepted that he had paid $20,000.00 and $60,000.00 in April, 2008 on account of the Attorney's fees for the Supreme Court which would have been after the Judgment was delivered on the 13th March, 2008. If one follows this bit of evidence to its logical conclusion it would mean that notwithstanding that the Attorney had the Judgment, when the Complainant paid these sums in April, 2008, the Attorney-at-Law nevertheless waited until May 29th, 2008 to read the Judgment and the Complainant knowing that the Attorney had the Judgment from the 13th March, 2008 nonetheless waited until the 29th May, 2008 to hear the Judgment.

(b) The Complainant owed the Attorney money for his fees on the Supreme Court suit and the Attorney had at some point threatened to remove his name from the record for nonpayment of fees by the Complainant. The following cross examination of the Complainant is instructive:

"**Adaramaja**: I am going to suggest to you that you always owe Mr. Haynes money.

Henry: No you have to pay him your honour.

Adaramaja: You are not speaking the truth.

Henry: I am speaking the truth your honour.....

Adaramaja: Mr. Henry I want to put it to you that throughout the trial, you were owing Mr. Haynes consistently.

Henry: No, you honour you cannot owe Mr. Haynes money, he is very strict with money.

Adaramaja: That even when you came to collect the judgment you were still owing legal fees.

Henry: No, I never owe him any money. I had to pay before the Court date every farthing.

Adaramaja: Mr. Henry, do you recall that just before the trial, Mr. Haynes threatened to withdraw if you did not pay the legal fees.

Henry: No your honour.

Adaramaja: It was after he threatened to withdraw that you paid a portion of the money.

Henry: No, I paid before we went to trial.

Notwithstanding the Complainant's insistence that he never owed the Attorney any money on account of the Supreme Court suit he acknowledged paying money to the Attorney in April, 2008 which was evidenced by Exhibits 7 & 8 which were receipts issued by the Attorney dated the 8th April, 2008 and April 17th 2008, for the sums of $20,000.00 and $60,000.00 after the Judgment was delivered expressed as follows "Legal fees –Re: Suit Robert Henry against Nal Taylor-Supreme Court".

(c) The Complainant instructed the Attorney to file an appeal.

(d) The Attorney verbally advised the Complainant of the time period within which he had to file an appeal.

(e) The Attorney took the deposit of $75,000.00 for the appeal on the 29th May, 2008 after the time period for filing of the appeal had expired.

(f) The Attorney told the Complainant that he had no confidence in the appeal and told him to get a second opinion after the time period for filing the appeal had expired.

(g) The Attorney told the Complainant that he would not look at the appeal until his outstanding fees had been paid and half of the deposit on account of the appeal costs were also paid.

THE LAW HAVING REGARD TO THE FACTS

52. On three (3) critical matters those being (1) when the Judgment was read to the Complainant; (2) when he paid the deposit on account of the fees for the appeal and (3) whether or not he owed the Attorney legal fees, the documentary evidence on which the Complainant relies does not support his evidence but in fact supports the evidence of the Attorney. This evidence is that the Judgment was read to the Complainant on the 14th March, 2008 but the Complainant did not pay any fees on account of the appeal until the 29th May, 2008, after the time for filing had expired. Further the Complainant owed the Attorney fees for the Supreme Court suit which he did not pay until April, 2008. These discrepancies in the Complainant's evidence is, in our view attributable the Complainant's age and powers of recall as opposed to him deliberately trying to steer the panel wide as, notwithstanding his verbal testimony he in fact sought to rely on the documentary evidence which contradicts him on occasions.

53. Notwithstanding the aforesaid it was incumbent on the Attorney once he had read the Judgment to the Complainant and upon the Complainant indicating his wish to appeal the decision, to immediately advise him that:

(a) he had 42 days within which to file an appeal and the consequences of not filing the appeal within the time period; and
(b) he did not feel the appeal had any merit and the reasons for his opinion.

54. The Attorney gave evidence that he did advise the Complainant of the time frame within which to file the appeal and that he felt the appeal had no merit but his advice

was not in writing, which, given the nature of the matters and the consequence to the Complainant if the appeal was not filed in time, it was incumbent on the Attorney to put this in writing.

55. This was particularly important given the fact that the Complainant owed the Attorney fees and the Attorney was requesting that these fees be settled first before he looked at the appeal. This would have alerted the Complainant to the importance of settling the fees as soon as possible and making a deposit on account of the appeal. Further and in any event since the Attorney knew that the Complainant wanted to appeal the decision he ought to have at least filed the Notice of Appeal to preserve the Complainant's rights or alternatively tell him immediately to find another lawyer if it was that he did not think there was any merit in the appeal. By not doing any of these things it is clear and we so find, that the Complainant expected the Attorney to protect his interest by at least filing the Notice and Grounds of Appeal within the time period rather than waiting until the deposit was paid when the time had expired and then telling him he had no case.

56. The Attorney was dealing with a lay person who would not be aware of the time frames within which to file certain documents in the Court or the consequences of not abiding by these time frames. The Attorney was under a duty to let the Complainant know about these time frames and to explain the consequences of not abiding by the time frames including the fact that the Complainant may loose his right to appeal. The possible consequence were so grave that notwithstanding the failure of the Complainant to settle all of his fees and to make a payment on account of the appeal given the time constraints and the fact that the Attorney still appeared to be representing the Complainant, he ought to have ensured that at the very least he did not place the Complainant in a prejudicial position by doing nothing while the clock was ticking and it does not matter that the Attorney felt the appeal had no merit. (**Sclater v Watt [1894] Times 1st May, page 3**). As soon as the Judgment was delivered the Attorney had a duty to so inform the Complainant of his views and let him find another attorney or, alternatively, file the appeal within the statutory prescribed time.

57. In view of all of the above we find that the Attorney's conduct as aforesaid was negligent.

58. **Canon IV(s)** of **the Legal Profession (Canons of Professional Ethics) Rules** provides **that "In the performance of his duties an Attorney shall not act with inexcusable or deplorable neglect".** For negligence to amount to misconduct it must be inexcusable and is such as is regarded as deplorable by fellow Attorneys-at-Law in the profession.

59. In **Corfield v DS Bosher & Co. [1992] 1 EGLR 163** the Attorney was under the mistaken impression that he had no right to appeal a decision. The Court held that the Attorney had a duty to be aware of the appropriate time limits and to inform the client if the limits were short or required urgent action. The Court held that the Attorney had breached his duty to advise the Plaintiff as to his right of appeal and the time limits for implementing any appeal.

60. When bringing a complaint against an attorney-at law it is well established that the applicable standard of proof is the criminal standard. That has been affirmed in the case of **Campbell vs Hamlet [20051 UKPC 19**. Accordingly where a complaint of professional misconduct is made, we must be satisfied beyond reasonable doubt that the complaint has been established. That means that we must be satisfied on the totality of the evidence adduced that the complaint has been made out and the quality of the evidence must be such that we feel satisfied, beyond reasonable doubt that conduct complained of has been proved.

61. The Attorney's failure to file the Notice and Grounds of Appeal within the statutory time limits whilst he still had conduct of the matter in circumstances where his client, the Complainant, had instructed that he wanted to appeal the decision has led to the Complainant losing his right to pursue an appeal and possibly property had an appeal been successful.

62. In view of the matters aforesaid we find that the applicable standard of proof has been established in this case and the Attorney is guilty of professional misconduct as under **the Legal Profession (Canons of Professional Ethics) Rules** he has breached **Cannon IV(s)**.

63. It would be remiss of us not to note that an Attorney has a right to decide not to represent a client any further for non payment of fees. **Cannon IV(n)(i)** provides:

> **(n) An Attorney may at any time withdraw from employment:—**
> **(i) where the client fails, refuses, or neglects to carry out an Agreement with, or his obligation to, the Attorney as regards the expenses or fees payable by the client..."**

64. However before withdrawing from the case the Attorney has a duty to put certain matters in place to avoid prejudicing his client. **Canon IV (o)** provides that:

> **"(o) An Attorney who withdraws from employment by virtue of any of the provisions of Canon IV (n) shall not do so until he has taken reasonable steps to avoid foreseeable prejudice or injury to the position and rights of his client including-**
>
> **(i) giving due notice;**
> **(ii) allowing time for employment of another Attorney;**
> **(iii) delivering to the client all documents and property to which he is entitled;**
> **(iv) complying with such laws, rules of practice as may be applicable; and**
> **(v) where appropriate obtaining the permission of the Court where the hearing of the matter has commenced."**

65. Although the Attorney says he advised the Complainant that he would not look at the appeal until his fees had been paid he did not really expressly indicate that he was no longer representing the Complainant. Yet he did nothing to protect the Complainant's rights, and then, after the time period for the appeal had expired the Attorney still accepted the deposit for the appeal clearly showing that he was still representing the Complainant.

66. The question now remaining is what penalty should be imposed on the Attorney. In **Corsfield v D.S. Bosher & Co**. supra the Court said:

> **"I now come to what appears to me to be by far the most difficult aspect of these proceedings, namely questions relating to damages. All such questions, in litigation of this kind, depend upon the evaluation of chances. Usually the court is called upon to make that evaluation once only. What is the value of the right which the plaintiff has lost? In this case, exceptionally in my experience, the court is called upon to make a two-stage valuation, because what the plaintiff lost was the opportunity of seeking to persuade an appellate court-in the context of this case the commercial court-to set aside the award and give the plaintiff a chance to argue his case before a fresh arbitrator. I have to determine not only what the prospects of success would have been in the appeal if it had been brought in time but what the results of further litigation would have been if the appeal had been successful.**
>
> **At the end of the day, I have come to a conclusion as to whether the plaintiff would have persuaded the commercial judge that this fell on the "Top Shop Estates" side of the line or on the "consideration of evidence" side of the line. It is plainly not so strong a case as Top Shop Estates or, for that matter, Zermalt Holdings. But I am not prepared to hold that the plaintiff had no chance in the commercial court that the judge would have set the award aside. On the other hand, I think**

that the odds were against the plaintiff; and I have come to the conclusion that the best evaluation I can make of the plaintiff's prospects of success in this issue is that he had a one-third prospect of success."

67. In **Yeoman v. Ferries [1967] SC 255** a plaintiff sustained injuries in the course of his employment when a ladder he was on slipped and he fell. He instructed his solicitor to make a claim against his employer. This was not done and the action became statute barred. The plaintiff sued his solicitor for damages for professional misconduct. The court held that the court must look at the value of a lost chance to make a claim and if suit had been filed the plaintiff may have on a balance of probability recovered damages and therefore entitled to damages against his solicitor. On page 6 of the said Judgment the Court held that:

"The matter was discussed in England in Kitchen v Royal Air Force Association, 1958 1 W.L.R. 563. The Master of the Rolls set out two types of case in which he thought the question of assessment of damage involved no difficulty. He said (at pp. 574-575): 'If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors' negligence. I would add, as was conceded by Mr. Neil Lawson, that in such a case it is not enough for the plaintiff to say: Though I had no claim in law, still, I had a nuisance value which one could have so utilized as to extract something from the other side and

they would have had to pay something to me in order to persuade me to go away.

Where a solicitor has been negligent, in a case like the present, he has, in my opinion, been guilty of depriving his client of a right, the right legitimately to press a claim for damages. I consider it would be grossly unjust to that client to say that that right had no value because, years after it should have been pressed, if necessary, to action and trial, it was held that the action of the pursuer failed at a time when, and in a court in which, it would not have been judged, but for the negligence of the solicitor concerned."

68. In **Kitchen v Royal Air Forces Association and others [1958] 2 All ER 241**, Lord Evershed M.R. stated on page 250-251 of the Judgment:

"I come last to what may be the most difficult point of all, namely, assuming that the plaintiff has established negligence, has she proved anything other than nominal damages? It is necessary to say something of the nature of the problem which (as I understand the law) the court has to solve in determining the measure of damages in such a case as this.....

If, in this kind of case, it is plain that an action could have been brought, and that if it had been brought, it must have succeeded, the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever had formulated, then it is equally plain that she can get nothing save nominal damages for the solicitors' negligence...

In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by the negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."

69. The action filed by the Complainant in the Supreme Court was for recovery of possession of lands occupied by one Nal Taylor. The Complainant/Claimant was the son of Daniel Henry who was the owner of the said land which was comprised of 2 adjoining parcels of land; one parcel of land being 1 1/8 acres and the other one acre. The defendant to the suit contended that he had a right to possess and occupy the said land as it was owned by his grandfather who left it for his descendants. The Court held that the evidence of the Complainant/Claimant, was not sufficient to identify the disputed land as the land referred to in the Will of his father and therefore owned by the deceased. As this was not established the Judge found in favour of the Defendant. Reading the Judgment the Judge's decision seems to rest on the failure of the Complainant to prove that the area of the disputed land was in fact owned by his deceased father. The case appears to have been based on the evidence solely of the parties who the trial judge would have had the benefit of seeing give evidence unlike the Court of Appeal. Consequently it is probable that the Court of Appeal would not have interfered with the Judgment unless it found that there was evidence on which the Learned Judge ought to have come to a different conclusion. We do not have the benefit of that evidence and certainly cannot place ourselves in the position of the Court of Apeal. All that we can and do determine is that, no appeal having been filed as at time of the hearing of the Complaint, the Complainant had lost all reasonable prospect of pursuing his appeal.

70. Although we are not strictly assessing damages as in the cases cited, we are aware of our jurisdiction to make an order of restitution. We are however guided by the

principles in those cases as to the approach to the issue which is presented by the facts of this complaint. We are of the opinion that any amount which this panel orders the Attorney to pay must be nominal and cannot reflect the value of the land supposedly lost. In any event there has been no evidence as to its value.

71. Given that the Attorney's negligence led to the Complainant being deprived of the right of an appeal which may have been successful we find that the Attorney ought to make restitution for such loss.

72. The Complainant has not established the other charges, specifically that the Attorney has not provided him with all information as to the progress of his business, not accounted to him for monies in his hands for his credit and charged him fees that are not fair and reasonable.

73. In the circumstances it is the decision of this Committee that pursuant to section 12(4)(f) of the **Legal Profession Act** the Attorney, Lawrence Haynes,:

    1. Makes restitution to the Complainant in the amount of $100,000.00; and
    2. Pays to the General Legal Council for the costs of these proceedings the amount of $20,000.00.

DATED THE 4th DAY OF May , 2012

CHARLES PIPER

JEROME LEE

DANIELLA GENTLES-SILVERA