DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

COMPLAINT NO.186/2007

IN THE MATTER OF FRANK MILTON PHIPPS and PEARL MILLICENT PHIPPS v RAYMOND CLOUGH
And IN THE MATTER OF THE LEGAL PROFESSION ACT

PANEL: MRS. MARGARETTE MAY MACAULAY, MRS. URSULA KHAN & TREVOR HO-LYN

APPEARANCES: Richard Small, Donna Scott-Mottley& Georgia Buckley for Frank & Pearl Phipps; Abe Dabdoub & Nicola Murray for Raymond Clough

DATES OF HEARING: 30/11/2013; 3/5/2014*; 17/5/2014*; 22/11/2014*; 6/12/2014; 7/3/2015; 28/3/2015*; 2/5/2015; 20/6/2015*; 11/7/2015*; 25/7/2015; 19/9/2015; 10/10/2015; 5/12/2015*; 16/1/2016; 12/3/2016*; 9/7/2016; 17/9/2016*; 8/10/2016; 12/11/2016*; 17/3/2018; 28/5/2018*; 29/5/2018*; (* Evidence taken)

BACKGROUND TO THE COMPLAINT

(1) Frank Phipps and Pearl Phipps (hereinafter called "the Complainants") owned two parcels of land at Aylsham in the parish of St. Andrew registered at Volume 1246 Folio 932 and Volume 1028 Folio 164 which were being held as one holding. They wished to have restrictive covenants endorsed on one of the titles modified in order to have the lands developed as condominiums and residential units. In order to do so, they retained the services of Mr. Raymond Clough (hereinafter called " the Attorney") to apply for the removal and/or modification of the Restrictive Covenants from the titles to the said land to facilitate development. This retainer was Pro Bono as only disbursements were reimbursed.

(2) The application for the modification of the restrictive covenant was made and there was an objector, a Harold Morrison who was represented by Mrs. Michelle Champagnie of Myers Fletcher and Gordon. The modification was therefore contested. As a result, the Complainants instructed the Attorney that RNA Henriques QC had agreed to act for them as Counsel, in relation to the required appearances in Court. On 7 January 2003 the application for removal and/or modification of the restrictive covenants was heard in Chambers before Mr. Justice Roy Anderson. Present were Michelle Champagnie and Donovan Rodriques. Prior to the hearing a Consent Order had been prepared and agreed between the Attorney and Michelle Champagnie which was presented to the Judge and after a last minute modification with regards to costs it was signed by the Judge.

(3) Subsequent to the consent order, both titles were surrendered and a new title was issued at Volume 1380 folio 664 and this new title did not have any subdivision restrictions. In 2007, a developer advised Harold Morrison that a multi unit development was about to be commenced on the property. As a result of this information, Harold Morrison objected to the proposed development on the basis that the Consent Order of 7 January 2003 did not permit this and thereby obtained an injunction against the development. An action was thereafter filed in March 2008 to vary or discharge the consent order. This was heard in March 4,5,6& 11 July. By her judgment Beswick J refused the variation or modification of the consent order and

refused to discharge the injunction. This judgment was appealed and the decision was affirmed by the Court Of Appeal. In her judgment Beswick considered the meaning of the consent order and its purpose at paragraphs 17 & 18 and stated as follows:-

"The next issue therefore is to determine the meaning of the Consent Order.
The Consent Order of January 7, 2003 made five changes to the Restrictive Covenants:-

1. It is endorsed on the certificate of title of the Phipps' land that it should be held as one holding with the gully land. The Consent Order extended that to say that owners of the Phipps' land and the gully land shall be entitled to erect on each Lot a single family private dwelling house with appropriate outbuildings, value of each house and outbuilding to be not less than $6 million.

2. Covenant # 1 on the gully land stated there should be no sub-division of the gully land. The Consent Order extended that to say that that was subject to the owners' entitlement to erect a single- family private dwelling house on each of the said Lots of land.

3. Covenant # 2 on the gully land stated that no building other than a private dwelling house with appropriate outbuildings shall be erected on the land and its value should not be less than five thousand pounds.

The Consent Order replaced "private dwelling house" with "single family private dwelling house" and "five thousand pounds" with "$6 million." The words "shall be erected" are absent from the Order, apparently in error.

4. Covenant # 11 on the gully land stated that it and the Phipps' land shall be held as one holding. The Consent Order added that the owners of the gully land and the Phipps' land shall be entitled to erect on each of the said Lots a single family private dwelling house with appropriate outbuildings with a value being not less than $6 million.

5. The Consent Order then amended "the one holding covenant endorsement" on the gully land. The original endorsement was that the gully land shall be attached to the Phipps' land and be held as one holding. The amendment added to that endorsement a repetition of Order 4 above concerning the right of the owners of the gully and Phipps' lands to erect a house on each lot.

It is in my view very clear that the purpose of these amendments was to allow for a single house to be built on each Lot - the Phipps' land and the gully land - although they were being held as one holding, that is, the land, although being held as one holding, could have two houses constructed on it."

In this context the "gully land " referred to the land in title registered at Volume 1246 Folio 932 while "Phipps land" referred to land contained in Volume 1028 Folio 164.

(5) During the applications for modification or removal of the Consent Order the Complainants discovered that on the 7th January 2003, a Donovan Rodriques had attended the hearing in Chambers instructed by Clough Long & Company on their behalf . This was contrary to their instructions to the Attorney.

(6) The Complainants on the 13th December 2010 made a complaint against the Attorney in the following terms:

a. He failed to attend Court on the 7th January 2003 when the application to modify restrictive covenant was to be heard.

b. He failed to ensure the attendance of Mr. R. N. A. Henriques Q.C. on that date as instructed by the applicants.

c. He allowed and/or instructed that the said Donovan Rodriques who was not an Attorney-at-Law to attend court and represent us on that date without our knowledge or consent.

d. He caused and/or allowed a Consent Order to be entered that was manifestly contrary to our instructions and/or contrary to our best interests.

5. He failed to take any or any appropriate action to set aside and/or vitiate the Consent Order.
6. He failed to file Points of Dispute on our behalf and attend taxation when a Default Costs Certificate was issued against the applicants.

(7) The essence of the complaint is that the Attorney acted with inexcusable and deplorable negligence in the performance of his duties (Canon 4 (s))

THE DEFENCE TO THE COMPLAINT

By his evidence and his affidavit in response the Attorney contends as follows :-

a. That he agreed to act for the Complainants in making an application for the modification of restrictive covenants but he was never paid a retainer nor did his firm ever charge for their services. In fact the matter was dealt with as Pro Bono.

b. That the Consent Order was worked out between the Attorney, Michele Champagnie, Donovan Rodriques, Frank Phipps and Katherine Phipps and the Complainants were aware of the contents of the Consent Order prior to its implementation on 7th January 2003.

c. That on the morning of the 7th January 2003, the Attorney accompanied by Donovan Rodriques attended in Chambers on Justice Roy Anderson where he introduced Donovan Rodriques as a law student and further that the terms of the Consent Order had already been agreed by the parties and that he would try and return to the hearing later that day.

d. That in the circumstances, it was the opinion of the Attorney that it was unnecessary for RNA Henriques Q.C. to attend the hearing as all that was to be done was for the Consent Order , which had already been agreed by the parties, to be entered.

e. That Donovan Rodriques had not held himself out as appearing for Clough, Long & Company at the hearing and he had not participated in the hearing in any way except as an observing law student.

f. That at the time the Bill of Costs and points of dispute arose, the file concerning the matter had already been sent by the Attorney to the Complainants new attorney on the instructions of the Complainants, so to act in those matters without clear instructions would have been inappropriate.

g. That he was not aware that Donovan Rodriques had added his name to the Clough Long letterhead or that he had referred to himself as being an associate of the firm and had he been so aware he would not have allowed him to do so.

In the decision of the Court of Appeal in Witter v Roy Forbes (1989) 26 JLR 129 at 132 to 133, Carey JA noted that in promulgating the Canons, the General Legal Council had taken a practical approach, no doubt appreciating that where an attorney conducted a busy practice some slips would inevitably occur that could be labelled as negligence or neglect, as this was the expected (unavoidable) consequence of a busy practice, the attorney ought not to be penalized for same as having committed professional misconduct. The proper remedy would be to seek redress by way of an action in the Court for negligence and not to penalize the attorney for an act of professional misconduct. Nevertheless, there was a level of neglect or negligence which no reasonably competent attorney would be expected to commit and this is what Canon IV (r) addressed as being professional misconduct by attaching the label "inexcusable or deplorable". It is for the Disciplinary Committee to determine whether the attorney had gone beyond an acceptable level of negligence or neglect into the realm of what is "inexcusable or deplorable".

THE BURDEN AND STANDARD OF PROOF

THE BURDEN OF PROOF: the Panel recognizes that in law the burden of proof is on the Complainant to prove his complaint to the standard of proof required in law. It remains for the Panel to evaluate the evidence placed before it to the standard of proof required, before it makes any findings that may be adverse to the Attorney.

THE STANDARD OF PROOF: The Panel reminds itself that in law, the standard of proof in cases of professional misconduct is that of beyond reasonable doubt. This is the standard that must be applied by the Panel in evaluating the evidence adduced before it.

THE EVIDENCE

Four (4) Persons gave evidence during the hearing namely: Frank Phipps, Raymond Clough, Michelle Champagnie and Donovan Rodriques in addition there were 25 Exhibits which are listed as follows:-

1. Diagram of Volume 1246 Folio 932

1A Title registered at Volume 1246 Folio 932

2. Title Volume 1026 Folio 164
3. Title Volume 1380 Folio 664
4. Letter Raymond Clough to Frank Phipps dated 10/4/02
5. Unsigned letter Raymond Clough to Frank Phipps dated 15/9/03
6. Letter Raymond Clough to Frank Phipps dated 30/9/03
7. Minutes of Order dated 7/1/03
8. Affidavit of Raymond Clough dated 15/7/02
9. Letter GLC to Frank Phipps dated 2/6/09
10. Letters Frank Phipps to Raymond Clough dated 26/9/09 , Raymond Clough to Frank Phipps dated 16/10/09 and Raymond Clough to Maurice Long dated 15/10/09
11. Inter office memo Donovan Rodriques to Raymond Clough dated 7/10/02
12. Letter to Jamaica Observer from Donovan Rodriques dated 8/10/02
13. Inter office memo Donovan Rodriques toRaymond Clough dated 10/10/02

14. Letter Donovan Rodriques to KLO & PH 31/10/02 and 14A Legal Notice dated 8/10/02
15. Letter to MFG per Michelle Champagnie from Donovan Rodriques dated 15/11/02
16. Bill of fees Donovan Rodriques to Raymond Clough dated 9/1/03
17. Affidavit of Service of Amended legal notice by Donovan Rodriques dated 5/12/02
18. Unsigned letter Raymond Clough to Frank Phipps dated 7/1/02
19. Originating summons dated 24/1/02
20. Record of Appeal Volume2 bundle
21. Letter dated 14th October 2002
22. Judgement of Sykes J delivered 10/11/16
23. Affidavit of Raymond Clough dated 14/1/13 plus attached exhibit
24. Letter from KSAC to Mr & Mrs Phipps dated 26 October 2007
25. Affidavit Michelle Champagnie dated 27/3/15

The following facts were not in dispute.

1. The complainant retained the Attorney to apply for the modification of restrictive covenants with regard to two parcels of land namely Volume 1246 Folio 932 and Volume 1026 Folio 164 . Volume 1246 had restrictive covenants against subdivision Volume 1026 did not have any restrictions against subdivision . Both parcels however were to be held together as one holding.

2. The application became contested when an adjoining neighbour objected to the application. As a result the Complainants instructed the Attorney that RNA Henriques QC was to appear in all matters involving Court.

3. That on 7th January 2003 a Consent Order was submitted to Anderson J in Chambers which was signed by the Judge. That present at the time of signing were Michelle Champagnie for the Objector and Donovan Rodriques for the Applicant.

4. That the Consent Order as filed subsequently allowed the Objector to obtain an injunction which prevented the Complainants from developing the property as a multi Unit development.

5. That an application was made in the Supreme Court for the Consent Order to be modified or discharged. The application to do so failed in both the Supreme Court and the Court of Appeal. The basis for this failure had its roots in the terms of the Consent Order itself.

The issues to be decided may be listed as follows.
1. What role was played by Donovan Rodriques in the settling of the Consent Order?

2. Were the terms of the Consent Order agreed to by the Complainants?

3. In the event that it is determined that Donovan Rodriques played a central role in the settling of the Consent Order was this done under and in accordance with the supervision exercised over him by the Attorney?

4.Did the Attorney exercise due care and sufficient diligence over the handling of the Complainants matter to prevent this problem.

5. In the event that the Attorney was negligent did it rise to the standard set out in the terms specified by Carey JA in the Witter v Roy Forbes case cited earlier .

THE ROLE PLAYED BY DONOVAN RODRIQUES IN THE SETTLING OF THE CONSENT ORDER.

The following facts were established in the evidence with regard to Donovan Rodriques.

1. At all material times Donovan Rodriques was a law student at the Norman Manley Law School and he was never admitted to the Jamaican Bar.
2. That at all material times he was under the direct supervision of the Attorney.
3. That he held himself out as an associate of Clough Long & Company by so declaring in documents relevant to the modification of the restrictive covenant (see exhibit 17 the first paragraph) in addition his name appeared on the Clough Long letterhead in exhibits 11, 12, 13 , 14, 15, .
4. That he helped to settle the terms of the Consent Order along with Katherine Phipps (see exhibit 6 letter from Attorney to Complainant in the third paragraph).
5. That he submitted a bill to Clough Long for fees for attendance in Chambers and drafting the consent order (see exhibit 16) subsequent to the 7th January 2003.
6. That he was the only person present representing the interests of Clough Long and therefore Frank and Pearl Phipps when the consent order was submitted , amended and signed by Justice Roy Anderson.

The only conclusion to be drawn from the above facts is that Donovan Rodriques played a central role in the application for the modification of the restrictive covenant and participated in the preparation of the consent order.

WERE THE TERMS OF THE CONSENT ORDER AGREED TO BY THE COMPLAINANTS

The Attorney contends that the Complainant was sent a copy of the draft consent order prior to it being signed by the Judge accordingly they had knowledge of its terms and they consented. This reasoning suggests that in the event the Consent Order was done against the interests of the Complainants they had consented to it so it would not be the fault of the Attorney. This fails to take into account two factors namely (a) that the Consent Order was amended in hand writing on the day it was signed by the Judge and (b) that in exhibit 6 which is a letter dated 30th September 2003 by the Attorney to the Complainant, he states that a relevant term which had been orally agreed with opposing Counsel was not in the order. The consequence of these facts is that, there could have been no consent to the final Order by the Complainants, as the one signed contained additional terms not previously therein but which were added at the hearing, and also there were omitted agreed terms. There is no evidence produced to the panel that the final amended order had been submitted to the Complainants for their consent, accordingly it cannot be said that they agreed to the final order.

The real question is whether or not the presence of retained counsel RNA Henriques would have made a difference to the final order and of this we cannot be sure, but what is beyond doubt is that Donovan Rodriques had neither the expertise or experience to deal with these issues. Effectively the Complainants were therefore not properly represented at this hearing and the specific instructions as to who ought to represent them were not carried out. In this context the contention by the Attorney that all the arrangements had been put in place

prior to the hearing so that Donovan Rodriques role was merely that of an observer does not assist the case for the Attorney, as it does not support what really occurred. It is also to be noted that by letter dated 15 September 2003 to the Attorney by the Complainant, the tenor of which clearly suggests that the Complainant was just then becoming aware of the Consent Order and so refutes the contention of the Attorney that the Complainant was sent a draft of the proposed order for their input.

WERE THE ACTIONS OF DONOVAN RODRIQUES DONE UNDER THE SUPERVISION OF THE ATTORNEY?

The evidence of Donovan Rodriques established that he was under the supervision of the Attorney at all material times while the evidence of the Attorney is that he was not aware of what Donovan Rodriques was doing in terms of the placing of his name on the letterhead and holding himself out as an associate. The Attorney further stated that had he known he would not have allowed this. The evidence has already established all the acts of Donovan Rodriques which were not permitted to be done by him and it is difficult to conclude that the Attorney would have been unaware of this as interoffice memos to the Attorney, affidavits and letters supervised by the Attorney which were issued relating to the Complainants business all had his name as a associate or implied he was a partner. In the event that it is assumed that the Attorney was unaware given the circumstances then the level of supervision was at the very least negligent. What was even more negligent is that the Attorney could have allowed an unqualified person to hold out himself as an attorney while under his supervision. It is of some interest that initially when the Complainant raised the issue of the participation of Donovan Rodriques at the entering of the Consent Order the reaction of the Attorney was that he never knew him or heard of him.

DID THE ATTORNEY EXERCISE DUE CARE AND DILIGENCE OVER THE COMPLAINANTS BUSINESS?

The Attorney's evidence established that this particular retainer by the Complainants was done pro bono and only outgoings were paid. This seems to suggest that because of the nature of the retainer less care is forthcoming to a client. The obligation of the Attorney to the Complainants to exercise due care and attention cannot be influenced by the size of the retainer. In the event that it would make a difference, the Attorney is under a duty to so advise the Complainants. There is no doubt that on the evidence presented to the Panel that the Attorney failed to exercise due care and attention over the Complainants business. He allowed a law student to participate in the matter at a level above his competence. He did not carry out the specific instructions given with respect to his client's representation at Court. He was primarily responsible for what happened with the Consent Order which effectively went against his client's instructions and his client's interests.

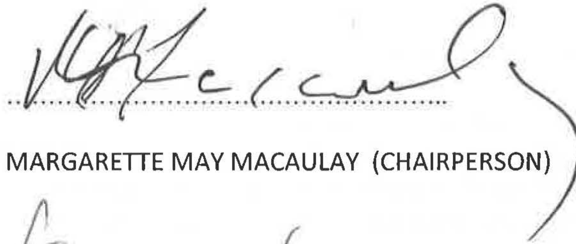
DID THE ACTIONS OF THE ATTORNEY AMOUNT TO INEXCUSABLE AND DEPLORABLE NEGLIGENCE ?

Carey J.A. in Witter v Forbes stated "there was a level of neglect or negligence which no reasonably competent attorney would be expected to commit and this is what Canon IV (r) addressed as being professional misconduct by attaching the label "inexcusable or deplorable". It is for the Disciplinary Committee to determine whether the Attorney had gone beyond an acceptable level of negligence or neglect into the realm of what is "inexcusable or deplorable". This has been the accepted standard for the establishment of what amounts to professional misconduct for inexcusable and deplorable negligence.

THE RULING

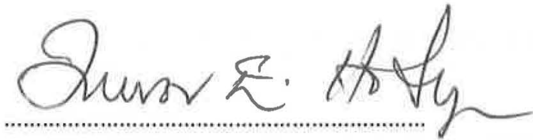
The issue therefore is whether in the circumstances of this case the conduct of the Attorney has reached that standard. There is no doubt that the handling of the Complainants matter was negligent. The purpose for which the retainer was made was not fulfilled. If due care and attention had been paid to the details this would not have happened. Had the instructions been followed with regard to Court representation what transpired thereafter may have been prevented. The allowing of a law student to hold themselves out as an Attorney and an Associate of the Attorney's firm while under his supervision is inexcusable.

Based on the evidence as presented here, it has been proved beyond a reasonable doubt that the Attorney acted with inexcusable and deplorable negligence in his conduct of the business of the Complainants. As a consequence therefore, the Panel finds that the Attorney is guilty professional misconduct contrary to Canon 4(s).



MARGARETTE MAY MACAULAY (CHAIRPERSON)

URSULA KHAN



TREVOR HO-LYN