DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

COMPLAINT NO.12/2015

JANET RUSSELL vs DONOVAN FOOTE

PANEL: TREVOR HO-LYN (Chairperson), DELROSE CAMPBELL, PETER CHAMPAGNIE.

HEARING DATES: 30 MAY 2018*, 27 SEPTEMBER 2018*, 11 OCTOBER 2018*, 22 NOVEMBER 2018* , 27 NOVEMBER 2018*, 13 FEBRUARY 2019*, 14 FEBRUARY 2019*, 19 MARCH 2019*(*Evidence taken)

CHRONOLOGICAL HISTORY OF THE COMPLAINT.

This complaint arose out of the settlement of a civil suit in which the Attorney acted on behalf of the Complainant.

This complaint was filed on the 19th November 2014 and first came before a panel on the 3rd October 2015 the Complainant was present, the Attorney was absent and the matter was not reached due to an ongoing part heard matter before the panel.

The matter was set for trial on the 5th March 2016. On the 5th March 2016 all parties were present and it was noted that there was no statement of account from the Attorney. The panel was assured by the Attorney that the Statement of Account would be filed by the 21st March 2016 and the matter was set for the 30th July 2016 for trial. It was noted at that time that the Attorney admitted that the settlement funds had been received by him in July 2012.

On the 30th July 2016 the Complainant was present along with her attorney while the Attorney was absent. The parties were ordered to file the list of documents and the documents on which they intended to rely by the 30th November 2016 and the matter was set for trial on the 4th March 2017.

On the 4th March 2017 all parties were present. The Complainant was again represented by an Attorney and at that time the panel was advised that the Attorney was represented by an Attorney but his attorney was not available for that day. The matter was then adjourned for priority trial on the 15th July 2017.

On the 15th July 2017 the Complainant and her attorney were present the Attorney was absent. The matter was adjourned to the 3rd February 2018 for priority trial with a cost award to the Complainant in the sum of Ten Thousand Dollars. At this hearing additional facts were now at hand relating to the matter and the Complainant was advised that she needed to file a further affidavit relevant to these additional facts.

On the 3rd February 2018 both parties were present but the panel had a part heard matter so the matter was adjourned for priority trial on the 19th May 2018 . The Attorney was to file an affidavit in response to the further affidavit filed by the Complainant on the 20th November 2017.

On the 19th May 2018 the Complainant was present and the Attorney absent a cost order was made against the Attorney in the sum of One Hundred Thousand Dollars and the matter set for priority trial the 30th May 2018. That date was to be the 8thtrial date and the 4th priority trial date.

On the 30th May 2018 the matter commenced, present were the Complainant , Clifton Salmon, The Attorney and his attorney Carlton Williams. Leave was granted for Mr. Williams to withdraw from the matter and part of the evidence in chief was taken. The matter was then adjourned to allow the Attorney to get another Counsel.

Thereafter the hearing continued on the dates set out aforesaid and the hearing of evidence was concluded on the 19th March 2019. The parties were advised to file written submissions on or before the 5th April 2019 and this having been done the panel set six weeks for the delivery of the judgment. This is a fulfillment of that promise.

THE COMPLAINT.

By way of Form of Application Against an Attorney dated 19thNovember2014 and affidavit in support bearing the same date the complainant alleged that :

1. The Attorney is in breach of the following canons namely :- 1. Canon 7(b)(ii) which states that an Attorney shall account to his client for all monies in the hands of the Attorney for the account or credit of the client whenever reasonably required to do so and 2. Canon 1(b) which states that an Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behavior which may tend to discredit the profession of which he is a member.

The hearing of this complaint commenced on the 30thMay 2018at the Office of the General Legal Council before the panel of Trevor Ho-Lyn (Chairperson), Peter Champagnie and Delrose Campbell and present were the Complainant and her partner Clifton Salmon, the Attorney and his attorney Mr. Carlton Williams. On the parties being in attendance, the Chairman of the panel addressed the partner of the Complainant, concerning a matter in which the Chairman had acted in a court matter against him. An enquiry was made of the partner as to whether he had any issue with the Chairman adjudicating in the matter . To this the partner responded that he did not have any objection. An application for an adjournment was then made on behalf of the Attorney by Mr. Williams on the grounds that he had another matter to attend to that morning and further that he also had a funeral to attend that day. That application was denied and Mr. Williams then sought leave to withdraw from the matterand leave was granted. The Attorney then sought an

adjournment to secure another attorney which was also denied. The matter then commenced with a view of only taking the evidence of the Complainant in chief.

COMPLAINANT'S EVIDENCE

1. Janet Russell (hereinafter called "the complainant") resides at Farm Pen District in the parish of Westmoreland and is a fashion designer and a freelance educator.

2. In November 2000 she underwent a dental procedure which resulted in her filing a suit in the Supreme Court for damages. While the suit was still pending her then attorney was disbarred and by virtue of a contingency agreement dated the 30th May 2011 Donovan Foote (hereinafter called "the Attorney was retained to complete the suit. The contingency fee agreement was tendered and admitted as **Exhibit 3**.

3. The suit did not proceed to trial as it was settled out of Court. On the 30th November 2012 by a hand delivered letter the Attorney paid to the Complainant the sum of Ten Million Six Hundred and Sixty Six Thousand Six Hundred and Sixty Six Dollars and Seventy Cents ($10,666,666.70) pursuant to the proportion determined by the contingency agreement, which represented 2/3 of the settlement of a sum of Sixteen Million Dollars. The letter dated 30th November 2012 was tendered and admitted as **Exhibit 4.**

4. Subsequently in January 2013 the Complainant loaned the Attorney Seven Million Dollars from her share of the settlement said loan to be repaid after six months. The loan was not promptly repaid and was not in fact repaid until the Complainant issued to the Attorney a letter of demand. Because of what transpired with the loan arrangement the Complainant included in that letter of demand a request to see the original settlement agreement. The letter of demand was tendered and admitted as **Exhibit 5**.

5. The request to see the settlement agreement was not immediately complied with and as a result, in November 2013, the Complainant attended the Supreme Court Registry in order to obtain a copy of that document.The document was not located in the Supreme CourtRegistry however while there the Complainant met one of the attorneys who had represented the defendant in her suit. She was advised by him that she should request her attorney to write to his firm for a copy of the settlement agreement. In addition she requested from the Court Registry a copy of the documents that they had on her suit file.

6. She paid for and collected three documents from the Court Registry namely (a) a change of attorney document dated 28 April 2011, (b) a notice of discontinuance dated the 19th July 2012 and (c) a pre-trial review order dated 19 September 2011. These documents caused the Complainant to have serious doubts as to prior information received from the Attorney, especially in light of the letter she had been given when she was paid her share

of the settlement on 30th November 2012. These documents received from the Supreme Court Registry were tendered and admitted as **exhibits 6** (change of attorney) **6A** (pretrial review order) **6B** (notice of discontinuance) **6C**(receipt for the payment of the copies of the documents).

7. The Complainant again tried to obtain a copy of the settlement agreement and by letter dated the 11 December 2013 from the Attorney she was advised that the terms of the settlement were confidential and should not be communicated This letter was tendered and admitted as **Exhibit 7**. By letter dated 12 December 2013 the Attorney sent a copy of the release and discharge document relating to a settlement of Sixteen Million Dollars to the Complainant. This release and discharge was tendered and admitted as **Exhibit 8**.

8. The Complainant on receiving this copy of a release and discharge document became even more doubtful of the conduct of the Attorney as to her mind the document though having a signature which looked like hers, was not in fact her signature and in fact she did not recall signing the document received from the Attorney. As a result the Complainant then retained another attorney a Cedric Brown (hereinafter referred to as CB) to try and obtain the original release and discharge agreement from the Attorneys for the Defendant.

9. CB contrary to his instructions sought to obtain the original release and discharge agreement from the Attorney not the attorneys for the defendant in the civil suit. His attempts were not successful and as a result the Complainant wrote to the General Legal Council to intervene, and after an exchange of letters between the Complainant and the Attorney, through the office of the General Legal Council, the Complainant on the 18th November 2014 filed a formal complaint against the Attorney, supported with an affidavit. The complaint was tendered and admitted as **Exhibit 1** and the affidavit in support as **Exhibit 1A**.

10. While the complaint was before a hearing panel of the General Legal Council Disciplinary Committee on the 5th March 2016, the Panel made an order for the Attorney to file a statement of account for the money received, by the Attorney ,on behalf of the Complainant, to be filed on or before the 21st March 2016. The Attorney complied with this order by letter dated 17th March 2016 which set out a statement of account in relation to the sum of Sixteen Million Dollars. This statement of account was tendered and admitted as **Exhibit 11.**

11. Subsequent to the receipt of the statement of account the Complainant received a letter from her then attorney CB, dated 22nd April 2016, which enclosed a copy of a release and discharge received by him from the attorneys in the civil suit, who had represented the defendant. This release and discharge was in the sum of Twenty Three Million Dollars.

The letter was tendered and admitted as **exhibit 9** and the release and discharge as **Exhibit 9A**.

12. In consequenceof this information the Complainant retained another set of attorneys namely Gifford, Thompson & Shields (hereinafter called "GTS") to verify the authenticity of the release for Twenty ThreeMillion Dollars and to take such steps as were necessary to recover the difference of Seven MillionDollars plus interest.

13. Following an exchange of letters between GTS and the Attorney the sum of $5,322,172.50 in total was paid to the Complainant from the sum of $7,000,000.00. The attorneys GTS having taken the view, that the Attorney was entitled to his 1/3 share of the $7,000,000.00 pursuant to the contingency fee agreement. The first payment to GTS came by way of letter dated 16th April 2016 and enclosed a cheque in the sum of Three Million Three Hundred and Thirty Three Thousand Three Hundred and Thirty Three Dollars and Thirty Three Cents. The letter was tendered and admitted as **Exhibit 10** and the copy of the cheque as Exhibit **10A**. The letter from GTS to the Attorney which resulted in the payment of this money was tendered and admitted as **Exhibit 12.**

14. Notwithstanding the receipt of these funds, the Complainant was not satisfied, and pursued the complaint and filed a further affidavit dated the 15th November 2017 with the accompanying documents on which she intended to rely . In this affidavit she set out that she was entitled to the full sum of $7,000,000.00 plus interest. This further affidavit was tendered and admitted as **Exhibit 2**.

15. After the commencement of the hearing into the matter the Complainant was served with Court proceedings by the Attorney for the sum of One Million Dollars in the Westmoreland Parish Court and pursuant thereto the Complainant filed a further affidavit with supporting documents this affidavit was tendered and admitted as **Exhibit 13**.

16. In summarythirteen Exhibits were tendered in evidence during the trial by the Complainant namely :- Exhibit 1- the complaint; Exhibit 1A- the affidavit in support; Exhibit 2- a secondary affidavit; Exhibit 3- the retainer and contingency fee agreement; Exhibit 4-letter dated 30 November 2012; Exhibit 5-Letter dated 11 November 2013; Exhibit 6-Change of Attorney document; Exhibit 6A-Pretrial Review Order; Exhibit 6B-Notice of discontinuance dated 19 July 2012; 6C receipt dated 22 November 2013; Exhibit 7 letter dated 11 December 2013; Exhibit 8 Release and Discharge for Sixteen Million dollars; Exhibit 9 –letter dated 22 April 2016; Exhibit 9A Release and Discharge for Twenty Three Million Dollars; Exhibit 10-Letter dated 16 April 2016; Exhibit 10A-Cheque in the sum of Three Million plus dollars; Exhibit 11- Statement of account; Exhibit 12- letter dated 10 May 2016; Exhibit 13-a further Affidavit and supporting documents;

17. The Complainant having completed her evidence in chief was then cross examined firstly by the Attorney and subsequently by Mr. Douglas Thompson who appeared for him on the last two days of the hearing of the evidence.

18. At the end of the cross examination there was no reexamination and that concluded the case for the complainant she having elected to call no witnesses.

19. The attorney for the Attorney then elected to make a submission of no case to answerand after due consideration of his submissions the panel ruled that there was a case to answer.

20. The Attorney, as is his right, elected to remain silent and only called one witness in the presentation of his defence.

EVIDENCE ON BEHALF OF THE ATTORNEY

1. The affidavit of Danley Daley the witness for the Attorney was tendered in evidence as the examination in chief of his evidence and became **Exhibit 14.** Thereafter he was cross examined by the Complainant. His evidence was that the Complainant had signed two release & discharge documents one for Sixteen Million Dollars and the other for Twenty Three Million Dollars on a specific day, in his presence and in the presence of the Attorney, and he had witnessed the Complainant's signature on both. He did not have his seal with him at that time so the following day the Attorney sent the documents to him for him to affix his seal and he did so.

2. In the course of his examination in chief, no attempt was made by Counsel for the Attorney, to actually place the two release and discharge documents into the hands of the witness, so that he could confirm that those documents, which were already in evidence, were the same documents, that he saw signed by the Complainant and which he witnessed.

3. The witness when cross examined was also unable to give an explanation as to how the Attorney, in a letter to the General Legal Council, had said that the Complainant had signed only two documents, namely a contingency agreement and a release and discharge document, while he the witness, was saying it was two release and discharge documents that were signed by the Complainant in his presence.

4. Apart from the oral evidence of the witness, there had been admitted into evidence documents which emanated from the Attorney which contained some of his responses to assertions made by the Complainant. It is therefore necessary to look at these documents to see how the Attorney responded to the assertions of the Complainant.

5. In the letter dated 30th November 2012 which was given to the Complainant and which was tendered and admitted as exhibit 4 the Attorney stated inter alia (a) In your

abovementioned suit an ultimatum was served on the Defendant's attorneys to settle the matter on or before the 30th day of November 2012 **in order to obviate the trial date set for the 13th December 2012 etc** and (b) As you are aware monies were paid out by me to Dr. Menchel to secure his attendance for the trial. I have contacted his officeto advise him that the trial is no longer necessary and to determine whether he will refund all or any of the United States dollars I advanced him to ensure his attendance to testify at your trial. I await his response **as that would be the only cost you would have to reimburse me.**

6. That letter contained a payment of 2/3 of a settlement figure of Sixteen Million Dollars to the Complainant and asserts that there was a trial date existing for the 13th December 2012 and the only costs to the Complainant depended on whether Dr. Menchel refunded any or all of the funds paid to him to attend the trial.

7. In his letter to the General Legal Council dated May 26th 2014 which was admitted in evidence as part of exhibit 2 the Attorney stated "The two (2) documents I asked Ms Russell to sign pertaining to the settlement of her case were: i. A contingency fee agreement upon her not being able to afford my fees of One Million Dollars ($1,000,000.00) ii A release and discharge to bring the matter to closure. He further enclosed a copy of the contingency agreement but stated that he was not at liberty to disclose the terms of the release and discharge document due to the confidentiality clause in it.

8. From this letter it is clear that the Attorney is saying that the Complainant only signed one release and discharge document and further he was not at liberty to disclose its terms due to a confidentiality clause in it.

9. Further in the same letter he states "There is no basis for Ms. Russell's complaint to you; certainly not on the grounds that she cannot remember the settlement sum signed to by her. She has received her share of the settlement money in accordance with the documents she signed off on, and was happy to bring this long outstanding matter to an end. Now it seems she wants to eat her cake and have it. There is nothing more left for her to get." It must be noted that up to the date of this letter the only evidence in relation to the settlement sum is that it was for sixteen million dollars.

10. By his letter dated 16th April 2016 to GTS at paragraph 2 the Attorney states " The difference between the sixteen million and the twenty three million is seven million not eight million as demanded in your aforementioned letter as sums which Mr. Foote has for Ms. Russell. When the two million cost is subtracted the balance of $5 million represents disbursements and expenditures (charges) incurred by me." Further in paragraph 3 "The difference of $7 million represents the amount negotiated/claimed by me against the

insured and is due to me (as my cost, disbursement& expenditure incurred by me at Miss Russell's request) and not sums which Mr. Foote has for Ms. Russell."

11. It will be noted that in the statement of account filed by the Attorney and dated March 17th 2016 the only debit outside of the settlement disbursements was the payment to the attorney who had initial conduct of the matter. This debit was offset by the payment of interest due for late disbursement of the settlement sum to the Complainant. No other costs were disclosed.

12. At paragraph 8 of the said letter to GTS the Attorney stated that "Ms. Russell then authorized me orally, and in writing, to make these payments on her behalf and then reclaim them directly, as expenses against the insured, OUTSIDE of the contingency fee agreement executed between us. These charges had to be paid up front and therefore Ms. Russell signed these agreements with me and Dr. Menchel, acknowledging that she understood that these charges will be out of pocket, and that a claim cannot be filed for them to Medicare in the USA by herself, Dr. Menchel or myself, because she had no medical PPO"

13. He then went on at paragraph 12 to detail some of the disbursements and expenditures he made although he does not actually detail the amount each incurred.Among the documents filed and tendered in evidence by the Complainant as part of exhibit 2 at pages 49 to 55 are statements and letters speaking to amounts expended in pursuance of the settlement of the matter. The letters which were also signed in acknowledgement of their receipt by the Complainant speak to expenses outside of the contingency fee agreement. There was however no statement of account with regard to these expenses forth coming from the Attorney.

ANALYSIS AND DISCUSSION OF THE EVIDENCE AND FINDINGS OF FACT

THE BURDEN OF PROOF: the panel recognizes that in law the burden of proof is on the Complainant to prove her complaint to the standard of proof required in law 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.

Although the Attorney exercised his right to remain silent and did not give oral evidence nevertheless, in the letters written by the Attorney, which were admitted in evidence, there were issues raised by him, to try and refute the assertions of the Complainant. The issues raised werein

essence that there was an agreement between himself and the Complainant for expenses to be incurred outside of the contingency fee agreement. These expenses would be repaid to him and would not form part of the settlement figure paid to the Complainant. Therefore of the Twenty Three Million Dollars the Seven Million Dollars difference with the Sixteen Million Dollars would be the figure, outside of the contingency fee agreement, which would cover his expenses and disbursements. Further the existence of the confidentiality clause restricted his obligation to disclose the actual settlement figure, for to do so, would cause the money to be refunded. Accordingly, since the misconduct complained of related to the accounting to the Complainant of money in his possession on her behalf, this had been satisfied by the statement of accounts rendered to the GLC in March of 2016. Further all of this must been seen in light of the Complainants instructions to him by letter of 12 March 2012 which ends by saying " as such I will accept no less than Sixteen Million Jamaican dollars after legal fees and other legal expenses relating to this matter." The Complainant had received her share of the Sixteen Million Dollars pursuant to the contingency agreement, hence , there was no more for her to get.

The fallacy in this reasoning is patently obvious in light of the main thrust of the Attorneys defence which is that the Complainant signed two releases one for Sixteen Million Dollars and one for Twenty Three Million Dollars. If the settlement was for Twenty Three Million Dollars, part of which would include expenses and disbursements outside the contingency fee agreement, which would be repaid by the Complainant, there would be no need for the release for Sixteen Million Dollars. The absence of oral evidence by the Attorney on this issue resulted in the panel only having the evidence of the Complainant on the issue to consider. Her evidence is that she did not know about the Twenty Three Million Dollars, she never signed any document headed release and discharge, and the signatures on the documents although appearing like hers, are not in fact hers. In the consideration of the evidence of the witness for the Attorney, the failure to actually place the challenged documents into the hands of the witness, for him to verify them as being the ones he saw the Complainant sign and which he witnessed,prevents the Panel from having direct evidence before it, that the exhibits were in fact the documents signed by the Complainant and witnessed by the Justice of the Peace. This renders the witness evidence of them unreliable. In light of this, the inevitable conclusion is for the panel to reject the evidence of the witness for the Attorney.In addition there is no evidence as to why it was necessary to be signing two separate release and discharge documents relating to the same parties over the same matter but for two different amounts on the same day at the same time.

The Panel also notes that all the documentary evidence emanating from the Attorney, up to and including the time that the statement of account was submitted to the GLC ,all spoke to a settlement of Sixteen Million Dollars at no time did he disclose a settlement sum of Twenty Three Million Dollars. The Attorney conveyed the impression in all his letters to the Complainant, the GLC and to CB that there was only a settlement for Sixteen Million Dollars hence his accounting for only that amount in his submitted statement of account. The provisions

of the Canon 7(b)(ii) states that an Attorney shall account to his client for all monies in the hands of the Attorney for the account or credit of the client whenever reasonably required to do so The release and discharge for Twenty Three Million Dollarsis a payment specifically to the Complainant in settlement of the suit, it therefore compels the Attorney to account for that amount of money. In this case it is patently obvious that the Attorney was not going to account for this sum as he all along relied on the sum of Sixteen Million Dollars as the sum for which he was accountable. To compound this issue the Attorney consistently relied on the non disclosure clause as his basis for not being at liberty to disclose the settlement amount. This approach fails to recognize that the Attorney did not sign the release and discharge, it was signed by the Complainant,sothe Attorney was not contractually bound by its terms. The Panel also noted that the attorneys representing the defendant in the suit, had no hesitation or reluctance in making the release and discharge available to CB the attorney for the Complainant, although such a clause would be primarily for the protection of the reputation of their client. The Panel therefore concluded that the Attorney used that clause as the basis upon which he could refuse to disclose the actual amount of the settlement for dishonest purposes.

In an examination of the timeline with regard to the settlement of the civil suit it is noted that the notice of discontinuance is dated 19th July 2012. The release and discharge is dated June 2012 and it refers to the discontinuance being done on the payment of the settlement amount hence the payment was before the 19th July 2012. The Attorney later admitted that he had received the settlement funds in July 2012. By his letter dated the 30th November 2012 the Attorney states inter alia "an ultimatum was served on the Defendant's attorneys to settle the matter on or before the 30th November 2012 in order to obviate the trial set for 13 December 2012." At the time of writing this letter the suit was already withdrawn some four months before so there could have been any need for any ultimatum and no need for a trial date for December. This letter in fact conveys the impression that the matter was just settled. The Panel finds that the contents of the letter are deliberately misleading and were calculated to deceive the Complainant.

The consequence of the decision by the Attorney to remain silent resulted in the paucity of any evidence to contradict the evidence of the Complainant and therefore effectively made the majority of the Complainants evidence unchallenged. Notwithstanding that there was no evidential challenge of the Complainants evidence by the Attorney the Panel still had to consider the totality of the Complainants evidence to ensure that it met the burden and standard of proof as is required.

It is to be noted that the oral and written evidence provided by the Complainant was consistent throughout and there were few if any contradictions or discrepancies The evidence was chronologically and logicallyconsistent and did not disclose any internal material dispute of factsand accordingly the panel accepts the evidence of the Complainant in its entirety. In fact the discrepancy raised in the submission of No Case had a perfectly logical and reasonable

explanation given by the Complainant which negated any assertion of being deliberately done to mislead and misrepresent.

The state of the evidence at the end of the case was such that based on it one could only come to the conclusion that the Attorney was guilty of professional misconduct. However the weight of evidence being against the Attorney seems to have prompted his attorney to instead attack the proceedings on the basis of bias and procedural unfairness which would result in the hearing being unfair. In this regard the counsel for the Attorney placed on record the basis upon which the hearing was unfair they were stated in this manner *During the exchange between the Panel and Mr. Williams, and this was before any evidence was taken, a question was asked by the Panel to Mr. Williams in relation to his knowledge of a settlement figure, to which he responded that he was aware of the settlement figure, it is not a secret, and the response of the Panel to Mr. Williams was that, "It might not be a secret, but it was a secret to Miss Russell". I take objection to that and I want it to be noted on the record, because that statement in and of itself, constitutes a finding or a conclusion on one of the matters ultimately to be ventilated, and this statement was done even before ... of evidence began. I want this objection to be noted in relation to the consideration that the hearing proceedings are not fair. I go back to that same day and to the very beginning...*

Further *That statement of the Panel initiating the hearing, the initial statement of the Panel to the complainant, indicating and bringing to the attention of all present of some, whatever it might be, connection, interaction, relation between the Panel and one of the parties associated with the complainant, and making a request of the complainant whether or not, because of that contact, interaction, relation, whether or not the complainant would be satisfied with the Panel hearing the matter, and asking the complainant that question, giving the complainant the option to answer yes or no, the complainant saying, "Yes I have no problem", and the Panel deciding to go ahead although Mr. Foote, the Respondent, having been made aware of that, indicated to the Panel that on that basis he is not comfortable, and would not wish the Panel to proceed. The Panel nonetheless, in the light of that, having given the option to the complainant, did occur the same latitude or courtesy or option to the Respondent, and I think that goes to squarely to fairness. My last point is, having decided to proceed despite the objections of Mr. Foote, the Panel proceeded to lead and marshal the evidence of the complainant. It is not that the Panel... The complainant not represented, and of course the Panel has the responsibility to assist anyone on either side, I have no difficulty with that. Where my objection lies, is the extent to which the Panel, not only brought before itself the supporting documents and put them in evidence before it, on behalf of the complainant, but the Panel actually led the complainant in evidence, word for word, line for line, as it would be in any adversarial situation from this side. The Panel was marshalling the evidence to itself, and as it marshalled the evidence to itself, it would ask Mr. Foote any objections then overrule them, and, with respect, that goes ultimately... because here we have the Panel not acting as an independent arbiter, judge, the Panel is a part of the*

proceedings, in which the Panel is supposed to judge, and that goes fundamentally to the fairness of the hearing in relation to the Respondent, Mr. Foote, and I would like to put on record that objection, all of it in relation to fairness, essential and indicative of what might, on the face of it, be bias that would adversely affect the respondent.

To summarize there were three grounds advanced namely 1. A decision had already been reached even before the evidence had commenced with regard to a fact in issue, that predetermination rendered the process unfair. 2. The issue of the Chairman being biased as he has a prior court matter against the Complainants partner and this was compounded by the Attorney not being afforded the same courtesy of rendering an opinion on the issue. 3. That the panel was both judge and prosecutor in the matter as the Panel led the evidence of the Complainant in which event the trial of the issues was unfair.

The predetermination of the facts prior to the commencement of hearing evidence.

This complaint fails to take into account the context in which the offending statement was made. In the course of an exchange between Mr. Williams counsel for the Attorney and the Panel, the Panel asked counsel if he was aware of the further affidavit filed by the Complainant. This affidavit arose because the Complainant was saying that she just being made aware of the settlement of Twenty Three Million Dollars and therefore asserting that this settlement was a secret to her. The words of the Panel were therefore directed to what the complainant was now saying. If you look at the history of the matter up to the time that the second affidavit had been filed there is nothing to suggest that anyone was aware of any other settlement figure especially since both the Complainant and the Attorney in all their documents had only made reference to the sum ofSixteen Million Dollars.In addition the context of the conversation also invited the Counsel to advise the Attorney as the Attorney was by law required to file an affidavit in response as he had not yet done so.

Panel: We have considered the application and cannot accede. We take it you have read the file.

Williams: I have read the file and I am of the view that I might be a witness. There are two preliminary issues where I might not be his representative but his witness.

Panel: There was a further Affidavit of Ms. Russell which Mr. Foote should have replied to which he did not but considering the central issue in the matter, you may really wish to advise your client.

Williams: What is the date of the Affidavit?

Panel: 15th November, 2017 more than six month ago.

Williams: From my recollection, I cannot recall seeing this Affidavit.

Panel: On the 3rd February, 2018 when Mr. Foote was here it was served on Mr. Foote so you might want to as the Affidavit says the settlement was for$23 million and Mr. Foote was paying $16 million.

Williams: I am aware of the settlement figure it is not a secret.

Panel: It might not be a secret, but it is a secret to Ms. Russell.

In this context the Panel therefore disagrees that the factual issue as to the knowledge of the Complainant about the 23 Million was therefore predetermined.

The issue of Bias.

Court precedents , legal opinions and textbook writers on the issue of bias have established the basis upon which the claim of bias can be successfully proved. The modern law of apparent bias was settled by Lord Hope in *Porter v Magill* [2001] UKHL 67, where Lord Hope indicated that the 'question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.

This test has subsequently been applied in the cases of Locabail (UK) Ltd v Bayfield Properties Ltd.2000 QB 451, AG Cayman v Tibbets 2010 3 All ER 95, Virdi v Law Society 2010 3 All ER 653, R v Institute of LEAT 2012 1 All ER 1435 the Jamaican cases of Henry, Williams et al v Commissioner of Corrections & DPP SCCA 62-67 / 2007 and Georgette Scott v GLC SCCA 118/2008 also Andre Penn v DPP BVIHCR2009/0031 a Judgement of the Eastern Caribbean Supreme Court, Sisson v Canterbury District Law Society 2011 NZCA 55, Saxmere Company Limited and others v Wool Board [2009] NZSC 72decisions of the New Zealand Court of Appeal.

In Saxmere, Blanchard J stated the test as follows *'a Judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". As that judgment proceeds to observe, that principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal (in the present case, the Court of Appeal) be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.*
It was pointed out in ***Ebner*** *that the question is one of possibility ("real and not remote"), not probability. The High Court of Australia also warned against any attempt to predict or inquire into the actual thought processes of the judge. Two steps are required:*

- *(a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and*
- *(b) Secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".*

The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. Lord Hope of Craighead commented in ***Helow v Secretary of State for the Home Department*** *that:before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.*

The elaboration of the features of the objective observer is, as Kirby J remarked in ***Smits v Roach,*** *a reminder to judges, the parties and the community reading their reasons that the standard that is applied is not simply the reaction of the judges to a particular complaint:*

It is, as far as it can be, an objective standard: one aimed at emphasising the undesirability of idiosyncratic and personal assessments of such matters. As the cases show, in such decisions different judges can reflect different assessments and reach different conclusions. The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that it provides an entirely objective standard by which to measure the individual case.

The courts must be careful not to subvert the hypothesis by ascribing too much legal knowledge to the lay observer. To do so might mean that justice is not both done and seen to be done by a notional representative of the public. On the other hand, if the court does not impute to the observer some knowledge about how barristers and judges commonly interact it may arrive at a hypothetical opinion of a hypothetical observer which does not reflect reality.

[7] There therefore need to be added to the facts about the case known to the observer, which I will shortly describe, some basic knowledge of how counsel and judges are expected to act and interact. That information is conveniently set out in ***Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd:***

(a) when barristers act on a client's behalf they do so in a professional capacity as their client's legal advocate selected to act in the case for that purpose. Any barrister so selected could have been briefed to fulfill the same task for the opposite side;

(b) in accepting a brief to act for a client in a particular commercial case, the barrister does not become part of or identified with the client and has no direct or indirect financial interest in the outcome of the case;

(c) the barrister acts as such as a member of an independent bar. The barrister is instructed by a solicitor or a firm of solicitors to present the client's case and in doing so is bound by a professional code of ethics ensuring that the barrister's conduct is in accordance with his or her professional standards;

(d) it is common place for barristers who are close associates, or friends and who may even be from the same set of chambers, to fight on opposite sides of a case without compromising their professional duties to act in the interests of their clients;

(e) as judges are usually appointed from the senior ranks of the profession, particularly the bar, it is likely that they will be well acquainted, and have formed close associations, with senior counsel appearing before them. It is also likely that they will have personal and professional associations with many of the counsel appearing before them.

Those associations between judges and the profession have been said by Lord Woolf CJ, speaking for a Bench of five in the Court of Appeal of England and Wales, to promote an atmosphere which is totally inimical to the existence of bias.

The observer must also be taken to understand three matters relating to the conduct of judges. The first is that a judge is expected to be independent in decision-making and has taken the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will". Secondly, a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases, which are randomly allocated. Making this point in Muir, the Court of Appeal referred to the following passage from the judgment of Mason J in Re JRL; ex p CJL:

It is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel. As Mr Kós QC said in his argument for the respondent, counsel are not judged. They are, rather, a trusted element of the judicial system.

It is important to bear in mind also, as Merkel J pointed out in Aussie Airlines,that the issue is not whether it would be better that another judge should have heard the case, but whether the judge who sat may not have brought an impartial and unprejudiced mind to the resolution of the questions for decision. Nor is it simply a matter of whether a judge has conducted himself in accordance with guidelines for judicial conduct. A failure to do so, though it may be open to criticism, may well have no bearing on a question of apparent bias.
Finally, and perhaps most obviously, the matter is not to be tested by reference to the perhaps individual and certainly motivated views of the particular litigant who has made the allegation of bias and is endeavouring to influence a result or overturn a decision and is therefore the least objective observer of all. Nor is it to be tested by reference to any statements by the judge as to

what did or did not have an influence. The Court is not making a judgment on whether it is possible or likely that the particular judge was in fact affected by disqualifying bias and the judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously."

In the case of Sission in delivering the judgement of the court Harrison J said *" Proof of apparent bias falls within the generic category of predetermination. It originates from the prohibition on a person being the judge in his or her own cause. In its most literal sense the prohibition applies where a judge is a party to the subject litigation or has a financial or proprietary interest in its result; in that case disqualification is automatic unless the nature of any such interest is trifling. In a less direct or secondary sense it may apply where the judge's conduct, behaviour or associations give rise to a suspicion of partiality, for example, because of a friendship with a party. In recent years appellate courts in this country and elsewhere have been called upon to revisit and refine the principles governing claims of apparent bias . The law in New Zealand is now settled by the decision of our Supreme Court in Saxmere Company Ltd v Wool Disestablishment Company Ltd (Saxmere (No 1)), approving this Court's decision in Muir v Commissioner of Inland Revenue. In essence, a Judge (or a member of a Tribunal exercising a judicial function) is disqualified if the fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question which he or she is required to decide.*
The apprehension of judicial partiality must be based upon a real and not a remote possibility. The fair-minded observer is presumed to be capable of an intelligent and balanced evaluation of all relevant facts. Two factors must be identified within the circumstantial inquiry. One is what it is that might lead the decision maker to decide a case other than on its factual merits – most frequently said to be a personal interest in the result. The other and equally important factor is the logical connection or causative link between the offending factor and the feared deviation from deciding a case other than on its merits. In practical terms, as Saxmere (No 1) shows, the enquiry is into what and how the decision-maker might possibly stand to gain from a result adverse to the complainant.

On this point Harrison J concluded "*Claims of apparent bias have become an increasingly popular avenue of collateral attack on adverse judgments. But, as Saxmere (No 1) shows, they are to be determined by an analytical assessment, not by reliance on general impression or presumption.*

This approach of asserting bias against members of a panel of the disciplinary committee is not new or novel it arose in the case of SCCA 118/2008 Georgette Scott v GLC ex parte Errol Cunningham there Panton P. at paragraphs 19 to 25 stated *" 19. The appellant contended that there was bias on the part of the individual panel members and the constituted panel as a whole. The complaint in respectof Mr. Charles Piper, panel member, related to a suit filed by the appellant asattorney-at-law. That suit was* ***Joy Hew v Sandals Resorts International Ltd.And Sandals Grande Ocho Rios.****Mr. Piper appeared for the defendants. He filed an acknowledgment of service on March 5, 2007, the defence of the first defendant on March 22, 2007, and the defence of the second defendant on November 16, 2007. The matter was referred to the Dispute Resolution Foundation and scheduled for hearing on October 15 and 16, 2008. The Committee handed down its decision on October 14, 2008. 20. In respect of Mr. David Batts, panel member, the complaint is that there existed at the time of the hearing, litigation in which*

his firm appeared for one of the defendants and the appellant appeared for the claimant. That case was ***Keema Richards v Dr. Junior Taylor, Dr. Kenneth Appiah and TheNational Chest Hospital.*** *The appellant presented documents to show that the firm of livingston, Alexander & Levy filed a defence for the first defendant. There is a "without prejudice" letter from the appellant to the firm but it was addressed for the attention of another attorney-at-law, Mr. Ransford Braham.*

21. As far as Mrs. Pamela Benka-Coker, QC. the other panel member is concerned, the bias complained of is her failure, as chairman of the panel, to accept the complainant's proposal to withdraw his complaint against the appellant. This complaint would also affect the other members of the panel as they participated in the refusal to entertain the proposed withdrawal.

22. The appellant contends that the cases ***Re Medicaments and Related Classes ofGoods*** *(No.2) [2001] 1 WLR 700 and* ***In Re Pinochet*** *[1999] UKHL 1; [1999] 1 All ER 577 are relevant so far as this ground of appeal is concerned. Mr. Beswick submitted that Mr. Piper should not have sat on the panel as he was sitting in his own cause. According to him, Mr. Piper's presence on the panel alone invalidates the hearing. The existence of contested suits between the appellant and members of the panel, in Mr. Beswick's view, amounted to the existence of bias and forms a basis for the automatic disqualification of the panel. Mrs. Minott-Phillips pointed out that the* ***Hew v Sandals*** *matter commenced after the disciplinary hearing had begun. In any event, she said, it should be borne in mind that the attorneys-at-law are merely agents of the persons they represent.*

23. I am experiencing some difficulty in appreciating the point that is being made by Mr. Beswick in respect of bias, so far as it relates to the instant case. For example, it has been said that by refusing to allow the withdrawal of the complaint, the head of the panel, learned Queen's Counsel, Mrs. Benka-Coker, has demonstrated bias. This submission is, in my view, unacceptable. From time to time, during the course of an hearing, a Court or tribunal will find it necessary to make rulings. The making of a ruling as to the course of proceedings cannot, per se, be an indication of bias. In refusing to allow the withdrawal of the complaint, the panel was exercising a right which it had to hear the complaint. Bearing in mind the nature of the allegations, and the role of the Committee, the panel was entitled to say: "this is not a matter which should be withdrawn, let us hear it". It was not an indication that they had arrived at an adverse conclusion in respect of the appellant. The point being advanced on behalf of the appellant is, in my view, without merit. Support for this position comes from the erstwhile attorney for the appellant, Mr. Christopher Townsend who, at para. 4 above, told the Committee that he did not think that the Committee should have ignored the complaint and the evidence that they had already heard. He merely needed to be afforded the opportunity to cross-examine the complainant.

24. The principle that Mr. Beswick has urged as being applicable is that a man should not be a judge in his own cause. In the instant case, it is difficult to appreciate why it is thought that that principle is applicable. The fact that a panel member is appearing as an attorney-at-law in a suit against the appellant cannot by itself amount to a reason for the disqualification of the panel member. There is no evidence of any issue having arisen in the suit ***Hew v Sandals*** *to lead to the view that Mr. Piper may have been a judge in his own cause. The first hearing of the complaint against the appellant took place before the suit* ***Hew vSandals*** *was filed. There is nothing to indicate the existence of the likelihood of bias at the commencement of the hearing,*

and there has been nothing shown to have occurred after the filing of the suit that could possibly have led to the perception of the likelihood of bias. In fact, in ***Hew v Sandals*** *the matter has been referred to the Dispute Resolution Foundation.*
25. In relation to the suit ***Keema Richards v. Dr. Junior Taylor and Others,*** *it seems that Mr. Ransford Braham of the firm of Livingston Alexander & Levy has conduct of the matter. The appellant has submitted for consideration two rather cordial letters between the attorneys (the appellant and Mr. Braham) in respect of photographs of the claimant who was the alleged victim of improper medical procedures. Here again, there is no question of Mr. Batts being a judge in his own cause, and there is nothing to indicate the likelihood of bias on his part. I am of the view that there is no merit in the ground of appeal alleging actual bias or the perception of bias."*

From the reading of these cases it becomes clear that whenever assertions of bias are being made it is necessary to show by analytic assessment, not on general impression or presumption, that there is a personal interest in the decision maker and the decision is likely to be, or has been tainted because of it. For the reasons expounded above the issue of the determination of the Panel being biased is not one upon which the Panel can proffer any opinion because as stated above " *and the judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously."*

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Panel acting as judge and prosecutor

In this hearing the Complainant was unrepresented, to facilitate the reception of her evidence in an orderly manner the Panel assisted in leading the evidence. All the documents tendered and admitted in evidence formed part of the list of documents upon which the Complainant intended to rely which were filed on the General Legal Council and served on the Attorney. When this submission was made initially,regard to the leading of evidence, no specific instances were referred to, in order to demonstrate the acting as a prosecutor as opposed to merely leading the relevant evidence. However in his written submissions the attorney for the Attorney referred to 112 instances of questions led by the panel which in his opinion made the conduct of the Panel assume the role of a prosecutor. As in the case of bias this submission will have to be determined by another judicial body.

The Attorney in his closing submissions raised other issues which we have not specifically commented on, this is not to be taken as being disrespectful of these submissions but based on the evidence before it the Panel considered these submissions to be without merit.

CONCLUSION

The following are the findings of fact by the panel.

1. The Complainant retained the Attorney by way of a contingency agreement with regard to a civil suit .

2. The suit was settled without a trial on its merits.

3. The suit was settled in the sum of Twenty Three Million Dollars of which Twenty One Million was for compensation and Two Million was for costs.

4. That by letter dated the 30th November 2012 the Attorney stated that the suit was settled for Sixteen Million Dollars.

5. That the Complainant was paid in accordance with the contingency agreement between the parties on a 2/3 to 1/3 basis.

6. That the suit was discontinued on the 19th July 2012 by the filing by the Attorney of a Notice of Discontinuance in the Supreme Court of Jamaica.

7. That this fact was never communicated by the Attorney to the Complainant and it was only by a visit to the Supreme Court Registry that the Complainant discovered this fact.

8. That up to December 2013 the Attorney had not disclosed to the Complainant any Release and Discharge document.

9. That up to and including the disclosure of the release and discharge document in December 2013 there was no document suggesting a settlement for a sum other than for Sixteen Million Dollars.

10. That upon his submission of a statement of account to the General Legal Council the Attorney was certifying that the relevant settlement figure was Sixteen Million Dollars.

12. That subsequent to the submission of the statement of account the Attorneys for the Defendant in the civil suit disclosed the release and discharge document which formed the basis of the settlement which was for Twenty Three Million Dollars.

13. That upon this disclosure being done the Complainant filed an additional affidavit with supporting documents which was served on the Attorney at a hearing.

14. That the Attorney contrary to law did not file an affidavit in response to this fresh affidavit.

15. That in the Attorneys letters to the attorneys Gifford Thompson and Shields the Attorney claimed that he was entitled to the difference between the Sixteen Million and the Twenty Three Million of Seven Million Dollars.

16. That the Attorney never provided any statement of account with regard to the Seven Million Dollars to justify the basis of his entitlement.

17. That the Defence of the Attorney which relied on the acceptance by the Panel that the Complainant signed two separate release and discharge documents for different amounts with regard to the same settlement was patently false.

18. That the Complainant was not aware of the settlement of Twenty Three Million Dollars until it was disclosed to her by the Attorneys for the Defendant in the civil suit.

19. That the Attorney relied on the non-disclosure clause in the release and discharge settlement document to deliberately avoid disclosing the true settlement figure to the Complainant.

20. That the conduct of the Attorney was dishonest as he contrived a scheme calculated to deceive the Complainant with a view to fraudulently deprive the Complainant of the full benefit of her settlement.

It follows from the above findings of fact that a breach of the canons set out in the complaint which asserts that :-

1. Canon 7(b)(ii) which states that an Attorney shall account to his client for all monies in the hands of the Attorney for the account or credit of the client whenever reasonably required to do so and

2. 2. Canon 1(b) which states that an Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behavior which may tend to discredit the profession of which he is a member.

Has been made out to the requisite standard as required by law. In consequence therefore the Attorney is in breach of the specified canons and is therefore guilty of professional misconduct.

Pursuant to the case of Owen Clunie v General Legal Council the Attorney is therefore afforded the opportunity to make submissions in mitigation.

DATED THE 30th DAY OF July 2019

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TREVOR HOLYN (CHAIRPERSON)

.....

DELROSE CAMPBELL

.....

PETER CHAMPAGNIE