DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

COMPLAINT NO. 190/2020

In the Matter of YHOHAN ERROL DAVIDSON and SEAN KINGHORN, an Attorney-at-Law.

AND

In the Matter of the Legal Profession Act, 1971

Panel:	Mrs. Tana'ania Small Davis, Q.C. Ms. Lilieth Deacon Miss Anna Gracie
Appearances:	Mr. Yhohan Davidson Mr. Sean Kinghorn
Recording Secretary:	Ms. Jeanie McLeod
Hearing Dates:	12 June and 16 November 2021

COMPLAINT

1. By Form of Application filed on 18th November 2020 and Form of Affidavit by Applicant sworn on 18th November 2020, Mr. Yhohan Davidson ("the Complainant") made a complaint against Mr. Sean Kinghorn ("the Attorney") that:
   (a) He has not dealt with my business with due expedition (Canon IV (r)); and
   (b) He has acted with deplorable negligence in the performance of his duties (Canon IV (s)).

EVIDENCE

The Complainant

2. The evidence of the Complainant was that on 16 February 2008, he met in a motor vehicle accident when a police officer collided with his motor vehicle. The Complainant states that as a result of the collision, he suffered a broken femur and his passengers sustained minor injuries. The Claimant was treated at hospital and states that he sought the services of the

Attorney as soon as he left the hospital and was able to move about. This representation was for himself and the passengers of the vehicle to get compensated for their respective pain, suffering and loss.

3. The Complainant states that he and the other persons first met the Attorney in March/April 2008 and he later contacted them and requested that they sign documents authorising him to be their legal representative.

4. The Complainant admitted that the Attorney made several requests of the Spanish Town Hospital, where the Complainant was treated, to produce the medical report but that these attempts were futile. When the Complainant made calls or visits to the Attorney's office to enquire about the case, he was advised that there was nothing that the Attorney could do as he could not force the hospital to produce the report. The Complainant stated that months turned into years and that by 2015 following a meeting with the Attorney, he himself started to follow up with the hospital. Following questions from the Panel, the Complainant clarified that he had been checking with the hospital prior to July 2015 but following that date his efforts intensified when the Attorney told him he can check with the hospital himself.

5. The Complainant testified that on one of his visits to the hospital a representative of the hospital explained that they could not locate his records and that was the reason for the delay in the provision of the report. The Complainant stated that at the time that he was told this, he himself had already made frequent visits to the hospital.

6. It wasn't until 2016 that the Complainant received a phone call to say that the hospital had located his records. After receiving the call, the Complainant stated that he continued to follow up until the doctor completed the medical report. Upon receiving the report, the Complainant took it to the Attorney, and it was then that the Attorney advised that his claim was now statute barred and that he would need to seek compensation from the hospital as it was due to their delay that the claim had not been commenced. The Complainant made negative comments on the Attorney's character and the Attorney advised that the Complainant should seek the services of another Attorney.

7. It was when the Complainant was trying to secure alternate representation that the Complainant formed the view that the Attorney acted with negligence and failed to carry out the necessary procedures prior to the case becoming statute barred. The Complainant stated that he was of the view that the Attorney could have gotten additional time from the "powers that be" to produce the medical report since the hospital was unable to locate the Complainant's records. As a result, the Complainant made the complaint against the Attorney.

8. The following documents were admitted into evidence without objection:-
   (a) Form of Application filed 18 November 2020 – Exhibit 1A;
   (b) Form of Affidavit by Applicant sworn 18 November 2020 – Exhibit 1B; and
   (c) List of Documents submitted 20 April 2021 – Exhibit 2:
      i. Letter from Attorney to Complainant dated 27 December 2016;
      ii. Letter from Attorney to Dr. Mark Minott dated 7 April 2008;
      iii. Letter from Attorney to Spanish Town Hospital dated 7 June 2012;
      iv. Letter from Victoria Mutual Insurance to the Attorney dated 14 April 2008;
      v. Authorisation to Obtain Medical Report;
      vi. Receipts from South East Regional Health Authority dated 18 March 2014 and 24 March 2016;
      vii. Manuchant Limited Request Forms dated 17 February 2008;
      viii. Manuchant Limited Sales Receipts dated 18 February 2008 in the sum of $52,000.00 and $10,090.02;
      ix. Referral Form B dated 27 February 2008;
      x. South East Regional Health Authority Invoice dated 28 February 2008;
      xi. South East Regional Health Authority Receipts dated 17 February 2008 and 7 March 2008;
      xii. Receipt No. CCRR No. 429136 for Abstract of Police Accident Report;
      xiii. Invoice from Portmore Wrecking Service Limited dated 13 March 2008;
      xiv. Invoice from Your Choice Wrecking dated 13 March 2008;
      xv. Receipt No. CCRT No. 2898268 for Medical Report;
      xvi. Receipt (undated) from Dr. Jithendra Vijayendra for Medical Report; and

xvii. South East Regional Health Authority Medical Report dated 21 October 2016.

9. In cross-examination, the Complainant explained that what he meant by incorrect procedures is that the Attorney failed to make "detailed follow up and request from the hospital, detailed reply, response to me on the progress of the matter and also making me aware that we were approaching a statute bar so that other arrangements could be made." In answer to the Attorney's question as to the legal basis for stating that he was negligent, the Complainant said "*You, I am assuming, had the upper hand to ask for leniency by the court or the powers that be for an extension until the record has surface whenever time, so it would be acceptable when it is available to proceed.*" However, the Complainant was unable to point to any rule giving this power.

10. The Complainant admitted to having several meetings with representatives of the Attorney's firm and that he spoke to at least three different attorneys. The Complainant confirmed that he was advised that the medical report had not been received and eventually agreed that he was advised that a suit could not be filed without the medical report. The Claimant repeated that it was when he took the medical report to the Attorney he was advised at that time that the statute of limitations rendered his claim statute barred.

11. While the Complainant stated that he couldn't recall the Attorney advising him to ensure that the hospital insert the date on the medical report, he agreed that the Attorney advised him that he had a possible cause of action against the hospital for the delay in the provision of the medical report.

12. The Attorney did not challenge the Complainant in cross examination on his evidence that he was only informed that his claim had reached its statute of limitation and was statute barred when he too the medical report to him.

The Attorney

13. The Attorney's Affidavit in Response to Complaint filed on 21 January 2021 and the two exhibits thereto, being the Medical Report of the South East Regional Health Authority

dated 21 October 2016 and the Attorney's letter to the Complainant dated 27 December 2016 was admitted as Exhibit 3 and comprised the Attorney's evidence in chief.

14. The Attorney does not dispute the account given by the Complainant in relation to the attempts they both made to secure the medical report. The Attorney's case is that there were a number of meetings and that in those meetings the Complainant was advised that the Attorney's hands were tied without the medical report from the Spanish Town Hospital. Further it was the Complainant who had advised the Attorney that the hospital had lost his records.

15. The main thrust of the Attorney's evidence is a denial of any negligence on his part based on the law in relation to claims involving personal injury matters. The Attorney, having cited the Civil Procedure Rules, in particular Rule 8.11(3), maintained that owing to the mandatory nature of the rule, a claim on behalf of the Complainant could not be commenced without a medical report attached to the claim.

16. It was for this reason that the Attorney indicated that he could do nothing without the medical report from the Spanish Town Hospital and why no claim was filed. The Attorney maintained that the Complainant's attention ought to be directed at the Spanish Town Hospital as the institution's delay in providing the medical report was the reason why the claim could not be commenced.

17. The Attorney's Affidavit did not address the issue of the timing of the advice to the Complainant as it relates to the limitation period, other than as contained in the paragraph (ix) on the last page of his 27 December 2016 letter - Exhibit S.K. 2.

18. In response to questions posed by the Complainant in cross examination as to whether the Attorney did all that he could to represent the Complainant, the Attorney stated "I have. The only thing that I have not done is to bring a suit against the Government of Jamaica and I made that decision because I think you are a troublesome client. If you were not, I would have done it for you. I would have brought the hospital to court for negligence and

the Government of Jamaica, but I chose not to do that for the very reason that we are here. I figured that you are a troublesome client."

19. In response to the Complainant's question as to whether the Attorney allowed personal feelings to get in the way, the Attorney replied that it became clear that the trust and confidence had broken down and that in those circumstances it was prudent to terminate the retainer.

20. In relation to the follow up procedure, the Attorney outlined that he employed several bearers, at least four, who as part of their responsibility attend the different institutions to follow up on medical reports and other documents. The Attorney explained that he did not have a record of each time they went to an institution, but that these follow ups were at least monthly if not weekly.

21. The Attorney stated that the information received from the hospital on each occasion was that the record was not yet found and as soon as the record was found they would produce the medical report. The Attorney went on to state that the Complainant was aware of this from as far back as 5th March 2012 when he called to receive an update and upon hearing the update indicated that he was going to have the Attorney investigated because, he had a police friend, and he wasn't hearing anything other than the Attorney did not get the medical report.

22. In answer to the Complainant's question as to when the Attorney determined that the Attorney/Client relationship had broken down, the Attorney advised that this was following the March 2016 meeting as referenced in the December 2016 letter to the Complainant.

23. In answer to the Complainant as to whether the matter could proceed based on the injuries which the Complainant presented with, the Attorney agreed that when he met the Complainant it was evident that he had a broken leg and that he had formed the view that it was a serious injury which had to be taken to the Supreme Court. The Attorney stated however, that for the purposes of settlement in order to put a figure to an insurance company he required the evidence to support a claim as he could not just pluck a figure

from the air and this was borne out by the letter from the insurance company requesting the details of the claim which the Attorney was unable to respond to.

24. In response to questions posed by the Panel in relation to the possibility of filing a claim notwithstanding the expiration of the limitation period, the Attorney stated that there was nothing barring the filing of a claim but that it would expose the Complainant to the risk of the claim being struck out and being exposed to an adverse costs order. The Attorney having previously formulated for the panel that the cause of action against the hospital and the Government of Jamaica would be negligence, stated that he did not believe that a claim had to be filed and struck out in order to prove that the Claimant had lost a right of action as the Limitation of Actions Act was clear. The Attorney stated that he was of the view that filing the claim without the medical report and relying on CPR 26 to rectify any failure to follow Rule 8.11(3) would be of no assistance as the provision in Rule 8.11(3) is mandatory and went to the jurisdiction of the court.

25. Finally, in response to a question posed by the Panel, regarding the existence of any letter that was written to the Complainant prior to the expiration of the limitation period telling him that the matter was about to become statute barred, the Attorney's response was "I don't see that letter but that is a discussion we would have had repeatedly with Mr Davidson." This was the only evidence that could be said to dispute the Complainant's evidence that he was only told about the limitation period after the claim had already become statute barred.

SUBMISSIONS BY THE PARTIES

26. The parties filed written submissions in accordance with the Panel's Order.

27. In his submissions, the Complainant urged the Panel to find that the Attorney did not do all in his legal power to advance his case before it became statute barred. Further, that over the years the Attorney did not advise him of the existence of the limitation period. Further, that the Attorney could have tried to make direct contact with either Dr. Mark Minott or Dr. Jithendra Vijayendra to try to expedite the report.

28. In his submissions, the Attorney urged the Panel to find:

(a) that he made several requests to the Spanish Town Hospital to produce the Complainant's medical report but such attempts were futile;

(b) that the Attorney made it known to the Complainant that there was nothing the Attorney could do as he could not "twist the arms" of the hospital personnel to obtain the medical report;

(c) that the reason for the delay was that the hospital could not locate the Complainant's records and therefore not produce the medical report;

(d) that the matter was dealt with expeditiously as having been retained, the Attorney dispatched letters to the doctor and insurer in April 2008 with "another" correspondence to the hospital in 2012. Weekly checks were made by the Attorney's clerk at the hospital and this notwithstanding, the medical report only became available in October 2016 because the hospital had misplaced the file. Finally, that there was evidence of several meetings between the Attorney and the Complainant culminating with the December 2016 letter giving clear advice and the status of the matter;

(e) that there was no evidence of negligence and/ or failure to follow procedure as there is no law which allows for the extension of time of the limitation period prescribed by statute. There was therefore no evidence before the tribunal which discloses negligence, let alone deplorable negligence; and

(f) that the argument that needs to be advanced by the Complainant is the negligence of the hospital of depriving him of his cause of action and constitutional right to a fair hearing.

29. In concluding, the Attorney asserted that neither ground of complaint had been made out and that on the contrary, the Attorney acted in keeping with the highest standards of the Bar and consequently the Complaint should be dismissed.

STANDARD OF PROOF

30. The Panel reminds itself that the standard of proof in disciplinary proceedings is the criminal standard which is beyond all reasonable doubt (**Campbell v Hamlet [2005] UKPC 19**) and the burden of proof rests on the Complainant.

FINDINGS OF FACT

31. The Panel accepts the following facts which were not disputed:
    (a) The Complainant was involved in a motor vehicle accident on 16 February 2008;
    (b) The Complainant retained the Firm, Kinghorn & Kinghorn of which the Attorney is a partner in or around March 2008;
    (c) The Attorney notified Victoria Mutual Insurance Company Limited of the Complainant's claim by letter dated 22nd February 2008 who responded requesting details of the claim by letter dated 14 April 2008;
    (d) The Firm wrote to Dr. Mark Minott (7 April 2008) and to Spanish Town Hospital (7 June 2012) to secure medical reports;
    (e) Both the Complainant and the Attorney made several attempts to secure the medical report from the Spanish Town Hospital;
    (f) The Complainant's personal efforts to obtain the medical report from the hospital intensified in 2015 following a meeting with the Attorney;
    (g) That in the absence of a medical report from the hospital at which the Complainant was initially seen and treated following the accident, the Attorney could not provide complete details of the Complainant's claim;
    (h) The Complainant's claim became statute barred on 16 February 2014; and
    (i) The medical report from the Spanish Town Hospital only became available in late 2016 as the hospital had lost the Complainant's records.

32. The important fact which goes to the heart of the complaint that the Attorney acted with inexcusable or deplorable negligence is whether the Attorney advised the Complainant of the limitation period prior to its expiration. To the extent that there was a dispute of that

fact, given that the Attorney did not speak to this issue in his Affidavit nor did he challenge the Complainant on it in cross examination, we find that the Attorney did not advise the Complainant prior to 16 February 2014 that his claim was about to become statute barred or advise of the date that it would take effect. In coming to this finding of fact, we took into account:

(a) the Complainant's demeanour in giving his evidence;

(b) the undisputed evidence that the Complainant frequently followed up with the Attorney as to the progress of his case and the efforts to obtain the medical report from the hospital, so much so that he assumed a very proactive role in achieving that end;

(c) the intensified personal efforts commencing in 2015, which would have been after the expiration of the limitation period and would be inconsistent with being advised that his cause of action had become statute barred;

(d) the absence of any documented advice from the Attorney to the Complainant advising that the Complainant's cause of action would become statute barred by 16 February 2014 prior to the 27 December 2016 letter;

(e) the Attorney's letter dated 27 December 2016 recited "*our further discussions in relation to this matter coming out of our several meetings with you*" which listed nine points beginning with the date of the accident and stated at (ix), "*In the last meeting with our Mr. Sean Kinghorn, you were advised that it was unlikely that you could still pursue your personal injury claim as it was now statute barred by virtue of the Limitation of Actions Act. Our Mr. Sean Kinghorn also informed you that you could possibly pursue an action against the Hospital and the Government of Jamaica for the inordinate delay in providing you with your medical report thereby effectively depriving you of your rights to pursue your claim. At that time our Mr. Sean Kinghorn indicated that he was reluctant to represent you in that claim but would give it some thought upon your receipt of your medical report from the Hospital.*" In this letter the Attorney records only one occasion on which the Complainant was advised of the limitation issue. The said letter records the last meeting date as 22 March 2016, a date after the limitation period had expired. This

was also around the time that the Complainant was advised that the hospital had finally located his medical records; and

(f) the following exchange in the course of the Attorney's cross examination of the Complainant:

Kinghorn:	You did not obtain medical report from the Spanish Town Hospital until October 2016 is that correct?
Davidson:	That's correct.
Kinghorn:	Am I correct that when you took that report to me, I advised you that the 6 years limitation period had passed.
Davidson:	At that time, you did.
Kinghorn:	Can you recall before you obtained that medical report that I had advised you that when the report was in fact obtained from the hospital you were to ensure that the report was dated.
Davidson:	I can't recall.
Kinghorn:	Can you recall me advising you that based on the date of the report you had a possible cause of action against the hospital for the delay in producing the report?
Davidson:	I recall words of that nature.

DISCUSSION & ANALYSIS

33. The main complaint in this matter is that the Attorney acted with inexcusable and deplorable negligence which led to the Complainant losing his right of action.

34. The case of **Sherrie Grant v Charles McLaughlin and Anor [2019] JMCA Civ 4**, is authority for the principle that a defendant may apply to strike out a claim if it appears on the face of the claim, that it is time-barred on the basis that the claim amounts to an abuse of the process of the court.

35. The Panel agrees with the Attorney's submission that there is no power under the rules to apply to extend the time for the filing of a claim to defeat the Limitation of Actions Act. The Panel however, in considering the Civil Procedure Rules, notes that the Court has the discretion to extend the time for doing anything under the Rules in certain circumstances. Such an application could have been made to rectify the non-compliance with Rule 8.11(3).

36. Part 8 of the Civil Procedure Rules 2002 deals with commencement of claims in the Supreme Court. Where the claim relates to personal injury there are additional requirements to be met by litigants as follows:

"Special requirements applying to claims for personal injuries

8.11 (1) This rule sets out additional requirements with which a claimant making a claim for personal injuries must comply.

(2) The claimant's date of birth or age must be stated in the claim form or particulars of claim.

(3) Where the claimant intends to rely at trial on the evidence of a medical practitioner, the claimant must attach to the claim form a report from a medical practitioner relating to the personal injuries alleged in the claim.

(4) Paragraph (3) does not restrict the right of the claimant to call other or additional medical evidence at the trial of the claim.

(5) The claimant must include in or attach to the claim form or particulars of claim, a schedule of any special damages claimed."

37. In reviewing the above rule, it does not appear that the failure to attach a medical report on its ordinary meaning precludes the claim from proceeding but carries two consequences. The first (as alluded to by the Attorney) is that the prospective defendant would not know the full particulars of the claim that he would need to meet and the second is that a prospective claimant would not be able to rely on the medical evidence at trial and therefore could possibly be unable to establish his injury or the gravity of the injury and thereby ultimately fail. The rule does not specify the need for a contemporaneous report and does not restrict the use of other or additional reports at trial provided that some medical report relating the injuries alleged in the claim is attached.

38. In **Bergan v Evans [2019] UKPC 33** the Privy Council in dealing with the Eastern Caribbean Civil Procedures Rules described 10.6 (2) (which is worded exactly the same in Jamaica's CPR) as clear and prescriptive in requiring that a defendant "*must state in the defence (a) whether all or part of the medical report is agreed; and (b) if a part of the medical report is disputed, the nature of the dispute*", stated at paragraph 27 of its decision

that "*The clear purpose of these provisions, which impose front-loading burdens on claimants and defendants in personal injury cases, is to require the parties at the earliest stage, before the court undertakes detailed case management, to flesh out the detail of the dispute (if any) ... Furthermore, an early identification of the ambit of the dispute about the claimant's injuries is likely to facilitate the resolution of the case by mediation or some other form of alternative dispute resolution.*" The Board went on to state at paragraph 35 of its decision that "*The regime for pleading in personal injury cases constituted by the combined effect of [EC CPR] rules 8.9 [affecting claimants and having the same wording as Jamaica's CPR 8.11] and 10.6 [affecting defendants] is merely aimed at establishing a convenient way of identifying the issues susceptible to medical evidence, rather than identifying the evidence which the court may permit to be deployed for the resolution of those issues.*"

39. The Board also went on to say that in light of the overriding objective and the given the tight timetable for filing of a defence (28 days) it may easily be supposed that the court would be generous in affording the defendant an extension of time to file a properly particularised defence or to amend that defence at a later stage. There is no reason why the same would not apply to a claimant who for good reason (failure of the hospital) is unable to fully particularise the injuries at the time of filing the claim. Indeed, it frequently happens that a claimant has to amend his claim upon receipt of a later and more detailed medical report.

40. In the case of **Jephtah Davis v Roy Marshall [2017] JMSC Civ 161**, Master A. Thomas (Ag) stated as follows:

> "[10] The use of the word **must** in Rule 11.16(2) does suggest that the Rule is meant to be mandatory. A litigant is therefore expected to strictly comply with the Rules. This is in keeping with the general thrust of the Rules to deal with cases expeditiously. However there is provision in the Rules which empowers the court in the appropriate circumstances to grant extension of time where the Applicant fails to comply with the time stipulated by the Rules. Rule 26.1(2) (c) provides that; "Except where these Rules provide otherwise, the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

[11] In *Moranda Clarke v Dion Marie Godson and Donald Ranger [2015] JMSC Civ 48*, the learned Master, Mrs. Bertram Linton (as she then was), had to address this very issue. In that case an application was made by the insurers seeking an order from the court to set aside the order for the substituted service which was effected on them. Despite the fact that she found that Rule 11.16 (2) "is meant to be mandatory", in paragraph 18 of her judgment, she stated,

"The Rules however also under Rule 26.1(2) correspondingly provides for the extending of the time for such an application in the exercise of the court's discretion and this provide some flexibility to ensure that justice is done."

Therefore, the fact that the Applicant has failed to comply with the timeline to file this application is not a bar to them being heard."

41. While the Panel has regard to the fact that the report, which was only available on 21 October 2016, advised the Attorney of the nature of the fracture (comminuted as opposed to simple or compound), the specific location of the fracture (proximal third of the right femur) and the degree of impairment being nil, the Panel must also have regard to the receipts and documents available to the Attorney during the life of the cause of action, in particular the Form written up by Dr Prasad stating "Classical Femoral Fixion Antegrade", the Manuchant Ltd. invoices for fixion femoral nail classic and skin traction kits etc., the Referral Form B for "Thrice weekly dressing post FF R femur" and the Invoice from South East Regional Health Authority dated 5 March 2008. This, the Panel believes, would have provided sufficient information to draft a claim and could have been attached to the Particulars of Claim.

42. A further reasonable step that was easily available to a reasonably competent attorney faced with the situation was to obtain x-ray report or scans which could confirm that there had been a fracture which would have constituted a sufficient medical report together with the documents referred to above to support the pleading of the Particulars of Injury. The Complainant could also have been advised to attend an entirely new doctor to get an assessment to be attached to the pleadings while the Attorney awaited the report from the Hospital. There was no evidence as to what transpired in connection with the request to Dr Minott for a medical report. The Attorney could also have recited the fact of the absence of the report from the hospital and that one would be attached as soon as it is received.

43. In **The Attorney General of Jamaica v Cleveland Vassell [2015] JMCA 47**, the Court of Appeal affirmed that amendments which do not introduce a new cause of action may be made to a party's statement of case after the expiry of a limitation period, and further, that an additional or new cause of action could be added to the statement of claim if it arises out of the same facts, or substantially the same facts, as to give rise to a cause of action already pleaded. In the circumstances of this case, the amendment that would be necessitated would not even have been to add a new cause of action, but simply to add particulars of injuries and potentially an additional remedy.

44. The Panel refers to the Canadian case of **Tiffin Holding Limited v Millican, 49 DLR (2nd) 216** in which the following obligations with regard to duty of care and skill were stated:-

> *"The obligations of a lawyer are, I think, the following: (1) To be skillful and careful; (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary; (3) To protect the interest of his client; (4) To carry out his instructions by all proper means; (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him; (6) To keep his client informed to such extent as may be reasonably necessary, according to the same criteria."*

45. The Panel noted that the extent and scope of the duty of care must depend on the particular circumstances of each case.

46. The Panel reminds itself of the distinction between negligence and inexcusable negligence as succinctly put in the oft cited dicta of Lord Esher's judgment in ***In Re Cooke [1889] 5 TLR,***:

> *"But in order that the Court shall exercise its penal jurisdiction on a solicitor it was not sufficient to show that his conduct was such that it could support an action for negligence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable to his profession. A professional man whether he were a solicitor or a barrister was bound to act with the utmost honour and fairness with regard to his client. He was bound to use his utmost skill for his client... A solicitor must do for his client what was best to his knowledge, and in the way which was best to his own knowledge, and if he failed in either of those particulars, he was dishonourable."*

47. See also **R & T Thew Ltd v Reeves (No 2) [1982] 3 ALL ER 1086** per Lord Denning MR at 1089, which we adopt:

> *"What conduct is sufficient? This compensatory jurisdiction still retains, however, a disciplinary slant. Just as officers in the services are subject to military discipline (see ss 64 ad 69 of the Army Act 1955), so are solicitors, as officers of the court, subject to judicial discipline. If they are guilty of any act, conduct or neglect to the prejudice and good order and [judicial] discipline or which is 'unbecoming the character of an officer and a gentleman', causing loss or damage to another, they can be ordered personally to compensate him. The cases show that it is not available in cases of mistake, error of judgment or mere negligence. It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof. In Myers v Elman [1939] 4 ALL ER 484 at 490. 498, 509, [1940]1 AC 282 at 292. 304, 319 Viscount Maugham put it as 'a serious dereliction of duty', Lord Atkin spoke of 'gross negligence', and Lord Wright said that 'gross neglect or inaccuracy' may suffice. Lord Wright's definition included 'a failure on the part of a solicitor ... to realise his duty to aid in promoting, in his own sphere, the cause of justice'. Lord Porter said that the solicitor there had been 'grossly negligent' (see [1939] 4 All ER 484 at 522, [1940] AC 282 at 338). Useful illustrations are to be found in Edwards v Edwards [1959] 2 ALL ER 179 at 13. [1958] P 235 at 258 (holding the solicitor liable to pay the costs of the other side because of his 'oppressive procedure') and Mauroux v Sociedade Comercial Abel Pereira da Fonseca SARL [1972] 2 ALL ER 1085, [1972] 1 WLR 962 (holding the solicitor not liable for an 'oversight')."*

48. The Attorney had a duty to inform the Complainant of the limitation date and the consequences of not filing a claim before the expiration of that date. An early authority for this is in the Judgment of Scrutton LJ in **Fletcher & Son v Jubb, Booth & Helliwell [1920] KB 175** where he states:

> *"Now it is not the duty of a solicitor to know the contents of every statute of the realm. But there are some statutes which it is his duty to know; ... What is the duty of a solicitor who is retained to institute an action which will be barred by statue if not commenced in six months? His first duty is to be aware of the statute. His next is to inform his client of the position...One would expect that as the time drew near the solicitors would tell them that if they did not bring an action their claim would be barred..."*

49. **Kitchen v Royal Air Force Association [1958] 1 WLR 563; Fletcher & Son v Jubb, Booth v Helliwell [1920] KB 175** is also authority for the point that allowing the limitation

period to run out without filing action or informing the client of the necessity to file an action is professional negligence.

50. In resolving whether the Attorney's failure to advise the Complainant of the limitation date and of the consequences thereof prior to expiration of the date amounts to professional misconduct, we consider the dicta of Carey J.A. in the case of **Earl Witter v Roy Forbes (1989) 26 JLR 129**, at 132-133:

> *"The Council is empowered to prescribe rules of professional etiquette and professional conduct. Specifically, rule (s) of Canon IV is concerned with professional conduct for Attorneys. It is expected that in any busy practice some negligence or neglect will occur in dealing with the business of different clients. But there is a level which may be acceptable, or to be expected, and beyond which no reasonable competent Attorney would be expected to venture. That level is characterised as 'inexcusable or deplorable'. The Attorneys who comprise a tribunal for the hearing of disciplinary complaints, are all in practice and therefore appreciate the problems and difficulties which crop up from time to time in a reasonably busy practice and are eminently qualified to adjudge when the level expected has not been reached"*

51. In this matter, the Panel is of the view that the Attorney's discharge of his responsibilities fell far short of what could reasonably be expected of a competent Attorney. It went beyond mere neglect or negligence to have failed to inform the Complainant of the limitation period and to have advised him appropriately as the expiration date approached. Added to this is the Attorney's explanation for not acting to file the claim. While it is true that through no fault of the Attorney, the medical evidence from the hospital was not forthcoming, a reasonably competent attorney would have explored the options to enable a claim to be filed to preserve the cause of action, attaching thereto what evidence that was in hand that related to the injuries to be set out in the particulars of claim, bearing in mind that it could later be amended when the medical report from the hospital came to hand. Another reasonable course to be taken to preserve the right of action would have been to have the Complainant obtain an X-ray of his leg which could reveal the evidence of the healed fracture, even as a place holder for the immediate imperative of CPR 8.11(3). A reasonable and competent attorney would have advised the Complainant of the steps that were being taken to preserve the claim and that additional steps would have to be taken to supplement

the particulars of injuries and amendment of the claim in due course. At the very least, if the Attorney believed that the Complainant would have been exposed to the risk of an adverse costs order if he had filed a claim that was not compliant with CPR 8.11(3) which was then susceptible to being struck out, he ought to have advised the Complainant (in writing) of his options and for the Complainant to decide whether he would take the risk in favour of filing a claim before the expiration of the limitation period.

52. The invoeation of CPR 26.1(2)(c) to extend the time for compliance and CPR 26.9(3) to rectify non-compliance with a rule are obvious and frequently used tools by litigators. The Complainant had a very good reason on which to ground such an application, if one were needed. There is no dearth of authority and precedent for the Court extending the time for compliance with a rule that is stated in mandatory terms. The Attorney's attitude to the Complainant's business betrayed a lack of due care and attention, which was ultimately significantly to the Complainant's detriment.

53. Insofar as the Attorney did not act with due expedition in taking available alternate steps to obtain medical evidence to enable the filing of the claim, and for the same reasons stated above the Panel also finds that the Attorney failed to act with due expedition.

54. The inescapable conclusion is that the Attorney failed to protect the Complainant's interest by filing a claim.

CONCLUSION

55. Having carefully considered the oral and affidavit evidence of both the Complainant and the Attorney together with the exhibits, the Panel finds that the evidence presented by the Complainant has met the requisite standard of proof, that is proof beyond a reasonable doubt in relation to the grounds complained of, i.e. that the Attorney has breached Canon IV (r) - *"An Attorney shall deal with his client's business with all due expedition ..."* as well as Canon IV (s) - *"In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect."*

56. The Panel therefore finds the Attorney to be guilty of professional misconduct.

57. In accordance with the procedure recommended by the Court of Appeal in **Owen Clunie v General Legal Council, Miscellaneous Appeal No. 03 of 2013 [2014] JMCA Civ 31**, the Panel directs that a date be fixed to give the Attorney an opportunity to be heard in mitigation before a sanction is imposed.

Dated the 16th day of November 2021.

TANA'ANIA SMALL DAVIS, Q.C.

LILIETH DEACON

ANNA GRACIE