

DECISION

Complaints: 180/98 Mernel Cox vs. Hugh Levy
181/98 Yvonnne Forbes vs. Hugh Levy
197/98 Pearl McLaren vs. Hugh Levy

Mr. Donald Scharschmidt Q.C. for the Respondent
Mr. Christopher Dunkley for the Complainants

Panel: Mr. Richard Donaldson- Chairman
Mrs. Margarette Macaulay
Mr. Derrick McKoy

The hearing of these Complaints took place over nine hearing dates.

Complaint 84/96 which had been made by Mrs. Yvette McGregor in her own name was withdrawn

As all three Complaints 180,181 and 197/98 related to the same set of circumstances and were virtually identical they were by consent of the Counsel representing the Complainants and Counsel representing the Respondent taken together.

The grounds of complaint against the Respondent were that:-

1. He has acted with inexcusable or deplorable negligence in the performance of his duties
Particulars of the Complaint were:-
 - (a) No explanation was forthcoming as to the five years delay between Agreement for Sale and Transfer
 - (b) His non-response to a letter of June 1990 with enquires as to the circumstances of this sale
 - (c) No evidence has been produced by the Attorney that a Notice making time of the essence was prepared or served on the Purchasers to expedite this sale
 - (d) He appears to have acted for the Purchaser as well as the Vendors
 - (e) Ultimately, we do not believe that this Attorney has acted in the Vendors' best interest

The Complainants submitted one Bundle of documents (Bundle#1) and the Respondent initially introduced a 'Supplementary Bundle' (Bundle #2) and later introduced another Bundle (Bundle # 3)

Evidence was given in support of the Complaints by Mrs. Yvette McGregor the daughter of Mrs. Pearl McLaren and by Mrs. Pearl McLaren. Evidence for the Respondent was given by Mr. Hugh Levy. Each witness was cross examined extensively. At the close of the evidence written submissions were at the invitation of the Panel made by both Counsel.

THE EVIDENCE OF THE COMPLAINANTS

Mrs. Yvette McGregor

She gave evidence that she was the daughter Mrs. Pearl McLaren. At the time of giving evidence she was living in Jamaica but in 1990 she was living in England. She came to Jamaica on a visit in 1990. At the request of her mother she visited the office of Mr. Hugh Levy on the 31st of January 1990. She inquired about the status of the sale of a premises at 227 Spanish Town Road with Mr. Levy and made notes in her diary of Mr. Levy's responses to her questions and any other information which he gave to her. With the leave of the Panel she referred to her diary notes and among them had the notes 'deposit of \$4500', 4th. December 1984 of sale Lascelles Hinds still held'. 'Sale price \$30,000'. 'Mernel Cox 15 April 1985 for signing' 'Bank of Jamaica account and letter dated August 1985 not replied to'.

She said that on her return to England she reported to her mother on the meeting with Mr. Levy. She said that after her return to England her mother received a letter in February 1990 from Mr. Levy saying that the sale had been completed. (No letter dated February 1990 was produced at the hearing. A letter dated the 29th of May 1990 from Mr. Levy to Mrs. McLaren was produced - Bundle #1 page 5- .In that letter Mr. Levy enclosed among other things a Closing Statement on the sale and a copy bank passbook showing money deposited).

Mrs. McGregor and her mother then wrote a joint letter to Mr. Levy dated 4th June 1990 asking a number of questions because she was surprised that the sale had been completed so soon after her visit in January 1990. That letter (Bundle #1 pages 6-7) set out several 'Points Needing Clarification' the most significant of which were:-

- (A) The precise date and year in the property was sold;
- (B) The name and address of the bank where the blocked account is held and the account number;
- (C) If the property was sold outright in 1984 in whose name was the balance lodged;
- (D) If the property was sold in 1985 whose signatures appear on the final sales documents;

(E) The property was originally valued \$30,000 in 1984. Why would it be sold for the same price in 1990

The letter closed by saying that if they did not receive a satisfactory response they would have to appoint an eminent firm of Attorneys to investigate the matter.

Mr. Levy in a terse response on 22nd. June 1990 (Bundle #2 P. 6) invited Mrs. McLaren to appoint an eminent firm of Attorneys to investigate the matter and advise her if any improprieties had taken place.

Later in her evidence Mrs. McGregor said that a matter of concern was that though she understood the transaction started in 1985 the Agreement bore a date -10th of February 1990- which was after her visit in January 1990. She commented that the property value had changed significantly between 1985 and 1990. She said she was aware when her mother had signed the agreement for sale.

Under cross-examination by Mr. Scharschmidt Mrs. McGregor agreed that one Sandra Cox was the daughter of the complainant Mernel Cox and was her cousin. She admitted that when she attended at Mr. Levy's office on 31st of January 1990 she was aware that Sandra Cox was still collecting the rent for the premises the subject of the sale. She said she knew Sandra had been collecting the rent from the time Mernel Cox left Jamaica prior to 1984. She had no personal knowledge of the tenants at the premises but had heard the name Josephine Reese mentioned. Later in the cross-examination she said Sandra Cox had died but she was uncertain when and was not sure she was still alive in January 1990.

On being asked the about information gleaned from Mr. Levy in her January 1990 visit to his office she after referring to her diary notes made reference to rent paid by one Rupert Reid and a Miss Ritta. She also made reference to a deposit of \$4500 paid by one Lascelles Hinds on 4th December 1984 and of letters Mr. Levy said he had written to Mernel Cox in 1984 and 1985 and in particular one dated 15th. August 1985 which was not replied to. She said he also told her the \$4500 deposit had been placed in a blocked account. Under further cross-examination she said it was the letter of 29 May 1990 to Mrs. McLaren that prompted the joint response to Mr. Levy dated 4th. June 1990. She said that when she visited Mr. Levy's office he never told her completion of the sale was imminent. When asked why she had asked Mr. Levy to say who the Vendors were she admitted knowing that it was her mother and her aunts.

She was referred to a letter dated 5th. October 1984 from Mr. Hugh Levy to Messrs Orville Cox & Company. She was also referred to a letter of 9th. April 1984 and one dated 24th. December 1984 from Orville Cox & Company to Hugh Levy & Company in reference to the premises at 227 Spanish Town Road. She was also a referred to a letter of 15 September 1985 from Mr. Levy to Orville Cox & Company. She then agreed that the letters showed that Mr. Levy had not been working for both parties but was representing her mother and her aunts.

Under reexamination by Mr. Dunkley Mrs. McGregor said Mr. Levy did not tell her in January 1990 that the agreement for sale had not been dated

MRS. PEARL MCLAREN

She said her father Joseph Phillips owned a property at 227 Spanish Town Road St. Andrew. On his death in 1964 the property was inherited by herself and the other two Complainants, they being the daughters of Joseph Phillips. In 1969 the three sisters decided to sell the property. At that time two of the Complainants lived abroad. Mrs. Mernel Cox up to then still remained in Jamaica and was collecting the rent from the tenant at the premises.

The respondent Mr. Hugh Levy was retained and he was asked to try and sell the property. In 1984 the tenant at the premises, one Mrs. Hinds, expressed an interest in purchasing the property. Mrs. McLaren said in her evidence in chief that she got no document to sign but later admitted having signed a transfer (Bundle #1 page 18). She said she did not receive it directly from Mr. Levy but via her sister Mernel Cox. In her evidence in chief she was unable to say when she did receive it.

She said that not having heard anything from Mr. Levy since 1984 she asked her daughter Yvette McGregor to visit Mr. Levy's office in January 1990. She said that on her daughter's return to England within two weeks after the visit to Mr. Levy she heard from Mr. Levy that the sale had been completed. She said that Mr. Levy did not tell her that he was going to date the transfer. He did not tell her he was going to date the Agreement 10th. February 1990. She was referred to the Transfer (Bundle#1 page 18). She agreed that no person named Hinds is referred to in that document. She said that the Transfer signed by her in 1984 had nothing to do with Mrs. Hinds. She admitted signing the Transfer in 1984. She later said it was not 1984 she signed it but was unable to say exactly when but did say it was not in 1990. She agreed that a letter dated 6th. August 1985 (Bundle #3 page 15) sent to Mr. Levy enclosing documents bore her signature. She also accepted as accurate a letter dated the 15th of August 1985 from Mr. Levy to her (Bundle #3 page 16) and that it was the Transfer she had signed and returned to Mr. Levy with that letter. She also accepted that a letter dated 20 May 1985 to Mr. Levy (Bundle#3 page 14) was sent by her sister Mrs. Yvonne Forbes.

Mrs. McLaren said that the Transfer showed the purchase price as \$30,000.00. She also admitted in cross-examination that up to January 1990, her niece Sandra Cox was still collecting rent from the premises 227 Spanish Town Road.

Mrs. McLaren admitted that she had retained a firm of Solicitors in England named Challenor & Roberts to write to Mr. Levy requesting him to sell 227 Spanish Town Road. She also admitted instructing her husband to write and sign her name to a letter to Mr. Levy in the 1960's. (At this stage in the proceedings Counsel for the Respondent sought to introduce new letters which were not included in any of the Bundles previously submitted. Counsel for the Complainant objected to their admission on the ground that there was no evidence that these documents were not previously available. He referred to the case of 'Ladd vs. Marshall'. The hearing was adjourned

to allow Counsel for the Complainants to examine these new documents. On the resumption of the hearing three months later Counsel for the Complainants renewed his objection to these new documents which had been put together and presented (Bundle #3). After hearing both Counsel the Panel ruled that documents in Bundle #3 would be admitted)

Mrs. McLaren acknowledged a letter dated 3rd. August 1965 from Challenor & Roberts to Mr. Levy requesting him to sell 227 Spanish Town Road (Ex. 5 Bundle# 3 page 1) and a reply from Mr. Levy dated the 6th. August 1965 (Ex. 6 Bundle #3 p. 2) and a letter of 17th August 1965 from Challenor & Roberts to Mr. Levy (Ex 7 Bundle#3 P. 3). She also acknowledged a letter dated 19th August 1968 from her to Mr. Levy (the letter written and signed for her by her husband) (Ex. 3 Bundle #3) in which she had expressed surprise to learn that her sisters were not interested in selling 227 Spanish Town Road and said she wanted to realise her share of the property. She also admitted that a letter dated 11th. October 1968 to Mr. Levy was sent by her (Ex.4 Bundle #3). In that letter she asked him to sell 227 Spanish Town Road so that she could get her share.

Mrs. McLaren said that from 1966 it was contemplated by herself and her sisters that the premises was to be sold. She said that she was not aware of any attempts by Mr. Levy to sell the property in the 1960s.

She said she had visited Mr. Levy's office once in 1977 along with her sister Mrs. Cox. She said that she was unaware of any effort by Mr. Levy to sell the property in the 1960s

EVIDENCE OF MR. HUGH LEVY

Mr. Levy said that he had been a practicing lawyer since 1957. He said he first came to deal with the estate of the father of the Complainants when he was approached by Mrs. Mernel Cox between the years 1964 and 1965. He said that he had received correspondence from Messrs Challenor and Roberts , Solicitors. He said he received a letter dated the 3 August 1965 from them (Ex. 5 Bundle 3 p. 1). He replied on the 6th. of August 1965(Ex. 6 Bundle 3 p.2). They responded on the 17th of August 1965 (Ex. 7 Bundle 3 p.3).

Mr. Levy said that the Executor of the estate of Joseph's Phillips had instructed him to sell the property at 227 Spanish Town Road. He wrote letters to four banks and another business organisation in an effort to sell the property. (The 4 letters were admitted as Exhibits 8-12 Bundle #3 pp. 4-8). He wrote to Challenor & Roberts on 21st. of January 1966 (Ex. 13 Bundle 3 p. 9) advising them on the approach to be adopted to get the property sold.

Mr. Levy referred to the letter of 19th of August 1968 (Ex. 3 Bundle #3 p.) from Mrs. McLaren to him and to a letter of the 19th. July 1976 from Mrs. Yvonne Forbes to him (Ex. 16 Bundle p.17) inquiring about the sale of the property. He replied by letter dated the 30th. of July 1976 (Ex. 17 Bundle 3 p. 18).

Mr. Levy said the first person who was interested in buying the property at 227 Spanish Town Road was one Josephine Reece a tenant of the premises. He prepared an Agreement for Sale and

sent it to her attorneys Messrs Orville Cox & Co. The Purchasers were Ms. Reece, Mr. Hinds and their two daughters. Ms. Reece later changed the instructions to remove the name of Mr. Hinds as a co-purchaser. (That Agreement was not tendered in evidence). Mr. Levy referred to Items 10-12 of Bundle #2 consisting of correspondence between himself and Orville Cox & Co. concerning the sale of 227 Spanish Town Road (See Bundle #2 pages 5, 8 10, 11 & 12).

Mr. Levy was referred to the Agreement for Sale dated 10th February 1990 (Bundle #1 p. 17). He said the deposit of \$4500 was paid in the year 1984 and he placed that money in a blocked account. He said he told the complainants of this by letter. He said he was aware that Mernel Cox and later her daughter were collecting rent from the tenants at 227 Spanish Town Road and that continued after the Agreement for Sale was signed.

He recalled Mrs. McGregor's visit to his office in January 1990. He said it was after her visit that he contacted Orville Cox & Co. and inquired of them if their client was still interested in buying the property. Based on their response to him he then contacted Ms. Reece directly. She told him that the balance of the purchase money was being held by Orville Cox & Co. She then got the money and paid it in to him.

In relation to the Agreement dated 10th February 1990 (Bundle #1 p. 17) Mr. Levy said "they did not sign it". He said the agreement was entered into in 1984 but he did not date it because if he had done so it would have attracted a penalty. The date was put in the agreement after the balance of the purchase money had been paid. He was not in contact with any of the Vendors nor were they in touch with him until the visit of Mrs. McGregor in 1990. He was referred to a letter dated the 3rd. of May 1985 from him to Mernel Cox (Bundle #2 p. 14). He was also referred to her reply dated 20th May 1985 (Bundle # 1 p. 15) instructing him what to do with her share of the money. He also referred to a letter from Mrs. McLaren to him dated 6th August 1965 (Bundle #2 p. 16) in which she said what was to be done with her share of the money.

He repeated that the Agreement for Sale was stamped after he received the balance of the purchase money and that was after Mrs. McGregor's visit in 1990. He said that the Complainants had signed the Agreement for Sale as Vendors in either 1984 or 1985 and that he had it in his possession until he submitted it to the Stamp Office in 1990. He said he was a Conveyancing Attorney of many years experience. He agreed that his clients were entitled to expect guidance, advice and protection of their legal rights from him.

He did not admit that a property valuation was good for only six months. He did admit that the valuation would have a "shelf life". He expressed the view that the property was valued at less in 1990 than it had been in 1984

He admitted inquiring in 1990 if the purchasers still wished to proceed with the purchase but did not make the same enquiry of the vendors who were his clients. He recognised that in her letter of 4th. June 1990 Mrs. McLaren stated that the value of the property in the year 1990 was a matter of concern to her. He did not tell Mrs. McGregor in January 1990 that the Agreement was not dated or had not been stamped. He said in his view until it was dated and stamped it is not an agreement and that either party could walk away from it.

He disagreed that the failure to consult the vendors before he dated and stamped the Agreement in February 1990 was a breach of his professional duty to them. He said he acted in their interest as the value of the property had declined.

Mr. Levy said that he believed that the Bank of Jamaica liberalised its policies in 1990. In response to the Panel Mr. Levy said the blocking of the money by the Bank of Jamaica did not stop him from stamping the agreement. He said the money was in a blocked account. He admitted signing the 1990 Agreement on behalf of the Vendors. He said he did not get any authorisation from the vendors to sign the Agreement for Sale on their behalf as "they were signing the Transfer so it did not matter who signed at the agreement"

Mr. Levy said that the Complainants had signed the first Agreement for Sale but he did not get them to sign the 1990 Agreement as they were all in different parts of the world. He said he did not pay all the money to his clients because these proceedings intervened. He said the money was in an account at Canadian Imperial Bank of Commerce and that the \$30,000 initially deposited had grown to \$133,033.29. He was asked by the Panel to produce a formal statement of account.

Contrary to what he had said earlier Mr. Levy now said to the Panel that the omission to date the Agreement did not invalidate it and once the balance was paid the sale could proceed. He expressed the view that the Vendors were in no hurry to complete the sale as they were getting both interest on their money and still collecting rent. He said it was Orville Cox and Co. who told him to contact Ms. Reece in 1990. He did so and she met with him and later brought the money to him. He said he did not hand over the money to the vendors following the relaxing of the Bank of Jamaica rules because questions were being asked about the money

The Panel requested Mr. Levy to produce the bank passbook for the account in which the funds were deposited. Mr. Levy subsequently produced an affidavit containing 14 paragraphs repeating some of the evidence he had given previously and exhibiting correspondence to and from the Bank of Jamaica in 1990 dealing with the requirement that the money be placed in a blocked account. Exhibited to the Affidavit was a copy of an extract from a Canadian Imperial Bank of Commerce/ Bank of Commerce Jamaica Ltd. savings passbook starting with an entry of \$22,194.75 on 5th April 1990 and ending on the 30th of April 1999 with a credit balance of \$73,039.90 and after a gap of one year and six months resumed in a CIBC/First Caribbean International Bank Jamaica Ltd. Passbook with an opening balance of \$82,733.37 on 31st October 2000 and ended with a balance of \$144,529.86 on 29 October 2010.

A copy of Mr. Levy's letter of 29th May 1990 to Mrs. McLaren and the statement of account which accompanied it were also exhibited to the Affidavit. The Panel permitted him to refer to and rely on it.

At the close of his case the Panel requested that both Counsel make written submissions. These were delivered in due course.

Submissions of Counsel for the Complainants

Counsel Mr. Christopher Dunkley submitted that Mr. Levy had failed to act in the best interest of the Complainants or competently in breach of Canon IV. He submitted that Mr. Levy had failed to give Mrs. McGregor information as to the status of the matter in January 1990 and thereafter hastily dated and lodged the documents at the Stamp Office thereby committing the Complainants to a sale in 1990 at a price which had been negotiated and fixed in 1984. He said that Mr. Levy failed to advise the Complainants of the legal status of the matter before committing them to the completion of the sale.

Counsel further submitted that Mr. Levy had erred in having received the deposit and then receiving no further instructions he continued with the sale. He failed to stamp the Agreement on receiving the deposit.

Counsel submitted that the most serious breach on the part of Mr. Levy was his failure to inform the Complainants that because the Agreement was not stamped or dated it was not effective. Had he so advised them they could have elected to withdraw from the transaction. Counsel ended by saying that the Complainants were kept out of their money for an inordinate period of time and that Mr. Levy's subsequent action had denied them the opportunity to mitigate their loss he cited the following authorities in support of the submissions:-

He presented an extract from Jackson & Powell on Professional Negligence 4th. Edition The following case were referred to in that extract:

Midland Bank Trust Co. Ltd. V. Hett Stubbs & Keen (1979 Ch. 384 p 402-403)

Clarke Boyce v Mouat (1994 A.C. 428 P. 402-403)

Martin B & Co v Roberts (1996 1 P.N.L.R. 45. P. 50)

Millian v Tiffin Holdings Ltd (1964 49 D.L.R. (2d) p 216 & 219)

Graybiar Investments Ltd. V Davis & Co. (1990 46 B.C.L.R. (2d) 164, 179 & 180)

Submissions of Counsel for the Respondent

Counsel Mr.. Donald Scharschmidt Q.C. submitted that the standard of proof applicable to this complaint was the same as in criminal cases. He referred to the specific complaint of Mrs. Mernel Cox .

Counsel submitted that in his letter of 29th. May 1990 to Mrs. Pearl McLaren, Mr. Levy had already addressed all of the real issues raised in her subsequent letter dated 4th. June 1990. He particularly noted that Mr. Levy had satisfactorily explained why he had not made "time of the essence" in the Agreement.

He said that Mr. Levy in keeping with the instructions had made efforts to sell the property. He referred to Mr. Levy's opinion as to the fall in value between 1985 & 1990 of the property and the general decline of the area in which it was located.

He submitted that the authorities showed that it was in order for an Attorney to represent both parties in a transaction even where there is a possibility of a potential conflict of interest.

He observed that the Complainants had made no inquiry of Mr. Levy concerning the sale from 1985 to 1989

Counsel cited the following cases:-

Smith vs. Mansi (1962 3 A.E.L.R. 875-885);

Clarke Boyce v. Mouat (1993 4 A.E.L.R. p 268) as authorities for a Solicitor to represent two parties to a transaction even where there was a possibility of conflict.

Gavaghan.v.Edwards (1961 A.E.L.R. p.477) as authority for a Solicitor to sign a memorandum relating to a contract for the sale of property

Sewart Wrightson Group Ltd. v Crocker and others (Times Law Reports of 19th September 1979) which held that an error in judgment by a professional does not of itself amount to negligence and that there ought to be no undue delay in prosecuting claims for negligence against professional persons

FINDINGS:

Relevant Facts:

Joseph Phillips died in either 1964 or 1965. He left premises at 277 Spanish Town Road to his then daughters Pearl McLaren, Yvonne Forbes and Myrna Cox. Shortly after his death the three beneficiaries decided to sell the premises. Ms. Pearl McLaren then lived in England, Ms. Yvonne Forbes lived in the U.S.A. and Ms. Myrna Cox remained in Jamaica for a time. The premises was rented. One of the tenants was Josephine Reece. Myrna Cox collected the rent.

Mr. Hugh Levy was retained soon after the death of Joseph Phillips to handle the preparation of the application for Probate of the Will. After obtaining Probate one or more of the beneficiaries including Ms. McLaren requested Mr. Levy to try and sell the premises. He made some attempts to find a buyer in the 1960's. They were unsuccessful. The tenant Josephine Reece expressed an interest in purchasing the property. She retained Orville Cox & Company to represent her. In 1984 or 1985 an Agreement was prepared by Mr. Hugh Levy. It contained a provision making time of the essence (see letter of 27th November 1984 from Orville Cox & Company to Hugh Levy & Company). A deposit of \$4,500.00 was paid by the Purchaser and the Agreement and the Transfer were sent by Mr. Levy to the Complainants abroad. They signed both the Agreement and the Transfer and returned them to Mr. Levy. Mr. Levy for reasons which are not

clear decided not to stamp the Agreement. We find that the Bank of Jamaica restrictions did not prohibit him from using money from the deposit to stamp the Agreement.

An issue was raised as to the absence of the name 'Hinds' or 'Hines' from the Transfer when a person with such a name was party to the proposed Agreement. We find that was not significant for the following reasons. The evidence is, that it was the Tenant Josephine Reece who made the approach to purchase the premises. She seemed to have some relationship with one Lascelles Hinds. Initially the name 'Hinds' featured prominently. See caption to the letters of 15th April 1985 from Mr. Hugh Levy to Messrs Orville Cox & Co (Bundle #2 p. 6) and his letter of the same date to Mernel Cox (Bundle#2 p. 5) and Bank of Jamaica letter of 1st May 1986 (Bundle #1 p. 1). In the notes of evidence of 26th September 2007 at pps. 5 & 8 Mrs. McLaren refers to the Tenant as Ms. or Mrs. Hinds probably confusing her as the spouse of Lascelles Hinds. In the cross examination of Mrs. McGregor the name put to her is Lascelles Hinds (notes of evidence of 16th June 2007 p. 5). In his evidence in chief Mr. Levy cleared up the matter when he said that it was Josephine Reece who instructed him to delete the name Lascelles Hinds from the transaction as he had failed to contribute his share of the purchase money (see notes of evidence of 16th January 2010 p. 2).

The transaction came to a standstill after the return of the documents to Mr. Levy by his clients the Complainants. Mr. Levy made no discernible effort to move the matter forward. On 28th December 1984 and again on 9th April 1985 the Purchasers' Attorneys Messrs. Orville Cox & Co wrote to Mr. Levy requesting a closing statement (see Bundle#2 Pages 8 & 10). No explanation has been offered by Mr. Levy as to whether or not those requests were complied with and if not, what was the reason for not providing the closing statement which is a normal procedural step in a conveyancing matter. The Complainants themselves, surprisingly, showed no interest in the progress of the sale as they made no effort to contact Mr. Levy for five years until January 1990.

The lack of interest on the part of the Vendors/Complainants was unusual. It was not until Mrs. Yvette McGregor happened to be coming to Jamaica on a visit in either late 1989 or January 1990 that her mother Ms. McLaren asked her to check on the sale. We find that it was the visit of Mrs. McGregor that brought the 5 year old transaction back to Mr. Levy's attention.

Following Mrs. McGregor's visit Mr. Levy was stirred to action. He made contact with the Purchaser through her Attorneys and enquired of her if she was interested in completing the sale. Inexplicably he made no attempt to ascertain from the Vendors if they wished to continue with this old transaction. Mr. Levy then abandoned the 1984 Agreement which was late for stamping. He prepared a new Agreement and had the Purchasers sign it and then without the authority of the Vendors signed it on their behalf dated it 10th February 1990 and subsequently completed the sale. He accomplished in four months what had not occurred for five years as by 29th May he was able to send a closing statement to Mrs. McLaren. She in response wrote him a letter in which she raised a number of "Points Needing Clarification". Mr. Levy failed to give a proper response to that letter. After making some unsuccessful effort to get effective legal representation the Complainants eventually laid the present Complaint against Mr. Levy in 1998. Up to that time, despite liberalization of the Bank of Jamaica regulations in 1992 Mr. Levy made no attempt to pay the purchase money to the Vendors/Complainants.

Mindful that it is the standard of proof in Criminal cases that is to be applied in disciplinary matters the Panel finds that:-

1. Though the Complainants as Vendors showed no interest for 5 years in the progress of their business with Mr. Levy it was the professional responsibility of Mr. Levy as their Attorney to drive the transaction through its various stages and bring it to a timely conclusion. Having been alerted by Mrs. McGregor's visit in 1990 that the matter had been allowed to remain dormant Mr. Levy chose not to contact his clients for instructions. He did not offer any explanation for the extraordinary delay in completing what should have been a routine transaction. He did not tell them if the delay was due to the Purchaser's default. He has given no explanation for the hiatus between 1984 and 1990 and we can only conclude that most unfortunately he had completely overlooked the transaction until the time of the visit of Mrs. McGregor in January 1990. We have also taken into account his letter of 16th July 1996 to the General Legal Council in which he candidly said:-

'The five year delay between Agreement and Transfer could only have been occasioned by the absence of any communication between the Vendors and me. No one asked any questions and the file therefore remained dormant until the Purchaser paid the balance of purchase money. I was hardly aware of the whereabouts of the several vendors.....'

Mr. Levy did not offer the Complainants the opportunity to decide if they wanted to proceed with or cancel the sale particularly as apparently 'time was of the essence' in the 1984 contract'. He made contact with the Purchaser's Attorneys and the Purchaser but failed to contact his own clients. Mr. Levy's opinion as to the declining value of the area and that it was in 1990 valued less than in 1984 was not a relevant consideration for him and not within his expertise and cannot excuse his failure to seek instructions from his clients. In failing to contact his clients Mr. Levy did not meet the standard of professionalism required by an Attorney-at-Law

Did Mr. Levy's conduct amount to professional negligence?

In the case of Farmer vs. Turner referred to in The Times Law Reports Volume XV 1889-99 to which we were referred by Counsel for the Respondent, Smith L.J. made the observation that "where an old client sued his solicitor for negligence he must prove it distinctly because the charge was as serious one to make against a solicitor".

We were referred by Counsel for the Complainants to Jackson and Powell on Professional Negligence 4th. Edition where at paragraph 4.04 reference is made to the case of Midland Bank v Hett Stubbs & Kemp (1979 Ch. 384) in which the contractual duties of a Solicitor to a client were reviewed. Among those duties is the obligation to devote to the clients business that reasonable care and skill to be expected from a normally careful and competent practitioner. At paragraph 4.06 reference was made to the case of Polishuk vs. Hagarty (1983 149 D.L.R. (3d) p.65 in which it was observed that; ' it was no defense that they had fulfilled the

standard of the ordinary competent solicitor as they had a contractual duty to complete the transaction according to the terms of the contract of purchase, which they were not able to vary without consent.....'

At paragraph 4.55 the duty of care and skill of a solicitor was analysed. Among these are; (a) a duty to consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him, and (b) a duty to keep his client informed to such an extent as maybe necessary according to the same criteria.

At paragraph 4.119 it is repeated that "the solicitor owes a duty to inform the client of the progress of the transaction which he is handling on the client's behalf. If he fails in this duty the client may suffer unnecessary loss or even be exposed to criminal liability. In such circumstances there is unlikely to be any defense to an action for negligence. Apart from satisfying his legitimate curiosity the client needs to be informed of material developments in order to decide whether he should give further instructions to the solicitor or modify his existing instructions. Where appropriate, the solicitor should invite further instructions at the same time as informing the client of developments."

We find that this oversight or failure by Mr. Levy to act for a period of approximately five years is a breach of Canon IV(s) of The Legal Profession (Canons of Professional Ethics) Rules which states that 'In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect'. It also amounts to a breach of Canon IV (r) in both its sub- paragraphs in that he demonstrably failed to deal with his clients business with all due expedition and failed to provide them with all information as to the progress of their business with due expedition

2. Mr. Levy in taking on himself the authority to prepare and sign a new Agreement for Sale dated 10th February, 1990 and one which differed in a material respect from the 1984 Agreement in that it did not make time of the essence completely exceeded his authority and to compound matters he then used the 5 year old Transfer to effect the Transfer pursuant to the '1990 Agreement'.

There is no evidence that Mr. Levy had any authority to sign a new Agreement on behalf of the Vendors/Complainants in 1990. Indeed in 1984, at a time when he was in communication with the Vendors he did not then consider that he had the authority to sign on their behalf but instead he saw to it that each vendor in her separate overseas location actually signed the Agreement. Nothing transpired after 1984 which could have led Mr. Levy to believe that in 1990 he had the authority to sign on behalf of his clients. In signing the February 1990 agreement he committed the Vendors to the price set in 1984 without consulting them. The Panel cannot take any account of Mr. Levy's opinion that the area around 227 Spanish Town Road was deteriorating and falling in value as he is not a Real Estate Valuer and is therefore not competent to give an opinion in that regard.

On the matter of the authority of a solicitor to sign a contract on behalf of his client Danckwerts L.J. in the case of *Gavaghan vs. Edwards* (1961 A.E.L.R. p.479) said:-
“ it is no doubt to correct (and there are cases in which it was so held) that the mere fact of the relationship of solicitor and client being constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum..... but that is not a hard and fast rule which is not capable of alteration.....there are cases where such an authority has been implied from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client”

Other cases dealing with the scope of the Attorneys' authority in representing a client in conveyancing matters have established that signing an agreement for sale as agent for the client is outside the normal role of the attorney. In the case of *Barbara Grant vs. Derrick Williams* (S.C. Civil Appeal 20/85) in dealing with the authority of an Attorney to sign an Agreement for Sale Kerr J.A. approved comments made in the case of *Kean vs. Mear* (1920 2 Ch. P.574) relating to the authority of an Estate agent to sign an agreement for a party and applied the same principles to an Attorney-at-law. At page 12 he said:-

"from these cases I extract the principle that when a Vendor authorises an estate agent to sell property at a stated price, or a solicitor to have the carriage of sale it must not be taken that they are empowered to do more than in the case of an estate agent to agree with a prospective purchaser the essential term i.e. the price, and in the case of a solicitor or attorney, to protect the vendors interest and prepare the necessary documents to complete the transaction. In short, to be able to act as agent beyond the normal role of their respective professions, specific authority must be conferred. In either case the authority to enter into a binding agreement for sale must not be lightly inferred from vague or ambiguous language. There must be definite instructions to that effect or the conduct and the circumstances in the particular case must be such that the estate agent or attorney must reasonably have understood that he was authorised to make the particular contract and to sign the agreement for sale”

Mr. Levy's unauthorised signing of the new Agreement and completion of this old transaction without notifying the Complainants of his intentions and getting their instructions amounted to professional misconduct and more so as it was done shortly after the visit of Mrs. McGregor to make inquiries. He should have informed them either through Mrs. McGregor or directly of his intentions. The withholding of that information constitutes a breach of Canon IV(r) of the Canons of Professional Ethics

3. Mr. Levy represented the Vendors only, up to 1990. It appeared that Messrs. Orville Cox & Co. no longer represented the Purchaser in 1990 so she collected the money from Orville Cox & Co. who had been holding it on her behalf and paid it to Mr. Levy (see evidence in chief of Mr. Levy on 16th. January 2010 page 4). From the time the new agreement was prepared in February of 1990 she was not separately represented and Mr. Levy was then the only Attorney involved in the transaction. He witnessed the signatures of the Purchasers on the Transfer.

Counsel for the Respondent referred to the case of Smith versus Mansi (1962 A.E.L.R. pages 858 & 875) and Clarke Boyce vs. Mouat (1993 4 A.E.L.R. page 268) as authorities which say that it is not improper for an Attorney-at-Law to represent both parties in a transaction.

In Clarke Boyce vs. Mouat at p.273 Lord Jauncey in dealing with the propriety of Solicitor acting for both parties said :

“ ...there is no general rule of law to the effect that a solicitor should never act for both parties in an action where their interests may conflict. Rather it is the position that he may act provide that he has obtained the informed consent of both parties to his acting....”

He also, at page 274 referred to the judgment of Richardson J. in the case of Farrington v. Row McBride & Partners (1985 1N.Z.L.R. p. 83) :-

“a solicitor’s loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting”

In Gavahan vs. Edwards (1961 A.E.L.R.) in dealing with a question of a solicitor acting for both parties Danckwerts L.J. said at p.479 :-

“... it is hardly necessary to say that I regard this situation as very unsatisfactory. In many cases it may work perfectly all right, but if anything whatsoever goes wrong with regard to the sale a solicitor who is acting for both parties is almost a certainty placed in a position where the interests conflict and a difficult situation is likely to arise”

The matter of an Attorney-at-Law acting for both parties is dealt with at Canon IV (l) of The Legal Profession (Canons of Professional Ethics) Rules which says that ‘notwithstanding the provisions of Canon (IV) (l) an attorney may represent multiple clients if he can adequately represent the interests of each and if each consents to such representation after full disclosure of the possible effect of multiple representation.’

In failing to notify and get the Complainant’s consent to him also representing the Purchaser is a breach of Canon IV (l)

Mr. Levy having decided to prepare a new Agreement for Sale ought to have consulted the Complainants and obtained their instructions particularly as the new Agreement omitted a material term and he was now the only Attorney acting in the transaction. Perhaps time was no longer of the essence when the new agreement was made as the purchaser may have by then paid the balance of the purchase money to Mr. Levy.

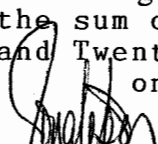
Given all those circumstances and particularly the 5 to 6 years of inactivity in the transaction Mr. Levy ought to have first consulted the Vendors and make them aware of the present position and get their instructions in relation to the transaction generally and inform them that he was now acting for both parties.

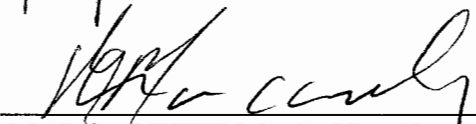
We find that having taken it on himself to represent both parties in the later stages of the transaction Mr. Levy’s judgment in the matter was impaired as he was no longer able to

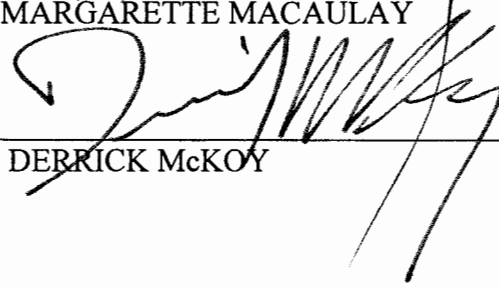
give his undivided attention to the Vendors' interests and this put him in breach of Canon IV (k).

4. Mr. Levy having completed the transaction in 1990 made no attempt to disburse the purchase money following liberalisation of the Bank of Jamaica regulations but rather chose to let the money remain in a savings account.
5. The Complainants having not received the purchase money in 1985 have been deprived of its use for not only the period of the initial 5 year delay but also the subsequent ten years to the present time during which the impact of inflation has depleted its value to the Complainants and that has not been off-set by the interest which has been earned in the Savings account.
6. We find that Mr. Levy did not act dishonestly in that there is no evidence that he benefitted in any way from the delay the Complainants have suffered. There is no evidence he received the balance of the purchase money before 1990. Had he received it then it is unlikely that the Purchaser and her Attorneys would have remained silent and not demanded Title. Furthermore it is not likely the Purchaser would have continued to pay rent had Mr. Levy received all of the purchase money. Mr. Levy's failure to act was born purely out of neglect or oversight of the matter.

In view of its findings at Numbers 1& 2 above and taking into account the findings at paragraphs 3-5 above the Panel imposes a fine of Four Hundred Thousand Dollars (\$400,000.00) and costs of Four Hundred thousand Dollars (\$400,000.00). Two Hundred and Fifty Thousand Dollars (\$250,000.00) of the costs shall be paid to the Complainants and One Hundred and Fifty Thousand Dollars (\$150,000.00) to the General Legal Council. Mrs. Levy is also to pay to the Complainants the sum of One Hundred and Forty-four Thousand, Five Hundred and Twenty-nine Dollars and Eighty-six Cents (\$144,529.86) held on deposit for them as at 29th October 2010 and interest thereon to 30th November 2011.


RICHARD DONALDSON


MARGARETTE MACAULAY


DERRICK MCKOY