

grounds of the complaint which was made against the Respondent were as follows:

- *He has not provided me with all the information as to the progress of my business with due expedition although I have reasonably required him to do so.*
- *He has not dealt with my business with all due expedition.*
- *He has acted with inexcusable or deplorable negligence in the performance of his duties.*
- *He has not accounted to me for all moneys in his hands for my account, although I have reasonably required him to do so.*

The Complainant filed a further affidavit which was sworn to on the 29th April, 2004 in support of her complaint.

The complaint was considered by the Disciplinary Committee on the 27th March 2004 and the decision was taken that the matter should be set for trial. The first date set for hearing was the 2nd October 2004 and the matter was adjourned on that occasion and on eight (8) other occasions (11/2/04, 19/3/05, 30/7/05, 24/9/05, 29/10/05, 11/2/06, 17/6/06 and 30/9/06) before the hearings actually commenced on the 11th November 2006 some three (3) years after the complaint was brought. These hearings took another full year to be completed and covered ten (10) more hearing dates. To the Complainant's credit she stuck with the matter over the course of the four (4) years and nineteen (19) hearing dates.

The delays and the reasons for the adjournments in this matter require some comment. The Panel finds it extraordinary that the Respondent either by himself or together with his attorney-at-law were singularly responsible for the series of delays which extended this matter for over four (4) years, a matter which in reality ought to have been completed in at most two (2) sittings over at most a three (3) month period. We find it even more remarkable given that the genesis of the complaint against the attorney-at-law was the delays in the execution of his duties. The delays in relation to the hearing of this matter proved very challenging to the Panel and we dare say the Complainant, who was present on every occasion. We nonetheless persevered and so did she. There is an old but pertinent saying that "justice delayed is justice denied" and the Respondent as an Attorney-at-Law has a responsibility to the public to ensure that he does not DELAY justice.

The Panel had requested Written Submissions from the parties. On the 10th November 2007 when the Written Submissions were not ready the Panel ordered that these Submissions be delivered to the office of the General Legal Council by November 16, 2007 failing which the Panel will decide the matter.

On the 16th November 2007, written submissions were received on behalf of the Complainant and those for the Respondent on the 7th December 2007. The Panel will therefore proceed to consider and decide this matter.

The Evidence

We will now turn to the evidence in this matter. The evidence for the Complainant was given by the Complainant herself who tendered in evidence as Exhibit 1, her affidavit sworn to on the 24th April 2004. She was then cross examined by Mr. Francis on behalf of the Respondent. In summary the Complainant's evidence was that:-

- (1) On the 19th March 2003 she instructed the Respondent to act on her behalf in the sale of property which was owned by herself and her husband.
- (2) Miss Todd the Respondent's secretary prepared an Agreement for Sale. The purchase price was Five Million Dollars (\$5,000,000.00) and completion was scheduled for one hundred and twenty days after the 11th April 2003 which was the date of the Agreement and the date on which the purchasers signed the Agreement and paid their deposit of Seven Hundred and Fifty Thousand Dollars (\$750,000.00). The Agreement for Sale dated 11th April 2003 was attached to her said Affidavit as *Exhibit HS-S1*.
- (3) She and her husband had acquired the said property by way of mortgages from Victoria Mutual Building Society (VMBS) and the National Housing Trust (NHT).
- (4) The purchasers were Mr. Kenneth Morrison and Mrs. Mauvelyn Morrison and they were obtaining a mortgage from Life of Jamaica Limited (LOJ) to complete the purchase of the property from herself and her husband.
- (5) She became upset and concerned when she realized that the Respondent had not signed the undertakings to VMBS and NHT until in August 2003 and that the Respondent's secretary was being investigated by the Police for fraud. She tried calling the

Respondent but go no reply. She reported the matter to the Fraud Squad.

- (6) That she was eventually able to get a meeting scheduled with the Respondent, his accountant and his secretary in August 2003 at which meeting she said she was told by the Respondent that he did not have the money to pay the Transfer Tax and Stamp Duty and that he, the Respondent was waiting on the completion of another matter to get the funds to stamp the Agreement.
- (7) The Respondent did not stamp the Agreement for Sale until the 27th October 2003 and the stamped Agreement for Sale was sent to Life of Jamaica in November 2003.
- (8) The sale transaction eventually took approximately ten (10) months to be completed, that is it continued for approximately six (6) months after the completion deadline of August 11, 2003.
- (9) At the end of August she and her husband having anticipated that the transaction would have been completed by the 11th August 2003, were forced to stop honouring their mortgage commitments to VMBS and NHT as they could no longer afford to pay the mortgage instalments. In response to her request, she was told by NHT and VMBS that the total interest that accrued between September 1, 2003 and January 27, 2004 amounted to One Hundred and Seventy Thousand Eight Hundred and Forty Nine Dollars and Fifty Cents (\$170,849.50), which was \$32,864.25 due to NHT and \$137,985.25 due to VMBS. The Complainant exhibited as *Exhibit HS-S7* to her affidavit documents from NHT and VMBS to support these interest charges.
- (10) On October 4, 2003 she said that she filed a complaint with the General Legal Council expressing her concerns with the manner in which the Respondent was handling the matter and on February 2, 2004 she signed the Application.
- (11) She accordingly attended at the Respondent's office on the 20th February 2004 and requested that he refund her the sum of \$170,849.50 which was the interest incurred due to the Respondent's inordinate and inexcusable delay.
- (12) The Respondent gave her a Vendor's Statement of Account dated 20th February 2004 and a cheque for her half of the net proceeds of sale amounting to \$449,878.91. She then agreed to accept the sum of \$140,000.00 in full and final settlement of her claim for the

additional interest charged to her mortgage accounts by VMBS and NHT. In this regard the Respondent signed a document dated 20th February 2004 whereby he agreed to undertake to reimburse herself and her husband \$140,000.00 being the additional interest incurred due to the late delivery of the title and other related documents to LOJ. This Undertaking and the Vendor's Statement were exhibited to her affidavit as HS-S8.

- (13) The Respondent tendered to her a cheque for approximately \$32,000.00 on account and promised the balance in twenty one (21) days. She objected to this and refused to take the cheque and insisted that he pay the full amount of the interest. When he failed to give her the cheque for the full amount of interest she refused to take either cheque (i.e. the one for \$449,878.91 and for \$32,000.00).
- (14) On the 23rd February 2004 she attended the Respondent's Office and spoke to his accountant and agreed to accept the cheques for \$449,878.91 and for \$32,000.00 and to give the Respondent the twenty one (21) days to settle the balance for the interest. She signed for both cheques.
- (15) On the 24th February 2004 she returned to the Respondent's Office to confirm that she would be getting the balance in twenty one (21) days. The Respondent came out of his office and proceeded to quarrel with her about paying the interest.
- (16) When she was en-route to negotiate the cheques she became upset about the manner in which the Respondent had spoken to her and she there and then decided she was not taking a part of the interest and wanted the full amount agreed upon. She returned to the Respondent's office and found the door closed and no one answered her knocking, so she went to the side window and saw the Respondent's secretary who told her that the Respondent had instructed her not to let the Complainant inside his office. She told her she was there to return a cheque and she still did not let her in, so she threw the cheque for \$32,000.00 through the window of the Respondent's office and left.
- (17) A week later she was visited by a Detective from the Fraud Squad who informed her of a report the Respondent had made. No charges were laid against her.
- (18) At the expiration of the twenty one (21) days she telephoned the Respondent's Office about the interest and the Respondent told her to "go to hell" and hung up the telephone on her.

- (19) She contends that the Respondent's handling of her transaction was improper in that he failed to use the deposit to stamp the Agreement for Sale in a timely manner and unduly protracted the matter on account of delays caused by him. This caused her stress and led to herself and her husband incurring additional charges for interest. Further she contends that the Respondent's treatment of her was not in keeping with how an attorney-at-law should treat his client and caused her humiliation and embarrassment.
- (20) She contends that the Respondent's handling of her matter was contrary to Canon 1(b); 1v(r) (s); vii (a)(b) (i) and (ii) of the Legal Profession Rules: Canons of Professional Ethics and seeks restitution in the sum of \$170,849.50 together with legal fees.
- (21) She exhibited the following documents to her said Affidavit:
- HS-S1 - Agreement for Sale dated 11th April, 2003 together with receipt dated 11th April 2003
 - HS-S2 - Letter from LOJ to Respondent dated 10th June 2003
 - HS-S3 - Letter from Respondent to VMBS dated 5th August 2003
 - HS-S4 - Letter from NHT to Respondent dated 29th August 2003
 - HS-S5 - Letter from Livingston Alexander & Levy to VMBS dated 28th January 2004
 - HS-S6 - Letter from LOJ to Respondent (with cheque) dated 13th February 2004
 - HS-S7 - Letter from NHT (with statements) dated 4th March 2004 together with letter from VMBS dated 27th February 2004
 - HS-S8 - Respondents Undertaking dated 20th February 2004 with signed acknowledgment by Complainant together with Vendors Statement of Account dated 20th February 2004

In cross examination the Complainant further stated that:

- (22) She did not agree that there was no inordinate delay, there was delay.
- (23) She did not agree that after the 5th August 2003 there was no delay. The title was not delivered to LOJ until October 2003 and that was delay.

- (24) The Respondent did not tell her that he was not going to stamp the Agreement until he was sure he was getting an undertaking for the balance of purchase money.

The evidence for the Respondent came from the Respondent himself and two witnesses namely Jennifer Todd-Hibbert the Respondent's secretary and Lascelles Edward Clarke an Accountant.

In summary the evidence of the Respondent himself was that:-

- (25) He is an Attorney-at-Law.
- (26) In April 2003 he at the request of his secretary Jennifer Todd-Hibbert, decided to act for the Complainant and her husband in the sale of their property part of Helshire, St. Catherine registered at Volume 1148 Folio 307 of the Register Book of Titles.
- (27) His secretary prepared the Agreement for Sale dated April 11, 2003, exhibited as HS-S1 to the Complainant's Affidavit and he approved it.
- (28) The transaction was not conducted on the Agreement for Sale dated April 11, 2003, it was conducted on an Agreement for Sale dated September 18, 2003 which was admitted in evidence as Exhibit 2.
- (29) The vendors and the purchasers are the same as those in the Agreement for Sale, Exhibit HS-S1 to the Complainant's Affidavit and the property was also the same as was every other material particular with the exception of the date.
- (30) After taking the Complainant's retainer to represent her, he investigated their title and found that there were two mortgages on the property.
- (31) He wrote to the mortgagees informing them of his client's intention to dispose of the property.
- (32) He heard from LOJ (the intended mortgagee of the purchasers) on the 25th June 2003 by letter dated 10th June 2003 in response to a letter he had sent to them.
- (33) A number of documents were illegally removed from his office by the Complainant without his knowledge or consent and that is the subject matter before the court in other proceedings.

- (34) The transaction commenced before the 18th September 2003, the deposit was paid by the purchaser on the 11th April 2003. See receipt dated 11th April 2003.
- (35) He did not give the Agreement for Sale dated 11th April 2003 to LOJ. The purchasers handed it to the lender who they were getting the mortgage from, to facilitate it.
- (36) He wrote to the NHT on the 14th July 2003 – admitted in evidence as Exhibit 4.
- (37) The following documents were admitted in evidence together as Exhibit 5:-

Letter dated 5/8/03	Respondent to VMBS
Letter dated 20/8/03	Livingston Alexander & Levy (LAL) to Respondent
Letter dated 1/9/03	Respondent to LOJ
Letter dated 10/9/03	Respondent to LAL
Letter dated 15/9/03	Respondent to LOJ
Letter dated 16/9/03	LOJ to LAL cc Respondent
Letter dated 18/9/03	LAL to Respondent
Letter dated 27/10/03	Respondent to LOJ
Letter dated 21/11/03	Respondent to LOJ
Letter dated 14/1/04	Respondent to LOJ

- (38) The sale was concluded in January 2004 and he did the accounts and apportioned the monies between the Complainant and her then husband. Mr. Sanderson accepted his portion gladly.
- (39) When he met the Complainant in January 2004 to pay her portion, his secretary Miss Todd and accountant Mr. Clarke were present. The Complainant expressed the view that she had to pay out money because of the delay in the completion of the transaction. He enquired as to the amount and he suggested that for good client/counsel relationship she ought to be paid. His accountant in the presence and hearing of all strongly advised and suggested that he should obtain from the Complainant receipts to support her contention. It was agreed that the Complainant would make available receipts to substantiate this extra payment.
- (40) He then wrote a formal letter to her dated February 23, 2004 requesting the receipts – Exhibit 6.

- (41) He got a written reply dated March 9, 2004 – Exhibit 7.
- (42) He signed an undertaking dated February 28, 2004. This was before the letter of March 9, 2004 was received.
- (43) The Complainant was to get the amount in the undertaking when she produced the receipts. Receipts have never been produced up to this day. He said he signed the document and left instructions with his secretary Miss Todd for the Complainant to be given the document when the receipts were produced. He said he actually left a signed cheque to be filled in when she came with the receipts. He cannot say how the Complainant came to have this document but he reported the loss of the undertaking from his Office to the Fraud Squad.
- (44) Other documents and about \$20,000.00 were also taken from his Office. The Complainant was arrested in April 2007 and charged for larceny and is before the Court. He went to the Half Way Tree Court on the 10th April 2007 about the matter. He had reported the matter from in 2003. He got a copy of the Information #4233 of 2007 – Exhibit 7. He was in Court as the Complainant.
- (45) He denied that he told the Complainant that the reason for the delay was that he did not have the money to stamp the transaction.

In cross examination he stated that :-

- (46) He authorized the preparation of the undertaking and signed it.
- (47) He could not recall which Agreement the closing scheduled for 30th August 2003 was based on. He could not agree or disagree that it was not the Agreement dated 18th September 2003.
- (48) He admitted that there was a late delivery of title but the delay may not have been caused by him.
- (49) He appreciated the implication of a professional undertaking.
- (50) He had given an undertaking to VMBS to pay over a certain amount on or before the 30th October 2003 and he was aware that he had to put himself in a position to honour this undertaking.
- (51) Both Agreements for Sale (i.e. dated 11th April 2003 and 18th September 2003 had the same 120 days for completion, so it was bad judgment on his part to give the undertaking for payment on

or before 30th October 2003 in light of all that had to be done in the transaction. It was not gross negligence.

- (52) The Agreement was stamped on 28th October 2003, he does not know what other factors could have stopped him from stamping it before.
- (53) He did not receive the documents from NHT and VMBS, (Exhibit HS-S7 of the Complainant's Affidavit)
- (54) He did not disregard the ethics of the profession in his conduct of the transaction.
- (55) It is not true that subsequent to the Complainant's arrest or appearance in Court he had words with the investigating officer regarding a settlement of this matter.
- (56) The blank cheque he gave his secretary with instructions, was filled in for \$34,130.13 by his secretary.
- (57) He responded to the Complainant's complaint by letters to the General Legal Council dated 13th November 2003 – Exhibit 9 and 16th April 2004 – Exhibit 10.

Jennifer Todd-Hibbert gave evidence on behalf of the Respondent and a summary of her evidence was that:-

- (58) She has been a legal secretary for twenty seven (27) years. She was employed to the Respondent as a legal secretary in February 2003 and up to the present time. In fact she was employed to him since 2000.
- (59) She has known the Complainant for over twenty (20) years.
- (60) In 2003 the Complainant came to her home and requested her to handle the matter of the sale of a property owned by the Complainant. She told her yes but that she would have to go through the Respondent.
- (61) The Complainant then came to her home again in early April 2003 and brought the prospective purchaser, a Mr. Kenneth Morrison.
- (62) She then prepared the Agreement for Sale and gave it to Mr. Morrison for signing. He took it away as both he and his wife had to sign it before a Justice of the Peace. He was required to return the signed Agreement along with the deposit.

- (63) After the Purchasers signed it, they gave it to the Complainant who also executed it with her husband and Mr. Morrison returned it to her (Mrs. Todd-Hibbert) at her home with a cheque for \$750,000.00 made payable to the Respondent for the deposit. She gave Mr. Morrison a computer generated receipt from the computer at her home and dated the Agreement the 11th April 2003 which was the date it was received.
- (64) She gave Mr. Morrison a copy of the Agreement so that he could seek his mortgage.
- (65) Up to this time (i.e 11th April 2003) the Respondent did not know about the transaction.
- (66) She then lodged the cheque to the Respondents client account at the Bank of Nova Scotia, King Street, most likely the following day and about two days later informed the Respondent of the transaction.
- (67) The Agreement was never submitted to the Stamp Office as she was waiting for the purchaser to get word from Life of Jamaica, (LOJ) the mortgage company or whichever mortgage company he was looking to for his mortgage financing.
- (68) She finally got word from LOJ in June 2003.
- (69) This sale was done in the Respondent's name but she was the one who was responsible for seeing the transaction through. This is the normal way that the Respondent's practice is conducted.
- (70) The Respondent normally oversees the transactions but he did not oversee this transaction as she (Mrs. Todd-Hibbert) was the person who knew the vendor/complainant. She did however inform the Respondent of the details of the transaction and that the deposit had been lodged to his account, a current account. He was not shown the Agreement for Sale, he did not request to see it. He said it was o.k.
- (71) The receipt given to the purchasers had a number. The receipts are numbered one after the other. She would have called the office and would have spoken to a junior secretary. She cannot recall her name who gave her the next receipt number.
- (72) The Agreement for Sale dated 11th April 2003 was never submitted to the Stamp Office. It was never re-executed. The Agreement for

Sale dated 18th September 2003 (Exhibit 2) was prepared by her at the same time the Agreement dated April 2003 was prepared. The date 18th September 2003 was written in by her when she was satisfied that the purchaser's mortgage was coming through. She had done many sales transactions before and that was how she would normally handle them and the Respondent would oversee such transactions.

- (73) Since the complaint, she has stopped doing transactions that way, as the Respondent told her in about 2005 that it was to be done differently and that once the deposit is received the Agreement is to be submitted for assessment and stamping.
- (74) The Respondent generally supervised these transactions by looking on the Agreements for Sale and instructing her what needed to be done when she reported to him.
- (75) She met with the Complainant in the Respondent's Office with the Respondent and Mr. Clarke the accountant on more than one occasion and on one of these occasions the completion of the sale was discussed.
- (76) She did not hear the Respondent tell the Complainant that he did not have the money to stamp the Agreement for Sale and I do not recall her asking him what happened to the deposit.
- (77) She remembered the Complainant at one of those meetings asking the Respondent about the extra interest she would have to pay to the mortgage companies because of the delays. The Respondent said in an effort to retain a good client relationship that he would consider re-imbursing her if there were any losses caused by the delay. He also requested that she give him whatever receipts she had in proof of the payments she made. She was not aware that the Complainant gave him any.
- (78) The Respondent's accountant, Mr. Lascelles Clarke looked at the whole transaction and determined that the losses if any would be a certain amount. The Respondent then did a without prejudice letter to the Complainant on his computer.
- (79) She identified the Respondent's signature on a without prejudice letter dated 20th February 2004. She did not prepare this letter and she cannot recall hearing the Respondent tell the Complainant anything about this letter and as far as she was aware the Respondent did not give this letter to the Complainant. She knows a report was made to the Police about this letter.

In cross examination she said in summary that:-

- (80) She did not recall the Complainant meeting the Respondent in May 2003, but that the Complainant visited the Office quite often from about May 2003 up to when the transaction was completed.
- (81) The meetings with the Complainant, the Respondent, the accountant and herself started in about August 2003 and took place every month thereafter. During her visits before August 2003 she did not see the Respondent.
- (82) The purchaser brought the Agreement for Sale to her home at about 5:00p.m because it was difficult for the purchaser to come to the Respondent's Office during the day.
- (83) The Respondent never explained to me the importance of the completion date.
- (84) The Respondent monitored me by asking what was happening in the transaction.
- (85) It is not true that nothing had happened in the transaction up to August 2003 as letters were written to the mortgagees in July 2003.
- (86) The Respondent explained to the Complainant what was required to be done to complete the matter and the reason for the delays when she met with him in August 2003.
- (87) She cannot recall the amount that the accountant had calculated as the Complainant's losses but it was less than the Complainant was claiming.

Mr. Lascelles Clarke also gave evidence for the Respondent and in summary his evidence was that:-

- (88) He is an administrative accountant and he did accounting work for the Respondent.
- (89) He recalled an occasion when the Complainant was claiming money from the Respondent for extra mortgage monies she had to pay as the conveyancing matter was late. The Respondent said he did not have much knowledge of the matter but if the Complainant had to pay extra money, he would pay it.

- (90) He told the Respondent that he would recommend that the Complainant bring him receipts to show the monies she paid after which the Respondent would pay.

All the persons at the meeting agreed and the Respondent said he would draft a document setting out the terms of the discussions and requesting the receipts.

- (91) He saw the document the Respondent drafted subsequent to that meeting (shown document). He said the document looked ok and that it was the Respondent's signature.

The following exhibits were admitted in evidence:

- Exhibit 1: The Complainant's Affidavit sworn to on the 29th April 2004 with 8 exhibits attached thereto.
Exhibit 2: Agreement for Sale dated 18th September 2003
Exhibit 3: Letter from LOJ to Respondent dated 25th June 2003
Exhibit 4: Letter to NHT from Respondent dated 14th July 2003
Exhibit 5: 11 letters involving the Respondent between 5th August 2003 and 14th January 2004
Exhibit 6: Letter from Respondent to Complainant dated 23rd February, 2004
Exhibit 7: Letter from Complainant to Respondent dated 9th April 2004
Exhibit 8: Information in the Half Way Tree Resident Magistrates Court (Criminal)
Exhibit 9: Letter from Respondent to the Disciplinary Committee of the General Legal Council dated 13th November 2003
Exhibit 10: Letter from the Respondent to the Disciplinary Committee of the General Legal Council dated 16th April 2004

The Written Submissions

- (92) The Panel considered the written closing submissions which were presented on behalf of both Parties, notwithstanding that those for the Complainant were received on the 16th November 2007 the day of the deadline and those for the Respondent on the 7th December 2007, some twenty one (21) days after the deadline.

Complainant's Submissions

- (93) The Panel agrees with counsel for the Complainant:-
- a. That the evidence which substantially came from admissions from the Respondent and his witness Mrs. Jennifer Todd-Hibbert, was that the Respondent delegated the conduct of the sale transaction to Mrs. Todd-Hibbert who was his secretary at the material time.
 - b. That it was clear for their said evidence that the Respondent's secretary had conduct of the transaction without any or any sufficient supervision by the Respondent.
 - c. That if an attorney-at-law delegates a transaction to his secretary and does not adequately supervise her and the transaction goes wrong as it did in this case the Respondent cannot escape liability by claiming it is his secretary's fault.
 - d. That it is inexcusable and deplorable negligence for an attorney-at-law to delegate to his secretary the conduct of a sale which he does not supervise, in circumstances in which he does not ensure that the terms of the agreement, in particular in relation to time are scrupulously performed.
- (94) We do not however agree with Counsel for the Complainant:-
- a. That there should be restitution of any sum other than the amount of the undertaking which was for \$140,000.00.
 - b. That there should be restitution of the fees collected.

Respondent's Submissions

- (95) We do not agree with the Respondent's attorney-at-law:-
- a. That the Respondent once he was aware of the transaction and accepted the Complainant's retainer he sufficiently monitored the progress of the transaction.
 - b. That the Sale Agreement dated 11th April 2003 could not be admitted in evidence because it was not stamped. The reason for disagreeing with this submission is that in essence, it was the fact that the Sale Agreement was prepared and executed on the 11th April 2003 and was not stamped which in great part established the Complainant's Case. This Agreement was admitted in evidence to establish the date that the transaction started and for no other purpose and there is no need for the Agreement to be stamped for this purpose.

- c. That the undertaking was a conditional undertaking. There was no evidence which persuaded us that there was any condition attached to this undertaking.
- d. That the Complaints of negligence, inordinate and inexcusable delays were not made out. This will be more fully dealt with in our findings.

Findings

Having considered all the evidence adduced in this matter the Panel finds as follows:-

- a. The Complainant retained the Respondent Attorney-at-Law through his secretary in March 2003 to handle the sale of a property in Sand Hills, Hellshire, St. Catherine, registered at Volume 1148 Folio 307 of the Register Book of Titles, which was owned by her husband and herself, to Kenneth Morrison and Mauvelyn Morrison.
- b. An Agreement for Sale was prepared by the Respondent's secretary and was executed by all the parties and was dated 11th April 2003, and a deposit of \$750,000.00 was paid by the purchasers to the Respondent on that date. A receipt dated 11th April 2003 was issued for this deposit. The Agreement for Sale provided for completion on or before 120 days of the date of the Agreement for Sale.
- c. The Agreement for Sale was not submitted to the Stamp Office for stamping within the thirty (30) days as is provided for in Sections 76 A and 32 (3) of the Stamp Duty Act.
- d. The Respondent did not write to the Complainant's mortgagees to inform them of the proposed sale until 14th July 2003 when he wrote to NHT and the 5th August 2003 when he wrote to VMBS.
- e. That the Respondent re-dated the Agreement for Sale the 18th September 2003 and it was not sent for stamping until the 27th October 2003 and the transaction was not completed until February 2004.
- f. That notwithstanding the fact that the transaction required the discharge of the two mortgages which the vendors had with VMBS and NHT respectively and the registration of a new mortgage in favour of LOJ which was taken out by the

purchasers. The Respondent was guilty of inordinate delay and inexcusable negligence in respect of the following:-

- i. the time he took to stamp the Agreement for Sale (i.e. October 27, 2003) when he had the deposit from the 11th April 2003.
 - ii. his failure to take any steps in the transaction before June 2003 when he had the signed Agreement for Sale and deposit from April 11, 2003.
 - iii. his failure to observe the completion date which was to be on or before 120 days of the date of the Agreement on 11th April 2003 (i.e. on or around the 11th August 2003).
 - iv. taking approximately 10 months to complete the transaction which was set for completion in 120 days (approximately 4 months) thereby causing the Complainant and her husband to have to pay additional interest.
- g. That because of the delay in the completion of the transaction the Vendors had to pay additional interest to the mortgagees which totaled \$170,849.50.
- h. That the Respondent having accepted some responsibility for the delay, unconditionally undertook in writing on the 20th February 2004 to pay the vendors the sum of \$140,000.00 to assist in their cost recovery as a result of the late delivery of the title and other related documents to LOJ and that this undertaking was presented to the Complainant who signed acknowledging the undertaking.
- i. That the Respondent has failed to honour his aforesaid undertaking and has failed to date to pay the sum of \$140,000.00.
- j. That the Respondent is guilty of inexcusable and deplorable negligence in delegating to his secretary the Complainant's sale transaction and failed to sufficiently or at all supervise her and in circumstances in which he did not ensure that the terms of the Agreement were scrupulously performed in particular in relation to the time requirements.
- k. This delegating of substantial portions of conveyancing transactions to secretaries seems to be a growing practice in Jamaica. We deprecate this practice and it is our view that

often times it is such delegation that causes many of the problems that often materialize here and in the Courts.

1. We find that there is no evidence which proves beyond a reasonable doubt that the Respondent did not provide the Complainant with all the information as to the progress of her business with due expedition although she reasonably required him to do so.

The Law

The Standards of Professional Conduct

The Standards of professional conduct are governed by the Legal Profession (Canons of Professional Ethics) Rules (hereinafter called the Canons) made pursuant to Section 12 (7) of the Legal Profession Act.

The following Canons have been brought into focus in this matter in that the Complainant contends that the Respondent is in breach of them:-

- Canons
- I(b) - *An Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member.*
 - Iv(r) - *An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with all the information as to the progress of the client's business with due expedition.*
 - iv(s) - *In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect.*
 - vi(d) - *An Attorney shall not give a professional undertaking which he cannot fulfil and shall fulfil every such undertaking which he gives.*
 - vii(a) - *An Attorney shall comply with the rules as may from time to time be prescribed by the General Legal Council relating to the keeping in separate accounts -
(i) the funds of himself or any firm with which he is associated; and
those of his clients*

- vii(b) - *An Attorney shall –*
- (i) *keep such accounts as shall clearly and accurately distinguish the financial position between himself and his client as and when required; and*
 - (ii) *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 Standard of Proof

This Panel is well aware of the burden of proof placed on a Complainant in these disciplinary complaints. In order to succeed on a complaint of professional misconduct we must be satisfied on the evidence so that we are sure, that is beyond a reasonable doubt that the attorney is guilty of a breach or breaches of the Canons.

See **Winston Campbell v Davida Hamlet** [2005] 66 WIR 346 and [2005] 3 All ER 1116, Privy Council Case No. 73 of 2001, Decision delivered on April 25, 2005.

Canon 1 (b)

The Complainant although stating in her Affidavit that the Respondent was in breach of Canon 1(b) and that his treatment of her was not in keeping with how an attorney-at-law should treat his client and caused her humiliation and embarrassment – this aspect of her complaint was not developed at the hearing and as such there is no evidence on which given the standard of proof, that the Respondent could be held to be guilty of a breach of this Canon.

Canons iv (r) and (s)

In relation to these Canons, it is the view of the Panel that conduct amounting to delay which is inordinate and negligence which causes a client to suffer loss and damage and for which there is no acceptable excuse or explanation is such as to amount to inexcusable negligence and a failure to deal with the clients' business with all due expedition. In such a case it is not a matter of mere negligence, error of judgment or mistake but amounts to conduct which is inexcusable and is such as to merit reproof. See **Myers v Elman** [1939]4 All ER 484 where their Lordships felt serious dereliction of duty, gross negligence or neglect would suffice.

In our view based on our findings the Respondent must certainly be guilty of breaches of these Canons in that the delay was inordinate and the neglect inexcusable and caused the Complainant and her husband to suffer loss.

Canon vi(d)

The important question to ask, when determining whether or not an attorney's undertaking should be enforced and the attorney punished in some way, is whether the undertaking was given by the attorney in his character as an attorney. Once it is so given, it matters not whether some technical defence is available or whether the attorney is guilty of blameworthy conduct. Indeed, Coleridge, J observes In **Re Hilliard** - (1845) 14 LJQB 225 at 226 that an attorney is "*never compelled to enter into [undertakings]; if he does, he should secure himself by his arrangement with his client, and he must be taken to know the legal consequences of his own act*". In that case, although the undertaking before the Court was void by section 4 of the Statute of Frauds, the Court ordered its enforcement by the attorney.

Hamilton J in **United Mining and Finance Corporation Ltd v Becher** [1908 – 1910] All ER Rep 876 further explained that "*the conduct which is required of [attorneys] is ...raised to a higher standard than the conduct required of ordinary men, in that it is subject to the special control which a Court exercises over officers so that in certain cases they may well be called upon summarily to perform their undertakings, even where the contention that they are not liable to perform them is entirely free from any taint of moral misconduct.*"

Breach/Possible Defences

The following circumstances constitute breach of and/or are not defences to an attorney's duty to only make undertakings he can fulfill and to fulfill each and every undertaking he gives.

- a. Delegating the task to someone else who then does not carry it through (See **Morris v General Legal Council, Ex parte Alpart Credit Union** [1996] 22 JLR 1)

In that case the appellant, an attorney-at-law, had a complaint made against him to the Disciplinary Committee of the General Legal Council for breaching an undertaking, made in his capacity as an attorney, to send the registered title of a recently purchased property to the mortgagee. The client somehow obtained possession of the said certificate of title and used it to secure a

separate loan from another mortgagee, with the result that the loan advanced by the mortgagee remained unsecured and the said client refused to repay the loan.

The appellant's case was that he had given instructions to his office staff to send the certificate of title to the mortgagee but, unknown to him, it was not sent and was subsequently abstracted from his office in his absence. The Disciplinary Committee ruled that the conduct of the appellant amounted to misconduct in a professional respect, and that he was liable to repay the balance of the loan to the mortgagee.

The Court of Appeal held that an attorney cannot exonerate himself from liability by pleading that he delegated the performance of the undertaking to another person.

- b. A technical defence, such as non-compliance with the Statute of Frauds (see **In Re Hilliard**)

In that case, although the undertaking before the Court was void by virtue of section 4 of the Statute of Frauds, the Court ordered its enforcement by the attorney.

Indeed, as Coleridge, J observed at 225:

It seems to me that the Court does not interfere against one of its own officers, merely with a view of enforcing in a more speedy and less expensive mode contracts in which actions might be brought, but does so with a view of securing honesty in the conduct of its officers in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. The principle applies equally whether the undertaking be to appear, to accept declaration, or other proceeding in the course of the cause, or to pay the debt and costs. The interference is not so much between party and party to settle disputed rights; as criminally to punish misconduct or disobedience in its officers.

- c. Not specifying, on the face of the undertaking, the conditions on which the undertaking is qualified (see **Re Woodfin and Wray** (1882) 51 LJ Ch427)

In that case the Court enforced an undertaking that was clear, express, and unqualified in its terms notwithstanding that the attorney's case was that the undertaking had meant to be qualified.

“This gentleman, as a solicitor, having personal experience in his profession, would very well know how to express that the undertaking entered into by him was qualified or unqualified, whichever was the right view to take of the arrangement...I cannot, upon the evidence before me, hold that it was taken subject to any qualification or otherwise than it is expressed.

Consequences of Breach

- d. The Disciplinary Committee has jurisdiction, by virtue of sections 11 and 12 of the Legal Profession Act and the amendments thereto by virtue of the Legal Profession Amendment Act (2007), to discipline an attorney where a complaint is made. Canon viii (d) stipulates that a breach of Canon vi (d) shall constitute misconduct in a professional respect and an Attorney who commits such a breach shall be subject to any of the orders contained in section 12 (4) of the Legal Profession Act. Section 12 (4) provides, inter alia, for the payment by the attorney of such sum by way of restitution as it may consider reasonable - a de facto jurisdiction to enforce an undertaking.

It is the Panel's view based on our findings and supported by the authorities cited above, that the Respondent is also in breach of this Canon.

Canons vii(a) and (b)

The Panel finds that even though the Complainant in her Affidavit alleges that the Respondent breached these Canons she did not lead any evidence which would satisfy the standard of proof required to prove these breaches.

She alleged that the Respondent after having received the deposit told her that he did not have the money to stamp the Agreement for Sale and that he was waiting on the proceeds of another transaction to do so. The Respondent and his witnesses denied this. This allegation without more could never be sufficient to prove such a serious allegation as this against an Attorney.

Conclusions

- (1) The Panel finds the Respondent guilty of Professional Misconduct for his breaches of Canons iv(r) (s) and vi (d) contrary to Section 12 of the Legal Profession Act.

- He did not deal with the Complainants business with all due expedition.
- He acted with inexcusable negligence or neglect in the performance of his duties.
- He failed to fulfil a professional undertaking.

Sanctions

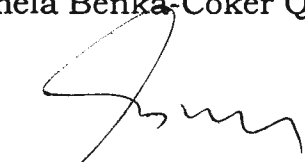
By virtue of the powers given to us under Section 12 (4) of the Legal Profession Act we hereby order the following:

- (a) That the Respondent Attorney-at-Law Berriston Bryan do make restitution to the Complainant by paying to her the sum of \$140,000.00 in relation to the undertaking which he did not honour.
- (b) That interest be paid by him to the Complainant on this sum at the rate of 12% per annum from the 20th February 2004 to the date of payment.
- (c) That the Respondent Attorney-at-Law do pay a fine to the General Legal Council of \$50,000.00 for his failure to act expeditiously.
- (d) That the Respondent Attorney-at-law do pay a fine to the General Legal Council of \$50,000.00 for his inexcusable negligence and neglect in the execution of his duties.
- (e) We also order that the Respondent Attorney-at-Law pay to the Complainant costs of \$150,000.00.

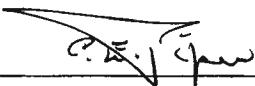
Dated the 4th day of Oct 2008



Pamela Benka-Coker Q.C



Stephen Shelton



Charles Piper