

**DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL
LEGAL COUNCIL**

COMPLAINT 210/98

ROBERT HARRIOTT

COMPLAINANT

AND

DONALD BERNARD

RESPONDENT

PANEL PAMELA E BENKA-COKER Q.C.

CHAIRMAN

JEROME LEE

ALLAN WOOD

HEARING DATES: 9TH JUNE AND 18TH JULY 01

PRESENT: KEVIN WILLIAMS, ATTORNEY AT LAW REPRESENTING THE COMPLAINANT, AND ROBERT HARRIOTT, THE COMPLAINANT.

NARRATIVE- The respondent Donald Bernard was, at all material times, an attorney-at-law practising in the firm of attorneys-at-law known as Donald Bernard and Co. with offices at 58 Laws Street, Kingston. In 1996, the complainant Robert Harriott, retained the services of Donald Bernard to act as his attorney –at-law in the purchase of land known as 20 Armour Glades, being part of the land registered at volume 117 Folio 437 of the Register Book of Titles.

The vendor of the property, the subject of the sale, was M& M Associates Ltd. The purchase price of the land was stated in the agreement for sale as \$1,800,000.00. Completion of the agreement was to be effected on or before the 31st August 1996. Pursuant to the agreement, the complainant paid the sum of \$360,000.00 to the vendor as a deposit on the purchase price.

The complainant then paid to Donald Bernard, at various intervals, sums totaling \$1, 513,745.00, which represented the total balance purchase price due to complete the sale, half costs and other charges payable by the complainant. The complainant also paid to Donald Bernard the sum of \$54,000.00 as his fees for having conduct of the transaction on behalf of the complainant.

It is important to note here, that under special condition 7, Time was of the essence of the agreement for sale, and that by way of special condition 8, interest was payable by the complainant on the balance of the purchase price as of the 1st September 1996, if the complainant failed to complete the sale by the 31st August 1996.

Donald Bernard failed to pay over any of the monies he received from the complainant to the vendor's attorneys-at-law Linton Walters and company. The vendor sought to terminate the contract, and forfeit the deposit paid, in the light of the apparent failure of the complainant to complete the contract in the time specified.

The complainant, on realising the perils of his situation, demanded that Donald Bernard pay over the sums received from him to the vendor's attorneys-at-law. In March of 1998, Donald Bernard paid over the sum of \$1,251,005.00 to Linton Walters and Company, but withheld the sum of \$242,990.00.

Because of the delay in completion, the complainant was obliged to terminate the services of Donald Bernard, secure the services of other attorneys to complete the sale, and borrow monies from the bank to pay the interest payable on the balance of the purchase price.

The complainant initiated this complaint because he alleges that the unprofessional conduct of Donald Bernard caused him to incur expenses, which could have been avoided, if Donald Bernard had, in a timeous manner, paid over the sums due to the vendor under the sale.

THE COMPLAINT: By affidavit dated the 12th October 1998 in support of his application, the complainant alleges the following charges:

- (i) The attorney has acted with inexcusable and deplorable negligence in the performance of his duties.
- (ii) He has diverted to his own use money I entrusted to him to execute a property purchase transaction.
- (iii) He has not accounted to me for all the money in his hands for my account or credit although I have reasonably required him to do so.
- (iv) I have repeatedly called him on the telephone and written him several letters asking him to refund me my money. Copies of all letters I have written to him plus receipts and all other documentary evidence pertaining to this complaint were forwarded to the General Legal Council in my original letter to you dated the 15th June 1998.

On both hearing dates, the Records indicated that the attorney Donald Bernard had been served with notice of the proceedings in keeping with the requirements of the 4th

Schedule to the Legal Profession Act. The attorney did not appear at the hearing and the Panel proceeded to hear the matter in his absence.

THE EVIDENCE: The attorney for the complainant opened to the case and then the complainant gave evidence. The following is the substance of his evidence. In 1996, he entered into an agreement for sale with M & M Associates to buy the lot of land known as 20 Armour Glades. He retained the services of Donald Bernard to act as his attorney in the sale. His father had introduced Donald Bernard to him. A copy of the agreement was introduced into evidence as exhibit 1. The witness further stated that the purchase price of the land as per the agreement was \$1,800,000.00.

He paid the sum of \$360,000.00 directly to the vendor. A receipt dated the 15th May 1998 was produced in evidence as Exhibit 2 as confirmation of this payment. The balance of the purchase price was paid to Donald Bernard in installments. The payments were as follows:

A On the 14/ 6 /96-\$360,000.00 as evidenced by receipt of even date and tendered as exhibit 4.

B On the 30/8/96-\$900,000.00 as evidenced by receipt of the same date tendered as exhibit 5.

C On the 4/9/96-\$160,000.00 as evidenced by receipt of the same date tendered in evidence as exhibit 6.

D On the 15/4/97- \$50,000.00 as evidenced by receipt of the same date tendered in evidence as exhibit 7.

E On the 23/6/97- \$55,000.00 as evidenced by receipt of the same date tendered in evidence as exhibit 8.

F On the 24/6/97- \$23,000.00 as evidenced by receipt of the same date tendered in evidence as exhibit 9.

G On the 28/ 8 97- \$745.00 as evidenced by receipt tendered in evidence as Exhibit 10.

A further sum of \$20,000.00 had been paid on the 29th November 1996 but the complainant had received no receipt for this sum.

A Statement dated the 29th November 1996 issued by Donald Bernard to the complainant was admitted in evidence as exhibit 3.

Up until March 1998, none of the funds which he had paid to Donald Bernard to be paid to the vendor's attorneys had been so paid. He went in to see Donald Bernard in March of 1998 and demanded that sums to complete the purchase be paid to the vendor's attorney.

Donald Bernard paid over the sum of \$1,250,000.00 to Linton Walters, but retained the sum of \$242,990.00. This sum of \$242,990.00 ought to have been paid over to the vendor's attorney.

By letter dated the 18th March 1998, and admitted in evidence as exhibit 11, the complainant terminated the services of Donald Bernard. In that said letter he advised Donald Bernard that he was making a claim against him for the interest he had to pay to the vendor owing to Donald Bernard's delay in paying over to the vendor's attorney, the sums needed to complete the contract.

In a letter of the same date and admitted in evidence as exhibit 12, the complainant advised Linton Walters that he had terminated the retainer of Donald Bernard. He also outlined the predicament in which he had been placed by the attorney and sought the indulgence of the vendor as he made efforts to complete the sale.

The complainant, on the 19th March 1998, paid over the sum of \$375,000.00 to the vendor. This sum represented part of the interest payable on the balance of the purchase price. This payment was substantiated by receipt dated the 19th March 1998, and tendered in evidence as exhibit 13.

The final payment of interest in the amount of \$59,295.33 was made on the 11th May 1998. This payment is evidenced by receipt bearing the same date and tendered in evidence as exhibit 14.

The complainant further gave evidence that he had to borrow money from the bank of Nova Scotia to pay the legal costs needed to complete the transaction. A letter dated the 5th June 01 was tendered in evidence as exhibit 15. This letter detailed the principal loan, interest and bank charges made by the Bank.

The complainant also stated that Donald Bernard agreed to pay to him the sum of \$432,000.00 representing interest and the sum of \$242,000.00 that he had withheld. This is evidenced by letter dated 1st May 1998 from Donald Bernard to the complainant and admitted in evidence as exhibit 16. In this letter Donald Bernard offers to pay to the complainant the sum of a minimum of \$20,000.00 towards settlement of the sum he acknowledged he owed to the complainant.

The first and only payment made by Donald Bernard in keeping with his offer of restitution was on the 15th May 1998. This was in the sum of \$30,000.00. Receipt dated the 15th May 1998 was admitted in evidence as exhibit 17. A letter dated the 18th May 1998, from the complainant to Donald Bernard again acknowledging receipt of the aid \$30,000.00 was admitted in evidence as exhibit 18. The complainant completed his evidence and his case was closed. His attorney at law then made submissions.

BURDEN OF PROOF: The burden of proof is on the complainant to establish the charges laid.

STANDARD OF PROOF: In cases such as these, where the allegations of professional misconduct involve allegations of dishonesty or moral turpitude, the standard of proof is that of “beyond reasonable doubt”. See the Privy Council decision of **Bhandari v Advocates Association reported** at 1956 3All ER p743.

ANALYSIS OF THE EVIDENCE: the complainant has adduced very compelling and irresistible evidence in support of the complaint. He has produced documentary evidence to corroborate his oral testimony in every material particular. He has produced receipts to show the payment to the attorney of the sums alleged and the dates on which these sums were paid. He has produced documentary evidence to demonstrate when the attorney paid over monies representing the balance of the purchase price to the vendor’s attorney. Exhibit 16 is a full admission on the part of the attorney that he was responsible for the delay in the completion of the sale.

It is important to note however, that counsel for the complainant, acting in accordance with the best traditions of the Legal Profession, pointed out that the complainant did not pay the total balance of the purchase price within the time that it should have been paid, that is to say on or before the 31st day of August 1996. Indeed he made the last payment on the 28th August 1997. He was at least partially responsible for the delay in the completion of the sale and the claim in respect of interest against Bernard was accordingly reduced by one-half.

It is also a reasonable inference to draw from the said letter, exhibit 16, that the attorney, by offering to settle the sum owed to the complainant in installments, had misappropriated the sum of \$242,990.00 entrusted to him by the complainant. These sums were entrusted to him for the specific purpose of completing the sale, and he withheld this sum at the time he made the payment of \$1,251,005.00 to Linton Walters in March 1998. Because of the attorney’s conduct, the complainant was compelled to expend additional sums of money to ensure completion of the sale, and to retain the services of the firm of attorneys-at-law Nunes Scholefield DeLeon and Co. to complete the sale.

On a careful examination of the oral and documentary evidence and being mindful of the standard of proof in cases such as these the panel makes the following findings:

FINDINGS:

- 1 The complainant Robert Harriott retained the services of Donald Bernard to act as his attorney in his purchase of 20 Armour Glades from M& M Associates Ltd.
- 2 The parties, in or around May 1996, entered into the agreement for sale.
- 3 Under the agreement for sale the purchase price was \$1,800,000.00.
- 4 On the 15th May 1996, the complainant paid to the vendor the sum of \$360,000.00 as a deposit on the sale.
- 5 Linton Walters and Co. acted as the attorneys for the vendor under the agreement for sale.
- 6 Between the 4th June 1996 and the 28th August 1997, the complainant paid the sum of \$1,568,745.00 to Donald Bernard as the balance of the purchase price and costs.
- 7 This sum includes the sum of \$62,100.00 paid to Donald Bernard as his fees to act for him in the sale. This is made up as follows, \$54,000.00 for the fee and \$8,100.00 for G.C.T.
- 8 On the 28th August 1997, the complainant paid the last amount due under the sale to Donald Bernard.
- 9 Donald Bernard failed to pay over any of these sums due to the vendor or its attorneys until March 1997 when he paid over the sum of \$1,251,005.00.
- 10 This sum was paid over at the insistence of the complainant who was anxious to have the sale completed, and who had gone in to see Donald Bernard after he had received certain information from the vendor.
- 11 Donald Bernard retained the sum of \$242,990.00, which he claimed was for Stamp duty, transfer tax and registration fees on the transaction. As a consequence, the complainant was put to additional cost and had to seek financing by way of a loan from the Bank of Nova Scotia Jamaica Limited and thereby incurred interest and costs on the loan amounting to \$84,000.00 and \$11,352.00 respectively.
- 12 This sum was not used for the purpose for which it was paid by the complainant.
- 13 Donald Bernard has not refunded it to the complainant.
- 14 By his letter dated the May 1st 1998 and exhibited as 16 Donald Bernard impliedly admitted that he had converted the said sum to his own use or for a purpose other than that for which it was entrusted to him.
- 15 Donald Bernard has acted dishonestly in his handling of the complainant's monies which were entrusted to him for the specific purpose of completing the agreement for sale.
- 16 Donald Bernard has refunded only the sum of \$30,000.00 to the complainant.
- 17 Donald Bernard has failed to do the work for which he was paid \$54,000.00 by the complainant.
- 18 Donald Bernard has not accounted to the complainant for all the monies in his hands for the account or credit of the complainant although he has been reasonably required to do so.

In light of the above findings, the panel finds Donald Bernard guilty of professional misconduct and in breach of canons 1(b) and V11 (ii) of the Legal Profession (Canons of Professional Ethics) Rules 1978 in that “he has failed to maintain the honour and dignity of the profession and has indulged in conduct which discredits the profession.” Donald Bernard has acted dishonestly and has wrongly misappropriated funds, which were entrusted to him by his client, the complainant, for a specific purpose. He has failed to account to the complainant for monies, which he held to the credit of the complainant.

The panel finds that the charges stated by the complainant in paragraphs (ii) and (iii) of his affidavit have been proven to a standard of proof beyond reasonable doubt. We make no findings in relation to the charges in paragraph (i) and (iv) of the said affidavit.

It remains for the panel to impose the appropriate sanction in the light of our findings. These are grave incidents of professional misconduct, which sadly are becoming more and more prevalent in the legal profession, and there are attorneys-at-law who persistently engage in this kind of conduct. It bears re-stating, that it is always wrong to misappropriate clients' funds. It is even worse if it is done dishonestly.

The relationship between the client and the attorney is a fiduciary one. Its existence depends on “trust”. If the attorney cannot be trusted to act at all times with scrupulous honesty with regards to the business of the client, then the client will have no confidence in the attorney, and the public will have no confidence in attorneys generally. Our “collective reputation” will suffer. In Jamaica, today attorneys-at-law are generally regarded by the public as being dishonest. If these dishonest actions are allowed to continue unabated and unrestrained we will all be losers.

In the instant case, Donald Bernard has already been struck from the Roll of Attorneys –at-Law entitled to practise here. In the circumstances, and in keeping with our powers under section 12(4) of the Legal Profession Act, we hereby order as follows:


(i) That by way of restitution, Donald Bernard do pay to the complainant Robert Harriott, the sum of \$578,342.04 with interest at the rate of 12% from the date of the judgment to payment. The sum is made up as follows, \$216,000.00 being one-half of the amount of interest the complainant had to pay to the vendor on the balance of the purchase price, owing to the Donald Bernard's delay in completing the transaction. The sum of \$266,990.00 which is made up of the sum of \$242,990.00 which was

withheld by Donald Bernard and \$54,000.00 for fees paid to him for work which he did not perform, less the sum of \$30,000.00 refunded by Donald Bernard.

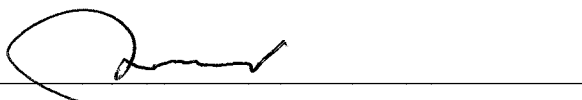
The sums of \$84,000.04 for interest paid by the complainant to the Bank of Nova Scotia Jamaica Limited on the bank loan, and 11,352.00 for bank charges make up the balance of the above total sum.

The sum representing the interest was reduced because the complainant also contributed to the delay in the completion of the sale. There is no order as to costs as the attorney-at-law representing the complainant declined to seek an order for costs.

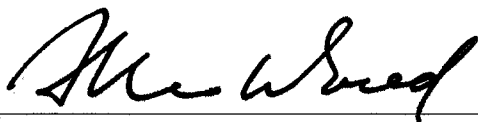
Dated the 18th day of July, 01.



PAMELA E BENKA-COKER Q.C.



JEROME LEE



ALLAN WOOD
