

2. Evidence was taken over seven days from the Complainant and from the Attorney, Mrs. Nelly Walker, Branch Manager of CIBC FirstCaribbean International Bank, King Street Branch and Mr Kadeem Heywood, IT Security Analyst who was deemed an expert. Written Submissions were filed by the Attorney and the Complainant on December 11th, 2020.
3. The Complainant raised issues concerning the due execution of the Affidavit of Kadeem Heywood. The objection raised that the jurat was executed by a person who was Mr. Heywood's employer and is therefore authenticating its own document is rejected. The argument is rejected for the simple reason that Mr. Heywood attended before the panel, was sworn and gave evidence in person. The Panel readily accepts the dicta of Sykes J (as he then was) in **Sandra Moore v Patrick Cawley** in which the learned judge identified the significance of the jurat to an affidavit: to authenticate that on the date stated, the affiant attended before the justice of the peace and attested as to the truth of the contents of the affidavit. Section 14 of the LPA empowers the Disciplinary Committee to make its own rules and govern its own procedure. Rule 3 of The Legal Profession (Disciplinary Committee) Rules speaks to an affidavit to support an application to the Committee to require an attorney to be in Form 2 of the Schedule to the rules. Rule 10 allows the Disciplinary Committee, in its discretion to act on evidence of any witness given by affidavit. Form 2 simply directs that the affidavit must be sworn before a justice of the peace. We are satisfied that Mr Heywood's evidence including his report are properly admitted and gave considerable assistance to the Panel in determining the Complaint which is centered on a fraud perpetrated through the medium of electronic mail correspondence between the parties.
4. The Attorney acted for the Complainant in the sale of his property situated at High Mountain, Bogwalk, Saint Catherine. The Complainant resided in the Cayman Islands and the main interaction between the parties was via email and telephone.
5. The case concerns the remittance of the proceeds of sale of the property. At the start of the attorney client relationship, the Complainant had given the Attorney details of his bank account at Scotiabank, Linstead Branch for the deposit of the proceeds of sale. When the sale was completed, on July 20th, 2018 the Attorney informed the Complainant by email sent from her internet email account tanyarama@hotmail.com to the Complainant's email address at mickel_anthony@hotmail.com. Both email addresses were the same addresses used by each party throughout the transaction. Her email asked for the address on his bank account which was "needed to transfer the proceeds of sale to you." and attached a Statement of Account which set out the amount that was payable to him.
6. What follows next is at the heart of the dispute. The Complainant never received the proceeds of sale. The Attorney remitted the proceeds of sale, acting on instructions she received by email from

mickel anthony@hotmail.com. Those instructions were to convert the proceeds from JMD to USD and to wire the funds to Umpqua Bank located in Portland, Oregon, USA to an account held by TLB Enterprise LLC.

7. The fact is that from the point of the Attorney's email sent July 20th, 2018 at 6:38pm [Exhibits 3/4a and 4/29], the email accounts of both parties were intercepted by fraudsters. The Complainant's email sent to tanyarama@hotmail.com on 20 July 2018 at 8:54pm [Exhibit 3/4a] responding to the Attorney's request and providing the address to facilitate the deposit to his bank account at BNS Linstead Branch was not received by the Attorney.
8. The next email that the Complainant sent is dated July 26th, 2018, at 5:23pm (or 12:26PM (GMT-5:00)) [Exhibit 3/11; Exhibit 4/4] in which he said "Good afternoon again Mrs. Powell. I asked Mr. James to collect the valuation report for me. So could you kindly give same to him. He will be there this afternoon. Thanks in advance."
9. It appears that the fraudster exited the interception after the email sent on July 26th, 2018 at 5:02pm from tanyarama@hotmail.com [Exhibit 3/12] informing the Complainant "You should have the transfer in your account by tomorrow. Sorry for the delay." The Attorney disavowed this email.
10. The Complainant was unaware of any of the correspondence after the Attorney's email of July 20th, 2018 requesting his address for the deposit to this bank account. Not having received the proceeds of sale, he telephoned the Attorney on July 27th, 2018 and it was then that the discovery was made of the fraud that had been perpetrated to the detriment of them both.
11. The evidence revealed that what transpired was that the Attorney's email of July 20th, 2018 which attached the Statement of Account and requesting information on the bank account to which proceeds were to be transferred had been "phished". The report of Kadeem Heywood confirmed that both the Complainant and the Attorney had had security breaches. For the Complainant it was his email addresses and passwords and for the Attorney it was her Date of birth, email addresses, gender, geographic location, names and passwords. The more serious cybercrime attack was against the Attorney's email account, and she was the victim of a Business Email Compromise.
12. Business Email Compromise is a cybercrime by which fraudsters target businesses and professionals by infiltrating their email account. According to Mr. Heywood, "the goal of the hacker is to get an unsuspecting victim to send money to a bank account owned by the hacker and not of the original source. The attack is achieved by compromising the email accounts

of one or more parties then through reconnaissance of the affected party they will put rules in place to remain undetected while they learn the workflow of the victim. They would then introduce fake invoices or try and convince the victim to send money to an alternative bank account”.

13. The Attorney’s email account was hacked and the fraudster put certain rules in place, unbeknownst to the Attorney. The words “invoice”, “rent”, “bank account”, “loan” or “money” were flagged to snoop through her email, so that any email containing those words were sent to johnsnoow2019@gmail.com. And moved to an archive folder. This is one form of what is known as phishing.
14. The Attorney’s email to the Complainant on July 20th, 2018 was the jackpot. Having hit upon an email which involved a financial transaction, the hacker spoofed the Complainant’s email address in order to dupe the Attorney into sending the proceeds to the fraudster’s bank account. Mr. Heywood said it was not necessary to go into the person’s email account in order to spoof the email address, just as long as you know the email address then it can be spoofed without hacking into the person’s email account. Mr. Heywood said that printing the document will show up the full source header including the address from which the email is sent as well as the accurate date/time from which it is sent by the sender. Some email providers, for example Gmail, Microsoft Office and paid monthly service email providers, have settings which will detect spoofing, depending on how the spoofing is done.
15. The only security measure the Attorney had on her Hotmail account was her password, which as stated above, Mr. Heywood discovered had been compromised. Following his discovery of what had happened with the Attorney’s email, Mr. Heywood said he took certain remedial measures: he removed the rule that had been created by the hacker, blocked the spoofer and had the Attorney change her password and enable two factor authentication on her account.
16. From the Complainant’s side all the emails appeared to be coming from the Attorney. The Complainant never saw the emails that were sent by the fraudster to the Attorney via commercial@alowifi.com spoofing his email address nor the Attorney’s replies to those emails. The Attorney never saw the Complainant’s email on July 20th, 2018, at 8:54pm [Exhibit 3/4a] as it was intercepted by the fraudster.
17. Mr. Heywood indicated that whenever there is frequent communication with a party, the system creates a shortcut by saving the email address as a contact so going forward, only the party’s name shows in the source header. Looking at the name you don’t know who is sending. When you reply to an email, it will then show “Re:” then the subject line.
18. It should be noted that a few of the emails do show the fraudster’s email

address commercial@alowifi.com. See Exhibit 3/5, 3/7, Exhibit 4/30, 4/33, 4/38/Exhibit 10 and Exhibit TWLP16/Exhibit 11.

DISCUSSION AND FINDINGS

19. We find that the Attorney honestly believed that she was communicating with the Complainant and that the Complainant had issued instructions changing the account information to which the proceeds of sale should be remitted. In her defence as to not having any reason to be suspicious of the change of payment instructions, the Attorney pointed out that the email of July 23rd, 2018 indicating an intention to vary the payment instructions also included information that only the Complainant would have, this being the line "Also Mr. James and miss Wright already have the keys in their possession." However, that exact line was taken by the fraudster from the Complainant's email of July 20th, 2018, at 8:54pm, no doubt deliberately used to give authenticity to the spoofed email.

Canon IV (r) An Attorney shall deal with her client's business with all due expedition and shall whenever reasonably required by the client provide him with all information as to the progress of the client's business with due expedition

20. The Complainant criticizes the Attorney's response and lack of interest in seeking to recover the funds. Mrs. Nelly Walker explained she received the Attorney's report by letter dated July 30th, 2018 and on that date the bank sent a SWIFT wire to the beneficiary bank – Ompqua Bank, asking for a recall of the funds. Mrs. Nellie Walker confirmed that the Attorney would have been advised to make a report to the police. There was no response from Ompqua Bank. Mrs. Walker said that the recipient bank does not usually respond if the funds were received. She said that the Attorney came in on a regular basis to enquire on the status of the funds.
21. The Attorney was alerted to the fraud by the Complainant's telephone call on July 27th, 2018. She said she did not report it to anyone that same day because of the timing: she had spoken to the Complainant at about 3pm on a Friday afternoon while at her office located in Spanish Town. Although the Complainant asked her to send him copies of the emails which she had sent and received via WhatsApp, the Attorney did not do so because her office cellphone is not a smart phone. The Complainant called the Attorney again on July 30th, 2018 to confirm that he had checked his bank account and the funds had not been received. The Complainant's daughter also visited her office on July 30th, 2018 and asked her to send copies of the email, however the Attorney told her that she was not sending any more emails to the Complainant's email address as it had been compromised. She said she was not provided another email address to send the emails to.

22. She went in to her bank on Monday July 30th 2018 and delivered a written report and she telephoned a superintendent of police at the Fraud Squad who advised her to come in the next day to give a statement.
23. The Attorney's chronology thereafter shows that the Complainant was initiating contact with her requesting updates and further information. On the advice of the investigating officer, the Attorney called the Complainant on August 7th, 2018 and suggested a meeting on August 9th, 2018. The Complainant informed her that he was returning to the Cayman Islands on the morning of August 9th, 2018 and therefore could not meet on that date. The Complainant disputes that account of the telephone conversation and says that in the conversation the Attorney told him that "she heard from the Bank and they said Monday 13th, 2018". The Complainant said that upon hearing that "the bank said Monday 13th, 2018", he changed his flight to August 15th, 2018.
24. In resolving this discrepancy between the two accounts, we consider the following: there is no evidence that there was an attempt to meet either August 7th or 8th to accommodate the Complainant's departure on August 9th. The Attorney does not appear to have used the opportunity to deliver the printed emails, since she was unwilling/unable to send them by email or WhatsApp. The Attorney said that she provided the Complainant with every update that she received from the bank [Exhibit 12, para. 89]. The Attorney received further calls from the Complainant and his stepson on August 13th and 15th inquiring whether she had heard anything further from her bank with regards retrieving the funds. That ties in with the Complainant's evidence that he had changed his flight in light of the Attorney's communication and the basis for the further calls on those dates. The Complainant's account is more credible.
25. The Complainant pointed to several emails from the Attorney over the course of their communications which identified that her emails were "Sent from my Verizon Wireless 4G LTE smartphone" [Exhibit MAK-5A-E and Exhibit 4 pages 10-13, 21,41-42]. We take this evidence as discrediting the Attorney that she was unable to send the email messages to the Complainant because her office phone was not a smartphone.
26. The Complainant further states that his daughter gave the Complainant her email address and offered to walk the Attorney through the process of forwarding the emails via WhatsApp, but the Attorney declined, saying she will figure it out herself. That evidence was not disputed.
27. By letter dated July 15th, 2019, almost one year later, the Attorney requested that the Bank provide the Fraud Squad with a statement [Exhibit 3 p. 16], which they did in August 2019. On the evidence before us, it was only in November 2019 when Mr. Heywood was retained that

necessary changes were made to the Attorney's email account to remove the phishing rule and to change her password and enable two factor authentication on her account. Even though the Attorney said she had discontinued use of the Hotmail address since this incident, it betrays a lack of interest in understanding what had occurred in order to prevent a repeat and learning ways in which to identify a cyber-attack.

28. From Mrs. Walker's evidence, all the bank did was to send the SWIFT wire requesting Umpqua Bank to recall the funds. That bank did not respond and FCIB did not take any further step. The Attorney's regular checks with the Bank would have been futile since nothing was actively being done.
29. In circumstances where it was clear that a fraud had been perpetrated, it must have been equally clear that the chances of recovering the funds are enhanced by the expedition with which steps are taken to investigate and trace the funds.
30. The Attorney was not working either by herself or together with the Complainant in a joint effort to retrieve the funds or to investigate the matter. There clearly was suspicion on each side. Notwithstanding that, the Attorney owed a duty to the Complainant to deal with his business and to keep him informed, which she failed to do.

Canon IV (s) In the performance of her duties an Attorney shall not act with inexcusable or deplorable negligence or neglect

31. There were a number of points where we consider the Attorney ought to have exercised better care in her handling of the Complainant's business, specifically the remittance of money. Instances of these are:
 - (a) Using an internet-based email account (Hotmail.com) on a public domain with little or no security features to conduct confidential and financial transactions;
 - (b) The only "security" on the Attorney's email account which she was using to conduct her professional duties was the use of a password;
 - (c) Having no cyber security software installed on her equipment. The Attorney had only antivirus software - SMADAV;
 - (d) Not taking any secondary authentication step to verify the client's change of instructions regarding transfer of funds.
32. Lawyers are in the position of holding sensitive information and large sums of money for their clients and third parties. Each of us is a potential target. The need to become more vigilant and to have appropriate security measures in place to protect that information and money increases as business is conducted other than in person.
33. The Complainant cited a paper by Mr. Alton Morgan with the subject E-Banking and Safeguarding Clients Funds which was presented at the CCJ

Academy for Law and the General Legal Council 5th Biennial Conference on December 14th, 2018. In the paper Mr. Morgan said "The problem of authentication of the identity of parties to electronic transaction extends beyond e-banking and is a real and present damager because true proof of identity is also crucial to public records offices where documents must be recorded to complete the desired legal transaction. Consequently there are significant legal risks by our laws of contract and of evidence in the minimizing or eliminating of paper documentation and traditional physiological identity verification processes for e-banking transactions.....We must also bear in mind that the internet is a public domain, not subject to control by any single authority and therefore matters of customers' privacy, security of e-banking transactions, validity of the electronic contract create a potential for confidentiality breach by e-banking that represents a major risk for lawyers in exposure for professional negligence or damage to reputation." He cited a common e-banking related risk "Fraudsters capturing (or hacking) the customers website or email to set up a fake instructions of account information to receive funds."¹

34. Complaints against lawyers arising from cybercrime are on the increase. While there are reports of this kind of fraud affecting lawyers in North America and the UK since 2014, it appears to have reached our shores in 2017 or thereabouts. Conveyancing transactions are the most frequent target. The first decision of the Disciplinary Committee on this issue was **Lillian Barrow & Kenneth Becker v Hope Ramsay-Stewart** delivered March 7th, 2020. A more recent decision is **Murdell Chambers-Watson v Lancelot Cowan** delivered July 10, 2021 (which is the subject of an appeal). Both cases involved transfers made by the attorneys based on instructions received by email, which turned out to have been manipulated.
35. As stated in the decision of the Disciplinary Committee in **Marnol Limited and Noel Jumpp v Herbert Grant** delivered January 17th, 2005, "it is not every negligent act or omission on the part of an attorney which gives rise to a finding of professional misconduct, even though such act or omission could ground a cause of action in the Supreme Court for negligence. This is so because the exercise of a disciplinary jurisdiction against attorneys-at-law has a penal element whereby the conduct of the attorney must be such as to warrant being described as unbecoming of a professional and meriting reproof or as captured in the wording of Canon IV (s) of the Legal Profession (Canons of Professional Ethics) Rules the negligence or neglect of duty must be such as to be described as "inexcusable or deplorable."
36. In **Leslie L. Diggs-White v George R. Dawkins [1976] 14 JLR 196** the distinction between negligence, even gross negligence and professional

¹ Page 3

misconduct was re-stated by Graham-Perkins JA:

"I now ask the further question: Ought the 'gross neglect or negligence' found by the majority of the division herein be held to amount, on the background of the findings at (7), (8) and (9), *supra*, to professional misconduct? I think not. Nearly ninety years ago, in a judgment which I respectfully commend as a constant reminder to every attorney-at-law in this Island, Lord Esher MR, with his accustomed and commendable clarity, emphasised the true distinction between negligence and dishonourable conduct. In *Re Cooke* (5) ((1889) 5 T.L.R. at pp. 407 -408) the learned Master of the Rolls said:

'But in order that the court should exercise its penal jurisdiction over a solicitor it was not sufficient to show that his conduct has been such as would support an action for negligence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable in his profession. A professional man, whether he was a solicitor or a barrister, was bound to use his utmost honour and fairness with regard his client.

He was bound to use his utmost skill for his client ... If an attorney were to know the steps which were the right steps to take and were to take a multitude of wrong, futile, and unnecessary steps in order to multiply the costs, then if there were both that knowledge and that intention and enormous bills of course resulted, the attorney would be acting dishonourably. A solicitor must do for his client what was best to his knowledge, and in the way which was best to his own knowledge, and if he failed in either of those particulars he was dishonourable.'

The foregoing criteria, *inter alia*, as to professional misconduct by an attorney-at-law in relation to his client are, I think, as valid today as they were in 1889. They point to the true standards and practices by reference

to which professional misconduct by members of our profession is to be judged when complaints made by lay clients to the Disciplinary Committee of the General Legal Council."

37. An error of judgment does not amount to negligence if the error is one that a reasonably well-informed and competent member of the profession could have made. The common law makes allowances for the difficulties in the circumstances in which professional judgments have to be made and acted upon. So said Lord Diplock in **Saif Ali v Sydney Mitchell and Co [1980] AC 198** at p 220D.
38. We are guided by the dicta of the Court of Appeal in **Earl Witter v Roy**

Forbes (1989) 26 JLR 129, at 132-133:

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

39. Further confirmation that the standard is to be judged by practising attorneys is found in Cordery's Law relating to Solicitors:

"Negligence in a solicitor may amount to misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession."

40. In the judgment of this Panel while the Attorney failed to exercise reasonable skill and care in handling the Complainant's money and could be said to have been negligent, her conduct does not rise to the level of inexcusable or deplorable negligence. We have come to this conclusion primarily for the reason that it has not been established beyond reasonable doubt that in 2018 attorneys were generally and widely well aware of all the dangers of cybercrime and specifically the nature of Business Email Compromise.

Canon VII (b)(ii) An Attorney shall account to her client for all monies in the hand of the Attorney for the account or credit of the client, whenever reasonably required to do so

41. On behalf of the Attorney, it was submitted that the duty to account to her client for all monies in her hand for the account or credit of the client is fulfilled by the Attorney maintaining proper accounts in keeping with the Legal Profession (Accounts and Records) Regulations and to provide information as to the status of those accounts to the client when required to do so. The further submission was that Canon VII (b)(ii) does not oblige an attorney to hand over money held to the client's credit to the client. The Attorney cited **Gresford Jones v The General Legal Council ex parte Owen Fearon, Misc Appeal No. 22/2002, March 18th, 2005** as authority for this latter submission. That is not the Panel's understanding of the Court's decision. In **Gresford Jones**, the issue in connection with Canon VII (b)(ii) was that the attorney had not provided a proper account,

having given inaccurate information as to sums received and expended by him and he had not paid over the monies being part of the estate of Peter Ferron to the complainant who was one of the beneficiaries of the estate. The Committee found that the attorney had acted in breach of Canon (VII)(b)(ii) in not accounting to the complainant for the funds to his credit. The Committee also found that the entitlement of the beneficiaries of the estate was in the residue and that the complainant, as one of the beneficiaries, had no right to be paid the assets until the residue was ascertained. The Court of Appeal upheld the Committee's decision on both counts. There was no ruling that an account did not extend to paying over money in the attorney hand.

42. The duty of an attorney to account to her client is not carried out only as long as there is compliance with the accounting regulations. The Attorney's argument that where there is no breach of the accounting regulation, there can be no breach of the duty to account to her client is faulty. The Panel also notes that the complaint here is not in relation to The Legal Profession (Accounts and Records) Regulations.
43. Money held by a lawyer on behalf of her client is held on trust. The classic exposition of the nature of that trust is found in **Tanfern Holdings Limited v Redferns (A Firm) [1995] 3 WLR 352**. Per Lord Browne-Wilkinson at page 436A:

"In the case of monies paid to a solicitor by a client as part of a conveyancing transaction, the purpose of that transaction is to achieve the commercial objective of the client, be it the acquisition of property or the lending of money on security. The depositing of money with the solicitor is but one aspect of the arrangements between the parties, such arrangements being for the most part contractual. Thus, the circumstances under which the solicitor can part with money from client account are regulated by the instructions given by the client: they are not part of the trusts on which the property is held. I do not intend to cast any doubt on the fact that monies held by solicitors on client account are trust monies or that the basic equitable principles apply to any breach of such trust by solicitors. But the basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach. I have no doubt that, until the underlying commercial transaction has been completed, the solicitor can be required to restore to client account monies wrongly paid away."
44. When asked in cross examination why didn't she call the Complainant when she got the email altering the instructions to deposit the proceeds into the Complainant's bank account at Linstead, Saint Catherine and instead to wire the funds to an account to a bank in the United States of America in the name of a company, the Attorney's reply was simply, "because my correspondence has been predominantly by email." The Attorney's response and demeanour throughout, including what seemed like a lackluster effort in trying to help the Complainant do all that he could to recover the money was

unsatisfactory.

45. **Re A Solicitor** was cited by the Attorney as authority for arguing that the Court took the attorney's state of mind into account in determining whether the attorney had been correctly found guilty of professional misconduct. The Panel did not find this case helpful since that case was about a breach of the Solicitors' Accounts Rules, which dealt with the failure to properly write up clients' books of accounts and not keeping books of account in proper form.
46. It was further submitted on the Attorney's behalf that for the Attorney's failure to hand over trust monies to amount to professional misconduct there must be an element of wrongdoing or moral turpitude; that there must be a deliberate or intentional act on the part of the Attorney to not hand over the trust monies to the client or in other words, there must be mens rea or the requisite mental state or degree of fault. That submission does not find favour with the Panel.
47. A trustee sufficiently discharges his duty if, when managing trust affairs, he takes all those precautions that an ordinary prudent man of business would take in managing similar affairs of their own: **Speight v Gaunt (1883) 9 App Cas 1 HL**. There are four important elements to that duty:
- (a) The yardstick is not what an ordinary prudent man of business would do if they had only themselves to consider, but what they would do if they had a moral obligation to provide for others (*Re Whiteley (1886) 33 Ch D 347 at 355*). An illustrative example of this is that although an individual may be prepared to risk all on a speculative venture, this would not be an appropriate thing for a person with a moral obligation to provide for others to do;
 - (b) The test is objective. Therefore, it is no defence that the trustee was doing their incompetent best; the standard is the "reasonably prudent man of business", and the fiduciary is expected to act with the care, skill and diligence that would be exercised by a reasonably diligent attorney carrying out the functions. "*A trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment when the question which he has to consider is whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence, and circumspection.*" Per Lopes LJ in *Re Chapman* [1896] 2 Ch 763 at 778.
 - (c) The standard of care cannot be decreased by reference to subjective factors.
 - (d) "Wilful default by a trustee means a passive breach of trust, an omission by a trustee to do something which, as a prudent trustee, he ought to have done – as distinct from an active breach of trust, that is to say, doing something which the trustee ought not to have done." This encompasses negligence. Wilful default does not mean conscious wrongdoing, but merely a wrongful omission entitling a claimant to an account on that footing: **Bartlett v Barclays Bank Trust Co. Ltd [1980] 2 WLR 430, 451**

48. The use of funds in the client account is based on the retainer and the instructions given by the client to the attorney for the use of those funds. Where the instructions come from a fraudster and not the client, that constitutes an unauthorized disbursement and the Attorney has committed a breach of trust and must restore the client account. In **Santander UK plc [2014] EWCA Civ 183**, solicitors purporting to act for the vendor in a conveyancing transaction were in fact instructed by a fraudster. It was held that paying away client money to effect a sham completion is the same as paying it away on no basis at all and constituted a breach of client account trust.
49. Similarly, in **Dreamvar (UK) Ltd. And Mishcon de Reya and Mary Monson Solicitors [2018] EWCA Civ 1082**, the solicitors were instructed by a fraudster pretending to be the registered owner of property in a case of identity theft. The innocent purchaser paid for the property and the imposter received the money and disappeared. The court held though the fraudster is obviously liable, there was no chance of recovery from him. Where a careful, conscientious and thorough solicitor, conducting the transaction by the book and acting honestly and reasonably, had not discovered the fraud, he might still be held to have been in breach of trust for parting with the money to a fraudster, albeit innocently.
50. And per Lord Browne-Wilkinson V.C in **Target Holdings Ltd v Redferns** (supra) at page 434E: "Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred".
51. The Complainant cited the case of **St. Lawrence Testing & Inspection Co. Ltd. V Lanark Leeds Distribution Ltd and Mark Schokking 2019 CanLII 69697 (ON SCSM)** as authority for the principle that where both parties are innocent victim of cybercrime, one of them must bear the loss, that one being the party that carries the greater risk. The responsibility for the loss must rest on the party best able to prevent the harm. In that case, as here, there were revised payment instructions by email. The facts briefly, were that the plaintiff and defendants were party to a written settlement agreement which included instructions for payment of the settlement amount to the plaintiff's lawyers' bank account. In response to the defendant's email to the plaintiff's lawyer asking whether payment could be made electronically and if so, requesting the bank account and transit numbers, a fraudster intervened and gave different instructions for deposit of the funds to a different bank account, to a person with no apparent connection to the parties. Just as in the present case, neither the plaintiff's solicitors nor the defendants realized the email modification scam and that each was corresponding with the fraudster and not each other until it was too late. The judge found that the law firm's email security met the standard to be reasonably expected of a law firm: they had a strong password and used an email subscription service and the hacking of the account was not due to any

negligence on the part of the plaintiff's solicitors.

52. The judge found that significant features of the case were that there was no contract authorizing reliance on email instructions nor any evidence of willful misconduct or dishonesty by the party whose email was hacked and there was no evidence to support a finding of negligence with respect to the computer/email security system. In the final analysis "...absent negligence on the part of the receiving party (here the Complainant), it is the originator of the transfer who is in fact dealing with the fraudster (albeit unknowingly), and is therefore in the best position to recognize potential indicia of fraud such as changed or unusual payment instructions." and therefore the liability must rest on the party best able to prevent the harm.
53. These cases establish the principle that the Attorney is not relieved from being held in breach of her fiduciary duty by reason that she acted on instructions given to her, if in fact the beneficiary client does not receive the funds.
54. 54. The Attorney honestly believed that she was acting on the instructions of the Complainant nor did she intend to deprive the Complainant of the proceeds of sale, but she was negligent in that she omitted to do something which a prudent trustee would have done, which is to obtain confirmation of the change of instructions to deposit the funds into an overseas bank in the name of a third party.
55. The Panel therefore finds that although a fraud has been perpetrated, in which the Attorney is also the victim, she has failed to account for money in her hand for the account or credit of the Complainant.

Canon 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 she is a member

56. In light of the Panel's finding in relation to Canons (IV) (r) and VII (b)(ii), and the reasons therefore, the Attorney has failed to uphold the dignity of the profession.

CONCLUSION

57. Having carefully considered the oral and affidavit evidence of both the Complainant and the Attorney together with the exhibits, and the expert's report the Panel finds that the evidence presented by the Complainant has met the requisite standard of proof, that is proof beyond a reasonable doubt in relation to Canons IV (r), VII (b)(ii) and I (b).
58. The Panel therefore finds the Attorneys to be guilty of professional misconduct.
59. In accordance with the procedure recommended by the Court of Appeal in **Owen Clunie v General Legal Council, Miscellaneous Appeal No. 03**

of 2013 [2014] JMCA Civ 31, the Panel directs that a date be fixed to give the Attorney an opportunity to be heard in mitigation before a sanction is imposed.

Dated the 3rd day of December 2021.



CHRISTOPHER KELMAN



TANA'ANIA SMALL DAVIS, Q.C.



DANE MARSH

