

DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

IN THE MATTER OF COMPLAINT No. 39/2019

MURDELL CHAMBERS-WATSON and
LANCELOT COWAN an Attorney at Law

AND

IN THE MATTER OF the Legal Profession Act
1971

Panel : Trevor HoLyn- Chairman

Dane Marsh

Nadine Guy

Appearances: The Complainant appeared represented by Trevor Cuff, Attorney at Law whilst Mr. Lancelot Cowan was represented by Mr. Lorenzo Eccleston, Attorney-At-Law.

The parties appeared by video link on the several trial dates.

The Complainant by her Complaint dated the 28th January, 2019, laid the following charges against Mr. Lancelot Cowan in the Form of Application and supporting Affidavit:

"My complaints include but is not limited to the below facts:"

- 1) He has not provided me with all information as to the progress of my business with due expedition, although I have reasonably required him to do so.
- 2) He has not dealt with my business with all due expedition.
- 3) He has acted with inexcusable or deplorable negligence in the performance of his duties.
- 4) He has not accounted to me for all monies in his hands for my account or credit, although I have reasonably required him to do so.
- 5) He has not given full disclosure nor has he received approval and he has acted in a manner in which his professional duties and his personal interest conflict or are likely to conflict.
- 6) He is in breach of Canon I (b) which states that, "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."

- 7) He is in breach of Canon VI (d) which states "An attorney shall not give a professional undertaking which he cannot fulfil and shall fulfil every such undertaking which he gives".
- 8) He has breached the Legal Profession (Accounts and Records) Regulations.

THE FACTUAL CIRCUMSTANCES

The factual circumstances which embody this complaint are not contested with regard to the consequences but only as to who is responsible for those consequences. In so far as the circumstances are concerned the following facts can be taken as being agreed.

1. In March 2018 the decision by the Complainant to sell her house in Canaan Hanover began to bear fruit as the tenant living in the house agreed to purchase it. The brother in law of the Complainant made contact with the Attorney for him to manage the sale.
2. An agreement for sale was duly signed and returned to the Attorney. The purchase price was to be met with a loan from the National Housing Trust.
3. Communication between the Complainant and the Attorney was primarily by email with the relevant email addresses being murdellwatson@yahoo.com and lcassociates@live.com.
4. By email dated the 23 August 2018 following a conversation between the parties an outline of the progress of the matter was given to the Complainant by the Attorney. This email was copied to the Complainants brother in law. It is to be noted that in this email the Complainant was advised that on receipt of the balance of the purchase price the banking information would be required to disperse the proceeds of sale.
5. Up to the 17 October 2018 the Attorney was still requesting the banking information with regards to the disbursement.
6. On the 22 October 2018 the Complainant provided the following email "Funds transfer, Hi Mr Cowan I've been trying to reach you, please transfer funds to Swift Code ,CHASUS 33 Account no 804855278 Thank you"
7. On the 27 October 2018 the following email was received by the Attorney "Hi Mr Cowan , please I need the funds to be transferred to the above bank account do not send to the previous account I sent to you. Kindly please confirm when I should be expecting the transfer and email me the swift copy once completed. Thank you

8. This email contained the following bank information:-

BANK:BB&T

ACC NAME: MASCON INVESTMENT INC

ACC NO: :3900099S3533

ROUTING NO: 031300123

MAILING ADDRESS: 24'17 WELSH RD STE 21 PHILADELPHIA, PA 19114

BANK ADDRESS: 1635 MARKET ST STE 110 PHILADELPHIA, PA 19103

9. It is to be noted that both banking instructions came from email address murdellwatson@yahoo.com

10. On the 7 November 2018 the Attorney sent the following email to the Complainant "Hello again. Please send the bank information again as the first email to me did not have the information.

Thanks

Lance Cowan."

11. On the 8 November 2018 the Attorney received this email from murdellwatson@yahoo.com "Hi Mr Cowan ,find attached the bank account where I need the funds transferred to, would appreciate so much if you can get this done today. Deduct any charges for the transfer from the total amount. Here is the swift code which is not included on the attachment, Swift Code : BRBTUS33. Kindly email me the swift copy of the transfer sa I can follow up with my bank. Thank you"

12. Acting on this latter information the Attorney made arrangements with his bank Sagicor for the transfer of the proceeds of the sale and on the 8 November 2018 the transfer was requested of the bank.

13. On the 9 November 2018 the Bank requested a copy of the agreement for sale from the Attorney and it was provided, subsequently the bank provided the following email "Good Day Mr. Cowan,

Thanks for sending the documents.

The wire transfer was done and sent, if any additional information is required I will inform you.

Regards

Bunacha Douglas | Teller, Dominica Branch

14. The first time that the email address murdellwetson@yahoo.com appears is in an email dated the 15 November 2018 which reads as follows

On Nov 15, 2018 4:41 PM, Murdell Watson <murdellwetson@yahoo.com> wrote:

Hi Mr Cowan ,this is to confirm to you that the transfer has been received. Thank you.

To which the Attorney responded.

From: Icassociates Law Firm <lcassociates@live.com>

To: Murdell Watson <murdellwetson@yahoo.com>

Sent: Thursday, November 15, 2018 10:53 PM

Subject: Re: Transfer to the above account please. Thank you.

U r most welcome. Send more money no work. Thanks again.

Lancelot Cowan

15. On the 29 November 2018 the Attorney received the following email On Nov 29, 2018 7:52 PM, Murdell Watson <murdellwetson@yahoo.com> wrote:

Hi Mr Cowan ,how are you doing today, Please I want to inform you that my financial adviser contact his bank to access the funds you sent to me and was informed by the bank he can't touch the money. Can you please take a serious action to contact your bank to call the bank to release the funds to me. I am surprised and don't have any idea why they are doing this because this has never happened to me. i would appreciate so much if you can act on this. Hope to hear from you soon. Thank you.

16. Thereafter until the 4 December 2018 there was an issue of the funds not being accessed and what steps should be taken to release them. Sagicor maintained that they were not asking for the funds to be held. In any event after the 4 December 2018 that issue seems to have been resolved and there were no further emails from murdellwetson@yahoo.com.

17. Following a visit to Jamaica by the Complainant it was determined that the account murdellwatson@yahoo.com had been compromised as the emails received by the Attorney had not been sent by the Complainant.

18. Based on the failure of the bank to retrieve the funds the Complainant made a report to the Police and then laid a complaint against the Attorney with the General Legal Council.

19. From these circumstances it can be readily concluded that they proceeds of the sale had not come into the possession of the Complainant. The Attorney based on the information received by email had sent those funds to a bank account which had been emailed to him. It is clear that the proceeds had therefore been diverted to an account belonging to a third party. It therefore becomes necessary to look at the applicable law with regard to these circumstances to determine who should bear the responsibility for the loss of the funds. We note that amongst the suggestions being made to the Attorney during his cross examination were insinuations that the Attorney had created this fake email account to defraud the Complainant. We consider those suggestions to be without merit and incompatible with the facts which arise from the evidence.

THE APPLICABLE LAW

20. The facts which form the basis of the complaint, have in recent times become quite prevalent and this case is one of several that have occupied the time and attention of the Disciplinary Committee. Recently there was decided by the Committee the complaint 7/2018 of Lillian Barrows & Kenneth Becker v Hope Ramsay-Stewart delivered on the 7 March 2020. This case also concerned the wiring of client's funds to an account other than the clients, based upon changed wire instructions delivered in the course of email correspondence. The Panel found that the failure to recognize the changed email address did not amount to inexcusable and deplorable negligence however the Panel determined that there was a breach of the Canon VII(b)(ii) and reasoned as follows

"The fact remains however that she has to date not paid over monies which was entrusted to her and which she had an obligation to pay over to the client. We do not accept that the duty by an attorney to account as contemplated by Canon VII (b)(ii) which provides "An Attorney shall ... 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..." is satisfied by giving to the client an explanation as to what happened to the monies in the possession of the attorney. We therefore find that the Attorney in this case has not accounted to the Complainants for the amount she had in hand. She has not accounted to the Complainants for the sum by advising that the email accounts were hacked and the monies sent to the fraudsters. This situation and the Attorney's fiduciary duty to ensure that monies held for a client is handed over to the client, would be no different if the money was in a bank account and stolen by a bank teller. The Attorney would similarly be liable to account/give the client the money and thereafter seek to recover from the bank."

21. The basis of this reasoning stems from the fiduciary responsibility regarding funds held by Attorneys on behalf of Clients. Money held by Attorneys for Clients are Trust Funds and therefore are subject to stringent rules regarding their safe keeping until they are in the hands of the client.
22. One of the relevant authorities with regard to the nature of the fiduciary responsibility that is placed on Attorneys with regard to Trust Funds is *Fourie v Van Der Spuy et al* from the REPUBLIC OF SOUTH AFRICA IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA CASE NO: 65609/2019 the following is an extract from that case:-

[13] In the case of *Wypkema v Lubbe 2007(5) SA138 (SCA)* , the court considered the nature of an attorney's trust account, as was summarised in *Fuhri v Geyser and Another 1979(1) SA 747(N)* at 749C-E, as follows by Hefer J:

'(D)espite the separation of trust money from an attorney's assets thus affected by s 33(7), it is clear that trust creditors have no control over the trust account; ownership in the money in the account vests in the bank or other institution in which it has been deposited (S v Kotze 1965 (1) SA 118 (A) at 124), and it is the attorney who is entitled to operate on the account and to make withdrawals from it (De Villiers NO v Kaplan 1960 (4) SA 476 (C). The only right that trust creditors have, is the right to payment by the attorney of whatever is due to them, and it is to that extent that they are the attorney's creditors. This right to payment plainly arises from the relationship between the parties and has nothing whatsoever to do with the way in which the attorney handles the money in his trust account.'

[14] The Court accordingly held that "when an attorney draws a cheque on his trust account, he exercises his right to dispose of the amount standing to the credit of that account and does so as principal and not in a representative capacity". This is a huge shift in contractual responsibility concerning monies paid to an attorney, this means that the attorney, as principal, has full control and responsibility concerning such money.

[15] The Applicant was obliged as a practising attorney to account to his client for the funds and as such did so as principal. It would not be a defence to a claim by the attorney to submit that he/she had paid as was instructed when he/she did not verify the instructions. This is deducted from the case of *Frikkie Pretorius Inc and Another v Glass 2011 (2) SA 407 KZP* at par 19 where the court said-

"In considering the duty of an attorney in dealing with trust money the Court in *Aeroquip SA v Gross and others* held-

An attorney who holds an amount of money in his trust account on behalf of a client is obliged to use it for no other purpose than he is instructed by the client. It is trite that it must always be available to the client. In *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 394 the court said: 'I deal now with the duty of an attorney in regard to trust money. Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount...'

[16] The Eastern Cape Local Division of the High Court was recently called upon to adjudicate a matter where the plaintiffs suffered a loss following a cybercrime being perpetrated in a conveyancing transaction. In this case, where there were almost identical facts as in the present case, the Honourable Tokota, J relied on two cases, to conclude that the attorney was liable. The first case is that of *Margalit v Standard Bank of South Africa* and another 2013 (2) SA 466 (SCA) where paragraphs 23 and 24 were relied on. I merely quote the essential part:

"As was remarked many years ago by De Villiers CJ, in a dictum recently followed by this court:

'I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be reasonably proficient in his calling, and if he does not bestow sufficient care and attention, in the conduct of business entrusted to him, he is liable; and where this is proved the Court will give damages against him.'

The second case is that of *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) page 499 D-E:

"In applying the test of reasonableness to the facts of the present case, the first consideration to be borne in mind is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services."

[17] The two legs would thus be a mandate/contract and a common law requirement of sufficient care and attention, in the conduct of business entrusted to the attorney.

MANDATE TO ATTORNEY

[18] *The relationship between an attorney and his client is based on a contract of mandate. This contract, inter alia, imposes fiduciary obligations on the attorney and an attorney has a duty of care to his client.*

[19] *This fiduciary duty, its nature and extent, are questions of fact to be determined from a consideration of the substance of the relationship between the parties as well as any relevant circumstances. Essentially the scope of a mandate depends on its terms.*

[20] *An attorney bears a legal duty to deal with the money in her trust account without negligence. It is a term of the mandate that the attorney will exercise the skill, adequate knowledge and diligence expected of an average practising attorney and an attorney may be held liable for negligence even where she committed an error of judgment on matters of discretion if she failed to exercise the required skill, knowledge and diligence.*

[21] *At best the 2nd Respondent can claim that she intended to pay the Applicant but paid the wrong person. This however is no defence as it was succinctly stated in Potgieter v Capricorn Beach Homeowners Association and Another [2012] ZAWCHC 66:*

"In the present case the Applicant, as a practising attorney, was intent on making payment to his client pursuant to the completion of a conveyancing transaction whereby his client sold immovable property to one Manyama and with the proceeds of the sale payable to the client. The Applicant was obliged as a practising attorney to account to his client for the funds and as such did so as principal. It would not be a defence to a claim by the client for the attorney to submit that he paid the wrong person and therefore he had discharged his duty to his client."

[22] *In Nissan South Africa (Pty) Ltd v Mamitz NO & Others 2005(1) SA 441 the Supreme Court of Appeal dealt with the question as to what are the consequences of mistakenly transferring money to an incorrect bank account?. The Court found that "payment is a bilateral juristic act requiring the meeting of two minds."*

CONCLUSIONS

[23] *It is common cause that 2nd Respondent has failed to pay over the balance due to the Applicant. In this respect the 2nd Respondent has failed to discharge her obligation to the Applicant and that should be the end of the matter.*

[24] It cannot be disputed by the Respondents that had the 2nd Respondent confirmed or verified the new bank details with the Applicant the fraud simply would not have occurred. It is abundantly clear from the facts that no verification process was followed and that the firm would have to carry the loss, not the Applicant.

23. The Panel has quoted extensively from this decision because this particular issue has not yet received judicial guidance in our jurisdiction. The principles however are equally applicable here as in South Africa.

24. The following is a case from Canada namely ONTARIO ,SUPERIOR COURT OF JUSTICE (SMALL CLAIMS COURT) BETWEEN:ST. LAWRENCE TESTING & INSPECTION CO. LTD. And LANARK LEEDS DISTRIBUTION LTD. and MARK SCHOKKING 2019 CanLII 69697 (ON SCSM). Again a case where funds had been diverted from a beneficiary to a fraudster in the course of the decision the Judge opined as follows:-

56. ***As noted at the outset of these reasons, the issue in this case can be restated as follows: Where a computer fraudster assumes control of Victim A's email account and, impersonating Victim A, issues instructions to Victim B, who then transfers funds intended for Victim A (or a third party) to the fraudster's account, is Victim A liable for the loss?***

57. ***In my view, the answer is "no", unless:***

a. ***Victim A and Victim B are parties to a contract which (i) authorizes Victim B to rely on email instructions from Victim A and, (ii) assuming compliance with the terms of the contract, shifts liability for a loss resulting from fraudulent payment instructions to Victim A;***

b. ***There is evidence of wilful misconduct or dishonesty by Victim A; or***

c. ***There is negligence on the part of Victim A.***

58. ***In this case, I find that:***

a. ***There was no contract between the Victim A (the Plaintiff, or its agent law firm) and Victim B (the Defendants) allowing Victim B to rely on fraudulent payment instructions from Victim A's email server to Victim B or shifting liability for a loss to Victim B resulting from such instructions to Victim A;***

b. ***There is no evidence of any wilful misconduct or dishonesty by the Plaintiff, McDonald Duncan or Baker; and***

c. ***There is no evidence to support a finding of negligence on the part of the Plaintiffs law firm, McDonold Duncan, with respect to its computer/email security system.***

59. *By way of further reasoning, I see no basis on which to distinguish the circumstances of the fraud in this case from those in which a home computer or business computer is "hacked", giving a fraudster access to the owner's email account. The fraudster then sends out an email to all of the "contacts" in the owner's email address book, asking the recipient to wire funds (typically \$1,000 to \$5,000) immediately to a PayPal or similar account able to receive electronic funds transfers. Assuming that the computer owner took the reasonable and recommended security precautions for its email account, I see no basis on which the computer owner could be held liable to reimburse those individuals who unfortunately fall victim to the fraud.*
60. *In reviewing legal commentary on computer fraud, this is clearly an area that would benefit from legislation to establish clear principles and guidelines for the allocation of liability in the event of computer frauds, which are increasing in number. In the United States, commentary with respect to the Uniform Commercial Code provisions dealing with wire transfer fraud suggests that in most cases, absent evidence of negligence or malfeasance by the "beneficiary" (receiving party), 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 (i.e. such as changed or unusual payment instructions).*
61. *As a general rule, equitable negligence principles seek, after the fact, to place responsibility for a loss on the party best able to prevent the harm.*

DISCUSSION AND ANALYSIS

25. From the three cases referred to the following principles emerge namely (1) it is not a defence to a complaint for an Attorney to state that he acted on the instructions of the Complainant unless he can show that he had verified those instructions. (2) it is not a defence to a complaint that he has failed to account for money entrusted to him to say that he carried out instructions given to him if the end result is that the Complainant has not received the funds. (3) The duty of the Attorney with respect to trust funds is to ensure that the trust funds are transferred to the beneficiary for whom the trust account was created, nothing short of that will be sufficient to discharge his fiduciary duty to his client. (4) Equitable negligence principles place responsibility for a loss on the party best able to prevent the harm.
26. The submissions of the parties although helpful with regard to the interpretation of the canons and what would amount to breaches thereof did not focus on the obligations that Attorneys bear when handling trust funds and the fiduciary duties that are embodied therein. The failure of the Panel to make reference

to them is therefore not to disregard them but rather to focus on the issues the Panel considers of central importance.

27. Applying the principles extracted from the above authorities it is clear that the Attorney has failed to account to the Complainant for money he had held in trust for her. He is therefore in breach of Canon VII (b)(ii) which provides "An Attorney shall ... 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..."
28. The next issue is however the issue of inexcusable and deplorable negligence. The Panel in complaint 7/2018 of Lillian Barrows & Kenneth Becker v Hope Ramsay-Stewart determined on the facts of that case that the Attorney was not in breach of this particular Canon finding that the failure to recognize the changed email address did not amount to inexcusable and deplorable negligence. The authorities cited above seem however to suggest that if there is a loss the responsibility must be borne by the party best able to prevent the harm. In addition if an attorney does not exercise the required skill and care in his performance of his duties he would be negligent. The distinction appears to be that in the ordinary determination of negligence the standard is on the balance of probabilities however to the contrary the standard in disciplinary matters is beyond reasonable doubt. In addition the negligence must be inexcusable and deplorable and this can be met by culpable non-performance, In the facts of this case the actions of the Attorney judged in the light of those standards cannot amount to inexcusable and deplorable negligence.
29. The complaint originally made reference to breaches of eight separate canons. In his closing submissions the attorney for the Complainant submitted as follows:- *In this matter, there are three substantive issues for the Disciplinary Committee of the General Legal Council to consider, namely:*
 - i. *Whether the Respondent acted with inexcusable and deplorable negligence in the performance of his duties toward the Complainant?*
 - ii. *Whether the Respondent has accounted to the Complainant for all the monies he received on her behalf, although reasonably required to do so?*
 - iii. *Whether the Respondent has breached Canon I (b) which states that, "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?"*
30. In this regard the Panel agrees with the attorney for the Complainant as the evidence as presented did not substantiate any of the other breaches of canons initially stated in the complaint accordingly those breaches have not been proved to the required standard and are dismissed. We have already

stated the findings of the Panel with regard to the issues of inexcusable and deplorable negligence and the failure to account. This leaves us with the issue of Canon 1 (b) which states that, "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?"

31. The following passage which arose in Geresford Jones v The General Legal Council (ex parte Owen Ferron) Miscellaneous Appeal No. 22/2002 (delivered March 18, 2005) was stated by Harrison, JA and cited with approval by the Panel in Lillian Barrows & Kenneth Becker v Hope Ramsay-Stewart:

"An attorney shall assist in maintaining the dignity and integrity of the Legal Profession and shall avoid even the appearance of Professional impropriety."

This standard of conduct required to be maintained by members of the legal profession is easily understood and perceived as basic good, upright and acceptable behaviour. Any deviation from this legal code is subject to scrutiny as it relates to the requirement of a particular canon. Consequently, "the honour and dignity of the profession ..." may be besmirched by a breach of a particular canon or "the behaviour (of an attorney) may tend to discredit the profession ..." and be a breach of a specific canon. Either conduct would not fail to contravene the requirements of the proper conduct demanded by Canon 1 (b). It is my view that the Canon is specifically widely drafted, in order to emphasize the ever prevailing high standard of conduct demanded by the profession and re-enforced by all the Canons in the Rules. The Committee was accordingly not in error to find that Canon 1 (b) relates to the conduct of an attorney "in relation to the Court, the regulatory body governing the profession, the law practice, the client, colleagues and certain other persons" and to find that the appellant was in breach thereof. The Canon may also be construed in light of the cumulative effect of the overall conduct of the appellant towards Ferron and the other beneficiaries from 1988 up to the filing of the complaint in 1996. Frequently, in legal proceedings, the same set of facts may point to several breaches of conduct. A tribunal is not for that matter precluded from making an adverse finding on each. The sole prohibition is that the offender may not be punished twice for the same breach.

32. The principle to be extracted from this exposition is that this Canon is widely drafted and will incorporate the behaviour of the Attorney towards the Complainant. Specifically in the Barrows & Becker v Ramsay-Stewart complaint the Attorney sought to deny any wrongdoing and lay the blame for the loss at the feet of the Complainant. The Panel found that this behaviour amounted to a breach of Canon 1(b).

33. It is clear that once it is realised that money belonging to a Complainant has not been received by the Complainant and cannot be recovered by the Bank or other Financial Institution the Attorney has a fiduciary responsibility to ensure that this failure is corrected. Where the Attorney has failed to verify the relevant wire instructions the issue of responsibility for the loss falls squarely on his shoulders. To maintain the honour and dignity of the profession the only available option is to accept the responsibility and pay over the sums due to the Complainant. It is understandable that the Attorney may wish to contest the issues concerning the loss however given the state of the law and the fiduciary responsibility placed on his shoulders the outcome is generally inevitable. In this particular case the Attorney had not verified the change in the wiring instructions, he therefore paid over the money to an unauthorised person and he has not accepted that he failed to discharge his fiduciary responsibility to the Complainant. Such behaviour is clearly in contravention of the Canon requiring maintaining the honour and dignity of the profession as it creates the impression that Attorneys will not accept responsibility for their failings. This is not behaviour which enhances maintaining the honour and dignity of the legal profession. From the foregoing it is the view of the Panel that the Attorney is in breach of Canon 1(b) to the required standard of beyond reasonable doubt.

CONCLUSION

34. The Attorney is therefore in breach of Canons VII(b)(ii) and 1(b) and is guilty of professional misconduct in regard to those Canons.
35. The other breaches specified in the complaint have not been proved to the requisite standard and are therefore dismissed.
36. Pursuant to the requirement imposed by the Court of Appeal in the matter of Owen Clunie v GLC the matter is to be set for a date for the hearing of mitigation of sanction.

DATED THE 10th DAY OF July 2021



TREVOR HO-LYN (CHAIRPERSON)



DANE MARSH



NADINE GUY