

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

COMPLAINT NO. 97 of 2021

**IN THE MATTER of SEAN GARVIN MOSES OSBOURNE, an
Attorney-at-Law.**

AND

IN THE MATTER of the Legal Profession Act, 1971

BETWEEN	CAREE PINNOCK	COMPLAINANT
AND	SEAN GARVIN MOSES OSBOURNE	RESPONDENT

PANEL: **Mrs. Daniella Gentles Silvera, KC (Chairman)**
 Ms. Carlene Larmond, KC
 Ms. Sidia Smith

APPEARANCES: **Ms. Caree Pinnock**
 Mr. Sean Osbourne
 Ms. Sue-Ann Williams for the Complainant
 Mr. Russell Stewart for the Respondent

HEARING DATES: January 15, 2022, March 26, 2022; April 2, 2022; April 30, 2022;
 June 18, 2022, July 23, 2022 and October 22, 2022, November 19
 2022.

COMPLAINT

1. The Complaint laid against Sean Garvin Moses Osbourne (hereinafter “the Respondent”) is that:-

- (i) He has acted with inexcusable or deplorable negligence in the performance of his duties;

- (ii) He has not accounted to [the Complainant] for all monies in the hands for [her] account or credit; although I have reasonably required him to do so;
 - (iii) He has breached the Legal Profession (Accounts and Records) Regulations
2. On 23 July 2023, the Panel ruled on the Respondent's no case submission. The Panel upheld those submissions in respect of complaint (i) and (iii) above. It was however ruled that the Respondent had a case to answer in respect of complaint (ii), above.

HEARING

- 3. The Panel heard evidence from the Complainant and the Respondent on March 26, 2022; April 2, 2022, April 30, 2022; June 18, 2022 and July 23, 2022.
- 4. The Complainant called two witnesses, namely, Mr. Cary Anderson and Ms. Kaydia Rowe, JMMB Bank Manager Manchester Branch. The Respondent did not call any witnesses on his behalf.
- 5. The Complainant in her evidence identified the Form of Application Against an Attorney-at-Law dated July 2, 2021 and the Form of Affidavit by Applicant sworn July 2, 2021 which were admitted into evidence as Exhibits 4 and 1 respectively. Also admitted into evidence in support of her case were the following documents: -
 - a. Exhibit 2 - Supplemental Affidavit of Caree Pinnock sworn to on March 3, 2022
 - b. Exhibit 3A -3N, being the documents listed and included in the Complainant's Bundle of Documents submitted on November 3, 2021 for trial;
 - c. Exhibit 6 - Affidavit of Mr. Carey Anderson sworn to 14th January 2022 with redactions; and
 - d. Exhibit 7 - Letter dated June 23, 2022, from Mayhew Law with attachments of redacted Bank Statements from JMMB
- 6. The Respondent in his evidence identified his Affidavit sworn to on November 8, 2021, which was admitted as Exhibit 12. Also admitted into evidence in support of his case were the following documents: -
 - a. Exhibit 5 - Intake documents consisting of Sale and Purchase Form, Source of Funds, Record of Instructions and Retainer Agreement
 - b. Exhibit 8 - Final Statement of Account Caree Pinnock dated January 18, 2021;

- c. Exhibit 9 - Final Statement of Account dated March 15, 2021, Regarding Ebony Vale Property;
- d. Exhibit 10 - Final Statement of Account dated July 19, 2021;
- e. Exhibit 11 - Initial Statement of Account to Pinnock dated May 26, 2021;

Complainant's Evidence

- 7. The Complainant's case is that she employed the Respondent in October 2020 to act on her behalf in the purchase of a property located in Ensom Acres, Spanish Town, St. Catherine. However, she was told that it was no longer available.
- 8. In November 2020, she started the process of purchasing a property at Ebony Vale also in Spanish Town, for a purchase price of \$7.8m. She obtained a Surveyor's and Valuation report on the property and she received the draft agreement for sale in December 2020 and the original final Sales Agreement on February 5, 2021, which she signed. She then transferred the sum of \$547,500.00 to the Respondent on 9 February 2021 of which \$100,000.00 was a retainer and the balance being the deposit and half costs payable under the Agreement for Sale. She alleges that said sum was sent to the Respondent's business account at JMMB.
- 9. The Complainant further alleges that the Vendor cancelled the Agreement due to the negligence of the Respondent. In April 2021, the Vendor's Attorneys-at-Law reimbursed to the Respondent, the funds which was paid over to them under the Agreement for Sale. In the same month of April 2021, the Respondent introduced the Complainant to Fern and Paul Herbet who were selling a property in Hampton Green, Spanish Town. A valuation and survey were done in May and June 2021, respectively. The Respondent acted for both herself and the Vendors.
- 10. The Complainant alleges that the transaction did not reach fruition as the Vendors became wary of the Respondent and decided they did not want to use him. They also decided that they wanted a cash buyer. This was communicated to the Complainant on 19 June 2021.
- 11. The Complainant further alleges that since then she has made numerous requests for the return to her of the sum of \$547,500.00 being the sum paid to Respondent in the Ebony Vale transaction but he has failed to do so. She alleges

that the Respondent stated that he would not return the funds until it was the right time.

12. On cross examination the Complainant admitted that prior to retaining the Respondent in respect of the purchase of properties at Ebony Vale and Hampton Green, she engaged his services for the proposed purchase of a property located in 198 Mountain View Avenue, Kingston 6. The Purchase of this property did not materialize as the same was valued for \$2m less than the agreed sale price which meant the Complainant would have to come up with the \$2m.
13. The Complainant also admitted that, in respect of that transaction she received the draft Agreement for Sale and the Respondent's Engagement Form. This was later in the evidence acknowledged to be the Retainer/Engagement Agreement (Exhibit 5). She also admitted to signing the document but never returned it to the Respondent.
14. The Complainant denied receiving a statement of account at the termination of the transactions for the purchase of the Mountain View property, Ebony Vale or Hampton Green property. She also denied receiving a Statement of Account at the beginning of the Mountain View transaction.
15. The Complainant denied that the complaint was fuelled by malice towards the Respondent.

Respondent's Evidence

16. By way of Affidavit evidence sworn 8 November 2021, the Respondent states that he was retained to act on behalf of the Complainant in the purchase of a property in St. Andrew, the transaction was not completed as the property "was out of reach". The Respondent further states that sometime in October 2020, the Complainant desired to buy an alternate property in Saint Catherine. Despite "closing" the Agreement for Sale that property was not purchased for a wide range of reasons with respect to the vendors.
17. A third property was identified in Spanish Town which again did not materialize for different reasons.

18. On 1 July 2021, the Complainant called the Respondent's chambers. Certain things were communicated to her following which she filed a complaint with the Disciplinary Committee of the General Legal Council.
19. In respect of the allegation of the breach of Canon VII(b)(ii) of the Legal Profession (Canons of Professional Ethics) Rules, the Respondent denied same and stated that he and his office has always made the client aware of her business. He stated that; "In fact, the office indicated the position upon the client's request but the client disputed the account before making a complaint."

Mountain View Property

20. In his evidence-in-chief, the Respondent alleges that he was first approached by the Complainant to act on her behalf in the purchase of property located at 198 Mountain View Avenue, Kingston 6 in the parish of St. Andrew. He alleges that the Complainant was sent several *on boarding* documents including a retainer agreement and the draft agreement for sale. The Respondent also claims that he later supplied the Complainant with an initial statement of account setting out the cost of the transaction including the Attorney's cost if the transaction was completed.
21. The proposed purchase of that property was not completed after a valuation was done and the value of the property was found to be \$8,000,000.00 whereas the agreed purchase price was \$10,000,000.00. This meant that the Complainant would have to find an additional \$2,000,000.00.
22. Nonetheless, the Respondent alleges that a Final Statement of Account dated 18 January 2021 was prepared and placed on the Complainant's file. He could not confirm whether it was collected by her. However, he alleges that he was informed by his office that the Complainant collected the document. He says he knows this because he remembers discussing with her the item in the bill in the amount of \$44,200.00 for printing and reviewing draft agreement for sale in or about October 2020. It is noted however, that not only was this discussion not put to the Complainant in cross examination, but the alleged discussion relied on to prove the Complainant's knowledge and receipt of the statement of account pre-dates the said statement of account.

Ebony Vale

23. The Respondent subsequently acted for the Complainant in the proposed purchase of property located in Ebony Vale. The Agreement for Sale was signed by the Complainant and the sum of \$547,500.00 was paid by the Complainant

to the Respondent. The sum represented a retainer of \$100,000.00 and the balance being the deposit and half costs payable under the Agreement for Sale. The relevant deposit was paid over to the Vendor's Attorneys-at-Law. This sale was also not completed as the Vendors received an offer higher than that made by the Complainant.

24. As with the Mountain View property, the Respondent alleges that he prepared two statements of account in respect of this sale. The initial statement of account which was prepared at the beginning of the transaction and which showed costs to the Complainant if the transaction was completed. He states that the Final Statement dated 15 March 2021 was also collected by Ms. Pinnock. However, he could not confirm that this was so as this was based on information received from his office. It is also noted that the initial statement of Account was not adduced into evidence nor was it put to the Complainant in cross-examination.

Hampton Green

25. The Respondent was also retained to act on behalf of the Complainant in this matter. The relationship broke down and the Complainant demanded a refund of her monies. The Respondent however refused to deliver same to the Complainant on the basis that he must be paid for work done. He prepared a Statement of Account dated July 19, 2021 which was never given to the Complainant as he told her not to go to his office. The Statement was however placed on her file.
26. On cross-examination, the Respondent *inter alia* agreed that as an attorney he was accountable to his clients for their money. He agreed that he received the sum of \$547,500.00 from the Complainant in February 2021. Of that sum, the sum of \$447,500.00 was paid in respect of the deposit and half costs due under the Agreement for Sale for the Ebony Vale property and the balance of \$100,000.00 was the retainer.
27. He further agreed that the Complainant demanded the return of her monies in June 2022.
28. He did not believe that it was prudent for him to put in writing the reason for retaining the Complainant funds as they were in discussions as to what is to be paid.

29. The Respondent also disagreed that he had no authorization to access the Complainant's trust monies.

Submissions of the Complainant

30. By Closing Submissions of the Complainant dated 4 November 2021, the Complainant submits that:

“...in conveyancing transactions, the deposit being held on trust is for the sole purpose of the client achieving the objective of purchasing a property. Therefore, the terms of the retainer agreement, prior authorisation and or instructions must be provided by the client to the Attorney for the use or movement(s) of the said funds.”

31. In this regard the Complainant relies on the case of **Target Holdings Limited v Redferns (H.L.(E.)) [1995] 3 WLR 352**. It is therefore claimed that the Complainant is entitled to have the full sum of \$547,500.00 returned to her from the Respondent.

Submissions of the Respondent

32. The Panel has thoroughly read and considered the submissions of the Respondent which are summarized as follows:

- (i) In failing to bring the retainer document the Complainant failed to satisfy the complaint;
- (ii) The failure to bring the retainer document goes to the credibility of the Complainant;
- (iii) It is logical that the Respondent did not intend to work for free and must therefore be compensated.

33. The Respondent relies on several cases from the United States of America which are not binding on the Panel. Among the cases are *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333 (1906), which is relied on to say that, “retainers may be considered as earned when paid when the attorney makes clear to the client that the attorney will have to forego other work to take on the case and the total fee is reasonable”.

34. In another case relied on *Matter of Tammy Sharif (2011)*, 564-565 the Court held that:

“If the attorney has already withdrawn the amount billed and the client within a reasonable time after receiving the bill disputes the bill, the

attorney must restore the disputed amount to the trust account until the dispute is resolved."

35. Reliance was also placed on the disciplinary decision in **C. Judith Pantry; Complaint No. 56 of 2020** to say that the attorney had thirty (30) days within which to account to a client.

ANALYSIS

Standard Of Proof

36. In disciplinary proceedings, the tribunal applies the criminal standard of proof, that requires it to be sure that the complaint brought against the attorney are proved beyond reasonable doubt: **Campbell v Hamlet [2005] UKPC 19**. The complainant bears the burden of proof to marshal the requisite evidence to make out each complaint beyond a reasonable doubt and thereby proving that the attorney is guilty of professional misconduct.
37. The Panel must examine each complaint to determine whether the evidence meets the required standard of proof in either respect.

Failure To Give Account.

38. The Complainant alleges that the Respondent breached canon VII(b)(ii) of the Legal Profession (Canons of Professional Ethics) Rules ("The Canons"). This Canon states:

"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 and he shall for these purposes, keep the said accounts in conformity with the regulations which may from time to time be prescribed by the General Legal Council."
39. The Legal Profession (Accounts and Records) Regulations of 1999, give detailed mandates to attorneys as to the manner in which funds and property belong to clients and third parties are to be maintained.
40. A review of the case law regarding canon VII(b)(ii) makes it clear that the courts have interpreted the meaning of failure to account as being where the Attorney has some money for the client and not handed it over despite being reasonably required to do so: **Re Browne (1972) 19 WIR 1**. In this case, Douglas CJ stated the following:

I think the principle is laid down by LORD ESHER. M.R., in Re Grey (4) where he said ([1892] 2 Q.B. at p.443):

"... the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore, be affected by anything which affects the strict legal rights of the parties . . . So, if a solicitor obtains money by process of law for his client, quite irrespective of any legal liability which may be enforced against him by the client, he is bound, in performance of his duty as a solicitor, to hand it over to the client, unless he has a valid claim against it. If he spends it, or if, still having it, he refuses to hand it over, he commits an offence as an officer of the Court, which offence has nothing to do with any legal right or remedy of the client." [Emphasis added]

41. In this case the Attorney General sought an order for a Solicitor to be struck off the roll on the ground that he failed to account for and repay his client's money received to purchase property and for failing to pay over the balance of money due to an estate which the Solicitor had received on the sale of property belonging to the estate. The Solicitor had been retained to represent the client in the purchase of property, £2,500.00 was paid over to the Respondent's firm on account of the purchase price for the property but the transaction was never completed, and repayment was requested. Although the Solicitor made promises to repay the money he never did so. The Court held:

"I hold that the Respondent was under a duty to pay over to his clients the amounts set out in the notice of motion. Further, the uncontroverted facts contained in the affidavits show that he had no valid claim to the money. His failure to pay over after numerous requests, his unfulfilled promises to pay, the absence of any explanation, either to his clients or in this Court, all go to show that the only logical inference to be drawn in this case is that the Respondent either used the money himself or if he still has it, he has refused to pay it over. There is no doubt in my mind as to the standard of proof required in this case: it must be proved to the high standard required by the gravity of the charges; see Bhandari v Advocates Committee 950. Nor am I in any doubt that the Respondent's failure to account and failure to pay over in the circumstances

described above constitute improper conduct on his part and conduct unbecoming a solicitor of the Supreme Court. The order of the court will be the Respondent, John Phillip Browne, will be suspended from practice for the space of two years and that he must pay the costs of these proceedings". (page 6)

42. The interpretation referred to at paragraph 40 above has been adopted by the Disciplinary Committee as demonstrated in the cases of **Kemisha Gregory v Debayo A. Adedipe – Complaint No. 26/2018** (Decision delivered on the 23rd October, 2019); **Garrett Dawkins v Jermaine R. Simms – Complaint No. 48/2009** (Decision delivered on the 21st September, 2017); and **Petitia Cooper and Neville Fearon v Daimian Masters – Complaint No. 29/2014** (Decision delivered on the 25th September, 2015) **Dawn Matthews v C. Judith Pantry; Complaint No. 56 of 2020**.
43. The issue therefore is whether the Respondent in this case was entitled to charge the fees which he states was charged on the Final Statements of Account (exhibits 8-10) and to retain and deduct same from the sum of \$547,500.00 paid which comprised a retainer of \$100,000.00 and deposit and half cost payable on the agreement for sale for the Ebony Vale property.
44. While we do not by this decision make any pronouncement on the persuasiveness of the authorities cited from the United States of America, it is worth pointing out that the Respondent himself did not do, as he submitted, that the case of **Tammy Sharif (2011)**, *supra*, instructed him to do, which was to return the funds to trust until the dispute is resolved. Instead, he has converted those funds to fees.
45. The relevant evidence is as follows¹:

“Osbourne: On the 1st July, when we were having this discussion about moving on to a next attorney and fees and the return of her money. And what would follow if I do not return \$547,000.00 to her things would follow such as a Police Report. That was the first thing she said she already had an attorney; she knows people in high and low places, she said all of this on that date. And I indicated to her she should go to the General Legal Council if she believes that she is over charged or I robbed her or whatever she believes, she should not only go to the police station but to the GLC. She informed me that she went to the police station via email, she went to the police station, and she went to the GLC. I was paid from the 1st July when I told her that I will be paid for all the work done.

¹ Proceedings held 23 July 2022

Panel: Mr. Osbourne, is it that you transferred those monies as your fees from the account? Is that what you did?

Osbourne: Yes, I did. It was moved from the Client Account to my business account.

Panel: But Mr. Osbourne, based on the rough calculation, your Statements of Accounts comes to \$545,744.00 and the money that she paid you was \$547,500.00.

Osbourne: So, that would mean she owes me \$10,000.00?

Panel: Seems like you owe her some money.

Osbourne: Oh, I owe her, I see. Right, so yes. Based on that calculation, I would owe her \$10,000.00. And I must be fair to Ms. Pinnock leading up to the 1st July there was an ongoing conversation about reducing, this was wholly discretionary. When we had this ongoing conversation about what I would be willing to ask for. That's where we ended up at a conflict. So, at my discretion I did have that conversation that I do recognize that it's costing you a lot and we have not closed a deal as yet. And that is why I recommended her to a purchaser – to a vendor, sorry, who was ready to sell, and she had all the things ready to go to a suitable purchaser. So, I did every step to mitigate how much she would spend. At every step of the way it was about avoiding her paying a lot of money for a house."

46. This Panel finds the case of *Gresford Jones v The General Legal Council (ex parte Owen Ferron) Miscellaneous Appeal No. 22/2002* (delivered March 18, 2005) instructive. In that case, the Court of Appeal found that the Attorney cannot unilaterally alter his fees without the agreement of the client. Therefore, an attorney who altered a fee that was initially agreed with the client was guilty of professional misconduct. Harrison JA said at page 36 of the judgment:

"the conduct of the appellant in respect of his attempt to change the initially agreed rate of remuneration is unfair and unreasonable ... Such conduct was indeed unbecoming of the appellant as an Attorney and accordingly would itself also be a breach of Canon 1(b)"

47. The findings of the Court of Appeal in *Gresford Jones* case are in keeping with section 21 of the Legal Profession Act which states:

"(1) An attorney may in writing agree with a client as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:..."

48. In the present case, both parties agreed that as part of the initial interaction between the Complainant and the Respondent, the Complainant was provided with what has been classified as "intake documents" which included a Retainer Agreement. In her cross-examination the Complainant stated that she received the document and signed it.
49. This Panel does not agree with the Respondent's submission that the Complainant's failure to include the retainer document as part of her evidence goes to her credibility or that her case must fail as a result thereof. Indeed, it was never put to her in cross examination that the failure to present that document as part of her evidence was for nefarious reasons. It would therefore be unfair to the Complainant to draw such an inference.
50. Nonetheless, it is to be remembered that the draft Retainer Agreement was part of the Documents relied on by the Respondent and which was put to the Complainant in cross-examination and which she admitted to signing.
51. The following terms of the Retainer Agreement are instructive:

a. "1. ENGAGEMENT OF ATTORNEY

The CLIENT hereby agrees to engage the ATTORNEY in order to assist with the purchase of a property at TANKERVILLE PEN, 198 MOUNTAIN VIEW AVENUE in the parish of Saint Andrew registered at volume 1327 Folio 835 in the Register Book of Tides, from OLIVIA KELLYANN ROSE. This assistance shall be provided by the ATTORNEY exclusively from Jamaica. The ATTORNEY shall use his best efforts to assist the CLIENT under this agreement

This retainer agreement applies only to the above mentioned matter and the services reasonably required completing the sale. If you require further legal services you will need to enter a new retainer agreement with this Attorney or retain other counsel.

...

4. ATTORNEY FEES

The CLIENT agrees to pay to SEAN G.M. OSBOURNE IN TRUST the amount of JMD 300,000.00 on account of ATTORNEY FEES according to the following fee schedule:

- The sum of JMD 100,000.00 immediately upon execution of this contract;

-The sum of JMD 200,000.00 upon being informed of the completion of t

...

REFUND POLICY- Fees paid in trust are not refundable if the contract is terminated by the client. In any event, the Attorney's total liability under this Contract is limited to any Attorney Fees paid by the Client to the Attorney."

(Emphasis Added)

52. Having read and considered the totality of the Retainer Agreement including the above cited clauses, this Panel comes to the conclusion that on a proper

construction, it means that if the transaction is not completed the Respondent would be entitled to retain the sum of \$100,000.00 as his fees. Such amount being the only amount that would have been paid into trust as fees at the termination of that transaction.

53. There is no evidence in this case that another retainer agreement was presented to the Complainant or signed by her in respect of the Respondent's engagement in respect of transactions involving the proposed purchase of the Ebony Vale or Hampton Green property. Certainly, it was never suggested to the Complainant that such existed.
54. Having regard to the terms of the said retainer Agreement this Panel finds that there was no retainer agreement in respect of the Respondent's engagement in respect of the purchase of Ebony Vale or Hampton Green. The Panel however notes that both parties agreed that of the sum of \$547,500.00 which was paid by the Complainant to the Respondent in respect of the Ebony Vale transaction, \$100,000.00 was a retainer.
55. There is however no evidence as to how this retainer sum was to be treated as was the case with the Mountain View Property. It was certainly not suggested to the Complainant that she was bound by the same terms of the Retainer Agreement. Instead, the Respondent suggested that the fees he is entitled to were based on time spent. He, however, could not identify to the Panel what hourly rate was being used or how the figures in his Final Statement of Account dated July 19, 2021 (exhibit 10) were arrived at.
56. The evidence in this regard is as follows²:

"Panel: The several Statements of Accounts which you—well two, no let's say exhibit ten in which you have stated fees for work done, how were those fees arrived at?

Osbourne: Initially as I explained there's an invoice that tells you— Ebony Vale, let's say it's \$8,000,000.00, we said there would be three percent—

Panel: This one is in relation to Hampton Green. So, lets deal with Hampton Green, exhibit ten, final statement.

Osbourne: She would receive an invoice that says Hampton Green will cost you such amount.

Panel: That's initial statement?

² Proceedings held 23 July 2022

Osbourne: Initial statement. This is in discussion, it's on paper, she knows how much it will cost. So, she would know that whatever monies I had on trust for her it's short monies for deposit. So, I had to explain that to her and let her know how much more she will need when the agreement is signed. So, she had an idea of how much Hampton Green would cost. The sale fell apart she wants back her money. I said okay, we have a lot of accounting to do because I have to calculate everything and see if I owe you, what I can absorb because there was a discussion about what I as an attorney, her attorney can absorb because she is moving away or whatever it is. She said she objected to that and said she wants all her money; she has to get all the money. I then had to look at the work that was done up to the point that the sale fell apart. I had to look at the agreement that I drafted, the discussion with her, the discussion with the vendors. I had to look at this whole issue the surveyor and the valuation. I had to guide her through that part. I had to look at all the correspondence, everything I did, and I priced her accordingly. Telephone calls, everything.

Panel: Alright, so, you say that you priced her accordingly, what rate is it that you are using to arrive at these figures? Rate, if any, I should say. How are you arriving at them? How are you arriving at – for example, \$15,800.00 for further conference to take instructions.

Osbourne: Alright, so, usually when a client comes to me as an attorney, I charge between \$10,000.00 to \$15,000.00 for my first time talking to you. Normally, people pay me consultation fee. So, that would be like a standard figure, \$10,000.00 per hour if we are doing hourly rate. So, in Ms. Pinnock's case, if I was to say I'm going to arrive at a figure by charging her per hour. I would then have to look at all the time I spent with her and calculate that per hour because we are no longer going at the 3% on completion. What she is saying to me is give me back my money, don't collect anything and I'm saying no. I have to find some way to collect it.

Panel: Alright, that's not what I'm asking you though. I just wanted to know how you arrive at the figures. But at what point did you communicate to her, how then you would be charging the fees, given that the transaction was not completed?

Osbourne: Well, initially from October, I explained to her that I work with a retainer, and I explained to her how the retainer works and what would happen if we don't conclude a transaction. So, when the first one failed, we had that discussion but now in July we had the discussion where I'm like look, we have to find a way where you're happy, so, let's see how we can see what is reasonable for all the work done from October to now because you are now parting I have no more money to get from you, absolutely none. You didn't get what you wanted, you are disgruntled, but I have been working.

Panel: So, there was therefore no agreement beforehand then as to what your rates would be in the event of the transaction not going forward.

Osbourne: Essentially it said, like I told her, I would have to price each service offer. I didn't like tell her okay, for me to read something it's going to be this figure, it's \$10,000.00 per hour, I didn't tell her that. Now, the only thing she has as guidance was the initial statements.

Panel: And just to follow up from that, the initial statement in respect of Hampton Green, which is exhibit eleven you are saying that that statement, which is dated May 26, 2021, would've given Ms. Pinnock an idea of what the charges would be that she was ultimately charged on July 19, 2021?

Osbourne: No, that initial had the thing been completed, so had it been 50%, had everything gone according to plan that would have been –"

57. There being no evidence of an agreement on fees between the parties as it relates to the Ebony Vale and Hampton Green transactions, it is this Panel's finding that the Respondent was not entitled to the fees charged in the Statements of Accounts in respect of same. It is equally the finding of the Panel that the Respondent is not entitled to the sum stated in the Final Account relied on in respect of the Mountain View property as same is in direct contradiction to the Retainer Agreement and therefore in breach of section 21(1) of the Legal Profession Act. All the Respondent would be entitled to pursuant to the Retainer Agreement would be \$100,000.00.
58. Accordingly, the Respondent was not entitled to transfer those funds received from the Complainant that is, the \$547,500.00, out of trust and to convert same to fees as he admittedly did.
59. There being no agreement in relation to the fees to be charged in respect of those transactions for Ebony Vale and Hampton Green, the Respondent had no entitlement to retain the sum of \$447,500.00 being the deposit and half costs paid on the Ebony Vale transaction or any part thereof. The sum of \$447,500.00 was paid to the Respondent as part of a conveyancing transaction as a deposit on account of the purchase price. He was therefore not entitled to retain any portion thereof without the direction or consent of the Complainant. Consequently, the Respondent should have handed over those monies to the Complainant once the request was made. His failure to do so is in breach of Canon VII(b)(ii).
60. This conclusion is supported by the **Target Holdings Limited v Redferns (H.L.(E.))** [1996] A.C. 421 where the Court states at page 436 A-B the following:

“In the case of moneys 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.

61. The Panel does not however agree with the Complainant’s submission that she is entitled to the return of the total sum of \$547,500.00. It is undisputed that \$100,000.00 of the said total sum was paid as a “retainer fee”; and would therefore not only properly stand to the credit of the Complainant in the Respondent’s trust account as being on account of fees, but would also constitute the only sum against which the Respondent could properly claim a right to lien in respect of any fees chargeable by him.
62. There being no Agreement between the parties as to how the fees would be charged in respect of Ebony Vale and Hampton Green transactions, the proper thing for the Respondent to have done was to proffer a bill to be taxed in accordance with section 22 of the Legal Profession Act.
63. Sections 21 and 22 of the Legal Profession Act set out clear guidelines as to what an attorney may do where there is a dispute regarding fees. It is not open to the attorney to unilaterally decide what his fees should be and then deduct same from trust monies which he holds for the client. This is certainly not what is contemplated by Regulation 18 of the Legal Profession (Accounts And Records) Regulations, 1999, which recognizes that an Attorney has a lien over property in his possession until he is paid costs due to him:

“Nothing in these Regulations affects an Attorney-at-Law right to lien, setoff, counter-claim, charge or any other right against moneys standing to the credit of a client account or trust bank account.”

64. Having heard the evidence of the Complainant and the Respondent and read all the affidavits and exhibits, the Panel makes the following findings of facts:

Finding of Facts:

- (i) The Respondent was contracted by the Complainant in or about October 2020 to act on her behalf in the purchase of a property located at 198 Mountain View Avenue in the parish of St. Andrew.
- (ii) The Respondent sent to the Complainant by email several documents including the draft Agreement for Sale and a draft Retainer Agreement;
- (iii) The Complainant signed the Retainer Agreement but did not return it to the Respondent.
- (iv) The proposed purchase of the Mountain View property was not completed.
- (v) No sums were paid to the Respondent in respect of the Mountain View property.
- (vi) The Respondent acted for the Complainant in the proposed purchase of land located in Ebony Vale, St. Catherine.
- (vii) On 5 February 2021, the Complainant paid to the Respondent's client account the sum of \$547,500.00. Of the sum transferred, \$100,000.00 was the retainer amount and \$447,500.00 was the deposit payable on the proposed purchase of property located in Ebony Vale.
- (viii) There was no written Retainer Agreement for Ebony Vale setting out how the "retainer fee" of \$100,000.00 for services rendered in the purchase of the property was to be treated. It is undisputed, however, that the sum of \$100,000.00 was paid as a retainer in respect of services for conducting that sale and the Panel finds that there is an oral agreement in that regard.
- (ix) The proposed purchase of the Ebony Vale property was not completed.
- (x) The Respondent acted for the Complainant in the proposed purchase of land located at Hampton Green, Spanish Town.
- (xi) The proposed purchase of Hampton Green was never completed.
- (xii) No Final Statements of Accounts were delivered to the Complainant by the Respondent.
- (xiii) There was no agreement between the Complainant and the Respondent in respect of the fees set out in the Final Statements of Accounts adduced into evidence (exhibits 8-10) by the Respondent.
- (xiv) The Attorney transferred from his trust account the sum of \$547,500.00 as his fees for the conduct of all the land transactions including Mountain View Avenue, Ebony Vale and Hampton Green;
- (xv) The Complainant did not agree to the Respondent's entitlement to such fees.
- (xvi) The Complainant has made several reasonable requests to the Respondent for her monies to be returned to her.
- (xvii) The Respondent has to not returned any sums to the Complainant.
- (xviii) The Respondent had no proper basis to transfer funds of \$547,500.00 from his trust account as fees for the conduct of transactions for the properties listed at (xiv) above. At most, the Attorney could properly have claimed a lien in respect

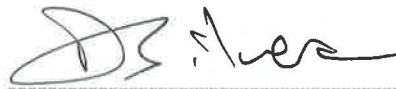
of the amount of \$100,000.00 held, as to the fees to be charged upon the failure of the Ebony Vale transaction.

CONCLUSION

- 65. Having carefully considered the oral and affidavit evidence of both the Complainant and the Respondent together with the exhibits, the Panel finds that the evidence presented by the Complainant has met the requisite standard of proof, that is proof beyond all reasonable doubt in relation to the ground of complained of, that is, the Respondent has breached Canon VII(b) (ii) of the Legal Profession(Canons of Professional Ethics) Rules in that he has failed to account to the Complainant, Carree Pinnock for all the monies in his hands for her account or credit although reasonably required to do so, being \$547,500.00. The Panel therefore finds the Attorney to be guilty of professional misconduct as per Canon VII (b) of the Legal Profession (Canons of Professional Ethics of Rules).

- 66. In accordance with the procedure recommended by the Court of Appeal in **Owen Clunie v General Legal Council SCCA No. 03 of 2013**, the Panel directs that a date be fixed to give the Respondent an opportunity to be heard in mitigation before a sanction is imposed.

Dated the 25th day of September 2023



DANIELLA GENTLES-SILVERA, KC



CARLENE LARMOND, KC



SIDIA T. SMITH

