

When this matter came up for hearing on the 8th April 00, the attorney failed to appear as required by the Rules under the Legal Profession Act. The panel satisfied itself that the attorney had been effectively served with the Notice of Hearing and proceeded to adjudicate on the complaint. This course was open to the panel in light of Rule 8 of the fourth schedule to the Legal Profession Act.

THE COMPLAINT - By way of formal application dated the 15th June 1999, the complainant instituted these disciplinary proceedings against the attorney. The affidavit in support is very detailed and it will be necessary to refer to all the charges outlined therein. At the outset, counsel for the complainant indicated that he would not be proceeding with the charge identified as (e) in its affidavit in support of the complaint. This particular paragraph refers to a transaction involving one Margaret Stewart. The panel was advised by counsel for the complainant that the sum due in that sale had been paid by the attorney.

The remaining charges are as follows:

- (a) On the 28th October 1998, the complainant instructed the attorney to prepare an instrument of mortgage to secure a loan it had granted to one Phillip Bennett and others. This mortgage was to be registered against premises known as Lot R54, Sydenham Avenue, Sydenham in the parish of St. Catherine and registered at Volume 954 Folio 235 of the Register Book of Titles. In pursuance of its commitment to the purchasers, the complainant, by letter dated the 23rd December 1998 forwarded the sum of \$1,100,000 to the attorney to be paid over to the vendor. This sum represented that portion of the proceeds of sale secured by the mortgage. This sum was not paid over by the attorney to the attorneys-at-law for the vendor, Messers Broderick & Broderick. The complainant was obliged to send a second sum to the attorneys-at-law in the sum of \$1,100,000.00 in settlement of its mortgage commitment. By letter dated the 15th January 1999, the complainant wrote to attorney asking him for an account of the monies disbursed to him in the transaction. The complainant never received a response from the attorney.
- (b) By letter dated the 10th November 1998, the complainant instructed the attorney to prepare an Instrument of Mortgage to secure a loan to purchasers Patrick Daley and his wife, and register same against certificate of title registered at Volume 1132 Folio 718 of the Register Book of Titles. This premises is known as 1 Kimberly Court, Golden Acres in the parish of St. Andrew. The complainant forwarded its cheque to the attorney in the sum of \$2,080,035.77 representing the net mortgage proceeds to settle its commitment to the vendor. The vendors advised the complainant on or around January 4th 1999, that they had not received this sum from the attorney. The complainant then forwarded its cheque to the vendors, Gregory Solomon and his wife in the sum of \$2,080,035.77 in settlement of the mortgage proceeds. By letter dated the 8th January, 1999, and copy letter dated January 6th, the complainant, but no response on account of the monies disbursed to him by the complainant, but no response has ever received from the attorney.
- (c) By letter dated the 4th December 1997, the complainant instructed the attorney to prepare The Instrument of Mortgage in relation to a loan to Ricket Allen and Rhoma Allen and register the said mortgage against premises known as Lot 4, Past of Rocky Park, in the parish of Manchester and registered at Volume 955 Folio 139 of the Register Book of Titles. By letter dated the 5th February 1998, The complainant forwarded its cheque to the attorney in the sum of \$1,200,000.00. This sum represented the gross mortgage proceeds to be paid over to the vendor. On or about the 5th February 1999, the complainant was advised that the vendor had not received the sum representing the mortgage proceeds from the attorney. On the 15th April 1999, The complainant paid the sum due to the vendor by sending a cheque in the sum of \$1,200,000.00 to the vendor. The attorney was convicted in the Resident Magistrate's Court on criminal Charges in relation to this sum and the complainant has received no account of funds from the attorney.

- (d) By letter dated the 13th October 1998, the attorney, acting as the vendor's attorney under an agreement for sale, gave his undertaking to the complainant that he would settle the sum due to the complainant under a mortgage loan which the complainant had made to one Pansy Grant and others, after the sale had been completed. This mortgage had been secured against premises known as 1 Clievdn Close and registered at Volume 1062 Folio 482 of the Register Book of Titles. The relevant duplicate certificate of Title and the Discharge of Mortgage were sent to the attorney on the basis of his undertaking. The complainant's Mortgage against the said property was duly discharged and the premises sold to the new purchasers. The attorney has failed to settle the outstanding balances due to the complainant under the mortgage that was discharged. This sum stood in the amount of \$3,854,458.55 as of the 29th January 1999. Despite several requests to the attorney by the complainant to settle the outstanding sum the attorney has not responded to these requests.
- (f) That by letter dated the 7th September 1998, the attorney, acting as the vendor's attorney under an agreement for sale, gave an undertaking to the complainant on behalf of its mortgagors Margaret Barrett and Sonia Ruddock to settle from the proceeds of the sale, their indebtedness to the complainant in relation to a mortgage loan secured by a mortgage registered against premises known as Apt. No. 25 Tiffany Manor, 5 Kensington Crescent, Kingston 5 in the parish of St. Andrew. On the basis of this undertaking, the complainant forwarded to the attorney the relevant duplicate certificate of title and Discharge of Mortgage and Statements to Close. The complainant's mortgage on the said premises was duly discharged and the premises sold. The attorney has failed to settle the sum due in the amount \$1,200,000.00. Despite requests made by the complainant to the attorney, to settle the said mortgage loan, he has failed to do so.
- (g) That by letter dated the August 20th 1998, the attorney acting on behalf of the vendors in a sale, issued an undertaking to the complainant on behalf of its mortgagors Patrick Blake and Anne-Marie Blake, to settle their indebtedness to the complainant from the proceeds of sale. This mortgage loan had been secured by mortgages registered against premises known as Lot 355 Azalea Close, Braeton New town, in the parish of St. Catherine and registered at Volume 1269 Folio 592 of the Register Book of Titles. In exchange for this undertaking, the complainant sent to the attorney, the relevant duplicate certificate of title, the executed discharges of mortgages, and the statements to close. The complainant's mortgages on the said property were duly discharged, and the property sold. The attorney has failed to pay over the sum of \$1,111,374.01 that was the amount due to settle the mortgage debt as at the 29th January 1999. Despite several requests made by the complainant to the attorney to settle the sums due the attorney has failed to respond.
- (h) By letter dated the 7th January 1998, the attorney acting as the attorney-at-law for the vendor, gave an undertaking to the complainant on behalf of its mortgagors Sonia Reid and Suzette Parker to settle their indebtedness to the complainant from the proceeds of sale. The mortgage had been registered against premises known as Lot 16, Part of Waterloo Gardens, Kingston 10 in the parish of St. Andrew, and registered at Volume 959 Folio 336 of the Register Book of Titles. On the basis of the aforesaid undertaking, the complainant sent to the attorney, Duplicate Certificate of title, the relevant Discharge of Mortgage and Statement to Close. The complainant's mortgage on the said security was duly discharged and the security sold by the complainant's mortgagors. The sum due to the complainant to liquidate the said mortgage loan at January 29th 1999 stood at \$2,660,436.86. Despite several requests made by the complainant to the attorney to settle the outstanding mortgage loan, there has been no response from the attorney and he has not paid the sum due.

It is further stated in the affidavit that at all material times the attorney was the only attorney with whom the complainant dealt in all the transactions although the attorney practiced under the name of Kevin Martin & Co. and that the complainant was seeking to recover the sum of \$13,833,437.14 from the attorney. (This sum is now less due to the withdrawal of complaint (e).)

The formal charges in the affidavit are as follows:

1. The attorney has failed to provide all information as to the progress of the complainant's business with due expedition, although it has reasonably required him to do so.
2. He has not dealt with complainant's business with allude expedition.
3. He has acted with inexcusable or deplorable negligence in the performance of his duties.
4. He has not accounted to the complainant for all monies in his hands for its account or credit, although it has reasonably required him to do so.

THE EVIDENCE ;

Mr. Delroy Bowen gave evidence in support of the complaint. He is the same person who swore to the affidavit deposed to by the complainant. He gave evidence that he was employed to the complainant as Executive Officer responsible for compliance and administration. He was asked to carry out an investigation in relation to various mortgages on which monies were outstanding. As a consequence of the audit he was assigned to conduct, the witness had two or three interviews with the attorney. He had commenced the audit because of few mortgagors complained that they were receiving mortgage arrears letters for mortgage loans they had already repaid. Vendors complained that they had not received the proceeds of sale of their properties. These complaints started in or around 1998. The attorney had written to the complainant by letter dated the 7th January 1998, advising the complainant that he acted on behalf of the vendors Sonia Reid and Suzette Parker and requested the following documents:

1. Duplicate Certificate of Title
2. Discharge of Mortgage
3. Statement to Close to February 28th 1998

It is to be noted that the evidence now being recounted relates to complaint listed as (h) in the affidavit in support of the Application.

In the said letter, the attorney undertook to settle the indebtedness of the vendors to the complainant from the sale proceeds.

The letter, the Statement to Close, a copy of the Certificate of Title, letter dated the 21st May 1998 written by the complainant to the attorney, letter dated the 28th October 1999 by the complainant to the attorney, and letter dated the 30th November 1998 from the complainant were tendered as exhibit 1.

On an examination of the Certificate of Title registered at Volume 959 Folio 336 of the Register Book of Titles it will be seen that mortgage No. 927613 was granted to the complainant by the vendors and registered on the 19th April 1996. The said mortgage was discharged on the 12th February 1998 and the Transfer registered in the name of the purchasers on the same 12th February 1998.

In its letter dated the 21st May 1998, the complainant enquired of the attorney about the delay in the settlement of the mortgage debt. And asked that the documents be returned to the complainant if the sale was not closed by the 30th June 1998. A new Statement to Close was also sent to the attorney under cover of that letter. The complainant, in its letter of the 28th October 1998 again queried the status of the sale and made a demand for the return of its documents.

In his letter of the 30th November 1998, the attorney wrote saying that he was enclosing a cheque in the amount of \$285,713.01 to pay off the arrears on the mortgage account. This amount was not paid nor did the attorney settle the mortgage account.

The witness gave the following evidence in relation to the complaint listed as (a) in the affidavit in support of the complaint.

By letter dated the 28th October 1998, the complainant wrote to the attorney instructing him to prepare Instrument of Mortgage in the amount of \$2,867,925.05 to secure a loan being made to Phillip Bennett et al. This letter along with letter dated the 27th November 1998, from the attorney to the complainant, letter dated the 15th January 1999 from the complainant to Messers Broderick & Broderick, attorneys-at-law were tendered as exhibit 2

The attorney, under cover of letter dated the 27th November 1998, confirmed that he had duly carried out the complainant's instructions and returned the complaint's documents to it. The mortgage in favour of the complainant was duly registered on the Duplicate Certificate of Title securing the loan granted to the said Phillip Bennett et al.

Under cover of letter dated the 23rd December 1998, the complainant sent to the attorney a Statement of Proceeds along with a cheque in the amount of \$1,100,000.00 the amount of the mortgage loan. On or around the 12th January 1999, the complainant was advised that the vendors had not received the proceeds of the mortgage loan from the attorney.

By letter dated the 15th January 1999, the complainant replaced the sum it had already sent to the attorney by sending cheque No. 905541 in the sum of \$1,100,000.00 to Broderick & Broderick. The attorney never refunded this sum to the complainant. Exhibits tendered in evidence as 8 and 8A corroborate this evidence. Exhibit 8, cheque No. 905369 demonstrates that the attorney negotiated the complainant's cheque in the amount of \$1,100,000.00. Exhibit 8A is cheque No. 905541 made payable to Broderick & Broderick in the sum of \$1,100,000.00.

Under the charge numbered (b), the attorney was instructed by the complainant to prepare Instrument of Mortgage to secure a loan to Patrick Daley and his wife. These instructions were contained in the complainant's letter to the attorney dated the 10th November 1998 and all the necessary documentation was sent to the attorney to enable him to fulfill these instructions.

On the 17th December 1998, the complainant sent the mortgage proceeds in the amount of \$2,080,035.77 to the attorney. This sum should have been paid over to the vendor. The attorney failed to pay over the said sum to the vendor. The complainant paid a second sum in the same amount to the vendor. The complainant subsequently wrote to the attorney enquiring about the status of the matter. The attorney has not responded to this request nor has he refunded the sum to the complainant.

The following documents were admitted in evidence as exhibit 3.

- 1 Letter dated the 10th November 1998 by the complainant to the attorney.
- 2 Letter dated 10th December 1998, the attorney to the complainant.
- 3 Letter dated the 17th December 1998 from the attorney to the complainant
- 4 Fax dated the 4th January 1999 from the complainant to the attorney.
- 5 Two letters dated the 6th January 1999 from the complainant to the vendors.
- 6 Letter dated the 6th January 1999 to attorneys-at-law Gifford, Thompson & Bright.
- 7 Complimentary slip from the complainant to the attorney indicating that it had sent copy letters dated the 6th January 1999 to the attorney.

In continuing his evidence, Mr. Bowen stated that the complainant instructed the attorney to prepare Instrument of Mortgage on behalf of Rhoma and Rickert Allen. He was authorized to register the said mortgage against premises Lot 4, Part of Rocky Park in the parish of Manchester and registered at Volume 955 Folio 139 of the Register Book of Titles. This mortgage was in the amount of \$1,200,000.00.

The attorney carried out the instructions he was given and provided proof by way of letter dated the 7th January 1998. The complainant sent a cheque in the amount of \$1,200,000.00 to the attorney to be paid over to the vendor.

This transaction is the one adumbrated in paragraph © in the affidavit in support of the complaint, and for which the attorney was convicted. The attorney has never accounted to the complainant for these funds.

Letters dated the 4th December 1997, 7th January 1998, and the 5th February 1998 were admitted in evidence as exhibit 4.

Pansy and Washington Grant were mortgagors of the complainant. They sold the property, 1 Clievden Close on which the complainant's mortgage was registered. The attorney acted on behalf of the Grants in this sale. The attorney by letter dated the 13th October 1998, formally requested all relevant documents from the complainant on his undertaking to settle the indebtedness of the Grants to the complainant from the proceeds of sale. The complainant forwarded the documents to the attorney including the duplicate certificate of title registered at Volume 1062 Folio 482 of the Register Book of Titles. The complainant has not yet received the amount of the debt from the attorney. The amount outstanding is \$3,854,458.55.

Letter dated the 13th October 1998, letter dated the 23rd November 1998, Statement to Close dated November 17th 1998, were tendered as exhibit 5. This evidence relates to complaint (d) in the affidavit in support of the complaint.

The complaint at paragraph (f) of the affidavit in support of the complaint is similar in circumstances to that at paragraph (d). The attorney had carriage of sale in relation to property registered at Volume 1270 Folio 298, in the names of Sonia Ruddock and Margaret Barrett. The attorney requested that the complainant provide him with the necessary documentation to complete the sale, on his undertaking to settle the indebtedness of the mortgagors from the sale proceeds. In this instance, the complainant did not forward the documents directly to the attorney but instead secured the services of the firm of Watson & Watson to protect its interests. The relevant documentation was sent to the attorney by the said firm of Watson & Watson on his undertaking not to do anything to the prejudice of the complainant and not to make use of the documents unless he was able to liquidate the total indebtedness of the vendors to the complainant.

The property was transferred to the purchasers and the total amount of the mortgage proceeds paid over to the attorney by the National Housing Trust in the amount of \$1,200,000.00. The exhibits disclose that the attorney was paid these proceeds on the 8th December 1998, and he acknowledged receipt of this sum on the 14th December 1998. The attorney has never accounted to the complainant for this amount.

Letter dated the 7th September 1998 with authorisation annexed, Agreement for Sale, letter dated the 17th September 1998, Statement to Close, letter dated the 18th September 1997, letter from Watson & Watson the attorney which is incorrectly dated, and letter from Watson and Watson to the complainant were admitted in evidence as exhibit 6.

Under complaint numbered (g), by letter dated the 20th August 1998, the attorney, acting as the vendor's attorney-at-law, issued an undertaking to the complainant, that he would settle the vendor's indebtedness to the complainant on the completion of the sale. In return for this undertaking he requested from the complainant and obtained inter alia, the duplicate certificate of title registered at Vol. 1269 Fol. 592 of the Register Book of Titles, and Discharge of Mortgage. These documents were sent to the attorney by the complainant under cover of letter dated the 28th August 1998.

The attorney failed to liquidate the vendors' indebtedness to the complainant from the sale proceeds.

The following documents were admitted in evidence as exhibit 7: letters dated the 20th August 1998, the 18th August 1998, 28th August 1998, and Statement to Close.

On the resumption of the hearing of this complaint on the 15th September 00, the witness Delroy Bowen continued his evidence. This evidence was largely concerned with admitting additional documentation in support of the complaints.

Cheque No. 905291 was tendered in evidence as exhibit 9. This is the cheque that the complainant sent to the attorney for him to pay over the mortgage proceeds to the vendor. The attorney failed to pay over the proceeds to the vendor and the complainant had to

replace the funds by sending cheque No. 90541 to the vendors Gregory and Althea Salmon.

The above cheques related to the charge numbered (b) in the affidavit in support of complaint.

A copy of cheque No 901581 was admitted in evidence as exhibit 10. This cheque in the amount of \$1,200,000.00 was paid to the attorney by the complainant to be paid to the vendor. This cheque represented the mortgage proceeds. The attorney did not pay this sum to the vendor and the complainant had to replace this amount. This was done by cheque No. 906429. This cheque was admitted in evidence as exhibit 10A. These exhibits relate to complaint No. ©.

Exhibit 11 is a record of entries made in the current account of the complainant at the National Commercial Bank. This record discloses that that cheque No. 901581 was lodged to and negotiated through the account of the complainant.

Exhibit 12 is a copy of the certificate of title registered at Volume 1269 Folio 592 of the Register Book of Titles. This exhibit relates to complaint (g). This exhibit confirms that the sale in which the attorney had carriage of sale was completed but the attorney did not settle the vendors' indebtedness to the complainant.

Exhibit 13 is a copy of the certificate of title registered at Volume 959 Folio 336 This exhibit relates to complainant (h). This exhibit discloses that the attorney, having carriage of sale under the relevant transaction, completed the sale. He failed to satisfy the vendors' indebtedness to the complainant.

Exhibit 14 is a copy of the certificate of title registered at Volume 1270 Folio 298. This relates to complaint (h). This exhibit confirms that the sale in which the attorney acted on behalf of the vendors was complete but he did not satisfy the vendors' indebtedness to the complainant.

The total sum owed by the attorney to the complainant under all the above transactions and for which he has failed to account to the complainant is \$17,586,340.96.

The above is a fair narration of the evidence adduced in support of the complaint by the complainant, the Jamaica National Building Society.

As has already been stated the attorney failed to appear at the hearing of this complaint.

The only evidence, which this panel has before it is that supplied by the complainant. This is the evidence that the panel is constrained to evaluate. The allegations made against the attorney are very serious ones indeed, and involve impropriety and dishonesty in dealing with money for which he was liable to account to the complainant.

We are mindful of the fact that, in Law the burden of proof rests on the complainant to prove the allegations to the standard of proof demanded in a case such as this.

The standard of proof, or level to which the evidence must rise, is "beyond reasonable doubt." This was confirmed in the leading Privy Council decision of **Bhandari v Advocates Committee** reported at 1956, 3 All E.R. p 743.

In the light of the above statements of principle by which we are guided, we have carefully examined the evidence adduced on behalf of the complainant. We have no reason to doubt the veracity of the witness Delroy Bowen. But even more importantly, the complainant, in support of its complaint produced copious and detailed documentary evidence. This documentary evidence corroborated all the charges in the affidavit of the complainant in every material particular.

We are of the considered opinion that all the charges listed, that is the charges at paragraphs (a) (b) (c) (d) (f) (g) (h) of the said affidavit have been proven beyond reasonable doubt. There is an abundance of evidence clearly establishing that the attorney committed the various acts of which he stands accused.

Pursuant to our evaluation, we therefore make the following findings of fact and mixed law and fact as we are obliged to do in keeping with section 15 of the Legal Profession Act.

FINDINGS OF FACT AND MIXED LAW AND FACT

1. The complainant frequently instructed the attorney to effect conveyancing transactions on its behalf.
2. That it instructed the attorney to prepare and register a mortgage in its favour over land being purchased by Phillip Bennett and others. The attorney registered the mortgage. The complainant sent the mortgage proceeds in the sum of \$1,100,000.00 to the attorney to be paid to the vendor. The attorney did not pay this sum to the vendor and the complainant replaced the said sum. The attorney has not accounted to the complainant for this sum.
3. The attorney was instructed by the complainant to prepare and register Instrument of mortgage over land being purchased by Patrick Daley and his wife. The attorney carried out these instructions. The complainant sent the mortgage proceeds to the attorney to be paid to the vendor in the amount of \$2,080,035.77. This sum was not paid to the vendor by the attorney. The complainant sent the said amount to the vendors Gregory Salmon and his wife in settlement of their obligation to the vendors. The attorney has failed to account to the complainant for this sum.
4. The attorney was instructed by the complainant to prepare Instrument of Mortgage over land being purchased by Rickert and Roma Allen. The Attorney carried out these instructions. The complainant sent the mortgage proceeds to the attorney in the amount of \$1,200,000.00 to be paid over to the vendors. The attorney did not pay over this sum to the vendors. The attorney was also convicted of a criminal offence in relation to this sum. The complainant also had to replace this sum in satisfaction of its obligation to the vendor.
5. The attorney breached his undertaking to the complainant and failed to pay over the sum of \$3,854,458.55 in satisfaction of the mortgage debt owed to the complainant by Pansy Grant and her husband after the sale of the subject property had been completed by him. The attorney has not responded to the complainant to its requests for an account of these sums.
6. The attorney breached his undertaking to the complainant and failed to pay over the sum of \$1,200,000.00 to the complainant in satisfaction of the mortgage debt which Margaret Barrett and Sonia Ruddock had owed to the complainant. The sale was completed but the attorney has failed to account to the complainant for this sum.
7. The attorney breached his undertaking and failed to pay over to the complainant the sum of \$1,111,347.01 in satisfaction of the mortgage debt owed to it by Patrick and Anne-Marie Blake. The sale was completed but the attorney has not accounted to the complainant for this sum.
8. The attorney breached his undertaking and failed to pay over to the complainant, the sum of \$2,660,436.86 in satisfaction of the mortgage debt owed by Sonia Reid and Suzette Parker to the complainant. The sale was completed but the attorney has failed to account to the complainant for this sum.
9. To date the attorney has failed to account to the complainant for a total sum of \$17,586,340.96.

DECISION: The Committee, in applying the law to the facts, and in pursuance of the required standard of proof, is of the unanimous opinion that the attorney is guilty of grave dishonesty and pursued a course of conduct calculated to deprive the complainant of large sums of money lawfully due to it. There is no doubt at all that on these facts, the attorney is guilty of misconduct in a professional respect.

We find that the attorney has breached Canons IV ® and VII (b) (ii) in that he has failed to provide the complainant with all information as to the progress of the its business with due expedition when reasonably required by the complainant to do so.

He has also failed to account to the complainant for all monies in his hands for the account or credit of the complainant.

The Committee makes no findings with regards to the allegations of negligence and inexcusable delay on the part of the attorney in the conduct of the business of the complainant.


Having found the attorney guilty of misconduct in a professional respect, the Committee now has the unenviable task of imposing the appropriate sanction on the attorney. This is always difficult, but on the facts of this case, we are of the view that the attorney must pay the ultimate penalty. No mitigating factors are before us.

In keeping with powers given to us under section 12 (4) of the Legal Profession Act, we make the following orders:

- 1 That the name of the Attorney Kevin L. Martin be struck from the Roll of Attorneys-at-Law entitled to practise in the several Courts of the Island of Jamaica.
- 2 That the said Attorney-at-Law Kevin L. Martin pays the sum of \$17,586,340.96 with interest, by way of restitution to the complainant the Jamaica National Building Society. The interest will continue to run until the full sum due is liquidated.
- 3 Costs \$50,000.00 of be paid to the Complainant by the Attorney Kevin L. Martin.

DATED THE 29th DAY OF March 01


 PAMELA E. BENKA-COKER Q.C.


 JEROME LEE


 LEILA PARKER-ROBINSON