

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

**COMPLAINT No. 33/99**

**BETWEEN**                      **CAROL REDHI**  
   **MARK REDHI**                      **COMPLAINANTS**

**AND**                              **LYNDEN WELLESLEY**    **THE ATTORNEY**

**PANEL:**                              **MISS NORMA LINTON Q.C.**  
   **MR. ALLAN S. WOOD**  
   **MR. L. SAMUEL HARRISON**

**DATES OF HEARING:** 13th October 2001, 25<sup>th</sup> January, 26<sup>th</sup> April, and 10th May 2002

This complaint arises out of an agreement in writing which was made between Robert Martin as vendor and the Complainants as purchasers, dated 8<sup>th</sup> October 1998 for the sale to the Complainants of a dwelling house at 51 Anderson Avenue, Bridgeport, St. Catherine, being the property registered at Volume 1145 Folio 21. The Complainants are a young couple who intended this dwelling to be their home. The Complaint dated 17<sup>th</sup> May 1999 against the Attorney requested the Disciplinary Committee to review the Attorney's conduct and to determine whether the Attorney had acted ethically and legally as follows:

*"The complaint I make against the Attorney-at-Law is that he has acted with inexcusable or deplorable negligence in the performance of his duties. As he admitted in his letter to the Council dated February 18, 1999. He claimed that a sale agreement for the said property was sent to New York in September 1998 to Julia Gordon and Doris Samuels. Subsequently, he collected our deposit and has effected a sale agreement dated October 8, 1998. Is it legal and ethical to have more than one sale agreement for one property running concurrently? Is it legal and ethical to collect individuals' money and mislead them in the way Mr. Wellesley has done? We are asking the Council to review all documents previously submitted and take the necessary action against Mr. Wellesley"*

Though the complaint was ably presented by Mrs. Redhi, the Complainants are not attorneys, and the complaint was therefore not drawn in the customary manner so that, other than the assertion of negligence, positive charges of misconduct were not asserted but rather couched in the form of questions; nevertheless, we find that the complaint was adequate to alert the Attorney to the issues

and the allegations which he was required to answer and no objection was taken by the Attorney to the form of the Complaint.

Further at the commencement of the hearing documents were tendered into evidence by consent including a letter from the Attorney to the General Legal Council dated September 8, 2000 (exhibit 18) and viva voce evidence in support of the complaint was given by Mrs. Carol Redhi. At the end of her evidence testimony was heard from the Attorney as well as his client Mr. Robert Martin. There was no dispute between the parties as to the evidence but rather the issues turned on whether the Attorney's conduct of the transaction amounted to professional misconduct contrary to section 12 of the Legal Profession Act and the Legal Profession (Canons of Professional Ethics) Rules (hereafter called the Canons).

The Panel also wishes to state that at the commencement of the hearing the Attorney opted to proceed without representation, as his Counsel, Mr. Robin Smith was ill. The Panel's perception was that the Attorney's approach was based on his view that the complaint was devoid of merit and the Complainants' redress lay against the vendor. The Panel impressed upon the Attorney the wisdom of having legal representation. Thereafter at the hearings on 26<sup>th</sup> April 2002 and 10<sup>th</sup> May 2002 Mr. Lloyd Shackelford appeared for the Attorney. At the conclusion of his case, Mr. Shackelford conceded, in our view quite properly, that the Attorney was liable to pay interest and to refund the legal costs, which had been paid to him by the Complainants.

As there is no controversy as to the facts which occurred, we set out in summary our findings of fact as follows: -

1. The Complainants entered into an agreement in writing with Robert Livingston Martin dated 8<sup>th</sup> October 1998 to purchase the property comprised in Certificate of Title registered at Volume 1145 Folio 21.
2. At all material times the attorney acted for the vendor while the Complainants were represented by Jennifer Messado & Company (Lanza Turner-Bowen)
3. Upon execution of the agreement for sale, a deposit of \$375,000.00 was paid to the Attorney by the Complainants together with \$11,500.00 being the Complainants' portion of his fee for preparing the agreement.
4. Neither the Attorney nor his client informed the Complainants or their attorneys that the vendor had made other offers to third parties to sell the property and that prior to the execution of the agreement by the Complainants, a similar agreement had been sent for execution to Julia Gordon who resided overseas.

5. In the belief that the vendor intended to honour his contractual obligations to them, the Complainants proceeded to secure a mortgage from the Clarendon Co-op Credit Union Limited as confirmed by letter dated November 9, 1998, exhibit 6.
6. Unknown to the Complainants on or about 13<sup>th</sup> October 1998, the vendor accepted a deposit and entered into a second agreement for the sale of the property to Julia Gordon and Doris Agatha Samuels. The advantage of this sale was that, though the consideration as expressed in Jamaican dollars was the same, the price was payable in United States dollars. The Attorney acted in this second sale.
7. By the Attorney's account the agreement which had been executed by the Complainants had been submitted by him to the Stamp Office for the assessment and payment of stamp duty and transfer tax on 14<sup>th</sup> October 1998
8. Consequent on the receipt of the deposit from Julia Gordon, the Attorney, by his own admission in evidence, withdrew their agreement from the Stamp Office on 16<sup>th</sup> October ~~2001~~ <sup>1998</sup> before the agreement was assessed for the payment of Transfer Tax and Stamp Duty and notwithstanding the fact that special condition 2 of the agreement stipulated that the Complainants' deposit should be used for that purpose. The deposit was not returned nor were the Complainants informed that the vendor was considering pursuing another rival sale.
9. The Attorney counseled the vendor as to the implications of his actions if he elected to proceed with a second sale in breach of his agreement with the Complainants and he went so far as to refer the vendor to another attorney who gave the vendor advice as to the consequences of his decision to proceed with the second sale in breach of the agreement with the Complainants. The vendor remained undaunted in his decision to breach his contract with the Complainants.
10. Thereafter the Attorney continued to act on the vendor's behalf in concluding the sale to Doris Samuels and Julia Gordon without informing the Complainants and with no step taken to immediately return their deposit at that stage.
11. The Attorney proceeded to prepare a transfer of the property to Julia Gordon and Doris Samuels, which is dated 23<sup>rd</sup> November 1998 (exhibit 5). The transfer exhibit 5 was stamped with remarkable alacrity on 24<sup>th</sup> November 1998 and that transfer together with a discharge of an outstanding mortgage to the Bank of Nova Scotia Jamaica Limited was registered on the title with even greater alacrity on 26<sup>th</sup> November 1998.

12. During the month of November 1998 correspondence was exchanged between the Attorney and the Complainants' attorney as though the Complainants' sale agreement was on foot and moving to completion. It was after the transfer was registered on title that the attorney by letter dated 11<sup>th</sup> December 1998, exhibit 14, wrote to the Complainants' attorney advising that their agreement had been rescinded and returning the deposit of \$375,000.00 without interest

It is clear from the foregoing that what the Attorney did was to proceed to act for the vendor in two rival and incompatible sale transactions and without informing the Complainants of this fact until after the second sale had been completed by registration of the transfer on title, thereby defeating their equitable interest. The Attorney's failure to inform the Complainants or their attorney during the months of October and November 1998 that he was moving to complete and register the rival transfer misled the Complainants and lulled them into a false sense that their agreement was being completed when in truth that was anything but the case. Interestingly, when the vendor was asked by the Panel why the Complainants were not immediately informed of his intent to proceed with the rival second sale, his answer was that only the Attorney could answer that question. In turn when the Attorney was asked that question by the Panel he could give no satisfactory answer.

The transfer was dated 23<sup>rd</sup> November 1998 and was registered within the short space of time on 26<sup>th</sup> November 1998. The Attorney admitted to the Panel that he did not indicate anything to the Redhis or their attorney during that time. Indeed, the Attorney also admitted, when questioned by the Panel, that the letter (Exhibit 14) advising the Redhis' attorney of the rescission of the contract was sent 11<sup>th</sup> December 1998. His silence during and up to the letter of 11<sup>th</sup> December 1998 was remarkable. By then, the Redhis had been presented with a registered transfer to the other purchasers - a *fait accompli*. When asked about this by the Panel, the Attorney said that his client, Mr. Martin "would have to compensate the Redhis". He said further that they could have lodged a caveat, but he could give no satisfactory answer to the Panel's question that by pushing through the transfer, he had effectively deprived the Redhis from purchasing the property.

Although as a general rule an Attorney does not owe a duty of care to third parties, special circumstances may arise that require a different conclusion, including where it is reasonably foreseeable that loss or injury may result to a third party (see for example, the line of cases applying **White v. Jones** [1995] 2 AC 207 – where a solicitor was held liable to beneficiaries, who were not his clients, under a Will). That duty of care is all the more manifest where, as in the present case, the Attorney knew and admitted during the proceedings that he foresaw the likely harm or loss to the Complainants.

The Attorneys defence was that he was at all times doing his best to discharge his client's instructions and acting in his client's interest. The Panel truly accepts that an attorney has a duty to

act in his client's best interest but as with all such obligations there are limitations, so that in discharging his duty to a client, an attorney is nevertheless expected to act in conformity with legal and ethical principles and to refrain from a course of conduct which will have the effect of lowering the dignity and esteem of his profession. We have no hesitation in finding that what the Attorney did in this case was not compatible with the proper standards of professional conduct and etiquette. The Attorney's conduct was deliberate and had the effect of making it impossible for the Complainants to preserve their claim to the property. If the Complainants had been alerted, it would have been possible for caveat to be lodged or an injunction sought on their behalf prior to the transfer.

By the time that they were informed of the vendor's purported rescission, the property had been transferred by the Attorney. The Panel understands that there are presently proceedings in the Supreme Court instituted by the Complainants for breach of contract and without attempting to trespass on the issues in that action, we comment that the effect of the Attorney's conduct was to effectively deprive the Complainants of their remedy of specific performance of the contract and to limit their claim to damages.

We repudiate the notion that an attorney in doing his best for his client should participate or indulge in deception or that it is permissible to pursue a course of conduct on his client's behalf which amounts to a breach of his client's contractual obligations, and particularly where, as in the instant case, the contract charged the Attorney with the responsibility for overseeing completion of the agreement on his client's behalf by providing that he had carriage of sale and permitting him to use the deposit paid by the Complainants for the purpose of stamping the agreement. The proper course for an attorney in that position who is instructed that his client does not intend to honour the contract is to terminate the retainer and to cease acting and we do not conceive that an attorney who withdraws in such circumstances could be accused of a breach of duty by the client who insists on a course of conduct which violates contractual obligations. This view is supported by Canon IV(q) which enumerates the circumstances when it is mandatory for an attorney to forthwith <sup>wit</sup> draw from his employment with a client as follows:

"An Attorney shall withdraw forthwith from employment or from a matter pending before Tribunal-

- i) where the client insists upon his representing a claim or defence that he cannot conscientiously advance;
- ii) where the client seeks to pursue a course of conduct which is illegal or which will result in deliberately deceiving the Court;

- iii) where a client has in the course of the proceedings perpetrated a fraud upon a person or tribunal and on request by the Attorney has refused or is unable to rectify the same; and
- iv) where his continued employment will involve him in the violation of a Rule of Law or a disciplinary rule.”

It is clear that in the present case the vendor was pursuing a course of conduct, which was illegal in that it involved a breach of his contract with the Complainants and he having been so advised and having decided to proceed, the Attorney ought to have withdrawn.

Furthermore, Canon V(n) provides:

“An Attorney shall not counsel or assist his client or a witness, in conduct that the Attorney knows to be illegal or fraudulent, and where he is satisfied that his client has in the course of the particular representation perpetrated a fraud upon a person or tribunal, he shall promptly call upon him to rectify same.”

In the present circumstances the Attorney assisted his client in pursuing a course of conduct which was, in our view, plainly illegal and unethical in that it involved the deliberate breach of the contract made with the Complainants and the Attorney assisted and colluded by ensuring that the transfer in favour of Julia Gordon and Doris Samuels was registered on title before informing the Complainants and returning their money, thereby ensuring that the Complainants would be deprived of the property which they intended to be their home.

By reason of the foregoing the Panel is satisfied beyond reasonable doubt that the Attorney is guilty of professional misconduct in that:

- 1) In breach of Canon V(n) of the Legal Profession (Canon of Professional Ethics) Rules the Attorney has counseled and assisted his client Robert Martin in an illegal course of conduct namely, the breach of the contract for the sale to the Complainants of the property comprising Volume 1145 Folio 21 of the Register Book of Titles.
- 2) The Attorney has also breached Canon IV (q) of the Legal Profession (Canons of Professional Ethics) Rules by failing to withdraw when it was clear to him that his client Robert Martin was pursuing a breach of the contract made with the Complainants.
- 3) In breach of Canon 1(b) of the Legal Profession (Canons of Professional Ethics) Rules the Attorney’s behavior has been dishonourable and has discredited his profession

As conceded by Counsel for the Attorney, an order for the repayment of the costs received by the Attorney from the Complainants, together with interest thereon and interest on the deposit for the period when it was held by the Attorney has to be made. An appropriate rate of interest is 15 per cent per annum. The deposit was held by the Attorney for approximately 3 months from 8<sup>th</sup> October 1998 to 11<sup>th</sup> December 1998. It was then returned to the attorney and held until 1<sup>st</sup> March 1999 when it was repaid with a sum of \$10,832.72 representing one month's interest. By our computation approximately six months interest was due, and giving credit for the interest payment made, the sum of \$17,292.28 is due. In addition the Attorney ought to have repaid the costs of \$11,500.00 which had been paid to him by the Complainants and interest thereon at the rate of 15 per cent from 8<sup>th</sup> December 1998 to 8<sup>th</sup> September 2002 amounts to \$6,468.75. By way of restitution the Attorney is accordingly ordered to pay \$35,261.03 together with interest thereon at the rate of 12 per cent per annum from the date of this judgment until the date of payment.

In addition it is appropriate to consider some additional sanction having regard to the discreditable nature of the Attorney's acts of professional misconduct. Though we have found that the Attorney's is guilty of grave professional misconduct, we are not of the view when all is weighed in the balance that the sanction of either striking off or suspension is <sup>NOT</sup> appropriate. *AW myd* *myd*

Although the Attorney's misconduct was indeed discreditable we accept that he was at all times attempting to discharge his client's instructions and not pursuing any personal gain or advancement. At the end of the day the Attorney's misconduct was caused by an overly blinkered view of his professional duties to his client and a failure to appreciate that the occasion warranted conduct ~~some~~ other than the simple discharge of the client's instructions, which would be the cause of loss to the Complainants who were innocent third parties. Indeed, the Attorney failed to appreciate that the pursuit of his client's instructions would be discreditable to the Attorney personally and discreditable to the profession of which he is a member. By reason of these considerations and notwithstanding the obvious element of deception perpetrated on the Complainants by the Attorney, to which we have already referred, we are of the view that a fine in the sum of \$100,000.00 is appropriate sanction in addition to the order for restitution. *AW myd*

In summary it is ordered as follows:

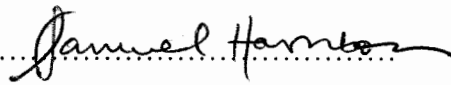
1. Pursuant to section 12 (4)(c) of the Legal Profession Act the Attorney Lynden Wellesley is ordered by way of restitution to pay the sum of \$35,261.03 to the Complainants with interest thereon at the rate of 12 per cent per annum from the date of this order until the date of payment.
2. Pursuant to section 12 (4)(a) of the Legal Profession Act the Attorney is to pay to the General Legal Council a fine in the sum of \$100,000.00.

3. Pursuant to section 12 (4)(b), in addition the Attorney is to pay to the Complainants for the days of hearing costs in the sum of \$20,000.00.

Dated the <sup>26<sup>th</sup></sup> day of October, 2002

  
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NORMA LINTON Q.C.

  
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MR. ALLAN S. WOOD

  
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MR. L. SAMUEL HARRISON