

JUDGMENT OF THE DISCIPLINARY COMMITTEE OF THE
GENERAL LEGAL COUNCIL

COMPLAINT 41/2001

BETWEEN DERYCK MARKS COMPLAINANT
(Executor of the Estate Desmond A. Marks deceased)

AND AUDREY HESLOP-MENDEZ THE ATTORNEY

PANEL: MR. CHRISTOPHER BOVELL
MRS. MERLIN BASSIE
MR. ALLAN S. WOOD

Persons Attending: Mr. Deryck Marks (the Complainant), Mrs Dolly Marks and Mrs Denise Marks-Lane;
Mr. John Graham and Miss Georgette Scott for the Attorney.

Dates of hearing: 8th and 9th July and 10th October 2002

This complaint was laid on 21st September 2001 by Deryck A. Marks (hereinafter called "Complainant") in his capacity as Executor of his father, Desmond A. Marks (deceased). The Complainant and the witnesses in support of the complaint, namely, the Complainant's mother Mrs. Dolly Marks and his sister Mrs. Denise Marks-Lane, all reside abroad and attended on the hearing 8th and 9th July 2002, when they gave viva voce testimony in support of the Complaint. The Panel accepts their evidence as truthful.

The Attorney never attended the hearings. Her Counsel explained that the Attorney was residing in the United Kingdom and was having difficulties with the immigration department which precluded her from traveling to Jamaica. Accordingly on 10th October 2002, an Affidavit by the Attorney sworn to on 25th September 2002 was read into evidence.

The grounds of complaint as set out in the Complainant's Affidavit in support of the Complaint sworn on 29th September 2001, are as follows:-

- i. She failed to provide the Estate with all information as to the progress of its business with due expedition, although the Estate reasonably required her to do so;
- ii. She failed to deal with the Estate's business with all due expedition;
- iii. She acted with inexcusable and deplorable negligence in the performance of her duties;
- iv. She has not accounted to the Estate for all moneys in her hand for the Estate's account or credit, although the Estate has reasonably required her to do so;
- v. In representing the Estate she failed to take reasonable steps to avoid foreseeable prejudice or injury for Estate's position and rights, as her client;

- vi. She has not promptly refunded such part of the fees paid in advance as may be fair and reasonable for Estate business not dealt with due expedition;
- vii. She misappropriated and embezzled Estate funds; and
- viii. She breached the contractual agreement with the Estate”

The most serious of the numerous grounds of complaint were the charges of failing to account to the estate and misappropriation. It was the widow, Mrs. Dolly Marks, who was given a formal Power of Attorney to act on behalf of the Estate, who had retained the Attorney following upon the death of her husband on 22nd July 1996. Her account in evidence was that in August 1996 acting upon the recommendation of someone she had met at the Offices of the Registrar of Titles, she met with the Attorney and retained her to handle her husband's estate; this involved the probating of the Will and acting in the sale of various properties which were variously held either in her husband's name or in the name of a company owned by her husband or in the joint names of herself and her husband. A retainer was paid as well as \$94,190.00 for transfer tax. The properties were:-

- i. 7 Dillon Avenue, Kingston
- ii. 4a Country Manor, Ocho Rios
- iii. 56 Great Pond, Ocho Rios
- iv. 15 Lady Kay Drive, Kingston 8

The property at 7 Dillon Avenue, Kingston was owned by E & M Associates Limited, a company owned by her husband as was 4a Country Manor, Ocho Rios, while 15 Lady Kay Drive was owned in the joint names of her husband and herself. It was the evidence of Mrs Marks that having paid a retainer to the Attorney the Attorney proceeded to act and completed the sale of 7 Dillon Avenue and commenced to act in the sale of 15 Lady Kay Drive by preparing the sale agreement and collecting the deposit. The first property which was sold was 7 Dillon Avenue, Kingston, which was put up for sale in 1996 following upon the appointment of the Attorney to act.

It was the evidence of Mrs Dolly Marks that the Attorney who was then in partnership with one Dahlia Allen abruptly left the island sometime in 1997. The Attorney by her affidavit stated that her departure from the island occurred in February 1998 and the Panel accepts that date as correct. With the Attorney's departure the various matters concerning the estate of her husband continued to be handled by the Attorney's partner Dahlia Allen, who she met after the Attorney's departure. However, the Panel accepts the evidence of Mrs. Marks that approximately two months after her departure the Attorney called her, apologised for her abrupt departure from the Island and promised that she would continue to supervise Dahlia Allen's handling of the legal affairs of the estate and the Attorney continued to correspond with respect to these matters and on one occasion traveled to Jamaica to deal with same. The Panel accepts the evidence of Mrs Marks that she was assured by the Attorney that while abroad she would continue to oversee the business of the Estate and that she was never advised that the partnership which existed between the Attorney and Dahlia Allen had been dissolved or that the Attorney was treating her retainer as at an end.

Following the departure of the Attorney matters quickly unraveled, the Estate was unable to obtain the proceeds of the sale of the properties at Dillon Avenue and Lady Kay Drive or an account of other monies paid for the payment of Transfer Tax or the sum J\$92,500.00, which Mrs Marks testified she had paid to the Attorney for the purchase of United States Dollars. On the evidence in support of the Complaint, the sale of 7 Dillon Avenue, Kingston was completed prior to the Attorney's departure from the Island. The sale of 15 Lady Kay Drive, Kingston 8 was

completed by Dahlia Allen, but the deposit had been paid prior to the Attorney's departure from Jamaica. The evidence of Mrs. Dolly Marks, which the Panel believes, was that on a visit to the Island, on 1st September 1999 both the Attorney and Dahlia Allen met with her at 17 Kensington Crescent, where she was staying, and advised her that they did not have the money which had been collected from the sale of the properties, that the Attorney admitted that of the total sum misappropriated she was personally responsible for the misappropriation of \$600,000.00. Both the Attorney and Dahlia Allen promised at this meeting with Mrs Marks to repay the money to the Estate and both the Attorney and Dahlia Allen signed a document which is dated 1st September 1999 (exhibit 26) which states:-

"This is to confirm that the tentatively agreed amount due of (\$1,897,740.60) One million eight hundred and ninety seven thousand seven hundred and forty dollars and sixty cents, will be made payable to you no later than 30th September 1999 being the date of first payment and total balance within 90 days thereafter.

Thank you so much for your kind consideration in this regard."

Mrs Marks testified to being bitterly disappointed for, as she explained, she had come to completely trust the Attorney and Allen as if they were daughters; she accepted their promise to restore the money misappropriated from the Estate. The promise to repay by 30th September 1999, which is contained in exhibit 26 was not kept with the result that Dahlia Allen had a meeting with Mrs. Dolly Marks-Lane, the daughter of Mrs. Dolly Marks, in September, 1999. Mrs. Denise Marks-Lane, a federal administrative judge, gave evidence, that this meeting was held at her offices in Florida with Dahlia Allen, who advised her that she was speaking for the Attorney as well as on her own behalf. She apologised for their default in making payment and explained that they did not have the money and asked to be given until December 1999 to repay \$1,600,000.00. We accept that Dahlia Allen spoke in that meeting as agent for the Attorney. The promise to make payment in December, 1999 was not kept.

In May 2000, Mrs. Dolly Marks visited the Attorney at her offices in London. At that meeting the Attorney promised to resume personal conduct of the affairs of the estate, and that she would instruct Dahlia Allen to send her all the files. The Attorney gave Mrs. Dolly Marks a cheque for £250 as a part payment towards the sum owed and explained that she was proceeding to sell her mother's property in Jamaica, at which time the balance would be paid. Upon being deposited, the cheque for £250 (exhibit 28) was dishonoured. Subsequently on 20th September 2000 a part payment of US\$4,000.00 was received from the Attorney. No further payment has since been made.

There was also tendered in evidence correspondence wherein the Attorney continued to accept responsibility for mishandling of the affairs of the Estate and the misappropriation of funds. By electronic mail to Mrs. Marks-Lane of 16th February 2000 (exhibit 8) the Attorney stated:

"Mrs. Allen has provided me with your e-mail address as I had misplaced the diary in which I had it written. Please accept my apologies for not responding sooner as I was very disappointed that the sale of the property fell through and as a consequence I fell into a rather deep depression. I had hoped that the next time we spoke it would be for me to tell you that the sale was completed and that the funds were available for your mother.

In any event I am advertising the property in the UK edition of the Gleaner and I am reducing the price in the hope of attracting a quick sale. I am also arranging to have the property advertised in the US edition of the Jamaican Gleaner. I will send you a copy of the advert if you wish. In addition I have listed the property with a realtor here in London who specializes in Jamaican properties. I am confident that a buyer will be found in short order. In the meantime I wish to make regular monthly payments to your mother in respect of the interest she would be earning if the funds were available to her. Initially I am proposing a payment of 250 pounds sterling. This is equivalent to US\$400. If I am in a position to pay more at any time I will do so, but every month a payment not less than 250 pounds sterling will be made. Please convey this proposal to your mother and let me know what arrangement you would prefer in respect of the remittance of the funds. The first payment would be made in first week in March. I do realise that this is only a drop in the bucket, but I have come to believe that I have to work with what is in my hand while I make plans in respect of what is to come.

Please convey my regards to your mother and extend my congratulations on the birth of her new grandchild. Please let her know that I will be speaking with her on the telephone as soon as I am able to make long distance calls again. In the meantime I will keep in touch with you with your permission and ask you to convey the relevant information to her..Please let me hear from you in relation to my proposal.”

By electronic mail dated August 15, 2000 (exhibit 3B) to the Complainant, the Attorney admitted her personal responsibility for the failure to deal with the Estate with all due expedition when she stated inter alia:

“I do realise that the personal problems that Mrs. Allen and I are presently encountering are not your concern as you and your family are entitled to have your matters dealt with as a matter of urgency. However, these are the practical circumstances that we have to deal with. I will freely admit that your matters have not been dealt with properly and in an expeditious manner. I take full responsibility for that as your mother was my client, I brought her matters into the partnership and then left to come to England to revive my career leaving Mrs. Allen to deal with matters that she did not have adequate expertise or support to deal with properly. I should have taken charge of these matters and seen them through to conclusion. I will take responsibility for my negligence in this respect and I am prepared to do so to the General Legal Council if disciplinary proceedings are instituted against me. The time for apologies is past, all that is left to do is fix what has gone wrong and accept whatever consequences may flow. The only thing that I would ask is that any complaint that you choose to file be against me only and not Mrs. Allen. The ultimate responsibility is mine and Mrs. Allen’s career should not be ruined because of something that she did not initiate. The work that she is presently involved in Jamaica on behalf of people who nobody else will fight for is too important to be jeopardised because of my inexcusable negligence in these matters.

I have spoken with Mrs. Allen and based on where the various matters have reached I can take them over and complete them. As your mother rightly pointed out we have collected fees for work that has been very shoddily done so far and I feel obligated to rectify that. Alternatively, I will have to brief any new lawyer that you instruct in detail as all these matters are complex to some degree. In the circumstances, I am awaiting your instructions.

Please forgive my rambling on so long.”

By her Affidavit the Attorney in response to the Complaint, the Attorney denied personal responsibility for the mishandling and misappropriation of her client’s money, placed blame entirely on her partner Dahlia Allen, stated that she had simply made repayments such as the US\$4,000.00 as a gesture of good faith and concluded at paragraph 39 as follows:

“That I have undertaken to repay to Mrs. Marks any of the estate funds remaining from the proceeds of sale of the property at Dillon Avenue which were received by me whilst I had conduct of the matters, less any sums already paid over by me, but on the advise of Counsel I have now withdrawn my offer to repay to Mrs. Marks any other sums outstanding which were received by Mrs. Dahlia Allen in my absence both in respect of the sale of Lady Kay Drive to Leonard Green et ux and in the sale of Lot 56 Great Pond to Margareta Davis.”

Counsel for the Attorney, Mr. John Graham was at pains in his submission to indicate that he was not the Counsel who was being referred to in the Attorney’s Affidavit as having advised her to withdraw her undertaking to repay the money which had been misappropriated from the Estate. Nonetheless, Mr. Graham attempted to mount a defence on the basis that the Attorney’s admission of her personal responsibility for mishandling of the estate and misappropriation of funds had been made gratuitously and arose not in her capacity of an Attorney, but by reason of her personal friendship with Mrs. Dolly Marks . This was a valiant attempt to defend the indefensible. It is common place that from the professional relationship of attorney and client there may develop a close personal relationship as was the relationship between the Attorney and the widow Mrs Dolly Marks. This in no way alters the professional duties and responsibilities that are owed by the Attorney and indeed having regard to the fiduciary relationship, which is understood to exist between attorney and client, the fact of a close personal relationship simply, in our view, underscores that the client is susceptible to being exploited and defrauded by an unscrupulous attorney, as occurred in the instant case. This merely illustrates the rationale for treating the relationship of an attorney and client as one from which undue influence is presumed.

In a complaint involving allegations of serious professional misconduct, such as in the instant case, the charges must be established beyond reasonable doubt. We find that the Complainant has discharged that burden and that the evidence in support of the gravamen of the Complaint is cogent. Though this hardly matters to the result, the Panel finds that the relationship which gave rise to the Attorney’s dealings with the property and affairs of the Estate was not a personal friendship, as the Attorney was not known to the Complainant or any beneficiary of the Estate prior to being retained by Mrs. Dolly Marks to handle the affairs of the Estate. In our view the relationship therefore

remained throughout the professional relationship of attorney and client which imposed from beginning to end a fiduciary duty upon the Attorney, which she callously abused. We find that:-

- (a) In breach of Canon VII (b) of the Legal Profession (Canons of Professional Ethics) Rules, the Attorney has failed to account to her client for all moneys in her hands and held for the account or credit of her client despite being reasonably required to do so;
- (b) The Attorney has participated in the misappropriation of funds which she collected on behalf of the Estate and particularly in respect of the sale of the property at 7 Dillon Avenue, Kingston, in which she personally acted and the Attorney has thereby acted dishonestly and in breach of Canon I (b) of the Legal Profession (Canons of Professional Ethics) Rules, she has thereby failed to maintain the honour and dignity of the profession of which she is a member; and
- (c) In breach of Canon IV (r) of the Legal Profession (Canons of Professional Ethics) Rules, the Attorney has failed to deal with her client's business with all due expedition.

Accepting the evidence of Mrs. Dolly Marks, we find that the sum owed by the Attorney to the Estate for which restitution ought to be made by the Attorney is \$722,168.02 made up as follows:-

- i. Balance from sale of 7 Dillon Avenue, Kingston - \$544,488.02
- ii. Sums paid to the Attorney by Mrs Marks to pay Transfer Taxes for which the Attorney has not accounted - \$245,180.00
- iii. Paid to the Attorney for purchase of US dollars - \$92,500.00
- iv. Owed for desk sold to Attorney by Estate -\$8,000.00
- v. Credit is given for the sum of US\$4,000.00 paid on 20th September 2002, which converted at J\$168,000.00.

Interest accrues on the balance of \$722,168.02 from 1st September 1999 when the Attorney admitted her liability (exhibit 26) at the rate of 12 per cent per annum.

We turn to consider the sanction which is appropriate in the circumstances of this case. It is an all too frequent occurrence that clients who are resident abroad have found themselves defrauded by unscrupulous attorneys-at-law; this was noted in a previous decision of the Disciplinary Committee in Jacqueline Grant & Gertrude Keane v Nancy Tulloch-Darby, Complaint 94 of 2000, Judgment 29th November 2001. That decision applied the principles laid down by Sir Thomas Bingham M.R. in Bolton v The Law Society (1994) 2 ALL ER 486 at p 492, and underscored that the Disciplinary Committee acts in the interests of the public and that by acting in the protection of the public, the interests of the profession is in turn best promoted, for thereby public confidence in the integrity of the profession will be maintained. Persons who are resident abroad are particularly susceptible to abuse by dishonest members of the legal profession, who ought to be deserving of utmost trust and confidence. We can hardly conceive of a greater abuse of trust than occurred on the facts of this case, where the Attorney had so gained the trust and confidence of Mrs Marks following her bereavement that she came to regard the Attorney as she would her daughter.

In keeping with these considerations, it is hereby ordered as follows:-

- (a) Pursuant to section 12 (4)(a) of the Legal Profession Act, Audrey Heslop-Mendez is struck off the role of Attorneys-at-Law entitled to practice in the several Courts in the Island of Jamaica.
- (b) Pursuant to section 12 (4)(c) of the Legal Profession Act, Audrey Heslop-Mendez is to pay to the Complainant, by way of restitution the sum of \$722,168.02 together with interest thereon at the rate of 12% per annum from 1st September 1999
- (c) Costs in the sum of \$75,000.00 inclusive of airfares and accommodation for the Complainant and the other witnesses who traveled to Jamaica for the hearing are to be paid to the Complainant by Audrey Heslop-Mendez.

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Dated the *30th* day of November 2002

ccrbny
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Mr. Christopher Bovell

Merlin Bassie
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Mrs. Merlin Bassie

Allan S. Wood
.....
Mr. Allan S. Wood