

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

IN THE MATTER of a
Complaint against Arthur
Kitchin

AND

IN THE MATTER of a
complaint by Gavin Clarke
(Estate Ruth Henry)

AND

IN THE MATTER of the
Legal Profession Act

**Panel: Mrs. Pamela Benka-Coker, Q.C.
Mr. Jerome Lee
Mr. Christopher Kelman**

1. This complaint was filed on March 16, 2009 setting out the following offences against the Respondent Attorney:
 - a. He has not provided me with all information as to the progress of my business with due expedition, although I have reasonably requested him to do so.
 - b. He has not dealt with my business with all due expedition.
 - c. He has acted with inexcusable or deplorable negligence in the performance of his duties.
 - d. He has not accounted to me for all the monies in his hands for my account or credit although I have reasonably required to him to do so.
 - e. He is in breach of canon 1 (b) which states that "An Attorney shall at all times maintain the honor and dignity

of the profession and shall abstain from behavior which may tend to discredit the profession of which he is a member.

2. On June 19, 2010 when this matter first came on for hearing the panel was informed by Mr. Gavin Clarke of the death of the Complainant on November 18, 2009. At the same time, Mr. Clarke presented the panel with the Last Will of the Complainant, as well as a Power of Attorney by her daughter and sole beneficiary, Ms. Dorothy Marjorie Burke appointing him as her attorney. The panel made an order substituting him as Complainant for Ruth Henry and adjourned the hearing to September 18, 2010 for trial. Mr. Kitchin was absent but represented by Counsel who explained that his client was ill.
3. On September 18, 2010, Mr. Clarke (hereinafter referred to as "the Complainant") was present but Mr. Kitchin was not. Mr. Junior Rowe was present at the request of Mr. Kitchin and informed the panel that Mr. Kitchin was still ill. Upon the panel being satisfied that the Respondent had been duly served with Notice of the hearing pursuant to Rules 5 and 21 of the Legal Profession (Disciplinary Proceedings) Rules set out under the 4th Schedule to the Legal Profession Act and in exercise of its discretion to proceed with the hearing in the absence of the Attorney, which is provided for under Rule 8 of the Legal Profession (Disciplinary Proceedings) Rules, the panel commenced the hearing of this matter with the evidence of Mr. Clarke.
4. Upon this being completed, the matter was adjourned part heard to November 27, 2010 at 12 noon to present the Respondent with an opportunity to cross examine the Complainant. On November 27, 2010 both parties were present. Mr. Kitchin indicated to the panel that he had received the notes of evidence taken at the prior hearing. As the panel was unable to entertain the hearing on account of its other

business, the matter was adjourned for hearing on January 22, 2011. On January 22, 2011 both parties were present and the hearing continued with the Respondent cross-examining the Complainant on his evidence. At the end of this exercise, the Respondent indicated his election to give evidence which he did. He was thereafter cross examined by the Complainant. At the end of the hearing, the Respondent informed the panel that he had the outstanding balance due to the Complainant in a current account at First Caribbean International Bank. He promised to bring a statement of account along with evidence of the bank account at the next hearing. Accordingly, the matter was further adjourned to February 12, 2011. When the matter was reached on February 12, 2011 at 12:15pm the Respondent produced a Statement of Account which he said he had prepared along with a record of funds held in a bank account. However, the Complainant indicated that he was not satisfied with the statement presented and wished to cross examine the Respondent further. Given the hour, a further hearing date was set for April 9, 2011.

5. On April 9, 2011 both parties were present and the Respondent was cross-examined further on the Statement of Account presented. Arising from the cross examination the panel considered that some of the fees appeared excessive and invited the Respondent to prepare a new Statement of Account. The Respondent agreed and the matter was adjourned to May 28, 2011. On May 28, 2011, the Complainant was present but the Respondent was not. His secretary attended on his behalf and informed the panel that he was unable to attend on account of illness and was requesting another date. The panel facilitated this request and adjourned the hearing for June 18, 2011. On June 18, 2011 with both parties present the matter continued with the Respondent being further cross examined by the Complainant. At the end of the hearing it was adjourned to July 9, 2011 for both parties to present closing submissions. The

Respondent also agreed to bring a cheque for the Complainant of the balance found due. On July 9, 2011 when the matter was called only the Complainant was present and no one attended to explain the Respondent's absence. On the application of the Complainant the panel permitted him to reopen his case to put in a closing statement of account which he said he had prepared. When he additionally attempted to tender a document prepared by a 3rd party, (an accountant), the panel refused to admit it in evidence and he consequently requested a further adjournment to permit the Accountant to attend and testify. On his application, the matter was accordingly adjourned to November 26, 2011. When the matter was called on November 26, 2011, the Complainant was present but the Respondent was not. He was represented by Mr. Junior Rowe who relayed a message he had received from the Respondent earlier that morning indicating ill health and a request for another date hearing set. The panel considered the history of the matter, refused the request and indicated that it was reserving its decision.

The Evidence

6. The Complainant gave evidence on September 18, 2010. He described the Respondent as a friend and broke down several times in the course of his evidence while recounting his knowledge of personal misfortunes which he said had befallen the Respondent. His evidence was that Ruth Henry owned property at 50A August Town Road, August Town and wanted to sell it. Having known the Respondent since 1990, he recommended the Respondent to the Complainant. A Valuation Report was prepared and showed a market value of \$1.850m. This report was tendered and admitted as Exhibit 1. The Respondent prepared an Agreement for Sale in September 2005. He explained that he only had the front page of the Agreement as the other pages were in England with the Complainant's

daughter, Dorothy Burke. The front page of the Agreement was admitted as Exhibit 2. The sale price was \$1.8million.

7. Mr. Clarke testified that by a letter dated May 17, 2007, the Respondent enclosed a cheque to Mrs. Henry in the sum of \$1m. The letter was admitted as Exhibit 3. The letter promised that the balance would be forwarded to her in two (2) weeks. No further sum was ever paid and eventually on September 23, 2009 this complaint was filed by Mrs. Henry. A letter dated September 29, 2008 and signed by Mrs. Dorothy Burke on behalf of Ms. Henry and addressed to the General Legal Council was admitted as Exhibit 4. Form of Affidavit by Ruth Henry dated September 23, 2009 was admitted as Exhibit 5. The Complainant said that Ruth Henry died in November 2009. A death certificate of Ruth Henry was admitted as Exhibit 6. The Last Will and Testament of Ruth Henry Exhibit 7. Power of Attorney signed by Dorothy Burke admitted as Exhibit 8. Letter dated September 28, 2007 Dorothy Burke to Arthur Kitchin Exhibit 9.
8. The Complainant gave further evidence that in May 2007 he had gone to the Respondent's house as part of efforts to collect the outstanding sums due. He said that he saw the Respondent who explained to him that he had a drug addiction and was not operating as he used to do. Nevertheless the Respondent gave him the cheque for \$1million. At that time the Respondent indicated that he had not excluded his fees and promised that when he had done that he would pay over the balance due. He then asked the Complainant to take him to the hospital for treatment which the Complainant did. The Complainant ended his evidence by saying that to date the balance due has not been paid by the Respondent.
9. At the next hearing the following documents were further admitted into evidence through the Complainant: Exhibit 10- fully executed Agreement of Sale dated September 7, 2005;

Exhibit 11-Certificate of Title registered at Volume 943 Folio 312; Exhibit 11A-letter dated May 1, 2006 from Attorney-at-Law Ms. Loreen Walker to the Respondent copied to Mr. Copie Brown; Exhibit 12A-Form of Affidavit dated May 7, 2009 by Ruth Henry; Exhibit 13-Vendor's Closing Statement of Account; Exhibit 14-Notice of Assessment from the Taxpayer Audit & Assessment Department; Exhibit 15-Revised Vendor's Closing Statement of Account.

10. The Complainant was cross-examined by the Respondent. The most significant aspect of this was the Complainant's acknowledgment that from the balance sale price, transfer tax, half stamp duty and registration fee were to be deducted. The Complainant nonetheless countered that interest was payable by the Respondent on the balance. After the cross examination the Complainant's case was closed. The Respondent elected to give evidence. His evidence was significant. He recounted to the panel a kidnapping ordeal which he said he suffered in October 2006 and an involuntary admission to the University Hospital. He said that he suffered post traumatic stress due to his use of various sorts of substances. This interfered with his ability to practice, including dealing with this matter. He resumed practice briefly in August 2008 but was back in hospital by December 2008. Since 2009 he said he has not practiced. As a result of these matters he said he passed Mrs. Henry's file to Mr. Barrington Frankson, Attorney-at-Law for him to complete the transaction but said this was not done. Nonetheless, he informed the panel that he remained in possession of the proceeds and he was willing to complete the matter and provide the Complainant with what was due.
11. He was cross-examined. He indicated that he was holding funds of \$800,000.00 from which the costs of sale were to be deducted. In answer to the panel, he says the funds were in a chequing account at First Caribbean International Bank. At the

end of the cross examination the panel requested that the Respondent on the next hearing date bring evidence of where the funds were being held, as well as a statement of account.

12. The panel is bound to evaluate this evidence applying to it the applicable standard of proof of beyond reasonable doubt. Having seen and heard both the Complainant and Respondent the panel is of the view that the facts are not in serious dispute. The Respondent does not deny that more than 8 years after he was retained the transaction has not been completed and the outstanding balance due has still not been paid to the Complainant. The Respondent blames this unhappy state of affairs on illness and substance abuse which has interfered with his practice. In any event the panel was impressed by the Complainant as a witness and the very meticulous way he gave his evidence. The panel accepts him as a witness of truth and makes the following findings of facts:

- i. Mrs. Ruth Henry the original Complainant retained the services of the Respondent prior to her death to act for her in a real estate transaction;
- ii. The Respondent acted in the transaction for Mrs. Henry the Vendor of land;
- iii. The purchase price was \$1,800,000.00 and has been paid in full to the Respondent by the purchasers;
- iv. Having reviewed Exhibit 15, the costs of sale totaled \$339,520 so that the net proceeds of sale due to the Complainant amounted \$1,460,480.00. We have subtracted an amount on the said exhibit amounting to \$4,660.00 (described as one half miscellaneous costs and GCT thereon) as in our view this item represents a double billing having regard to item 3.
- v. The sum of \$1m has been paid by the Respondent to the Complainant;

- vi. When the costs of sale are deducted from the amount owed the balance due and owing to the Complainant is \$460,480.00 plus interest at an appropriate rate.
 - vii. We consider 6% per annum an appropriate rate. Applying that rate to the sum of \$460,480.00 between May 17, 2007 and June 23, 2012 interest amounts to \$141,020.42.
 - viii. The Respondent has failed to render a proper account to the Complainant for the balance which he admitted is owed;
 - ix. The Respondent has not dealt with the Complainant's business with due expedition;
 - x. The Respondent has a history of substance abuse which has affected his ability to practice.
13. The Committee repeats the oft-quoted **dictum** of Sir Thomas Bingham in the case of **Bolton v Law Society** reported at [1992] 2 All ER 486 at 491,

" It is required of lawyers practicing in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness...any solicitor who is shown to have discharged his professional duties with less than complete integrity, probity and trustworthiness must expect severe sanction to be imposed on him by the Solicitor's Disciplinary Tribunal. Lapses from the required high standard may of course take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties."

The legal profession perhaps more than any other depends on trust. Attorneys are of necessity put in funds by their clients for multitudinous purposes but hold these funds upon trust for their clients for use solely for the purposes for which they are

entrusted. Use for other purposes, failure to account for the funds when required to do so by the client and failure to pay over funds due are not only injurious to the individual client but to the integrity and reputation of the entire legal profession. The panel is aware of its overriding duty to protect the public and the integrity of the legal profession by upholding professional standards. Dishonest conduct such as the Respondent has been shown guilty of in this case is reprehensible and inimical both to the public and the general reputation of the legal profession.

14. In this case, the Respondent has been shown to have acted dishonestly and abused the trust reposed in him by the Complainant. During the course of these proceedings the Respondent gave solemn assurances of his holding the balance due and his intention to bring to the next hearing a cheque for that balance. He failed to do this. The panel cannot ignore the evidence of the Respondent's acknowledged history of substance abuse which is partly responsible for the state of affairs of which the Complainant complained. In these circumstances we find that the complaint proven that the Respondent has failed to account to the Complainant for all moneys in his hands for his account and credit although reasonably required to do so in breach of Canon VII (b) (ii). We also find that the Respondent failed to deal with the Complainant's business with all due expedition in breach of Canon IV (r). We find proven as well that he has acted with inexcusable or deplorable negligence or neglect contrary to Canon IV (s) and has not maintained the honour and dignity of the profession or abstained from conduct tending to discredit the profession of which he is a member contrary to Canon 1 (b).

Sanctions

15. Accordingly, it is hereby ordered as follows:

- i. Pursuant to section 12 (4) (a) of the Legal Profession Act, the name of Arthur Kitchin is struck off the Roll of Attorneys-at-Law entitled to practice in the Island of Jamaica;
- ii. Pursuant to section 12 (4) (f) of the Legal Profession Act the Attorney shall pay by way of restitution to the Complainant the amount of \$601,500.22 being the balance due to the Complainant plus accrued interest as shown in paragraph 12. Furthermore, the Attorney shall pay interest at a rate of 6% per annum on the said sum of \$601,500.22 from the date hereof until the date of payment.
- iii. The Respondent is to pay costs to the Complainant of \$30,000.00;
- iv. The Attorney is to pay costs to the General Legal Council of \$60,000.00.

Dated the 23rd day of June 2012


Pamela Benka-Coker, QC


Jerome Lee


Christopher Kelman