

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

COMPLAINT NO. 8/2013

In the Matter of INDRA BAHADUR and
DONALD GITTENS an Attorney-at-Law.

AND

In the Matter of the Legal Profession Act,
1971

Panel: Walter Scott, Q.C. - Chairman
 Daniella Gentles-Silvera
 John Graham

Appearances: The Complainant, Indra Bahadur, and the Respondent, Donald Gittens.

Hearing: 3rd November, 2014, 2nd February, 2015, 22nd April, 2015

COMPLAINT

1. The complaint against the Attorney-at-Law, Donald Gittens, (hereinafter called “the Attorney”) is contained in the Form of Affidavit sworn to on the 18th December, 2012 by Indra Bahadur (hereinafter called “the Complainant”). The complaint is:
 - (a) that the Attorney has not provided the Complainant with all information as to the progress of her business with due expedition although reasonably required to do so;
 - (b) that the Attorney has failed to deal with the Complainant's business with due expedition.
 - (c) the Attorney has acted with inexcusable or deplorable negligence in the performance of his duties; and

- (d) the Attorney has not accounted to the Complainant for all moneys in his hands for her account or credit although she has reasonably required him to do so.
2. The Panel commenced the hearing of this matter on the 3rd November, 2014. Both the Attorney and the Complainant 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 **Fourth Schedule to the Legal Profession Act** and both were in attendance.

EVIDENCE

3. The evidence of the Complainant was that on the 10th January, 2012 she retained the services of the Attorney to represent her in the dissolution of her marriage and a custody hearing with respect to the child of the marriage, Nyah Tafare Simms. On the 11th January, 2012 the Complainant paid a retainer of Eighty Eight Thousand One Hundred and Twenty Five Dollars (\$88,125.00) to the Attorney. The Attorney suggested in an email dated the 31st January, 2012 that they may need to apply for an expedited date by doing an affidavit of urgency. The Complainant, never heard from the Attorney after the 31st January, 2012 to April, 2012 when he called to say documents needed to be signed. During this period the Complainant made numerous attempts to contact the Attorney by way of emails, text messages and voicemails left on the Attorney's mobile telephone and calls to his secretary requesting that the Attorney call her. Telephone bills were tendered into evidence showing telephone calls made to the Attorney. Between January, 2012 to May, 2012 she made nine (9) telephone calls to the Attorney's mobile phone (Exhibit 4). Nine (9) emails were tendered into evidence from the Complainant to the Attorney after

the 31st January, 2012 dated the 15th March, 2012, 12th April, 2012, 13th April, 2012, 20th April, 2012, 3rd May, 2012, 7th May, 2012, 8th May, 2012, 16th May, 2012 and 11th June, 2012. She received no response from the Attorney.

4. The Complainant had custody and primary care and control of the child of the marriage and the father had access. During this said period that is, between the 31st January, 2012 to April, 2012 the Complainant said she expressed her concerns to the Attorney about the child of the marriage, who was a special needs seven (7) years old child, whom she believed was in an unstable environment as he was between two (2) homes as she lived in Kingston and her husband lived in St. Ann's Bay and she felt since the child was mentally challenged it was not in his best interest for him to be traveling to and from St. Ann's Bay every week. Further the husband would without discussion change the times of his access to the child without much notice. The parties had agreed that from the 3rd January, 2012 the father would pick up the child from school on Fridays at 4:00 p.m. and drop him off at school on Mondays at 10:00 a.m. He changed his mind and decided to drop off the child at school on Tuesday mornings instead, which he proceeded to do notwithstanding the Complainant's objections.

5. On the 12th April, 2012 the Complainant received an email dated the 12th April, 2012 from the Attorney who advised that the date fixed for the hearing of the application was the 19th November, 2012. He further advised that the affidavit of urgency he had recommended must now be pursued and he requested that the Complainant send him "a

full statement of the present situation so that he could prepare an affidavit of urgency to meet with and convince the Registrar of the Supreme Court to abridge the date.”

6. On the same day before the email was sent by the Attorney, the Complainant sent a trail of SMS messages between herself and her husband to the Attorney. In the email trail the Complainant’s husband messaged the Complainant refusing to drop off the child when he was supposed to and advised that he would be keeping him over the Easter holidays.
7. On the 13th April, 2012 the Complainant sent the Attorney an email (Exhibit 7) in which she described the current situation that being:
 - (a) her husband had taken Nyah over the Easter holidays and did not return him when he should have; and
 - (b) the instability in Nyah’s residential living was leading to an increase in his tantrums and insecurity.

She ended the email by stating “if there is anything further that you need from me please advise.”

8. On the 20th April, 2012 the Complainant again advised the Attorney by email of Nyah’s increase tantrums due to instability in his current living arrangements. By email dated the 7th May, 2012 the Complainant sent the Attorney a text from her husband. She stated in the email that based on the husband’s text she would not have the child over summer and further stated “I need this emergency appeal for Nyah” and she needed to speak to the Attorney. She mentioned her son and his behaviour in general terms and a proposal sent

to her by her husband. She had previously sent the Attorney an email on the 3rd May, 2012 forwarding him an email from her husband in regards to a proposal for an agreement in relation to the matrimonial house on the 7th May, 2012. None of these emails were responded to by the Attorney.

9. Eventually the Complainant terminated the services of the Attorney by email dated the 8th May, 2012 on the basis that the Attorney did not respond to her phone calls and emails. She requested a bill for work done. She emailed the Attorney on the 16th May, 2012 and 11th June, 2012 but received no response to these emails until the 28th June, 2012. She requested that her file be handed over to her new Attorney-at-Law (which to date has not been done) and which caused the scheduled court date of the 19th November, 2012 to be postponed. Mr. Seymour Stewart, the Attorney's law Partner, denied receiving the file from the Attorney.

10. The evidence of the Attorney was that he was retained in the matter of a custody application for the child of the marriage and he was not retained to deal with any matter regarding divorce proceedings. This is supported by email dated the 10th January, 2012 from the Complainant to the Attorney (Exhibit 3) when she says "please accept this as my written instructions to proceed through the Courts re custody arrangements for Nyah" and the Attorney responded by email dated the 10th January, 2012 advising of his fees "for conducting application for custody" and requested a retainer.

11. The Attorney filed the Fixed Date Claim Form for the custody matter on the 26th January, 2012 within fifteen (15) days of being paid the retainer of Seventy Five Thousand Dollars (\$75,000.00) plus G.C.T. by the Complainant. An email dated the 18th January, 2012 from the Attorney was produced during the course of the proceedings and in that email, reference was made to documents being sent to the Complainant for her to sign. Another email dated the 31st January, 2012 from the Attorney to the Complainant was produced whereby the Attorney confirmed that the Court documents were filed and they were awaiting a date to be fixed by the Registrar. He advised that an affidavit of urgency (Exhibit 2) would need to be done to get an expedited hearing and requested that the Complainant prompt him later that day by way of a reminder. This was done by the Complainant.

12. The Attorney never felt that he had sufficient material to prepare an affidavit of urgency particularly as the Complainant had physical custody of the child and the father had only occasional access which he breached from time to time, but these breaches according to the Attorney were not sufficient to ground an affidavit of urgency. Even if his judgment in this regard was bad it did not constitute inexcusable or deplorable negligence.

13. He further gave evidence that the Complainant and himself had several telephone conversations after January, 2012 including in April, 2012 when they discussed filing an affidavit of urgency. In any event the Complainant could communicate with his law Partner, Mr. Seymour Stewart, and his secretary, Monica Brown. The Attorney admitted that the Complainant called him many times, and left text messages and voice messages

but it would be unmanageable to treat with all of them. He says she sent him twenty seven (27) emails and he sent her twelve (12) emails. His evidence was that he spoke to her extensively by telephone but he could not prove it as all his calls were made from a prepaid telephone service which he no longer had.

14. By email dated the 8th May, 2012 the Complainant asked a bill for work done to date and advice as to how the refund for the remainder of the retainer was to be done to which the Attorney did not respond notwithstanding her further emails sent on the 16th May, 2012 and 11th June, 2012. According to the Attorney he felt the Complainant really wanted a refund for part of the moneys paid as opposed to a bill and the Complainant had in any event retained another Attorney. He felt he did more work than the amount paid as the retainer and if he prepared a bill and the Complainant did not pay it he would have to get it taxed and pursue payment of it and therefore he was willing to forgo the bill. According to his evidence the work which he did amounted to roughly Three Hundred and Fifty Thousand Dollars (\$350,000.00) at Fifteen Thousand Dollars (\$15,000.00) per hour. In any event the Attorney's evidence was that the retainer was not a payment on account of fees but to establish the seriousness of the client's claim which he would therefore not have to account for as he was not holding any moneys to the credit or account of the Complainant.

15. The Attorney did not respond to the Complainant in relation to her request for a bill until the 28th June, 2012 when he advised that he had delivered the file to Seymour Stewart and that he was preparing a bill of fees.

16. Having read the affidavits and exhibits and having heard the evidence of the Complainant and the Attorney, the Panel finds the following has been established beyond reasonable doubt which is the standard of proof as stated in Winston Campbell v David Hamlet [as Executrix of Simon Alexander] Privy Council Appeal No. 7 of 2001.

- (a) The Attorney was retained by the Complainant to represent her in a custody application only and not divorce proceedings.
- (b) The Attorney acted with reasonable haste between being retained on the 11th January, 2012 and preparing the necessary documents for the custody application and sending them to the Complainant on the 18th January, 2012 for signing and thereafter filing them on the 26th January, 2012.
- (c) The Attorney had sufficient information to prepare an affidavit of urgency, and seek to get an early date for the hearing of the matter, particularly as by emails dated the 13th April, 2012 and 20th April, 2012 the Complainant spoke about her son's tantrums increasing and his feelings of insecurity which she believed was due to the instability of his current living arrangements moving back and forth between Kingston with her and her husband in St. Ann's Bay. This was against the background that the child in question was a small child (7 years old) who was mentally challenged.
- (d) Between the 31st January, 2012 (when the Attorney advised the Complainant that the documents had been filed and an affidavit of urgency should be done so as to get an expedited hearing) to the 12th April, 2012 (when the Attorney advised the Complainant of the date of hearing of the application) the Complainant made

several telephone calls to the mobile number of the Attorney and sent him a number of emails advising him of what was occurring and asking about the affidavit of urgency. Between this period the Attorney did not communicate via email or telephone call with the Complainant and advise her on the progress of the matter or anything else at all.

- (e) The Attorney at no time wrote to the Complainant to say if the information she provided was sufficient to prepare an affidavit of urgency although she wrote to him by emails dated the 15th March, 2012, 12th April, 2012, 13th April, 2012, 20th April, 2012 and 7th May, 2012 referring to the affidavit of urgency and providing information.
- (f) The Attorney did not send the Complainant twelve (12) emails but seven (7) of which five (5) were on or before the 31st January, 2012.
- (g) The retainer was paid not on account of fees but to establish the seriousness of the Complainant's claim.

17. The custody of a child is usually by its very nature a matter that should be dealt with urgently which the Attorney apparently initially appreciated as within fifteen (15) days of being retained he had prepared the documents to be filed in Court and filed same. It appears that after doing so on the 26th January, 2012 and advising the Complainant that they would need to do an affidavit of urgency to get an expedited hearing he "dropped his hands". We believe the Complainant that she tried to speak to the Attorney on the matter in relation to the preparing of the affidavit of urgency and the progress of the matter in general, via telephone calls, emails and text messages but the Attorney did not respond to

say what was needed for an affidavit of urgency or at all. He did not respond until the 12th April, 2012 when by email he advised the Complainant that a date had been fixed in November 2012 for the hearing of the matter and repeated that they would need to do an affidavit of urgency to get an earlier date. The Complainant thereafter sent information by emails dated the 12th April, 2012, 13th April, 2012, 20th April, 2012 and 7th May, 2012 notwithstanding which the Attorney still did not respond to say whether or not it was sufficient.

18. A client is entitled to be advised by her Attorney as to the progress of her matter. This Complainant was certainly so entitled and made reasonable requests as to progress of the matter. The Attorney had a duty to respond to the Complainant's, his client's, telephone calls, emails and text messages even where some of the requested information went outside the boundaries of the retainer which appears in any event to only be in relation to one (1) email of the 2nd May, 2012 which dealt with a proposal by her husband to deal with a house. All other emails referred to the child of the marriage, the custody application, the affidavit of urgency and that the Complainant was not hearing from the Attorney. The Attorney failed to advise her of the progress of the matter from the 31st January, 2012 until the 12th April, 2012 some seventy one (71) days later which cannot be justified. The Attorney gave evidence that he advised the Complainant that she could communicate with his law Partner and his secretary, however this cannot mitigate the Attorney's duty to respond to his client and advise on the progress of the client's business as he was retained as her Attorney and not his law Partner or his secretary.

19. This failure of the Attorney to provide the Complainant with information as to the progress of her matter with due expedition constitutes misconduct in a professional respect which is further exacerbated by the fact that the matter concerned an application for the custody of the child.

20. We are mindful of the fact that in preparing the documents to be filed in court the Attorney acted with due expedition but we are of the view that he did not so act thereafter to try and get an expedited hearing, notwithstanding that it was he who advised the Complainant of the need for an affidavit of urgency to get an expedited hearing. He advised the Complainant of this in his email of the 31st January, 2012 and yet responds to none of her emails starting with email dated the 15th March, 2012 from the Complainant when she said:

“I am concerned that I haven’t heard from you with regard to an emergency application which I thought was the approach to be taken. I have left emails, texts and voicemails and spoken with Monica.”

21. The Attorney again advised the Complainant in his email of the 12th April, 2012 of the need for an affidavit of urgency and then fails to respond to the Complainant’s emails to advise her that the information provided was in his opinion not sufficient, as he says he felt so, and perhaps to give her examples of the type of information that would be sufficient. Hence nothing was done to expedite the matter from the filing of the Court documents from the 31st January, 2012 until the retainer was determined on the 8th May,

2012. This action or better yet failure to act constitutes a breach of the Attorney's duty to act with due expedition.

22. We believe the Attorney that the retainer was paid not on account of fees but to establish the seriousness of the claim. Accordingly, the Attorney had no obligation to account for same as the sums were not held on the account of the Complainant or to her credit. We therefore find that the complaint of failing to account has not been established.

23. Whilst it is this Panel's view that the Attorney did have sufficient information to file an affidavit of urgency, we appreciate that the Attorney was of the opinion that the information was not sufficient and in the circumstances of the case his actions cannot be classified as deplorable or inexcusable neglect or negligence based on the applicable standard of proof in disciplinary proceedings.

CANONS

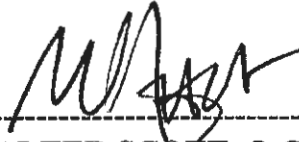
24. We therefore find that the Attorney has breached Canon IV (r) of **The Legal Profession (Canons of Professional Ethics) Rules** and for ease of reference we set out below the said Canon:

Canon IV (r) provides that:

"An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with all information as to progress of the client's business with due expedition."

25. In these circumstances we find that the Attorney is guilty of professional misconduct as per Canon VII of the Legal Profession (Canons of Professional Ethics of Rules) in that he has breached Canon IV (r).

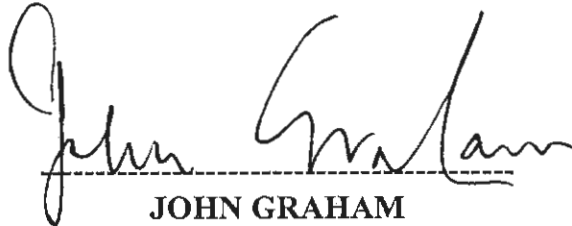
Dated the 22nd day of April, 2015



WALTER SCOTT, Q.C.



DANIELLA GENTLES-SILVERA



JOHN GRAHAM

**FORMAL ORDER OF THE DISCIPLINARY COMMITTEE OF
THE GENERAL LEGAL COUNCIL MADE ON COMPLAINT
NO. 8 2013**

**IN THE MATTER OF INDRA BAHUDAR VS DONALD
GITTENS**

AND

**IN THE MATTER OF THE LEGAL PROFESSION
ACT 1971**

**PANEL: MR. WALTER SCOTT, Q.C.
MRS. DANIELLA GENTLES-SILVERA
MR. JOHN GRAHAM**

DECISION DELIVERED ON THE 23RD JUNE, 2015

UPON THE APPLICATION dated 18th. December, 2012 made under section 12(1) (a) of the Legal Profession Act and coming on for hearing before the Disciplinary Committee on the 3rd November, 2014, 2nd February, 2015, 22nd April, 2015, 23rd June, 2015

AND UPON the Complainant Indra Bahudar appearing in person and having given evidence on oath

AND UPON the attorney-at-law Donald Gittens appearing and having given evidence on oath

AND UPON DUE CONSIDERATION of the sworn evidence of the Indra Bahudar and Donald Gittens

THE COMMITTEE FINDS THAT:

The Attorney is guilty of professional misconduct for failing to advise the Complainant of the progress of the matter with due expedition. The panel has taken into account the evidence as to character and reputation from Queen's Counsel Mr. Ransford Braham and has listened to his submissions as to the position with regard to the reputable harm as he puts it to the attorney.

The Panel listened to Ms. Bahadur who has been gracious.

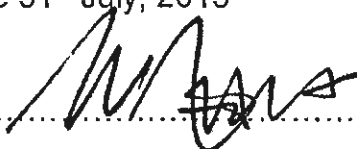
The Panel has taken all the circumstances into account and has borne in mind the decision of the Disciplinary Committee in the matter of Brown and Gardner where the Attorney was found guilty of the same breach of the Canon. As there has to be some

jurisprudence in consistency, the panel imposed the same sanction in the circumstances.

PURSUANT TO THE FOREGOING FINDINGS THE COMMITTEE UNANIMOUSLY HEREBY ORDERED THAT:-

Pursuant to s 12 (4) of the Legal Profession Act:

1. That the Attorney Donald Gittens be reprimanded.
2. That the Attorney Donald Gittens pays the cost of these proceedings in amount of \$40,000.00 on or before the 31st July, 2015

A handwritten signature in black ink, appearing to read 'M. Gittens', is written over a horizontal dotted line.

CHAIRMAN OF PANEL

Dated 7th July, 2015