

**Decision of the Disciplinary Committee of  
The General Legal Council**

Complaint No. 90 of 2011

<b>BETWEEN</b>	<b>AMY ROBINSON</b>	<b>COMPLAINANT</b>
<b>A N D</b>	<b>DON FOOTE</b>	<b>RESPONDENT</b>

**Panel:**     **Mrs. Pamela Benka-Coker, Q.C.**  
              **Mr. Walter Scott, Q.C.**  
              **Mrs. Gloria Langrin**

**Hearing Dates:**

19 September 2012, 28 November 2012, 13 March 2013, 21 November 2013, 22 January 2014, 12 February 2014, 12 April 2014, 19 July 2014, 29 January 2015, 9 April 2015, 5 May 2015, 3 June 2015, 25 July 2015, 26 September 2015, 9 December 2015, 14 July 2016, 5 October 2016

**Representation:**

Mrs. Amy Robinson (by Skype)   Complainant represented herself  
Mr. Don Foote                               Respondent represented by Mr. John Thompson

**BACKGROUND**

1. This matter stems from an Order made by the Supreme Court of Judicature that Ms. Amy Robinson (hereafter called “the Complainant”) and her former spouse, Mr. Dorrel Saunders whereby each party was entitled to one-half (1/2) share of a property situate at Lot 10, Emmaville, Smithfield in the parish of Westmoreland upon sale of the said property.
2. There was joint carriage of the sale between Mr. Don Foote, Attorney-at-Law (hereafter called “the Attorney”) acting on behalf of the Mr. Saunders and Ms. Vonique Mason, Attorney-at-Law of Messrs. Brian Clarke & Company acting on behalf of the Complainant.

3. An Agreement for Sale dated the 15<sup>th</sup> day of October 2010 was drafted by the Attorney which was signed by the Complainant and Mr. Saunders as joint vendors, with the prospective purchaser, Mr. Henry Moo Young left to sign the same.
4. Sometime in December 2010, the Complainant was informed that construction work was being carried out at the said property without her consent and before Mr. Moo Young had signed the Agreement. This was communicated by way of letter dated the 12<sup>th</sup> day of January 2011 to the Attorney from Ms. Mason. However, there was no response from the Attorney to these queries and a further letter dated the 14<sup>th</sup> day of January 2011 was sent to the Attorney by Ms. Mason insisting that the Purchaser vacate the property and requesting a copy of the fully executed Agreement for Sale. There was also a request for the Agreement for Sale to be rescinded if possible.
5. There was no response from the Attorney to any of the requests. This led to a Letter of Complaint being sent by the Complainant to the General Legal Council on the 3<sup>rd</sup> day of February 2011.
6. On the 16<sup>th</sup> day of February 2011, Ms. Mason again wrote to the Attorney insisting that the Agreement for Sale be rescinded. Upon receipt of this letter by the Attorney, he responded on the 1<sup>st</sup> day of March 2011 refusing to rescind the sale asserting that Ms. Mason had no right to rescind the same and that it was necessary to let Mr. Moo Young into possession. Additionally the Attorney stated that he had the fully executed Agreement of Sale and the completion was set for the 30<sup>th</sup> day of May 2011. To date, a fully executed Agreement for Sale has not been produced by the Attorney.
7. A Notice Requiring Completion dated the 9<sup>th</sup> day of May 2011 was served on Mr. Moo Young. It was at this point, that Mr. Moo Young denied being put into possession. Additionally, the full deposit had not been paid.
8. The Complainant filed an Application against an Attorney-at-Law dated the 13<sup>th</sup> day of June 2011 in which she alleged:

*The complaint I made against the Attorney-at-Law is that he has acted with inexcusable or deplorable negligence in the performance of his duties and he is in breach of Canon 1(b) which states that, "An Attorney shall at all times maintain the honour and dignity of*

*the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member”*

9. This Complaint was supported by an Affidavit sworn to on the 13<sup>th</sup> day of June 2011 and by a further Affidavit sworn to on the 10<sup>th</sup> day of December 2012.
10. The complaints were all denied by the Attorney.
11. The hearing was held over a series of dates during the period 22 January 2014 to 15<sup>th</sup> day of October 2016 with the Complainant joining by Skype pursuant to **Section 10 (3) of the Legal Profession (Disciplinary Proceedings) (Amendments) Rules 2014**. On that date, the Complainant gave her evidence in chief and was cross examined by the Attorney’s Attorney-at-Law, Mr. John Thompson. The Attorney who testified on oath was also cross examined by the Complainant.
12. Written Closing Submissions along with supporting documents were submitted by the Complainant. The Respondent Attorney failed until 07 April 2017 at 3:28 p.m to submit any Written Closing Submissions in spite of the Panel having given him ample opportunity to do so.
13. The Panel took time to review the notes of the evidence, the several exhibits and the Closing Statement of Amy Robinson and the Closing Submissions of Donovan Foote to the General Legal Council and now delivers its Decision.

## **THE EVIDENCE**

14. The evidence of the Complainant in support of her complaint consists of oral evidence, affidavit evidence and documentary evidence. The evidence of the Attorney consists of oral evidence, affidavit and documentary evidence.

## **EVIDENCE OF THE COMPLAINANT**

15. The initial evidence of the Complainant is set out with commendable brevity in her Affidavit of 13 June 2011 and is reproduced herein in full.

*“That Don O. Foote Attorney-at-Law was employed by my former husband Dorrel Henry Saunders (hereinafter referred to as “my*

*former husband”) in connection with the sale of the property known as Lot 10 Emmaville, Smithfield in the parish of Westmoreland being the land registered at Volume 1081, Folio 237 of the Register Book of Titles owned jointly and severally as tenants in common by me and my former husband (hereinafter referred to as “the Property”)*

*That the joint tenancy to the property was severed on the 11<sup>th</sup> March 2010 by order of the Supreme Court of Judicature of Jamaica and it was ordered that the property be sold and the sale proceeds distributed equally between me and my former husband (a copy of the draft order (the only one sent to me) now shown to me and marked “exhibit AVR1”)*

*A contract for the sale of the property to Henry Moo Young (hereinafter referred to as “the Purchaser” at \$9,500,000.00 was prepared by the said Don O. Foote.*

*A period of 90 days was agreed by the parties for completion of the sale and the “Sale Agreement” and the “Transfer of Land” were signed by my former husband and then by me on the 15<sup>th</sup> October 2010 (a copy of the said documents now shown to me and marked “exhibit AVR 2”)*

*The “Sale Agreement” and the “Transfer of Land” were not signed by the Purchaser before the 90 day expiry period.*

*In January 2011 I was informed by my nephew that construction work had commenced on the property and photographs were taken and were sent to me. Exhibited hereto are four photographs taken after the commencement of the construction work (now shown to me and marked “exhibit AVR 3”).*

*I telephone my Attorney-at-Law Veronica R. Mason of Suite #5 Uptown Shopping Centre, P.O Box 140 Lucea Hanover who then contacted Don O. Foote firstly by telephone and then by letter dated 12<sup>th</sup> January 2011 (and a copy of the letter is shown to me and marked “exhibit AVR4”).*

*On the 24<sup>th</sup> January 2011 my Attorney-at-law wrote again to Don O. Foote and a copy of the letter is shown to me and marked exhibit AVR5”).*

*On the 16<sup>th</sup> February 2011 my Attorney-at-Law wrote again to Don O. Foote and a copy of the letter is shown to me and marked “exhibit AVR6”)*

*A response from Don O. Foote was received by letter dated 1<sup>st</sup> March 2011 (and a copy of the letter is shown to me and marked “AVR7”)*

*Work continues on the property to date and I understand that the buyer is in occupation but has not signed the Sale Agreement or the Transfer of Land and I have not received my share of the proceeds of sale of the property.*

*Don O. Foote has permitted the commencement of construction work on the property without completion of the sale of the property, which remains in my name and in that of my former husband.*

*I have been informed that the person responsible for the construction work on the property is Mrs. Foote, the wife of the said Don O. Foote and it has not been explained to me why this is the case.*

*Don O. Foote has breached the terms of the contract of the sale agreement by agreeing to put in possession the purchaser who has failed to sign the Sale Agreement and Transfer of Land documents. He has also allowed structural alterations to property by way of an extension that has transformed the property so it is unrecognisable and is irreversible.*

*Don O. Foote has failed to obtain my permission before putting the purchaser in possession of the property knowing that the sale has not been completed and that in doing so he is in breach of the terms of the contract.*

*Under the present circumstances I have requested the withdrawal of the contract several times but Don O. Foote will not comply with my request.*

*In a letter dated 1<sup>st</sup> March 2011 from Don O. Foote exhibited hereto I was accused of abandoning the property and leaving the responsibility of maintenance to my former husband. Don O. Foote is aware of the fact that prior to the sale agreement, my former husband was living in the property with his new wife without paying any rent to me for a number of years. Between 2003 and 2007, my former husband rented out the property and I have never received any of the rent. It is my belief that the rental income would have been sufficient to maintain the property given that no rent was received by me I was further accused of frustrating the first attempt to sell the property in 2008 but I refused to sign the earlier contract because the residential address and former residential address contained in the contract for my former husband were both incorrect and I was concerned that there may be fraud involved. A letter dated 14<sup>th</sup> January 2008 from my previous solicitor highlighted this matter (a copy of the letter and previous transfer and agreement are shown to me marked exhibit AVR8). The accusations against me by Don O. Foote contained in the letter exhibited hereto as AVR7 are unfounded and disparaging and in making such unfounded and disparaging statements about me in knowledge of the actual facts, he has discredited the profession of which he is a member of.”*

16. There is a bundle of exhibits inclusive of the several letters written by the Complainant's Attorneys-at-Law to the Attorney and letters by the Attorney to the Complainant's Attorneys-at-Law.

#### **CROSS EXAMINATION OF THE COMPLAINANT**

17. Mr. John Thompson, Attorney-at-Law who appeared for the Attorney, cross examined the Complainant. The Panel is of the respectful opinion that this cross examination failed to address the material issues in the complaint and also failed to impugn or discredit the evidence of the complainant. In these circumstances the cross examination will not be replicated here and the Notes of Evidence are referred for their substantive content.

18. We believe that we do no injustice to Mr. Thompson by our finding that the cross examination of the complainant was unremarkable. Nothing of any significance turns on it or flows from it.

19. At the close of the Complainant's case, counsel for the Attorney made a submission that there was no case to answer by the Attorney. The panel was of the view that this Submission had no merit on the evidence adduced so far and dismissed the submissions. The Attorney gave evidence.

#### EXAMINATION IN CHIEF OF THE ATTORNEY

20. As already stated the attorney gave oral evidence, affidavit evidence and documentary evidence was introduced by him in support of his case. The Attorney in his examination-in-chief testified that the property is still left to be transferred and that upon receiving the letter dated 16<sup>th</sup> day of February 2011, he took no further steps in attempting to have the property sold to Mr. Moo Young.

#### CROSS EXAMINATION OF THE ATTORNEY

21. In cross examination, the Attorney agreed that the purchaser should not have been put in possession except on completion as stated in the sale. The reason he assigned for doing so was that there were some problems due to the costs to him for upkeep of the property and he did not want same to be vandalised. His evidence further stated that, ***"I told him to put Mr. Moo Young in possession because he wanted to purchase it and he could repair it."***

22. The Attorney also stated that he did not think it was necessary to reply to the Complainant's Attorney-at-Law letters, and it was not his practice to ignore letters on a whole. However, the Complainant asserted through her questions that that was one of the reasons for her Attorney-at-Law writing to him.

#### THE LAW

23. The Panel reminds itself that the burden of proof to establish the complaints rests solely and entirely on the Complainant. The Panel also reminds itself that the standard of proof which is required from the complaint is proof beyond a reasonable doubt. (*Wilston Campbell v Davida Hamlet (as executrix of Simon Alexander) Privy Council Appeal No. 73 of 2001*).

24. The significant legal issues in the case arise from Complaint listed at paragraph 8 of the Decision.

25. On the basis of the complaint as filed the panel is of the considered opinion that there are two substantive issues to be determined. Did the Attorney, “in the performance of his duties act with inexcusable or deplorable negligence or neglect?” Secondly, “did the Attorney fail to maintain the honour and dignity of the profession and abstain from behaviour which may tend to discredit the profession or which he is a member.”

26. In the leading case of *Earl Witter v Roy Forbes (1989) 26 JLR 129* the Court of Appeal in Jamaica addressed the test to be applied to cases of professional misconduct. In Carey JA (as he then was) stated as follows: -

*“We are not in this appeal dealing with professional misconduct involving an element of deceit or moral turpitude.....as to rule it is not mere delay that constitutes the breach, but the failure to deal with the client’s business in a business-like manner. With respect to rule (s) it is not inadvertence or carelessness that is being made punishable but culpable non-performance”.*

27. The Judgment of *Earl Witter* was recently applied by the Disciplinary Committee in *Complaint No. 63/2010 David Bennett v Sean Kinghorn*. The Panel accepts that in matters such as these the Complainant has to prove, to the requisite Standard of Proof, not mere carelessness or inadvertence that would suffice in a civil trial, but culpable non-performance or gross recklessness.

28. The relevant Canons of the Legal Profession (Canons of Professional Ethics) Rules are IV (s) and 1 (b).

(i) CANON IV (s)

In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect

(ii) CANON I (b)

An Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member.



## 29.EVALUATION OF THE EVIDENCE

In evaluating the evidence and in an effort to resolve the issues raised, the Panel will take into account the demeanour of the complainant and that of the Attorney and the content of their evidence.

## 30.THE Demeanour OF THE COMPLAINANT

She is an elderly lady who is a retired nurse. She was very familiar with the facts of her complaint, was credible and presented her case in a coherent manner. In spite of the fact that she was a bit irascible and short tempered at times, which the Panel thinks may be attributable to her ill health and advanced years, her evidence was persuasive and was not in any way discredited by cross examination or any prevarication on her part.

## 31.THE Demeanour OF THE ATTORNEY

The Attorney is mild mannered and soft spoken, but the content of his evidence was not such that displaced the evidence of the complainant or undermines it in anyway. He did not display a solid knowledge of the facts surrounding the complaint, his conduct of the sale as the Attorney-at-Law who had joint Carriage of Sale, nor generally the history of the transactions involved. He was hesitant and did not appear to be convinced of what he himself was saying.

32.In these circumstances, we are of the opinion that the complainant has discharged the burden and standard of proof imposed on her in law, and that she has proven her complaint beyond a reasonable doubt.

## FINDINGS

33. The Panel is obliged by *Section 15* of the *Legal Profession Act* to make Findings of Facts. The Panel finds that the complainant was a witness of truth, that her evidence was unshaken in cross examination and accepts her evidence. On the other hand the Panel finds that the evidence of the Attorney was convenient, constructed evidence which was patently self-serving in part, and generally lacked credibility.

34. The Panel finds the following facts:

- (i) There was an Order from the Supreme Court of Judicature that the complainant and her former spouse, Mr. Dorrel Saunders was entitled to one half (1/2) share

of a property situate at Lot 10, Emmaville, Smithfield in the parish of Westmoreland upon sale of the said property. Consequent upon the said Order, the sale was pursued, but to this date, has not been completed.

- (ii) The Agreement for Sale was signed by both the complainant and her former husband but was never signed by the purchaser.
- (iii) The Attorney had joint carriage of sale of the Agreement with Ms. Vonique Mason Attorney-at-Law from the firm of Brian Clarke & Company.
- (iv) The Attorney acted for and on behalf of the former husband of the complainant Mr. Dorrel Saunders.
- (v) Ms. Vonique Mason acted on behalf of the complainant.
- (vi) The Attorney knew and was in contact with the proposed purchaser Mr. Moo Young.
- (vii) More importantly, the Attorney stated that he was in possession of the Duplicate Certificate of Title and that the purchaser was put into possession by Mr. Saunders permission. The Attorney presented an undated letter signed "D Saunders" giving his authority to act in writing.
- (viii) The Attorney put the purchaser in possession of the property without the consent and knowledge of either the complainant or her Attorney-at-Law.
- (ix) The fact that the Attorney alleged that persons were put into possession by permission of his client, Mr. Saunders does not negate the fact that permission was required from the complainant in light of her one-half (1/2) share in the property. The property was subject to a joint sale and the granting of early possession ought to have been communicated to the complainant and her consent obtained.

- (x) Despite the fact that Mr. Moo Young did not sign the Agreement of Sale, he was allowed by the Attorney to make alternations to the property.
- (xi) The refusal to reply to the Complainant's Attorney-at-Law reflects the Attorney's appalling communication skills and disregard for Counsel. He stated that the reason was due to the pending consummation of the contract but this never occurred because of the rescission letter. Nonetheless, the Attorney had a duty to ensure that the joint owner of a property to be sold and divided pursuant to the Court order was kept abreast of every development.
- (xii) The Attorney at all of the material times conducted the sale as if the sole vendor was his client, the former husband of the complainant, when in fact both the complainant and her former husband were the vendors and were entitled as a matter of law to equally decide of any and all of the material issues which may have come up for decision.
- (xiii) The Attorney acted with gross discourtesy to his fellow colleague, the Attorney-at-Law for the complainant throughout the transaction.
- (xiv) The Attorney had no right in law or pursuant to the terms of the proposed Agreement for Sale to place the proposed purchaser in possession without the purchaser having ever signed the Agreement for Sale.
- (xv) The Attorney had no right in law to consent to any alternations being done to the premises by the proposed purchaser.
- (xvi) The conduct of the Attorney fell far below the professional standards required by an Attorney in the conduct of the subject transaction. This was patently demonstrated by the fact that at the request of the

Attorney-at-Law for the complainant, he refused to terminate or rescind an Agreement that he knew did not exist as it had not been signed by the purchaser, and under which the purchaser had no rights.

(xvii) The conduct of the attorney amounted to inexcusable or deplorable negligence or neglect in the performance of his duties.

(xviii) Viewed as a whole, in the circumstances of this complaint, the conduct of the attorney in the unprofessional way in which he handled this transaction, his failure to respond in a timely manner to letters sent by Ms. Mason all tend to discredit the profession and undermine the trust and confidence that members of the public place in Attorneys-at-Law in the conduct of their business.

## CONCLUSION

35. We find that the applicable standard of proof in these disciplinary proceedings which is that of a criminal standard being beyond all reasonable doubt, (*Wilston Campbell v Davida Hamlet* (as executrix of Simon Alexander) Privy Council Appeal No. 73 of 2001) has been established and the Attorney is guilty of professional misconduct as per Canons iv (s) and I (b) of the Legal Profession (Canon of Professional Ethics).

36. In accordance with the decision of the Court of Appeal in *Owen Clunie v the General Legal Council* a date for a Sanctions Hearing will be fixed by the Secretary of the Disciplinary Committee.

37. We believe that it is important to state that this matter has been delayed for several reasons, not the least of which was the taking of a preliminary point by the Attorney and the legal arguments which flowed from it that the complainants UK Solicitor Mr. Mendes DaCosta was not entitled to represent the complainant in the action. Additionally, it was very difficult to find dates convenient to all of the members of the Panel and the Attorney and his Attorney-at-Law during the work week. This became necessary as

the complainant asserted that her religion prohibited her from participating in Hearings on a Saturday, which is the day on which Hearings are usually heard.

DATED THE 11<sup>TH</sup> DAY OF APRIL 2017

  
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PAMELA BENKA-COKER, Q.C.

  
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WALTER SCOTT, Q.C.

  
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GLORIA LANGRIN