

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

COMPLAINT NO. 17/2016

IN THE MATTER OF THE LEGAL PROFESSION ACT 1971

BETWEEN	C.O.K SODALITY CREDIT UNION LIMITED	COMPLAINANT
AND	LANCELOT A. ST. MARTIN COWAN	RESPONDENT

PANEL: :MR. WALTER SCOTT Q.C
 :MR. MICHAEL THOMAS
 :MRS. DEBRA E. McDONALD

APPEARANCES:-

MS. JACQUELINE MIGHTY representative of **COMPLAINANT**
MS. ROSHENE BETTON Attorney-at-Law for **COMPLAINANT**
MR. LEONARD GREEN Attorney-at-Law for **RESPONDENT**
Mr. LANCELOT A. ST. MARTIN COWAN, RESPONDENT

HEARING DATES: 14th May 2016; 19th July 2016; 6th April 2017

COMPLAINT

The Complaint is that:-

- 1] “ The Attorney by his acts and conduct breached the LEGAL PROFESSION (CANONS OF PROFESSIONAL ETHICS) RULES (1978) Canon VI(d) to wit:-

“An Attorney shall not give a professional undertaking which he cannot fulfill and shall fulfill every such undertaking which he gives”

- 2] When the matter commenced on the 14th May 2016, neither the Attorney nor his representative was present. The Panel, having noted :
- (i)the Affidavit of Service of Waylon Henry, sworn to on the 12th May 2016 wherein he deponed that on the 8th April 2016, he attended the General Post Office and posted by Registered mail the Notice Of Hearing to the attorney dated 6th April, 2016 and;
 - (ii)The certificate of posting of a registered article bearing registration number 1787 and the stamp of the General Post Office with date 8th April, 2016.

Satisfied itself that the Attorney had been properly served with the notice of hearing, commenced the hearing. The evidence of Ms. Jacqueline Mighty, representative of the Complainant was taken.

- 3] The matter was then adjourned part heard to the 19th July 2016. The Panel directed that the notes of evidence and notice of the date for continuation be delivered to the attorney.
- 4] On the 19th July 2016, the Attorney attended with his representative Mr. Leonard Green, Attorney-at-Law. Mr. Green tendered apologies for the absence of the Attorney on the previous date which was due to the Notice having been served at an address from which the Attorney had removed. He had since then notified the Council of his current address.
- 5] Ms. Mighty was then cross examined by Mr. Green and re-examined by Ms. Betton. The matter was then further adjourned part heard to the 20th October, 2016. The Attorney who had failed to comply with the requirement to file an affidavit in response to the complaint, was directed to file and serve same by the 9th September 2016.
- 6] The hearing was adjourned on two subsequent dates, once upon the application of the Complainant and the other due to the unavailability of a member of the Panel.
- 7] On the 9th February 2017, the matter did not proceed, due to the fact that the attorney had still not filed his affidavit, nor was the attorney present. Mr. Green was present but could not account for the absence of his client. The Panel adjourned the matter to the 6th April, 2017, with costs of that day to the Complainant.
- 8] The hearing resumed on the 6th April 2017, when the case for the Complainant was closed. The Attorney testified and was cross examined by Ms. Betton. Mr. Green did not re-examine the Attorney and closed the case of the respondent Attorney-at-law.
- 9] The parties were directed to file and serve written submissions by the 26th May, 2017. Only the Complainant has complied with this directive, having requested and being granted an extension of 14 days. To date, the respondent attorney-at-law has not filed any submissions at all.

EVIDENCE

The Complainant's case

- 10] The Evidence of the Complainant is contained in the Affidavit of Ms. Jacqueline Mighty, the then Chief Executive Office of COK Sodality Co-Operative Credit Union (hereinafter referred to as "the Complainant"). The affidavit was sworn to on the 24th September 2015 and was tendered in evidence as Exhibit 2, the Form of Application of the same date, being admitted as Exhibit 1.
- 11] Ms. Mighty deponed that the Attorney acted on behalf of Nigel Bair who at the material time was a member of the Complainant. Mr. Bair operated a company known as Sure Limited. The Attorney was a director of Sure Limited. Mr. Bair applied to the Complainant for a bridging loan of One Million Five Hundred Thousand Dollars to assist Sure Limited, to be repaid over a period of four(4) months.
- 12] Mr. Bair was at the time in the process of selling his property located at 40 Harwood Drive, Washington Gardens, Kingston 20, St. Andrew. The property is registered at Volume 950, Folio 364 of the Register Book of Titles.
- 13] The Attorney had carriage of the sale of this property. By letter dated September 19, 2011, to the Complainant, the Attorney advised that he was in possession of the Duplicate Certificate of Title for the property at 40 Harwood Drive. He also confirmed that *"this property is to be used as the collateral to secure the line of credit applied for by Sure Limited from your organization."*
- 14] By letter dated November 11, 2011, the Attorney gave his professional undertaking to the Complainant to *"register the transfer to the purchaser and to pay you \$1,500,000.00 of the net sale proceeds on completion of the said transaction and on our receipt of the said sale proceeds. This undertaking expires on October 31, 2012."*
- 15] The Complainant issued a letter to Mr. Bair dated December 8, 2011 which contained the terms of the Offer of Finance in the sum of \$1,500,000.00. At item 11 it reads as follows:

"SECURITY

The Loan will be evidenced by a Promissory Note and supported by:

- i) *Letter of Undertaking from Lancelot Cowan and Associates to pay the amount of \$1,500,000.00 plus interest from the proceeds of sale of property located at 40 Harwood Drive, Washington Gardens, Kingston 20 and to forward to COK the certificate of title for said property in the event*

the sale is aborted to allow for a mortgage to be stamped and registered for the loan amount at which time the relevant fees will become applicable”

- 16] In keeping with the requirements of the Complainant, the Attorney issued another letter of undertaking dated December 8, 2011 to wit:-

“this is our professional undertaking to register the transfer to the purchaser and to pay you \$1,500,000.00 and any additional interest that may be due at the time. Of the net sale proceeds on completion of the said transaction and on our receipt of the said sale proceeds. In the event that the sale falls through, we undertake to forward to you the certificate of title. This undertaking expires on April 30, 2012”

- 17] The Complainant, in reliance upon the aforementioned undertaking, disbursed the loan of \$1,500,000.00 by 6 cheques over the period December 9th to 20, 2011.

- 18] In January 2012, Mr. Bair delivered to the Complainant, a cheque in the sum of \$675,000.00 to be applied to the loan repayment. The cheque was dishonored.

- 19] The attorney then issued a third undertaking to the Complainant, by a letter dated March 1st, 2012.

“This letter is further to our December 8, 2011 letter to you.

In relation to the returned cheque of \$675,000.00 on the Nigel Bair SURE account, this is our professional undertaking to settle amount outstanding from this cheque plus associated costs From the sale proceeds.... On the completion of the transaction and receipt of the said sale proceeds from the Purchaser...”

- 20] On or about March 1st 2011, the attorney delivered to the Complainant a cheque in the sum of \$200,000.00 drawn on the account of Lancelot Cowan &/or Jacqueline Cowan towards the loan of Mr. Bair.

- 21] Notwithstanding repeated demands, the attorney has not delivered to the Complainant:

- i) The sum of \$1,500,000.00;
- ii) The sum of \$675,000.00
- ii) The Duplicate Certificate of Title registered at Volume 950 Folio 364 of the Register Book of Titles.

- 22] Ms. Mighty was cross examined by Mr. Leonard Green, Attorney-at-Law, on the 19th July 2016. She was asked whether legal advice had been taken by the

Complainant prior to the acceptance of the undertakings of the 8th December 2011 and 1st March 2012. She responded that the legal representative would have reviewed the documents prior to disbursement, but could not say that “legal advice” was received.

- 23] Mr. Green questioned her knowledge of the status of the sale transaction and enquired why this was not a part of her evidence. Ms. Mighty responded that the status was not the concern of the Complainant in circumstances where they were relying on an undertaking from an attorney, she was however aware that the sale had not been concluded. It was suggested to the witness that the attorney had no obligation to make payments in light of the fact that the transaction was never concluded, the undertakings being conditional upon that event, the only surviving obligation being to produce the title.
- 24] On re-examination, Ms. Mighty confirmed that contrary to his undertaking the title had not been delivered by the attorney.

THE ATTORNEY’S DEFENCE

- 25] The attorney’s affidavit sworn to on the 27th February, 2017 was filed with the Council on the 28th February 2017. The affidavit was tendered and is admitted as EXHIBIT 4.
- 26] He admitted that he issued the letters of December 8, 2011 and March 1, 2012. He however contended that the undertakings were conditional upon completion of the sale and that as the sale was not completed, he received no funds and therefore was not in a position to make payments to the Complainant.
- 27] The attorney deponed that he was not a party to the loan taken by Mr. Bair and was unaware of the terms of the loan agreement between the Complainant and Mr. Bair. He sought to explain his payment of \$200,000.00 towards the loan by saying that he paid same to rid himself of the presence of employees of the Complainant who came to his office and refused to leave without collecting funds from him.
- 28] He admitted that he had not delivered the title to the Complainant despite several demands. He stated further that the title had been returned by him to Mr. Bair at his request on Mr. Bair’s promise to return it to the attorney to complete the transaction.
- 29] In his examination in Chief, the attorney when asked whether he had informed the Complainant that the transaction had not been completed responded to say “I don’t believe so.” He also stated that he did not believe that he had responded to any of the letters from the Complainant requesting payment and / or the title.

- 30] During cross examination of the attorney by Ms. Betton, he confirmed that he gave an undertaking in his letter of December 8, 2011 to deliver the title to the Complainant if the sale fell through. He did not communicate to the Complainant that he had parted with possession of the title. His requests to Mr. Bair for the return of the title had not been heeded.
- 31] The attorney called no other witnesses and closed his defence on the 6th April 2017.

THE BURDEN AND STANDARD OF PROOF

- 32] The Panel recognizes that in law, the burden of proof is upon the complainant. The standard of proof in cases of professional misconduct is that of “beyond reasonable doubt”. This standard was applied by the Panel in evaluating the evidence adduced before it to determine the appropriate decision to make in the circumstances of this complaint.

ANALYSIS OF THE EVIDENCE

- 33] The Complainant’s evidence was cogent and very well supported in all material particulars by documents submitted.
- 34] Written Submissions were also filed by the complainant in compliance with the directions of the Panel. The Submissions were comprehensive and of great assistance in tracing the history of the matter and referring to legal authorities on the matter of undertakings by attorneys-at-Law.
- 35] In summary, the Complainant contends that:-
- (i) The attorney’s liability to the Complainant was twofold: A conditional liability to pay the sums of \$1,500,000.00 and \$675,000.00 and interest (if any) from the proceeds of sale; and a contingent liability to forward to the Complainant the duplicate Certificate of Title.
 - (ii) The attorney should have been aware of the fact that the sale was in jeopardy at the time the relevant undertakings were given.
 - (iii) If he were not so aware, at the time when he realized that the condition precedent in his undertaking to settle the sum of \$1,500,000.00 from the proceeds had failed due to the aborted sale, the Complainant ought to have been informed.
 - (iv) At the time when the attorney became aware that the contingent liability had crystallised, he ought to have delivered the duplicate Certificate of Title to the Complainant.

- (v) The attorney being aware of his obligations pursuant to his undertaking, parted with possession of the duplicate Certificate of Title, thereby causing prejudice to the Complainant which has now been placed in an unsecured position.
- 36] The Panel notes that the attorney filed his Affidavit in response to the Complaint on the 28th February, 2017. This, despite the fact that:-
- (a) Rule 4(2) of the Legal Profession (Disciplinary Proceedings) Rules requires attorneys to file and serve an affidavit in response within 42 days of service of the Application and Affidavit in support of the Complaint:
 - (b) An Order made on the 19th July 2016 that he file and serve his affidavit by the 9th September 2016;
- 37] The affidavit filed by the attorney was not accompanied by any exhibits. He did not seek to tender any documents during his oral evidence. He did not file written submissions.
- 38] The attorney has admitted his obligation contained in his undertaking to deliver the Duplicate Certificate of Title to the Complainant upon cancellation of the sale. He has not explained why in the circumstances he parted with possession of the Duplicate Certificate of Title at his client's request. He has not produced evidence of any attempts made by him to retrieve the Title. He has not indicated in his Affidavit, or under cross examination, the date when he parted possession of the Title.

FINDINGS OF FACT

- 39] Having reviewed the evidence presented by the Complainant and the documents admitted, the Panel accepts the evidence of the Complainant which has not in any material respect been displaced by the attorney. We therefore find that the following has been established beyond reasonable doubt:-
- (a) The attorney is an attorney in private practice as Lancelot Cowan & Associates.
 - (b) The attorney was a director of the company SURE LIMITED.
 - (c) The principal of SURE LIMITED, Mr. Nigel Bair, applied to the Complainant for a loan in the sum of \$1,500,000.00 with interest to be settled from the proceeds of sale of a property owned by Mr. Bair at 40 Harwood Drive, Washington Gardens, St. Andrew, registered at Volume 950, Folio 364 of the Register Book of Titles.
 - (d) The Agreement for Sale in question is dated 30th September 2011, with a completion date of 365 days from that date.

- (e) The attorney represented Mr. Bair and had carriage of sale of the property.
- (f) One condition of the loan was that an undertaking be issued by the attorney to settle the sum of the loan plus any interest upon completion of the sale and if the sale was cancelled, to deliver the title for the property to the Complainant.
- (g) The attorney by letter dated December 8, 2011 to the Complainant issued the required undertaking in the terms directed by the Complainant.
- (h) The Complainant, in reliance upon the undertaking of the Attorney, disbursed to Mr. Bair, the sum of \$1,500,000.00 in December 2011.
- (i) In or about January 2012, Mr. Bair issued to the Complainant a cheque in the sum of \$675,000 to be applied to repayment of the loan account. The cheque was dishonoured.
- (j) By letter dated March 1, 2012, the attorney issued to the Complainant a letter of undertaking to settle the sum of \$675,000.00 being the proceeds of the dishonoured cheque, from the net proceeds of sale, upon completion and receipt of the proceeds.
- (k) On or about March 1, 2012, the attorney paid to the Complainant by cheque, a sum of \$200,000.00 towards the repayment of the loan.
- (l) The attorney was in possession of the Duplicate Certificate of Title, subject of his undertaking of December 8, 2011, prior to issuing the undertaking..
- (m) The sale transaction was never completed.
- (n) The attorney did not inform the Complainant that there was any difficulty with the sale transaction.
- (o) The attorney parted with possession of the Duplicate Certificate of Title by handing same to his client Mr. Bair.
- (p) Notwithstanding repeated demands by the Complainant, the Attorney has failed to make the payments of \$1,500,000.00 plus interest of \$675,000.00; or deliver the Duplicate Certificate of Title to the Complainant.
- (q) The indebtedness to the Complainant is now unsecured due to the failure of the attorney to honour his undertakings.

THE LAW

40] **Canon VI (d)** states-

“An Attorney shall not give a professional undertaking which he cannot fulfill and shall fulfill every such undertaking which he gives”

Canon VIII(d) states-

“Breach of Canon VI(d) shall constitute misconduct in a professional respect

41] The required standard with regard to undertakings by attorneys was stated by Carey, J.A. in delivering his judgment in the Court of Appeal case of **Sylvester Morris v General Legal Council ex Parte Alpart Credit Union (1985) 22 JLR 1**. That case, concerned the conduct of an Attorney-at-Law who breached his undertaking which in the view of the General Legal Council amounted to professional misconduct, Carey J. A stated: -

“The importance of undertakings in the world of commerce and conveyancing cannot be overemphasized. The practice of attorneys giving undertakings relating to certificates of titles has been of long standing and the whole business, especially in conveyancing would be brought to a halt if parties whether they be attorneys or financial institutions could no longer rely on the word of a member of an honourable profession.”

42] In the case of **Udall v Capri Lighting Ltd**, Balcombe J stated that there is no requirement to prove dishonourable conduct. Failure to implement a solicitor’s undertaking is prima facie to be regarded as misconduct.

43] We find that the attorney is guilty of professional misconduct in that he has failed to honour the undertaking to the Complainant to deliver to the Complainant, the duplicate Certificate of Title registered at volume 950 Folio 364 of the Register Book of Titles upon it becoming evident that he would not be in a position to settle the sums of \$1,500,000.00 and \$675,000.00 or any sum at all from the proceeds of sale.

44] The attorney has caused the Complainant to suffer prejudice and loss as a result of having relied upon the word of the attorney in his undertaking.

45] The attorney by his own conduct, inexplicably placed himself in a position which undermined his ability to honour the professional undertaking. Further he did so at time when he was either aware that the transaction was in jeopardy or aware that it had been aborted. This was compounded by the fact that he failed to notify the Complainant of the true state of affairs.

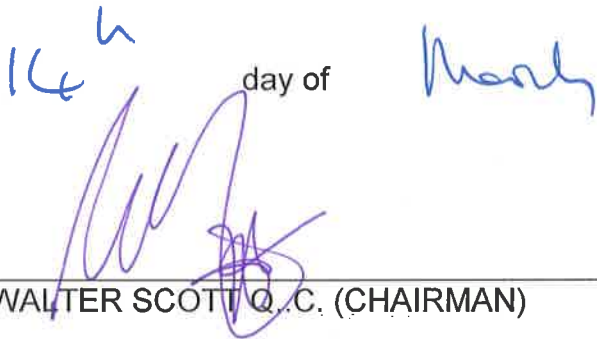
46] The English Law Society’s Guide to the Professional Conduct of Solicitors states that:

“In the absence of an express term, there is an implied term in a professional undertaking that it is to be performed with a reasonable time having regard to its nature. If there is any untoward delay, the giver is under an obligation in professional conduct to keep the recipient of the undertaking informed”.

47] In recognition of the directive of the Court of Appeal in the matter of **Owen Clunie v. GLC CA 3 / 2013** this Panel directs that a date be set to give the

attorney an opportunity to be heard in the mitigation before a sanction is imposed.

Dated this 14th day of March 2018



WALTER SCOTT Q.C. (CHAIRMAN)



MICHAEL THOMAS



DEBRA E. MCDONALD