

DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

COMPLAINT No. 132/2017

In the matter of Cecille Thomas and
Donovan OcConor Malcolm, an Attorney at Law

AND

In the matter of the Legal Profession Act 1971

Panel : Mrs. Debra E. McDonald- Chairman

Mr. Dane Marsh

Mr. Jeffrey Daley

Appearances: The Complainant appeared in person and was represented by Mrs. Yualande Christopher Walker, Attorney-at-Law. The Attorney did not appear nor was he represented at the Hearing by Counsel.

Hearing dates: 24th July, 2018, 19th September, 2018, 7th November 2018 and 16th January, 2019

THE COMPLAINT

- 1) The Complainant by her Form of Complaint dated the 31st May, 2017 against the Attorney asserted that he had breached the following Canons:
 - a. **Canon I(b) of the Legal Profession (Canons of Professional Ethics) Rules [1978]** which states that an Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behavior which may tend to discredit the profession of which he is a member.

- b. **Canon VII (a)** which states that an Attorney shall comply with rules as may from time to time be prescribed by the General Legal Council relating to the keeping in separate accounts-
 - i) The funds of himself or any firm with which he is associated;
and
 - ii) those of his clients.

- c. **Canon VII (b)** which provides that an Attorney shall:
 - i) Keep such accounts as shall clearly and accurately distinguish the financial position between himself and his client as and when required; and
 - ii) Account to his client for all monies in the hands of the Attorney for the account or credit of the client, whenever reasonably required to do so

And he shall for those purposes keep the said accounts in conformity with the regulations which may from time to time be prescribed by the General Legal Council

INTRODUCTION

- 2) This Complaint had its first hearing date on 3rd February, 2018 when the Complainant appeared represented by her Attorney, Mrs. Yualaunde Christopher Walker and the Attorney, Mr. Malcolm, did not appear but was represented by Mr. Steven Powell, Attorney at Law were present. A date was fixed for trial of the Complaint on the 11th and 18th April, 2018. The Attorney was granted an extension of time by the Panel to file an Affidavit in Response to the Complaint.

- 3) On the 11th April, 2018, The Complainant and her attorney were present. Ms. Kadian Carter, Attorney-at-Law holding for Mr. Steven Powell appeared before the Panel and requested a further adjournment of the Hearing. The Panel noted the contents of a letter dated April 10, 2018 received by the Secretary of the Disciplinary Committee of the General Legal Council from Mr. Steven Powell, which enclosed a medical certificate for Mr. Malcolm

dated April 10, 2018 which stated that Mr. Malcom sustained trauma to his head and back from a fall and *“is expected to be unfit to work for approximately two (2) weeks”*. Mr. Powell’s letter requested an adjournment to a date after the third week in July, 2018. The Panel adjourned the Hearing to May 9th, 2018.

- 4) On the 9th May, 2018 The Complainant was scheduled to attend by Video link. Her attorney Ms. Christopher Walker was present. Mr. Laurence Philpotts Brown, Attorney-at-Law appeared before the Panel and indicated that he was holding for Mr. Steven Powell, Attorney at Law, who represented Mr. Malcolm. He requested that the matter be further adjourned to a date in the third week of July, 2018. The Panel refused the application for adjournment but the Hearing could not proceed due to technical difficulties with the Skype video-link that would have prevented the Panel from receiving the Complainant’s evidence by Skype. The Hearing was adjourned to the 24th July, 2018.

- 5) On the 24th July, 2018, The Complainant and her attorney were present. Ms. Kadian Carter, Attorney at Law appeared at the request of Mr. Malcom. She advised the Panel that she was not representing Mr. Malcolm in the matter, she was only attending to advise the panel that Mr. Malcolm was unable to attend on that date due to illness, and to request a new hearing date. The Secretary of the Disciplinary Committee had received a Medical report dated July 21, 2018 addressed *“To Whom It May Concern”* from Dr. Edmond Miller advising that Mr. Malcom was suffering from an acute case of thrombosis in his left foot and had to undergo immediate surgery. It stated that Mr. Malcolm was *“deemed not fit to work for the next three (3) weeks”*. The Panel noted that the Complainant had again travelled from overseas for the third time for the hearing and commenced same with the taking of her evidence in chief. The Matter was then adjourned part-heard to the 19th September, 2018 with instructions to the Secretary that the Attorney should be provided with the notes of evidence.

- 6) Mr. Vincent Henry, Attorney-at-Law appeared before the Panel on the morning of September 19, 2018 to request a further adjournment on behalf of The Attorney on the basis of his ill health, specifically, he had undergone surgery to his foot and was having difficulty with mobility. The Complainant and her attorney were present.
- 7) The Panel was informed by the Secretary that two weeks earlier, Mr. Patrick Bailey, Attorney-at-Law, by email to her dated September 8, 2018 indicated that he would be assuming Mr. Malcolm's legal representation in the matter. The type-written Notes of Evidence were sent to Mr. Bailey by email on September 17, 2018 at his request.
- 8) The Secretary also brought to the attention of the panel, an email received from Mr. Bailey on September 19, 2018 requesting an adjournment of the Hearing, advising that Mr. Malcolm was ill and that Mr. Malcolm would be forwarding a medical certificate in due course.
- 9) A medical Certificate dated 12th September, 2018 from Dr. Edmond Miller was received by the Secretary on the morning of the Hearing by email from Mr. Malcolm indicating Mr. Malcolm's inability to attend due to illness. It stated that Mr. Malcom was *"suffering from a medical condition and is unfit for work for a period of 18 days commencing 12.09.2018"*.
- 10) The Panel refused the application for an adjournment of the matter, as the Complainant had again travelled from overseas and was present. Costs previously awarded to the Complainant arising from the absence of the Attorney had not been paid. Further, the Panel having granted to the Attorney several extensions of time within which to file his affidavit, to wit:
- (i) On the 3rd February, 2018 extended to the 15th February, 2018;
 - (ii) On the 11th April, 2018 extended to the 25th April, 2018 and

(iii) On the 9th May, 2018, when he was absent but requested a hearing date in July, 2018 through Counsel appearing for him .

11) The Attorney had not complied. The Panel formed the view that in all the circumstances, there would be greater prejudice to the Complainant if the matter did not proceed. On the other hand, the Attorney would not be prejudiced as he would receive the notes of evidence. Mr. Henry left the room and the hearing of the evidence in chief of the Complainant continued. The matter was then adjourned the matter part-heard to the 7th November, 2018.

12) By letter dated November 7, 2018 addressed to the Secretary of the General Legal Council Mr. Patrick Bailey by letter of even date withdrew from his representation of Mr. Malcolm on the basis that he was unable to obtain instructions. Mr. Bailey's letter enclosed a copy of a medical Report from Dr. Hugh Ashman dated October 24, 2018 which stated that Mr. Malcolm had undergone a tonsillectomy and had developed complications arising from that surgical procedure. It stated that Mr. Malcolm "*is not fit to work for the next nine (9) weeks*".

13) The Panel completed the taking of the Complainant's evidence on the 16th December, 2018 and the Complaint closed her case. The Attorney did not appear nor was he represented. The matter was further adjourned to the 19th January, 2019.

14) On the 19th January, 2019 again only the Complainant and her Attorney at Law, Mrs. Yualande Christopher Walker appeared. There was no communication from the Attorney. The Panel considered the evidence closed and Judgment was reserved.

THE EVIDENCE

15) The Form of Complaint dated 31st May, 2017 and Affidavit in support also dated 31st May, 2017 were admitted into evidence as **Exhibit 1** and **Exhibit 2**, respectively. The Complainant's List of Documents with attachments dated

9th April, 2018 was admitted as **Exhibit 3**. A further affidavit of the Complainant dated 13th March, 2018 with exhibits attached was admitted as **Exhibit 4**.

- 16) The Complainant's evidence was that she entered into an agreement with Monica Blair and Keith Blair (the Vendors) to purchase land part of Antrium Pen in the parish of St. Andrew registered at Volume 279 Folio 61 of the Register Book of Titles, also described as 65 ½ Deanery Road, Kingston (hereinafter referred to as "the said property") for an agreed purchase price of Fifteen Million Six Hundred (\$15,600,000.00). The Agreement for Sale was dated the 12th of September, 2013 with completion set for sixty (60) days, however, the Panel noted that the copy Agreement for Sale, which on its face appears to have been stamped by the Stamp Office, bore the date 1st June, 2015 (see **Exhibit 4**). Of the agreed purchase price Five Million One Hundred and Ninety-nine Thousand Four Hundred and Eighty Dollars (\$5,199,480.00) was to have been financed by a vendors' mortgage granted over the property for a three (3) year term.
- 17) In the transaction, the Vendors were represented by the Attorney acting under the name "Donovan O. Malcolm & Co., Attorneys-at-Law". The Complainant said that she later discovered that Mr. Malcolm was employed full-time as an Associate Attorney-at-Law at the firm Clough Long & Co. The Complainant paid a total sum of Eleven Million Five Hundred and Fifty-three Thousand Three Hundred and Thirty-two Dollars (\$11,553,332.50) to the Attorney towards the purchase price, closing costs, and fees for applications for change of use and modification of a boundary breach.
- 18) The Complainant also gave evidence that she paid sums to the Attorney to settle the vendor's mortgage well before the end of the three (3) year mortgage term. After requesting her title and being given multiple excuses by the Attorney, she reported the matter to Dr. Raymond Clough, Senior Partner at the Firm Clough Long & Co., who took over conduct of the matter and rendered a Statement of Account to her (See **Exhibit 3 pg. 60**).After

receiving a Statement of Account from Dr. Raymond Clough she learnt that only Five Million Dollars (\$5,000,000.00) of the Eleven Million Five Hundred and Fifty-three Thousand Three Hundred and Thirty-two Dollars (\$11,553,332.50) that she paid to the Attorney had been paid over to Clough Long & Co. leaving a balance of Six Million Five Hundred and Fifty-three Thousand Three Hundred and Thirty-two Dollars and Fifty Cents (\$6,553,332.50) not accounted for. The balance of purchase price monies, and interest due under the Agreement for Sale and Mortgage, respectively, were paid over to Dr. Clough by the Complainant making a grand total of Sixteen Million Four Hundred and Twenty-five Thousand Nine Hundred and Seventy-seven Dollars and Fifty Cents (\$16,425,977.50) paid to Donovan O. Malcolm & Co and Dr. Raymond Clough/ Clough Long & Co. collectively. This sum excluded closing costs, which were paid separately.

19) The Complainant further stated that after requesting a copy of the Title for the said property directly from the Titles Office of the National Land Agency she discovered that the Respondent Attorney had registered a vendors' mortgage of Eight Million Six Hundred and Eleven Thousand Dollars (\$8,611,000.00) on the title for the property and not Five Million One Hundred and Ninety-nine Thousand Four Hundred and Eighty Dollars (\$5,199,480.00). The Complainant stated unequivocally that she had not executed a mortgage deed for Eight Million Six Hundred and Eleven Thousand Dollars (\$8,611,000.00). The Complainant contended that in an attempt to conceal the overstated mortgage sum registered on the title Mr. Malcolm presented to her a falsified copy of the registered title with reference number A1110836(see **Exhibit 5**) showing a mortgage of Five Million One Hundred and Ninety-nine Thousand Four Hundred and Eighty Dollars (\$5,199,480.00)

20) The Panel accepted the Complainant's evidence of a printed transcript of "Whats App" text conversations, between herself and the Respondent Attorney between September 2016 and December 2016. which was admitted into evidence as a part of **Exhibit 3**. The Panel noted in particular

the conversation recorded on the 22nd December, 2016 at 5:51AM where Mr. Malcom said to the Complainant:

i. "Please I am really begging you, I have done a wrongful act, I have learnt from this, I don't want to loose [sic] my license to practice as an Attorney, I don't want to go to court. I am begging you Ms. Thomas, I am on my knees, please give me some time to work back the monies"

21) The Claimant further gave evidence that she was told by the vendor, Mr. Blair, just prior to her attending the hearing in December 2018 that he would not surrender the title to her as he was still owed Two million Six Hundred Thousand Dollars (\$2,600,000.00), this in spite of her having satisfied all payments due under the Agreement for Sale and vendors' mortgage.

ANALYSIS

22) No evidence was lead in relation to the breach of Cannon VII(a) i and ii.

23) Whilst the Attorney did not represent the Complainant in the transaction his handling of the sale of the subject property and more particularly his treatment of monies he received from the Complainant directly and adversely impacted the Complainant. Section 12 (1) of the Legal Profession Act states that:

i. "Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concerning any of the following acts committed by

an attorney, that is to say – (a) any misconduct in a professional respect ... “

FINDINGS

1. The Panel having heard her evidence and observed her demeanor accepted the Complainant's evidence as truthful.
2. The Attorney, Mr. Donovan Malcolm, acted for the vendors Monica Louisa Blair and Keith George Blair and had carriage of the sale of the property at 65 ½ Deanery Road, Kingston to the Complainant and her daughters Charice Thomas and Kayan Thomas.
3. The purchase price was partly financed by a vendors' mortgage granted to the Complainant and her co-purchasers. The Attorney, acting through the firm, Donovan O. Malcolm & Co., received Eleven Million Five Hundred and Fifty-three Thousand Three Hundred and Thirty-two Dollars (\$11,553,332.50) in four (4) tranches, which comprised a part of the balance purchase price, closing costs and fees for applications to change the use of the said property and to modify a boundary breach.
4. The Attorney has failed to account to the Complainant for all monies received from her by not remitting the appropriate purchase money to the Vendor thereby depriving the Complainant of receiving her Title and property that she has paid for in full.
5. The Attorney registered a vendors' mortgage of Eight Million Six Hundred and Eleven Thousand Dollars (\$8,611,000.00) on the title for the property and not Five Million One Hundred and Ninety-nine Thousand Four Hundred and Eighty Dollars (\$5,199,480.00) which was the mortgage amount agreed by the parties and stated in the mortgage deed executed by them.

6. The Attorney provided the Complainant with a copy of the duplicate Certificate of Title for the property which showed a mortgage registered thereon in the amount of Five Million One Hundred and Ninety-nine Thousand Four Hundred and Eighty Dollars (\$5,199,480.00).
7. The Complainant obtained from the Titles Office, a Certified copy of the duplicate Certificate of Title which showed an indorsed mortgage of Eight Million Six Hundred and Eleven Thousand Dollars (\$8,611,000.00).
8. Although the agreed mortgage amount has been satisfied in full by the Complainant the Attorney has neither discharged the mortgage on the title nor delivered the Duplicate Certificate of Title to the Complainant.
9. The Complainant paid to the Attorney Six Hundred and Thirty Thousand Dollars (\$630,000.00) as legal fees for the Attorney to make an application for a change of use of the property and Seven Hundred and Fifty Thousand Dollars (\$750,000.00) as legal fees to apply for the modification of restrictive covenants to cure an encroachment at the property. These sums were additional to the balance purchase price and closing costs.
10. The Attorney has not carried out the legal work for which he charged the fees nor has he refunded the Complainant any part of the monies paid as stated above.
11. The Attorney had admitted to the Complainant that he used her money and asked for time to “work back the monies”

CONCLUSION

1) The Panel finds Mr. Donovan Malcolm guilty of professional misconduct having breached Canon I(b) and Canon VII (b) of the Legal Profession (Canons of Professional Ethics) Rules [1978] which stipulates that:

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(i) 2) 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;

(ii) 3) An Attorney shall account to his client for all monies in the hands of the Attorney for the account or credit of the client, whenever reasonably required to do so.

2 4) The Panel accepts that the required standard of proof is that which is beyond a reasonable doubt. The Complainant's evidence has met that standard.

In keeping with the decision of the Court of Appeal in the matter of OWEN CLUNIE v. THE GENERAL LEGAL COUNCIL the Panel will set a date for hearing at which the Attorney may, should he wish to do so, present arguments in mitigation on the matter of sanction.

Dated the 8th day of March 2019

[Signature]
DEBRA E. McDONALD

[Signature]
DANE MARSH

[Signature]
JEFFREY DALEY

