DECISION OF THE DISCIPLINARY COMMITTEE

OF THE GENERAL LEGAL COUNCIL

COMPLAINT NO: 42/2013

IN THE MATTER OF **MR. KEITH JARRETT,** an Attorney-at-Law

AND

IN THE MATTER OF THE LEGAL PROFESSION ACT, 1971

BETWEEN	JOSCELYN MASSOP	COMPLAINANT
AND	KEITH JARRETT	RESPONDENT

Panel:

Mrs. Judith Cooper-Batchelor - Chairman
Mrs. Tana'ania Small Davis
Mr. Jeffrey Daley

Appearances:
Mr Joscelyn Massop
Mr Anthony Williams (Complainant's attorney at law)
Mr Keith Jarrett

Hearing dates:

July 21, 2018; September 22, 2018, October 20, 2018, November 10, 2018

The Complaint

1. By form of Complaint dated 28th February 2013 and Form of Affidavit sworn to on the same date Joscelyn Massop (hereinafter called the Complainant) made the following complaint against Keith Jarrett ("the Attorney");
    a. He has not provided me with all information as to the progress of my business with due expedition, although I have reasonably required him to do so.
    b. He has not dealt with my business with all due expedition.
    c. He has acted with inexcusable and deplorable negligence in the performance of his duties.

2. The Complainant's evidence consisted of:
    a. Form of Application – Exhibit A
    b. Affidavit in Support dated February 28, 2014 – Exhibit B
    c. Bundle of Documents filed March 6, 2014 – Exhibit C
    d. Bundle of Documents filed October 21, 2015 – Exhibit D
    e. Bundle of Receipts filed June 30, 2016 – Exhibit E
    f. Supplemental List of Documents – Exhibit F

3. The Complainant stated in his affidavit that on 16th April 2006 he hired the Attorney to represent him after he was involved in a motor vehicle accident. The Attorney's retainer was $15,000.00, which he paid in two instalments, receipts for which were shown in Exhibit E.

4. The Complainant goes on to say that on 16th May 2006 he gave the Attorney a statement as well as a report stating that there were faulty brakes on the other vehicle involved in the accident. However, this report was not submitted as a part of the Complainant's defence filed in the suit. The Complainant says that he enquired about his case by telephone and in person from time to time. He was told by the Attorney that all was well. On 19th May 2009 he learnt from the Attorney that a judgment in default had been entered against him on 14th January 2008. He was never informed of date(s) for court nor was he aware of the orders made at Case Management Conferences or the first Pretrial Review.

5. In March 2009 the Attorney informed him that he had instructed Mr Rudolph Francis to act for him. On or around May 28th 2009 the Complainant telephoned Mr Francis and told him that he wished to leave the island to attend his brother's funeral. He was given the go ahead to do so.

6. However, on 1st June 2009 he was informed of a court date on 4th June 2009 and was instructed to return to the island. His attempt to return was unsuccessful. On 18th June 2009 Judgment was entered against him for a total of $8,067,233.00.

7. Among the documents relied on by the Complainant are all the documents filed in the Supreme Court in Suit Temar Morrison (by his mother and next friend Audrey White) v Relva Sylvester and Joscelyn Massop, the Affidavit of Keith Jarrett filed on 1 March 2011 in Supreme Court Civil Appeal No 102 of 2009 and the judgment of the Court of Appeal delivered on 30 November 2012 on the Complainant's appeal against the order in the Supreme Court refusing to set aside the default judgment.

Defence

8. The Attorney filed two affidavits deponed to on 23rd June 2013 and 29th January 2015. He also gave oral evidence under oath.

9. In his first affidavit, the Attorney stated that he accepted a retainer from the Complainant to represent him in the negligence claim brought against him and another. He admitted that he filed a Defence on the Complainant's behalf. The Attorney referred to the affidavit that he swore in the Supreme Court proceedings in support of the Complainant's application to set aside default judgment for failure to attend Case Management Conference on 8th January 2008 and highlighted by way of restatement, his statements from that affidavit to the effect that the Complainant had instructed him as to the examination of both motor vehicles in the accident and that the co-defendant's motor vehicle was found to have a defective braking system and "That due to inadvertence, [he] failed to plead those facts into [the Complainant's] Defence prepared and filed on his behalf on the 1st day of June, 2006." The Attorney further stated that he remembers that the Complainant gave him that information at the time when he was interviewing him for the retainer.

10. The Attorney then says that he instructed another Attorney to attend the Case Management Conference on 4th November 2007 but that he did not receive a report from that attorney as to what transpired at the Case Management Conference. He later discovered that the Case Management Conference was held on 14th January 2008 but as he was not aware of the date, neither he nor the Complainant was in attendance.

11. Judgment in Default of attendance at Case Management Conference was served on the Attorney at his office on 23rd January 2008 but he was not personally aware of this until 19th March 2009 when he was advised by Mr. Rudolph Francis that an application should be made for relief from sanction. He then attempted to contact the Complainant by telephone to direct him to meet with and brief Mr. Francis to make the application on his behalf. Thereafter, the Attorney said he left conduct of the Complainant's case completely to Mr Francis. The Attorney said he was not served with the Notice of Appointment for Case Management Conference scheduled for 6th June 2007 and only discovered it when he made a search of the Court file in February 2011.

12. In his second affidavit, the Attorney says that when the Complainant came to see him, he informed him that his practice was in the area of criminal law and that his consultant in civil litigation was Mr. Rudolph Francis. He told the Complainant that he would need to pay a retainer of $25,000.00 to send his case to Mr. Francis. The Complainant didn't have that money, so to save him from a default judgment, he filed an Acknowledgment of Service on his behalf.

13. In paragraph 9, the Attorney purports to correct his earlier affidavit to say that the Complainant did not tell him that after the accident the two motor vehicles involved were examined at the Gordon Town Police Station by the Government's Motor Vehicle Certifying Officer from the Ministry of Transport and that the other vehicle involved in the accident was found to have a defective braking system until after he had prepared and filed his defence and that is why those facts were not pleaded in the Complainant's defence.

14. The Attorney's second affidavit repeats that he asked another attorney to attend the Case Management Conference on 4th June 2007 on his behalf and that the attorney did not give him a report of what took place on the 4th of June 2007. He was therefore unaware that the matter had been adjourned to January 14th 2008 when judgment was entered against the Complainant, as the Complainant was absent and unrepresented.

15. The Attorney instructed Mr Francis to file an application to set aside the Judgment in default and for leave to file an amended defence out of time. The application was refused and damages were assessed against the Complainant in the sum of $7,177,318.46 plus costs and interest.

16. The Complainant's appeal against the order made was argued by Lord Anthony Gifford. The appeal was dismissed.

17. The Attorney says that he was not negligent in the management of the Complainant's defence and that the reason he was unsuccessful was due to the Complainant's failure to keep in contact with him.

BURDEN AND STANDARD OF PROOF

18. The burden of proof is on the Complainant who must prove misconduct on the part of the Attorney beyond a reasonable doubt.

THE EVIDENCE AND FINDINGS OF FACT

19. Where there is a conflict between the evidence of the Complainant and that of the Attorney, the panel prefers the evidence of the Complainant. The Attorney's affidavit filed on 1st March 2011 in support of the Complainant's appeal as well as the judgment of the Court of Appeal in Massop v. Morrison [2012] JMCA Civ. 56 paints the picture of how the Attorney handled the Complainant's matter.

20. Firstly, the Attorney's failure to follow up with the attorney who was asked to attend case management conference resulted in Judgment in default being entered against the Complainant on the adjourned date. Not having received a report from the attorney who he asked to attend court in his place for the first case management conference, the Attorney was duty bound to ensure that he made himself aware of the status of the matter. On the Attorney's own evidence, he became aware of the default judgment on or about 19th March 2009.

21. Secondly, an application to set aside the said Default Judgment was not made in a timely fashion, despite service of the Default Judgment on the Attorney on 23rd January 2008. The Attorney's attempt to argue that service on his office as inadequate[1] as he was not personally served is rejected and is entirely inconsistent with the civil procedure rules.

22. Thirdly, the panel accepts that the Attorney was given instructions about the inspection of the vehicles by the Motor Vehicle Certifying Officer from the Ministry of Transport and that other vehicle involved in the accident was found to have a defective breaking system and further accepts the Attorney's sworn affidavit to the Court and the submissions made by Counsel instructed by the Attorney in the appeal that the failure to plead the defective brakes was solely the Attorney's fault[2].

23. Fourthly, the Attorney did not keep the Complainant abreast of his matter and because of this the Complainant did not attend the case management conferences and Pretrial Reviews. The Panel accepts the Complainant's evidence that he made enquiries of the Attorney about the progress of his matter from time to time and was assured that everything was going well. The Attorney's evidence is that he did not inform the Complainant about the court dates as he was not himself aware of them. The Attorney's own evidence makes it clear that he was not himself staying abreast of the matter.

24. Fifthly, despite the Attorney's attempt to excuse his handling of the Complainant's matter by saying that he had advised the Complainant from the outset that he practices in the area of criminal law and that he would have to brief a consultant in civil litigation, all the documents filed in the Supreme Court and the Court of Appeal on behalf of the Complainant which included in Exhibits C and D were "Filed by Keith A Jarrett, Attorney-at-Law for and on behalf of the [Complainant]". The Attorney therefore accepted and represented that he had conduct of the matter.

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[1] The Attorney said that his secretary signed in receipt of service of the Default Judgment but did not bring it to his attention.

[2] See paragraph 4 of the Judgment of Brooks JA

The Law

25. The requisite standard expected of an attorney at law was addressed by Carey JA in Witter v Forbes (1989) 26 JLR 129, –

"We are not in this appeal dealing with professional misconduct involving an element of deceit or moral turpitude. Both rules of which the appellant was found guilty are concerned with the proper performance of the duties of an Attorney to his client. The Canon under which these rules fall, prescribes the standard of professional etiquette and professional conduct for Attorneys-at Law, vis-a-vis their clients. It requires that an Attorney shall act in the best interest of his client and represent him honestly, competently and zealously within the bounds of the Law. He shall preserve the confidence of his client and avoid conflict of interest. The violated rules, both involved an element of wrong-doing, in the sense that the Attorney knows and, as a reasonable competent lawyer, must know that he is not acting in the best interests of his client. As to rule (r) 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. This is plain from the language used in the rules.

...

Specifically, rule (s) of Canon IV is concerned with professional conduct for Attorneys. It is expected that in any busy practice some negligence or neglect will occur in dealing with the business of different clients. But there is a level which may be acceptable, or to be expected, and beyond which no reasonable competent Attorney would be expected to venture. That level is characterized as 'inexcusable or deplorable'."

26. Further, the Attorney by accepting a retainer to conduct the matter held himself out as having reasonable competence, skill and knowledge to do so. If, as the Attorney says, his area of practice is criminal law, he should not have accepted the retainer to conduct civil litigation on behalf of the Complainant if he did not consider himself competent. By his retainer, the Attorney contracts to be skilful and careful and there is an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. See :Fennell v Johns Elliott (A Firm)[2008] PNLR 12:

> *A solicitor, in common with other professional men, is required to exercise reasonable care and skill. The question of whether a defendant solicitor has made a mistake in any given case is usually capable of a definite answer. The issue of whether that particular mistake was negligent is a matter upon which (in borderline cases) the mere citation of authority is unlikely to be decisive. The judge must apply what he perceives to be the standard of "the reasonably competent solicitor". In Midland Bank v Hett, Stubbs and Kemp (1979) Ch. 384 , Oliver J. emphasised that a solicitor should not be judged by the standard of "particularly meticulous and*

conscientious practitioner .... The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession".

42. The duty of care and skill has in the leading text books been derived from Tiffin Holdings Ltd v Millican (1965) 49 D.L.R. (2d) 216 ("Tiffin's case") as follows:

> *"The obligations of a lawyer are, I think, the following:*
>
> *(i) To be skilful and careful;*
>
> *(ii) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary;*
>
> *(iii) To protect the interests of his client;*
>
> *(iv) To carry out his instructions by all proper means;*
>
> *(v) To consult with his client in all questions of doubt which do not fall within the express or implied discretion left to him;*
>
> *(vi) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria."*

27. In Godefroy v Dalton[3], a case of some vintage, Tindal CJ said thus:

> *"It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia, or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on at the bar, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law."*

28. Consistent failure to attend to the client's business with expedience over a significant period of time has repeatedly been held to be sufficient to justify a finding of inexcusable or deplorable conduct. In this case, there was a period of three years between the filing of

[3] (1830) 6 Bing 460

the defence (1st June 2006) and the Attorney's awareness of the status of the matter (19th March 2009), which was at that point, most deleterious to the Complainant, default judgment having been entered one year prior and assessment of damages imminent (June 2009). The Attorney was neglectful in failing to follow up with the attorney who attended the first case management conference on his behalf. Remaining ignorant of the status of the matter, he allowed a default judgment to be entered against the Complainant. Having been properly served with the default judgment on 23rd January 2008, the Attorney acted with inexcusable and deplorable negligence in failing to apply promptly to have it set aside.

29. The panel finds that the Complaint has been made out and that the Attorney is guilty of inexcusable and deplorable negligence in the performance of his duties.

30. Further, the Attorney did not provide the Complainant with all the information as to the progress of his business.

31. In consequence thereof, the Attorney is in breach of the Canons IV(r) and (s) of the Legal Profession (Canons of Professional Ethics) Rules and is therefore guilty of professional misconduct.

32. The Panel directs that a sanction hearing be caused to be held in accordance with the guidance of the Court of Appeal in Owen Clunie v. GLC, CA 3/2013 delivered on the 22nd of September, 2014, to give the Attorney an opportunity to be heard in mitigation before a sanction is imposed.

Dated the 27th day of June 2019

JUDITH COOPER-BATCHELOR

TANA'ANIA SMALL DAVIS

JEFFREY DALEY