

**DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL  
COMPLAINT NO: 61/2019**

IN THE MATTER OF **LATOYA SPENCER** and **DONOVAN MALCOLM** an Attorney-at-Law  
AND

IN THE MATTER OF THE LEGAL PROFESSION ACT, 1971

**PANEL:**

Daniella Gentles (Chairman)

Delrose Campbell

Anna Gracie

**Appearances:** Latoya Spencer was present. No one appeared for the Respondent Attorney-at-Law nor did he appear.

**Hearing Dates:** January 18<sup>th</sup> 2020, 1<sup>st</sup> Feb 2020

Handwritten signatures and initials in black ink, including what appears to be 'S. H.' and 'D.C.'.

**The Complaint**

1. By way of Form of Application Against an Attorney-at Law dated 19<sup>th</sup> of March 2019 as amended with leave of the Panel on the 18<sup>th</sup> January, 2020 and Affidavit in support thereof dated the 19<sup>th</sup> of March 2019 Ms **LATOYA SPENCER** (hereinafter referred to as the “Complainant”) alleged that **DONOVAN MALCOLM** (hereafter referred to as “the Respondent Attorney”) is in breach of the following Canons contained in the Legal Profession (Canons of Professional Ethics) Rules, as amended, namely :-
  - a. “He has not dealt with my business with all due expedition.
  - b. He is in breach of Canon I (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.

- c. He has not accounted to the Complainant for all moneys in his hand although I reasonably required him to do so.”
2. The hearing of this complaint took place on the January 18<sup>th</sup> 2020 at the Office of the General Legal Council. The Respondent Attorney was absent and failed to file an Affidavit in Response though required to do so pursuant to Rule 3 of the Legal Profession (Disciplinary Proceedings) Amendment Rules, 2014. The Panel having been satisfied as to the service of the notice of the proceedings commenced 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 in exercise of its discretion to proceed with the hearing in the absence of the Respondent Attorney as permitted by Rule 8 of the Fourth Schedule of the Legal Profession Act which governs the procedure at the hearings.

### **The Evidence**

3. The Complainant was sworn and gave oral evidence. She stated that by Agreement dated September 27, 2018 (Exhibit 3) she agreed to purchase property at Braeton New Town, Saint Catherine. The terms of the agreement included the payment of a price of Eight Million Two Hundred Thousand Dollars (\$8,200,000.00); the payment of a deposit of Eight Hundred and Twenty Thousand Dollars (\$820,000.00); a payment by the Complainant upon the signing of the Agreement of the sum of Twenty Thousand Dollars (\$20,000.00) and attendant General Consumption Tax being the Complainant’s portion of the cost of the preparation of the Agreement for Sale. The Agreement for Sale named the Purchaser/Complainant’s attorney as “*TAYLOR CRAIG Partners Attention Commander Errol Taylor*” and the attorney having carriage of sale (Vendor’s attorney) as the Respondent Attorney, Donovan Malcolm.
4. The Complainant paid the deposit as required by the Agreement and was issued with a receipt numbered 0006456 and dated August 3<sup>rd</sup>, 2018 in the amount of Eight Hundred and Forty-Three Thousand Three Hundred Dollars \$843,300.00 (Exhibit 4). The receipt states that the sum represents payment for “10% deposit

*(\$820,000) & ½ share for Agreement for Sale with GCT (\$23,300)...*" and was issued under the signature that appears to be that of the Respondent Attorney.

5. The Agreement for Sale contained a provision whereby the Complainant was required to provide letters of commitment from two financial institutions totalling Seven Million Three Hundred and Eighty Thousand Dollars (\$7,380,000.00) within 45 days of the date of the Agreement failing which either the Complainant or the Vendor could terminate the Agreement within 14 days after the due date. It provided that in the event the Agreement was terminated within the required time frame the Complainant would be entitled to a refund of *"all monies save and except the Attorneys fee for preparing the Agreement for Sale"*.
6. The Complainant's evidence is that she was unable to secure a loan and was therefore unable to provide the requisite letters of commitment within the time frame provided by the Agreement or within the extended time agreed on by the Vendor. By the letter dated January 24, 2019 (Exhibit 6) her attorneys Taylor Craig Partners wrote to the Respondent Attorney advising him of this fact and requesting a refund of the of *"the 10% deposit (\$820,000.00)"*. By email of January 26, 2019 (Exhibit 5c), the Respondent Attorney acknowledged receipt of that letter and wrote *"The contents of your letter are duly noted and I will have the deposit sent to you forthwith."*
7. The Complainant's evidence is that the Respondent Attorney failed to repay the deposit of \$820,000.00.
8. The Complaint and Affidavit in support filed by the Complainant with the General Legal Council were tendered and admitted into evidence as Exhibits #1 & #2 respectively. Also tendered and admitted in evidence were the following:
  - Agreement for Sale dated 27 September 2018 Exhibit #3
  - Receipt #0006456 dated 3 August 2018 for the sum of \$843,300.00 Exhibit # 4

- Emails between Errol Taylor and Donovan Malcolm were compendiously marked Exhibit 5 and further identified as follows:
  - Emails dated 13 December 2018 Exhibit #5a
  - Email dated 24th January 2019 Exhibit #5b
  - Email dated 26th January 2019 Exhibit #5c
  - Email dated 30th January, 2019 Exhibit #5d
  - Email dated 26th February 2019 Exhibit #5e
- Letter dated 24th January 2019 from Taylor Craig Partners to Donovan Malcolm Exhibit #6

### The Burden Of Proof And Standard Of Proof

9. It is the law that the legal burden of proof is on the Complainant to prove the salient facts of the complaint. It makes no difference that the Respondent Attorney never attended any of the hearings at which evidence was taken, the legal responsibility remains on the Panel to evaluate the evidence it has before it to the standard of proof required, before it makes any findings.

10. The standard of proof in cases of professional misconduct is that of "*beyond reasonable doubt*". This is the standard that must be applied by the Panel in evaluating the evidence adduced before it. (**Winston Campbell v David Hamlet (as Executrix of Simon Alexander) [2005] UKPC 19.**)

### Evaluation Of The Evidence

11. In this case there was no evidence adduced on behalf of the Respondent Attorney. The only evidence before the Panel is the oral evidence supported by documentary evidence given by the Complainant; the Panel is therefore left with her unchallenged account. This is the evidence that the Panel will examine in seeking to arrive at its conclusion by applying the law to the facts.

### Findings of Fact

12. An examination of the evidence did not disclose any inconsistencies or discrepancies in the oral account which was supported by the exhibits admitted

into evidence. We accept the evidence of the Complainant as a witness of truth and find that the following has been established beyond reasonable doubt:

- a. The Complainant entered into an Agreement dated September 27, 2018 to purchase property at Braeton New Town, Saint Catherine. The terms of the agreement included the payment of a price of Eight Million Two Hundred Thousand Dollars (\$8,200,000.00) and the payment of a deposit of Eight Hundred and Twenty Thousand Dollars \$820,000.00 which deposit was paid to the Respondent Attorney who represented the Vendor and a receipt given for the sum dated August 3<sup>rd</sup>, 2018.
- b. The Complainant was not able to secure the loan required to complete the purchase and notified the Vendor's attorney of this fact as provided for under the Agreement. In keeping with the terms of the Agreement the deposit of \$820,000.00 was refundable to the Complainant.
- c. The Complainant's Attorney wrote to the Respondent Attorney requesting a refund of the 10% deposit.
- d. The Respondent Attorney promised to make the refund by way of his email of January 26, 2019.
- e. Up to the date of the hearing, the Respondent Attorney has failed to refund the deposit paid by the Complainant.

**Conclusion:**

It follows from the above findings of fact that the Respondent Attorney has breached the various Canons set out in the complaint namely that:-

- a. He has not dealt with my business with all due expedition (Canon 4 (r)).
- b. He is in breach of Canon I (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.
- c. He has not accounted to the Complainant for all moneys in his hand although reasonably required to do so (Canon VII (b) ii).

13. These breaches have been made out to the requisite standard as required by law, of proof beyond reasonable doubt and accordingly the Respondent Attorney is guilty of professional misconduct in respect to each of the specified Canons. The Panel now affords the Respondent Attorney the opportunity to address it on the sanction to be imposed.

Dated the 1st day of February, 2020



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Daniella Gentles



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Delrose Campbell



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Anna Gracie