2004 LSBC 17
Report issued: May 19, 2004
Citation issued: February 20, 2003

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

ALEXANDER JELETZKY

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: April 8th and April 27th, 2004

Panel: James D. Vilvang, Q.C., Single Bencher Panel

Counsel for the Law Society: Luisa Hlus
Counsel for the Respondent: Christopher E. Hinkson, Q.C.

Background

[1] On February 20, 2003, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. This citation directed that this hearing panel inquire into the Respondent's conduct as follows:

> 1. Your conduct in breaching the following undertaking extended to Raymond Froh, a fellow member:
>
> > " (e) not to release the said funds until such time as our office has received a letter from [a financial institution] confirming the collateral and outstanding balance under their security and advised you in writing of our client's acceptance of such letter."
>
> You breached this undertaking by releasing the funds without receipt of the required written advice from Mr. Froh.

[2] The Respondent acknowledged proper service of this citation.

[3] The Respondent agreed to a Panel consisting of a single Bencher.

AGREED FACTS

[4] An Agreed Statement of Facts was provided by counsel. The Agreed Statement of Facts was marked as Exhibit 2. It provides that:

1. Alexander Jeletzky was called to the Bar on June 26, 1974.

2. Mr. Jeletzky is a sole practitioner with a general law practice located at Suite 16 - 100 West Pender,

Vancouver BC.

3. On December 5, 2002, pursuant to Rule 4-13 of the Law Society Rules, the Discipline Committee resolved to recommend to the Chair that there be a direction to issue a citation against Mr. Jeletzky and the Chair so directed.

4. On February 20, 2003 the Law Society forwarded a letter to Mr. Hinkson, Q.C., counsel for Mr. Jeletzky, seeking acceptance of service of the enclosed citation. Mr. Hinkson acknowledged service on behalf of Mr. Jeletzky.

5. At all material times, Mr. Jeletzky acted for [a numbered company] (the " purchaser/borrower"), taking instructions from its principal, H.K.

6. In approximately July 2001, the purchaser/borrower became interested in purchasing a Harley Davidson dealership franchise (the " business") from [a company] (the " vendor"). At all material times, the vendor was represented by its solicitor, M.R., then of the law firm [a law firm].

7. In order to purchase the assets of the vendor's business for a total purchase price of $525,000.00, the purchaser/borrower required financing for approximately one half of the total purchase price, or $262,501.00 (the " proposed financing").

8. [A credit union] (the " lender") was prepared to provide the proposed financing to the purchaser/borrower. Raymond Froh acted as solicitor for the lender at all material times in relation to the proposed financing, and took instructions from B.M., the lender's senior manager of business services.

9. The terms of the proposed financing were set out in the lender's commitment letter dated October 31, 2001, addressed to Mr. K. from Mr. M. and accepted by the purchaser/borrower on November 13, 2001. The primary security required by the lender was a general security agreement, providing a specific first charge over the business accounts receivable and inventory and a first floating charge over the remaining assets of the business.

10. [A financial institution] (" H Financial") had previously registered a charge in the Personal Property Registry of British Columbia under base registration number 8873224 (the " H Financial Charge"), charging the following collateral of the vendor's business: " *all goods supplied before or hereafter by secured party, all parts and accessories therefor and accessions thereto and all proceeds thereof*."

11. Under the proposed financing, the lender's required security of a first charge over all assets of the business would be adversely affected unless the previously registered H Financial Charge were discharged as part of the purchase of the assets.

12. In a letter dated November 20, 2001, Mr. Froh forwarded to Mr. Jeletzky the lender's security documents for execution by the purchaser/borrower. The letter advised Mr. Jeletzky that the funds would be forwarded on various undertakings, including the undertaking to discharge the H Financial Charge. The letter and documents were received by Mr. Jeletzky at approximately 5:24 pm on November 20, 2001.

13. On November 21, 2001 at approximately 9:29 am, Mr. Jeletzky telephoned Mr. Froh's office and left a message that he had a problem with the undertakings and conditions precedent.

14. On November 21, 2001, Mr. Jeletzky couriered a letter to Mr. Froh enclosing executed security documents and stating he would re-evaluate the undertakings and trust conditions contained in Mr. Froh's letter dated November 20, 2003.

15. On November 21, 2001, Mr. Jeletzky faxed a letter to Mr. Froh addressing a concern with a condition precedent in the commitment letter and indicating the purchaser/borrower does not have sufficient funds to discharge the enumerated liens, which included the H Financial Charge.

16. On November 22, 2001 at approximately 12:54 p.m., Mr. Froh received from Mr. Jeletzky a faxed letter indicating that the H Financial Charge was not being paid out as part of the proposed financing. Mr. Jeletzky's letter asked whether Mr. Froh was in a position to release funds, as the transaction was to close that day at 3:45 p.m. at the office of the vendor's solicitor.

17. On November 22, 2001 at approximately 3:49 p.m., Mr. Froh received from Mr. Jeletzky a faxed letter indicating that [a business] agreed the H Financial Charge did not need to be satisfied from the proceeds of sale.

18. Mr. Jeletzky's understanding was based on what Mr. K. relayed to him as a conversation between Mr. K. and Mr. M. to the effect that the lender would approve the purchaser/borrower's assumption of the H Financial Charge.

19. On November 22, 2001 at approximately 4:00 p.m., Mr. Froh's office sent a fax to Mr. Jeletzky advising the lender's funds were available for pick up by him in accordance with the undertakings set out in an attached letter dated November 21, 2001, which contained a number of confirmations and five undertakings. The material fifth undertaking read as follows:

> (e) not to release the said funds until such time as our office has received a letter from H Financial confirming the collateral and outstanding balance under their security and advised you in writing of our client's acceptance of such letter.

(the " Undertaking").

20. On November 23, 2001 at approximately 8:59 am, Mr. Froh faxed a letter to Mr. Jeletzky wishing to amend the fourth undertaking to provide for a new lease, rather than a lease assignment, for premises located in Delta, BC.

21. Mr. Jeletzky attempted to contact Mr. Froh at approximately 4:45 p.m. on November 23, 2001, at which time he was advised that Mr. Froh had already left for the day. Nonetheless, Mr. Jeletzky proceeded to disburse to the vendor's solicitor the funds required for the purchase of the vendor's business, including the funds which were the subject of the Undertaking.

22. On December 12, 2001, Mr. Froh complained to the Law Society about Mr. Jeletzky's breach of the Undertaking.

FINDINGS OF FACT

[5] Counsel for the Law Society called the following witnesses:

a) Raymond P. Froh, a member;

b) B.M., Senior Lender of [a credit union] (the " Lender"), Mr. Froh's client.

[6] Mr. Hinkson called the Respondent and H.K., the principal of [a number company] (the " Purchaser/Borrower"), the Respondent's client.

[7] Mr. Froh testified that on November 22, 2001 shortly after receiving a faxed letter from the Respondent

indicating that the H Financial charge was not being paid out as part of the proposed financing, Mr. Froh spoke to Mr. M. about that subject. Mr. M. advised Mr. Froh that he was *assuming* that the charge simply related to a computer lease worth about $35,000.00. Mr. M. told Mr. Froh, " If that is what it is, I don't have a problem with it."

[8] Mr. Froh confirmed that he did not discuss the terms of undertakings with Mr. M. at that time or at any time. Mr. Froh stated that he never discusses the terms of undertakings with clients because he does not believe that clients understand undertakings.

[9] Mr. Froh stated that he got instructions from Mr. M. to the effect that a letter from H Financial confirming the nature of the charge and the outstanding balance would be sufficient to enable the deal to proceed.

[10] Upon receipt of those instructions, Mr. Froh prepared and sent a letter as described in paragraph 19 of the Agreed Statement of Facts containing the relevant undertaking.

[11] Mr. M. testified that he had 25 years experience in banking including eight years with [a credit union]. He confirmed that he was knowledgeable in issues of commercial banking. Nevertheless, he said that although he had conversations with Mr. K., he did not recall talking about undertakings. He said, " That [undertakings] was up to Mr. Froh."

[12] Mr. M. confirmed the evidence of Mr. Froh to the effect that [a credit union] would consent to an advance of the funds without having a first charge ahead of H Financial but that they required a letter from H Financial confirming the nature of the charge and the amount outstanding.

[13] Mr. K. testified to the effect that he had conversations with Mr. M. in which Mr. M. advised him the H charge was " not a major issue" but Mr. K. acknowledged that Mr. M. had expressed concern about who would have priority over which assets.

[14] Mr. K. testified that just prior to closing he asked Mr. M. if there was anything else which would prevent this deal from closing. Mr. K. stated that Mr. M. advised him that, " Mr. Froh has all the instructions necessary to let you close today." Relying on that statement, Mr. K. testified that he then told the Respondent that everything was in place to close the deal.

[15] Mr. K. stated that he " did not worry about the legal end of the deal." He acknowledged that he may not have referred to " undertakings" and that he may simply have used the words " any impediments" .

[16] The Respondent testified that when he got the letter referred to in Tab 19 of the Agreed Statement of Facts late in the afternoon of November 22, 2001, he immediately attempted to contact H Financial but he could not reach them because they were located in Toronto and it was after the close of business there. The Respondent stated that he then advised his client that the new undertaking would collapse the deal. The Respondent testified that Mr. K. asked him to keep working toward completion of the deal.

[17] The Respondent testified that on November 23, Mr. K. telephoned him and advised him that the deal " was a go" and that Mr. M. was on side. The Respondent stated that he telephoned Mr. Froh and left a message but that Mr. Froh did not call back for four days. The Respondent acknowledged that he intended to write a letter to Mr. Froh advising that he had been told by Mr. K. that the deal was to proceed, but the Respondent stated that he never got around to writing the letter.

[18] At approximately 2:00 p.m., November 23rd, the Respondent had completed drawing up the documents and departed for the office of the lawyers for the Vendor. The deal was closed and at approximately 4:00 or 4:15 p.m., the purchase funds were handed over by cheque.

[19] The Respondent stated that he closed the deal on the basis of his understanding that " the undertaking

had been removed by Mr. M. and that all that I had to do was confirm it."

[20] On April 27th the Respondent testified that he spoke to Mr. Froh and Mr. Froh inquired as to why the Respondent had completed the deal without being released from his undertaking. The Respondent stated that he replied that he believed he had been authorized by Mr. M.

[21] The Respondent testified that " November 23 was a busy, high pressure day. I took my client's direction and thought I simply had to confirm [that the undertaking had been released]" .

DISCUSSION

[22] In my view this case does not turn on the issue of credibility. I found Mr. Froh, Mr. M., Mr. K. and the Respondent to be honest, straightforward witnesses. I find that the evidence each of them gave was largely consistent with the evidence given by the others.

[23] I find that the Respondent had an honest belief, based on information given to him by Mr. K., that Mr. M. wanted the deal to proceed. The question is, however, was it reasonable for the Respondent to assume that Mr. M.'s wishes could entitle the Respondent to conclude that he had been released from the clear and unequivocal undertaking imposed on him by Mr. Froh in the letter referred to in paragraph 19 of the Agreed Statement of Facts.

[24] I find that the Respondent was not justified in reaching the conclusion that he had been released from the undertaking.

[25] Chapter 13, Rule 1(a) of the Professional Conduct Handbook provides as follows:

> " Rule 1 Subject to Rule 2, a lawyer shall report to the Law Society:
>
> (a) another lawyer's breach of undertaking which has not been consented to or waived by the recipient of the undertaking,"

[26] That section has assisted me in reaching the conclusion that in the circumstances of this case, the only person who could relieve the Respondent from the responsibility of his undertaking was Mr. Froh, the person who had imposed the undertaking upon the Respondent.

[27] I conclude that the Respondent was not entitled to rely on the statements of Mr. K. who purported to be conveying approval to proceed with the deal from Mr. M.

[28] Luckily, but only luckily, in this case Mr. K. was honest and apparently truthfully conveyed what he believed he had been told by Mr. M. The potential for disaster in proceeding on the basis of information given to him by his client which he could only *assume* to be true should have been obvious to the Respondent. It was far from prudent for the Respondent to rely on advice from his client to proceed with the deal in the absence of the written assurance from H Financial which had been demanded by Mr. Froh.

[29] For the purpose of deciding this case, I do not need to determine whether there could ever be circumstances in which a lawyer would be entitled to regard himself/herself as being relieved form the conditions of an undertaking imposed on him/her by other counsel on the basis of information received from his or her client. I am highly doubtful that such circumstances could ever exist and I am certain that they did not exist in this case.

[30] I also find that the Respondent was not justified in believing that he had been relieved from the conditions of his undertaking as a result of statements made by Mr. M. Mr. M. was represented by Mr. Froh

as counsel at all material times. The Respondent was not entitled to act on the basis of information given by Mr. M., even without the extra difficulty that in this case it was conveyed by Mr. K. which made it even more perilous for the Respondent to rely on it.

[31] The Respondent stated that he felt under tremendous pressure from his client to close this deal. In my opinion that does not justify his actions. It is the duty of counsel not to allow their ethics to be compromised by pressure from clients.

CONCLUSION

[32] In deciding this case I have instructed myself that the onus on the Law Society to prove the case is higher than a balance of probabilities.

[33] I conclude that the undertaking imposed upon the Respondent by Mr. Froh in Mr. Froh's letter of November 22, which appears at Tab 11 of the Agreed Statement of Facts, was unambiguous in its terms.

[34] I conclude that the Respondent was bound by that undertaking until released from it by Mr. Froh.

[35] I conclude that the Respondent breached the undertaking by disbursing to the Vendor's solicitors the funds required for the purchase of the Vendor's business including the funds which were the subject of the undertaking.

[36] I conclude that the Respondent was not justified in believing that he had been relieved from the obligations of the undertaking by information given to him by his client.

[37] I conclude that the Respondent has professionally misconducted himself by breaching his undertaking.