

2006 LSBC 09

Report issued: March 10, 2006

Oral Reasons: February 27, 2006

Citations issued: February 24, 2005 and
September 20, 2005

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

Kenneth Joseph Spears

Respondent

Decision of the Hearing Panel

Hearing date: February 27, 2006

Panel: Gavin Hume, Q.C., Chair, Thelma O'Grady, Dirk Sigalet, Q.C.

Counsel for the Law Society: Gerald Cuttler

Appearing on his own behalf: Kenneth J. Spears

Background

[1] Two citations were issued against the Respondent on February 24, 2005 and September 20, 2005 pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Director of Professional Regulation of the Law Society, pursuant to the direction of the Chair of the Discipline Committee. The amended citation directed that this Panel inquire into the Respondent's conduct as follows:

1. That, between April 1999 and January 2002, you breached the following Law Society Rules:

- (a) Rule 3-51(1), in that after receiving trust funds you failed to deposit the funds in a trust account as soon as practicable;
- (b) Rule 3-57(2), in that you withdrew or authorized the withdrawal of trust funds in payment of your fees and failed to first prepare a bill for those fees and immediately deliver the bill to your client;
- (c) Rule 3-59(3), in that you failed to record transactions in your accounting records in chronological order and in an easily traceable form;
- (d) Rule 3-63(1)(a), in that you failed to record trust transactions promptly, and in any event not more than 7 days after the transactions;
- (e) Rule 3-63(1)(b), in that you failed to record general transactions promptly, and in any event not more than 30 days after the transactions; and
- (f) Rule 3-65(1), in that you failed to prepare the required monthly trust reconciliations.

2. That you failed to account to M.U. Ltd. for funds (the "Settlement Funds") received by you in trust on

behalf of your client, [name] Ltd., and your client, M.U. Ltd. in the settlement (the "Settlement") of the claim for damages arising from the seizure of a vessel, namely the [vessel] (the "Claim") , contrary to Rule 3-48 of the Law Society Rules.

3. That while acting for both your client, [name] Ltd., and your client, M. U. Ltd., with respect to the Claim, the Settlement and your receipt and use of the Settlement Funds, you acted in a conflict between the duty of loyalty you owed your client, [name] Ltd., and the duty of loyalty you owed your client, M. U. Ltd., and you breached your duty to your client, M.U. Ltd. in that you:

(a) failed to explain to each client the principle of undivided loyalty;

(b) failed to advise each client that no information received from one of them as part of the joint representation can be treated as confidential as between them;

(c) failed to secure the informed consent of each client, with independent legal advice, or at all, as to the course of action that would be followed if a conflict arose between them;

(d) failed to inform your client, M.U. Ltd. of any proposals for settlement, or to explain any proposal for settlement properly or at all;

(e) entered into the Settlement of the Claim on instructions from your client [name] Ltd., without obtaining the instructions of your client, M.U. Ltd.;

(f) failed to report candidly, promptly and completely to your client, M. U. Ltd., the proposal for the Settlement, the Settlement, your receipt of the Settlement Funds and the manner in which you intended to use and in fact used the Settlement Funds;

(g) failed to pay any portion of the Settlement Funds to your client, M. U. Ltd., but instead used all of the Settlement Funds to pay to your client, [name] Ltd., and to yourself, without informing and obtaining the authorization and consent of your client, M.U. Ltd.;

(h) continued to act when there was a conflict of interest between your client, [name] Ltd., and your client, M.U. Ltd., regarding the manner in which the Settlement Funds would be divided between them and your continued involvement placed you in a conflict of interest;

(i) attempted to advance and prefer the interests of your client, [name] Ltd. over the interests of your client, M.U. Ltd.;

(j) failed to keep your client, M.U. Ltd., reasonably informed;

(k) failed to answer reasonable requests from your client, M. U. Ltd., for information;

(l) failed to respond, when necessary, to telephone calls from or on behalf of your client, M.U. Ltd.;

(m) failed to answer within a reasonable time communications from or on behalf of your client, M.U. Ltd., that required a reply;

(n) failed to disclose all relevant information to your client, M. U. Ltd.;

(o) failed to candidly advise your client, M.U. Ltd., about the position of the matter;

contrary to Chapter 1 (Canons of Legal Ethics), paragraphs 3(2) and (8), Chapter 3, Rulings 3(a), (b), (c), (f), (j), (k) and (l), Chapter 6, Rulings 1, 2, 4(a), (b), (d) and 5 and Chapter 10, Ruling 1(d) of the *Professional Conduct Handbook*.

4. That you, contrary to Chapter 13, Ruling 3 of the *Professional Conduct Handbook*, failed to respond to communications from the Law Society regarding the complaints of E.M.
5. That you, contrary to Chapter 13, Ruling 3 of the *Professional Conduct Handbook*, failed to respond to communications from the Law Society regarding the complaint of P.M.
6. That you, contrary to Chapter 13, Ruling 3 of the *Professional Conduct Handbook*, failed to respond to correspondence from the Law Society dated February 5, 2004 and March 29, 2004, regarding the supplementary Audit Report dated January 28, 2004.

[2] This citation came before this Panel as a conditional admission of a disciplinary violation and consent to a specific disciplinary action pursuant to Rule 4-22 of the Law Society Rules. The Respondent admitted that he had professionally misconducted himself and consented to the following disciplinary action concerning the citation dated February 24, 2005:

- (a) a suspension of 60 days;
- (b) a fine of \$7,500; and
- (c) payment of costs, to be made over 24 months.

[3] The Respondent admitted that he had professionally misconducted himself and consented to the following disciplinary action concerning the citation dated September 20, 2005:

- (a) a reprimand;
- (b) a fine in the amount of \$1,000; and
- (c) payment of costs, to be made over 24 months.

Agreed Statement of Facts

[4] An Agreed Statement of Facts was filed as Exhibit 1 in these proceedings. The Agreed Statement of Facts provided as follows:

1. The Respondent is a member of the Law Society of British Columbia. He was called to the Bar in 1987.
2. The Respondent has tendered a conditional admission and consent to specified disciplinary action concerning the amended citation.
3. The Respondent admits service of the citations.
4. On January 18, 2006, the Discipline Committee accepted the conditional admission and instructed discipline counsel to recommend their acceptance to the Hearing Panel.
5. The matters set out in the amended Schedule to the citation dated February 24, 2005 fall into three categories. Count 1 involves breaches of Law Society Accounting Rules. Counts 2 and 3 involve conflict of interest, preferring one client over another and failing to account to one of the clients for whom the Respondent acted. Counts 4, 5 and 6 relate to the Respondent's failure to respond to communications from the Law Society.

Count 1 – Accounting Breaches

6. Mr. Kinsey prepared a comprehensive report dated January 2, 2002, which substantiates the discipline violations particularized in this count.

7. In his conditional admission, the Respondent admitted to each of the discipline violations which are the subject of Mr. Kinsey's report.

8. It should be noted that Mr. Kinsey did not conclude that the Respondent was involved in dishonest conduct such as theft of trust funds or billing for work which was not done, falsifying billings, etc.

Counts 2 and 3 – Failing to Account, Acting in a Conflict between Clients, Breaching the Duty of Loyalty owed to each client

9. The Respondent acted on behalf of the owner of a vessel (the "Owner") claiming damages against a bailiff and a credit union for wrongful seizure and damages to the vessel during the course of the seizure. The Owner's insurer (the "Insurer") paid approximately \$20,000.00 to repair the vessel and therefore had a subrogated claim to recover this amount. The Owner's claim was substantially greater than \$20,000.00 as it included a claim for loss of business/profits/opportunity, and was approximately \$450,000.00.

10. Initially, the Respondent only acted for the Owner. However, in the fall of 2000, the Respondent approached the Insurer and proposed that he be retained regarding the subrogated claim. An agreement between the Respondent and the Insurer was reached whereby the Respondent would pursue the subrogated claim on the basis that his legal fees would be limited to 30% of the Insurer's share of the recovery achieved inclusive of all taxes and disbursements. There was no discussion regarding how the Insurer's share of recovery would be calculated.

11. On December 28, 2000, the Owner settled the claim for \$73,334.00 plus about \$6,900.00 already held in trust by the Respondent's former law firm with the Respondent's knowledge and agreement. The Respondent did not consult with or receive instructions from the Insurer to agree to this settlement. The amount of the settlement was significantly less than what the Owner was claiming but it was sufficient to pay out the Insurer in full. Therefore, there was clearly a potential for a conflict between the Insurer and the Owner regarding the manner in which the settlement proceeds would be shared. The Respondent's view was that, pursuant to Canadian Maritime Law principles, an insured controls the litigation when an underwriter does not pay the claim in full.

12. Although the matter was settled on December 28, 2000, the Respondent did not inform the Insurer about the settlement until March 18, 2003, despite receiving inquiries from the Insurer about the status of the case.

13. By July 2001, the Respondent had dispersed all of the settlement funds which he received (\$73,333.34) to the Owner (approximately \$33,000.00) and to himself (approximately \$40,000.00) for fees. The Respondent did this because he believed that the \$6,900.00 which was held in trust at his former law firm would be sufficient to pay the Insurer its portion of the settlement proceeds. However, these funds were not in his possession when he paid out the funds to the Owner and himself. Further, the Insurer did not agree to limit its recovery from the settlement proceeds of \$6,900.00.

14. When the Respondent advised the Insurer of the settlement (on March 18, 2003), his reporting letter stated that the amount payable to the Insurer was \$2,770.54, on the basis that this amount represented the "pro-rated portion of the claim". The Respondent stated that "on the basis of our agreement, I will take steps to render a trust cheque to the underwriters in the amount of \$2,770.54 . . . once all the

matters are in order to release the funds from trust. These funds are being held in trust at another law firm . . ."

15. The Insurer rejected the Respondent's position, and took the position that it was entitled to receive approximately \$14,400.00 from the settlement proceeds (i.e. full recovery less 30% for fees).

16. Prior to March 2003, the Respondent's former law firm had applied the \$6,900.00 to payment of the Owner's outstanding accounts. Therefore, there was no money from the settlement proceeds available to pay the Insurer (not even the \$2,770.54 which the Respondent said was the Insurer's portion). However, it should be noted that the law firm did not inform the Respondent that it used the \$6,900.00 which it previously held in trust to pay down the Owner's previous accounts when the Respondent sent his March 18, 2003 letter to the Insurer.

17. The Respondent did not pay the Insurer \$2,770.54, let alone the \$14,400.00 which the Insurer claimed. Litigation ensued between the Insurer and the Respondent. In addition, the Insurer reported the Respondent to the Law Society. The civil claim against the Respondent was settled in late 2005.

18. The Respondent has conditionally admitted to each of the discipline violations detailed in Counts 2 and 3. The Respondent acknowledges that he should have immediately perceived the potential conflict between his clients, candidly reported to them concerning the settlement, placed any disputed funds in trust and removed himself from any involvement in the subsequent dispute.

Counts 4, 5 and 6 – Failed to Respond to Communications from the Law Society

19. Count 4 concerns the Respondent's failure to respond to communications from the Law Society regarding counts 2 and 3. The Respondent was informed of the Insurer's complaint (i.e. the "EM Complaint") on April 29, 2003. He was asked to respond within 3 weeks. The Respondent indicated he would consult with counsel and respond as requested. He did not respond until July 4, 2003. At that time, he provided lengthy letters and documentation to the Law Society. Further correspondence between the Respondent and the Law Society ensued thereafter, particularly relating to the use of the \$6,900.00 held at the law firm. The Respondent failed to provide responsive letters to the Law Society as requested. However, the Respondent did provide some responses based on the information he had with respect to the disposition of the funds and followed up in correspondence to the law firm.

20. Regarding Count 5, on February 19, 2004, the underwriter for the Insurer complained to the Law Society concerning the Respondent's conduct in another matter, alleging that the Respondent was incompetent. The Respondent was advised of this complaint on March 9, 2004. On March 12, 2004, the Respondent advised that the matter was in active litigation, however, he did not respond to the substance of the complaint. On May 5, 2004, Law Society counsel advised him that the matter would be referred to the Discipline Committee if a response was not received within 5 days. The Respondent did not provide a response.

21. Regarding Count 6, the Respondent failed to provide a substantive response to correspondence from the Law Society concerning questions which arose as a result of a supplementary audit report prepared by Mr. Kinsey on January 28, 2004.

Citation dated September 20, 2005

22. This citation arose as a "continuation" of count number 6 of the citation dated February 24, 2005. On April 12, 2005, Law Society counsel requested that the Respondent provide answers to specific questions regarding the payment of provincial sales tax. The questions arose as a result of comments

contained in Mr. Kinsey's reports. The Respondent failed to respond despite several reminders.

23. The Respondent has forwarded a letter to the Law Society confirming that he would respond to the matters raised in Counts 5 and 6 of the citation dated February 24, 2005 and the citation dated September 20, 2005 by February 21, 2005. On February 21, 2005, the Respondent did so.

[5] After considering the circumstances set out in the Statement of Facts, and having heard the submissions of counsel, the Panel accepts the admission and finds that the Respondent professionally misconducted himself with respect to the citations dated February 24, 2005 and September 20, 2005.

[6] The Panel further finds the penalty proposed by the Respondent on each of the citations, and recommended by the Discipline Committee, to be appropriate in all of the circumstances.

[7] It is accordingly ordered that the Respondent:

1. be suspended from the practice of law for a period of two months (60 days), effective Monday, March 13, 2006;
2. be reprimanded;
3. pay a fine in the amount of \$8,500; and
4. pay costs of these proceedings in the amount of \$10,000, over a period of 24 months, to commence one month after his return from suspension.

[8] The Executive Director is instructed to record the finding of professional misconduct on the Respondent's Professional Conduct Record, to impose the disciplinary action and to inform the complainant of the disposition.

[9] There will be publication of this decision in the normal course.