2019 LSBC 05
Decision issued: February 13, 2019
Citation issued: July 13, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

AMARJIT SINGH DHINDSA

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	September 13 and October 18, 2018
Panel:	W. Martin Finch, QC, Chair Carol Gibson, Public Representative Lindsay R. LeBlanc, Lawyer
Discipline Counsel:	Alison L. Kirby
Counsel for the Respondent:	Gerald A. Cuttler, QC

BACKGROUND

[1] On July 13, 2017, a citation was issued against the Respondent (the "Citation") pursuant to the *Legal Profession Act* and Rule 4-17 of the Law Society Rules.

[2] The Citation directed that this Panel inquire into the Respondent's conduct as follows:

1. Commencing approximately July 2014 you acted in a conflict of interest by acting for A Inc. and one or more of 93 end purchasers in connection with the purchase and sale of lots in a development property originally owned by F Ltd., contrary to rule 3.4-1 and paragraph 2 of the Appendix C of the *Code of Professional Conduct for British Columbia.*

2. In the course of representing your client, A Inc., in connection with the purchase of a development property from F Ltd. and subsequent sale of one or more of lots 5, 6, 34,

53, 55, 57, 59, 66, 77 and 79 to the end purchasers whom you also represented, you failed to honour a trust condition imposed by lawyer JH, in each of his ten letters dated January 29, 2015, by failing to provide JH with a copy of the compliance deposit agreements signed by the end purchasers prior to the registration of the transfer documents, contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia.*

3. In the course of representing your client, A Inc., in connection with the purchase of a development property from F Ltd. and subsequent sale of one or more of lots 17, 27, 58, 78 and 93 to the end purchasers represented by notary HV, you failed to honour a trust condition imposed by lawyer JH, in each of his five letters dated March 31, 2015 or April 13, 2015, by doing one or more of the following, contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia:*

    (a) failing to provide JH with a copy of the compliance deposit agreements signed by the end purchasers prior to authorizing the registration of transfer documents by HV;

    (b) failing to provide JH with a copy of the undertaking letters between your office and HV prior to the completion date under the purchase agreement between A Inc. and the end purchasers.

4. In the course of representing your client, A Inc., in connection with the purchase of a development property from F Ltd. and subsequent sale of one or more of lots 37, 54, 64 and 69 to the end purchasers whom you also represented, you failed to honour a trust condition imposed by lawyer JH, in each of his four letters dated May 22, 2015, by registering transfer documents when you did not hold in your trust account sufficient funds to complete the transaction and without concurrently registering the applicable mortgages, contrary to rule 7.2-11 of the *Professional Conduct of British Columbia.*

[3] The conduct alleged in each paragraph was stated to constitute professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[4] The Citation was authorized on July 6, 2017 and issued on July 13, 2017. The Respondent admits that he was properly served with the Citation.

FACTS

[5] The evidence before the Panel was submitted by way of admissions made to a Notice to Admit and the testimony of two witnesses: JH and the Respondent.

[6] The Respondent was called and admitted as a member of the Law Society of British Columbia on June 8, 2001. His practice is primarily real estate.

[7] In mid-2014, the Respondent was retained by A Inc. to act on its behalf with respect to the purchase of land from F Ltd. and F Co. (collectively "FF"). This involved 103 residential real estate lots being developed in Abbotsford, British Columbia (the "S Project").

[8] In 93 of the 103 conveyance transactions, the Respondent acted for both A Inc., as buyer under a Novation Agreement and seller under the End Purchase Agreements, and for the relevant end purchasers as purchasers of the lots.

[9] JH, a lawyer and member of the Law Society of British Columbia, acted for FF.

[10] The Novation Agreement dated May 5, 2014 established the terms of the purchase and sale agreement for the 103 lots of the S Project. S Ltd. was the original seller, FF was the seller by novation and A Inc. was the buyer. A Inc. agreed to purchase all 103 lots from FF, but, it could obtain registrable property transfers directly from FF for any of the 103 lots. A Inc., in turn, could sell any of the properties to third party purchasers, which it did pursuant to End Purchase Agreements.

[11] The Novation Agreement made FF responsible for the subdivision of the lots. It further required FF to provide the lots ready for building permit application, fully serviced and with connections for electrical, natural gas, water and sanitary and stormwater sewers. A Inc., on the other hand, was the "developer" as defined by the *Real Estate Development Marketing Act*, SBC 2004, c. 41. A Inc. had acquired the right to purchase and dispose of a development property, and the 103 lots were sold pursuant to a disclosure statement.

[12] The Novation Agreement required A Inc. to obtain compliance deposits of not less than $5,000 for each end purchase, which was to stand as security for FF's requirement to post security with the City of Abbotsford for subdivision servicing works.

[13] The Respondent did not prepare the End Purchase Agreements, and they were delivered to the Respondent's office fully executed. The End Purchase Agreements were prepared with A Inc. as seller and the end purchaser as buyer. As A Inc. did not have title to the 103 lots, A Inc.'s ability to transfer title pursuant to the End Purchase Agreements was dependent on its contractual relationship with FF pursuant to the Novation Agreement.

[14] The eventual sale of the 103 lots to the end purchasers occurred over a period of time in batches.

[15] The allegations contained in the Citation relate to the Respondent's representation of A Inc. and the end purchasers of 93 lots in the S Project.

ONUS AND STANDARD OF PROOF

[16] The Law Society has the onus of proving the allegations in the Citation, and the standard of proof is the balance of probabilities: *Foo v. Law Society of BC,* 2017 BCCA 151, at paragraph 63.

ANALYSIS

Allegation #1 – Did the Respondent act contrary to rule 3.4-1 and paragraph 2 of Appendix C of the *Code of Professional Conduct for British Columbia?*

[17] Rule 3.4-1 of the *Code of Professional Conduct for British Columbia* (the "Code") provides as follows:

> A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

[18] Paragraph 2 of Appendix C of the Code provides as follows:

> A lawyer must not act for more than one party with different interests in a real property transaction unless:
>
> (a) because of the remoteness of the location of the lawyer's practice, it is impracticable for the parties to be separately represented,
>
> (b) the transaction is a simple conveyance, or
>
> (c) paragraph 9 applies.

[19] The Law Society submits that rule 3.4-1 and paragraph 2 of Appendix C of the Code was breached because the transactions were not simple conveyances for the following reasons:

(a) The transactions were not straightforward but contained commercial elements. The End Purchase Agreements were individual components of a larger purchase and sale agreement between two developers. A Inc. was purchasing the whole of the proposed subdivision for a set price per lot and then effectively flipping the individual proposed lots to the end purchasers for a higher price;

(b) The property value of all the lots for which the Respondent represented both A Inc. and the relevant end purchasers was significant;

(c) Four of the transactions involved a mortgage back from the end purchasers to A Inc. as the vendor;

(d) At the time the Respondent was retained, the subdivision had not yet been approved by the City of Abbotsford, and the encumbrances had not yet been registered on title. In other words, the Respondent was being retained to act for A Inc. and the end purchasers in relation to contracts for the pre-sale of units in a development property that was not yet completed and neither the seller nor the buyer were aware of the exact nature of the non-financial charges;

(e) The transactions were not a direct sale from a developer to the buyer of completed residential building lots. The purported seller, A Inc., did not have title to the property, and its ability to transfer title to the end purchasers was dependent on its contractual relationship with FF and its own compliance with the Novation Agreement;

(f) A Inc., as buyer, had obligations to FF with respect to completion dates (including the risk of forfeiting a $100,000 deposit with respect to the final six sales) for the purchase of the lots. A Inc.'s obligations to FF were separate but related to the obligations of the end purchasers to complete by a specified date;

(g) The sales did not relate to completed residential building lots after the statutory time period for filing claims for builders liens had expired. JH testified that the City of Abbotsford did not accept applications for building permits until March 2, 2015, did not grant a certificate of substantial completion to FF until after that date and in April 2015, FF was still working with the City of Abbotsford on lot grading. The statutory time period for filing a builders lien is 45 days after a certificate of completion is issued or the head contract has been completed or the improvements have been completed;

(h) After completion, FF and A Inc. had ongoing construction and servicing obligations to the City of Abbotsford with respect to lot grading, ESC compliance and compliance with the building scheme, design plans and tree survey;

(i) The end purchasers had ongoing construction and servicing obligations to FF and A Inc. to build their homes and to comply with the building scheme, design plans, tree survey and lot grading; and

(j) The transactions included construction-related holdbacks (the Compliance Deposit and ESC holdback) from each end purchaser to secure the ongoing obligations. Those construction-related holdbacks were obtained from the end purchasers via A Inc. but held by FF.

[20] The Respondent's position is that he considered the transactions for which he was retained and concluded that the conveyances were "simple" after considering the following factors:

(a) The value of the property or the amount of money involved in each lot conveyance was relatively modest (in the range of $230,000 to $260,000);

(b) The non-financial charges were already addressed in the End Purchaser Agreements and were not unusual;

(c) The Respondent was not advised of, and did not discover, any liens, holdbacks for uncompleted construction or vendor's obligations to complete construction in existence at the time of completion;

(d) The transactions did not include the sale of any new residential units or a business;

(e) The transactions did not involve the drafting of a contract of purchase and sale;

(f) The transactions did not involve an inducement to purchasers that a registered transfer or other legal services were included in the purchase price of the property; and

(g) With the exception of four lots, completion was to involve the payment of all cash for clear titles.

[21] The issue to be determined is whether the 93 conveyances where the Respondent acted for both A Inc. and an end purchaser constituted "simple conveyances" as defined by the Code.

[22] Paragraph 4 of Appendix C of the Code provides that:

> In determining whether or not a transaction is a simple conveyance, a lawyer should consider:
>
> (a) the value of the property or the amount of money involved;
>
> (b) the existence of non-financial charges, and

(c) the existence of liens, holdbacks for uncompleted construction and vendor's obligations to complete construction.

[23] Both the Law Society and the Respondent directed the Panel to the Commentary provisions of Appendix C of the Code:

1. The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them:

   (a) the payment of all cash for clear title,

   (b) the discharge of one or more encumbrances and payment of the balance, if any, in cash,

   (c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,

   (d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is

      (i) a revolving mortgage that can be advanced and re-advanced,

      (ii) to be advanced in stages, or

      (iii) given to secure a line of credit,

   (e) transfer of a leasehold interest if there are no changes to the terms of the lease,

   (f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or

   (g) any combination of the foregoing.

2. The following are examples of transactions that must not be treated as simple conveyances:

   (h) a transaction in which there is any commercial element, such as

      (i) a conveyance included in a sale and purchase of a business,

(ii) a transaction involving a building containing more than three residential units, or

(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(i) a lease or transfer of a lease, other than as set out in subparagraph (e),

(j) a transaction in which there is a mortgage back from the purchaser to the vendor,

(k) an agreement for sale,

(l) a transaction in which the lawyer's client is a vendor who:

(i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

(ii) is or was the developer of property being sold, unless subparagraph (f) applies,

(m) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage, or

(n) the drafting of a contract of purchase and sale.

[24] The commentary provided in Appendix C is not an exhaustive list and provides guidance on what constitutes a "simple conveyance". It is for the Panel on the facts in this case to determine whether the 93 conveyances were "simple".

[25] The Respondent argues that the 93 conveyances were separate and distinct transactions and should be treated as such. The Panel rejects this argument. The 93 conveyances cannot be considered in a vacuum. The 93 conveyances must be considered as one larger transaction for the following reasons:

(a) A Inc. was the developer of the 103 lots;

(b) The 103 lots were marketed and sold by A Inc. pursuant to a disclosure statement, as required by the *Real Estate Development Marketing Act*;

(c) The Novation Agreement required A Inc. to obtain compliance deposits for each end purchase to stand as security for FF's requirement for subdivision servicing works;

(d) The lots were conveyed to end purchasers in batches by A Inc.; and

(e) The value of the 103 lots was significant at $23,116,311.86.

[26] The only distinction between the 93 conveyances was the end purchaser. When considered through the lens of A Inc., these conveyances were part of the 103-lot development and clearly had a commercial element to them.

[27] There was a commercial element to A Inc.'s dealings in the transaction. A Inc. was a developer marketing lots to third parties. A Inc. had obligations to FF pursuant to the terms of the Novation Agreement. The Novation Agreement involved a complex transaction between A Inc. and FF and, to a lesser extent, S Ltd.

[28] The Panel does not accept the Respondent's argument that the value of the property was relatively modest. This fails to recognize that this was more than the individual transactions and A Inc. was required to pay FF $23,116,311.86, which is not a modest amount.

[29] The Panel also does not accept the Respondent's argument that the non-financial charges were usual. The conveyances were subject to a disclosure statement provided by A Inc. to the end purchasers, and the end purchasers were subject to a statutory building scheme containing restrictions and requirements related to landscaping and development on the lots. Even if the transactions were to be considered as individual conveyances, the nature of these agreements and A Inc.'s requirements to FF put the Respondent in a position where he could not provide to the end purchasers advice that was not in conflict with the position of A Inc.

[30] The mere fact that liens may not have been registered with respect to this 103-lot development is not a factor that, in and of itself, renders the transaction a "simple conveyance". One of the factors that must be satisfied to render a conveyance "simple" is that the statutory period for builders' liens to be filed has lapsed at the time of the transaction. The Agreed Statement of Facts provides that subdivision approval was granted on or about November 6, 2014 and the first conveyances were in January 2015. On the evidence, the Panel is unable to make any findings on whether the builders' lien

period had lapsed when the first conveyances occurred in January 2015. This factor is not determinative of the issue as the conveyances were commercial for A Inc.

[31] The Code provides that, where there are holdback requirements and vendor obligations to complete construction, the conveyance is not considered "simple". Here, A Inc. was required to obtain municipal subdivision servicing compliance deposits from the end purchasers to satisfy developer servicing requirements to the City of Abbotsford. This was not a factor the Respondent considered.

[32] For the reasons set out above, the 93 conveyances are not "simple conveyances". A lawyer must not act for more than one party with different interests in a real property transaction unless the transaction falls within one of the exemptions listed in paragraph 2 of Appendix C of the Code. Having found that no exemption exists with respect to the 93 conveyances, the Respondent acted for more than one party with different interests contrary to the Code.

[33] The test for professional misconduct is set out in *Law Society of BC v. Martin,* 2005 LSBC 16. To commit professional misconduct, as opposed to a mere rules breach, a lawyer must engage in conduct that is "a marked departure from the conduct the Law Society expects from its members." As a real estate practitioner, the Respondent ought to have recognized the complexity of the transaction and its commercial element. The Respondent ought to have further recognized that his advice to the end purchasers had the potential to conflict with that of his other client, A Inc.

[34] The duty of loyalty is "one of the core values of the legal profession, perhaps the core value": *Law Society of BC v. Coglon,* 2006 LSBC 14, at paragraph 6.

[35] The Panel finds that it was a marked departure from the behaviour the Law Society expects of lawyers when the Respondent acted for A Inc. and the end purchasers in 93 conveyances of the S Project.

[36] Therefore, we find that the Respondent's conduct in violating rule 3.4-1 and paragraph 2 of Appendix C of the Code constitutes professional misconduct.

Allegation #2 – Did the Respondent act contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia* regarding lots 5, 6, 34, 53, 55, 57, 59, 66, 77 and 79*?*

[37] Allegation #2 concerns an alleged breach of undertakings in respect to lots 5, 6, 34, 53, 55, 57, 59, 66, 77 and 79 in the S Project, which were to be conveyed from FF to end purchasers via A Inc. on January 30, 2015 (the "Batch #1 Lots").

[38] The Law Society alleges that this conduct constitutes a breach of undertakings and is professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

[39] The Respondent represented both A Inc. and the relevant end purchasers on the conveyances of the Batch #1 Lots.

[40] On or about January 28, 2015, the Respondent prepared and forwarded to JH's office the Form A Transfer, Seller's Statement of Adjustments, GST Certificate and Certificate of Residency (the "Seller's Documents") with respect to each of the Batch #1 Lots.

[41] An email dated January 28, 2015 from the Respondent's legal secretary, CW, to JH's legal administrative assistant, KH, advised that documents were being prepared and sent for the following lots to close on Friday, January 30, 2015: 5, 6, 11, 13, 34, 53, 55, 57, 59, 66, 77 and 79.

[42] On January 30, 2015, the Respondent received ten letters from JH enclosing the executed Seller's Documents for each of the Batch #1 Lots. Each of the ten letters provided that the Seller's Documents were to be returned to the Respondent, inter alia, on an undertaking that:

1. You will provide us with a copy of the signed Compliance Deposit Agreement prior to registration.

[43] The Compliance Deposit Agreement referred to in the ten letters was the Construction Deposit Acknowledgement that the Respondent was to have arranged for the end purchasers to execute prior to closing.

[44] On January 30, 2015 at 4:36 pm, KH wrote to the Respondent referring him to his undertaking to provide the executed Compliance Deposit Agreement prior to registering documents. She noted that she had not yet received the Compliance Deposit Agreements and asked why her title search of lot 5 indicated that there was a pending Form A Transfer and mortgage.

[45] Upon receiving KH's email, the Respondent called CW and instructed her to deliver the Compliance Deposit Agreements to JH's office.

[46] On January 30, 2015 at 5:39 pm, CW provided KH with executed Compliance Deposit Agreements for all of the Batch #1 Lots. In her email, CW wrote:

Hi Kathleen,

Sorry, Amar just called.

He told me to get those Compliance letters over to you earlier (prior to registration). I got caught up with the cheques/registrations etc.

Attached are the signed Acknowledgments for all ten lots.

[47] The following table sets out the date and time at which the Form A Transfer for each of the Batch #1 Lots was registered with the Land Title Office, and the date and time at which a copy of the relevant Compliance Deposit Agreement was provided to JH's office.

Lot	Registration of Form A Deposit Agreement Transfer by The Respondent	Delivery of Compliance Agreement to JH
5	January 30, 2015 at 14:13:57	January 30, 2015 at 17:39
6	January 30, 2015 at 14:15:49	January 30, 2015 at 17:39
34	January 30, 2015 at 17:15:43	January 30, 2015 at 17:39
53	January 30, 2015 at 17:13:37	January 30, 2015 at 17:39
55	January 30, 2015 at 17:01:52	January 30, 2015 at 17:39
57	January 30, 2015 at 17:11:09	January 30, 2015 at 17:39
59	January 30, 2015 at 16:56:40	January 30, 2015 at 17:39
66	January 30, 2015 at 17:06:23	January 30, 2015 at 17:39
77	January 30, 2015 at 17:04:14	January 30, 2015 at 17:39
79	January 30, 2015 at 16:58:49	January 30, 2015 at 17:39.

[48] The Respondent fully acknowledges that he is responsible for CW's oversight. He sincerely regrets and apologizes for the fact that it occurred.

[49] The Respondent was in possession of executed Compliance Deposit Agreements prior to registration but failed to deliver them to JH pursuant to the undertaking.

[50] The Respondent had instructed CW not to register the signed Compliance Deposit Agreements prior to delivering them to JH's office. Since the Respondent had been called away from the office and the closings were to occur later that day, the Compliance Deposit Agreements were electronically forwarded to the Respondent by CW for him to sign

electronically. Since CW was an experienced conveyancer, the Respondent did not think that he had to confirm that she had followed his instructions.

[51] When it was brought to the Respondent's attention that the executed Compliance Deposit Agreements had been registered before being sent to JH's office, the Respondent immediately instructed CW to rectify the omission.

[52] There were ten instances of a breach of undertaking when the Respondent failed to honour a trust condition imposed by JH in each of his ten letters dated January 29, 2015. However, the breaches were rectified in approximately three and a half hours of registration in two instances and in less than 45 minutes of registration in the other eight instances.

[53] The Panel must determine whether or not the Respondent's breaches of undertaking constitute professional misconduct pursuant to the test set out in *Martin*.

[54] Undertakings are of fundamental importance to legal practice. The Court of Appeal in *Law Society of BC v. Heringa*, 2004 BCCA 97, affirmed at paragraph 10 comments made by a Law Society hearing panel:

> Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
>
> The trust and confidence vested in lawyers' undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

[55] It was the Respondent's evidence that, in a meeting prior to the date and on the morning the Compliance Deposit Agreements were to be delivered, he had given instructions to his legal secretary to be sure to get the letters out before registering. He did not follow up to ensure that his instructions were followed.

[56] The Respondent admits that he is fully responsible for the oversight of his legal secretary. Counsel for the Respondent argued that, while he was not in any way trying to diminish the importance of undertakings, there are undertakings that are breached in a "grievous way, and then there are things like what we've seen where a mistake is made by staff." It

is the Respondent's position that his conduct was not a marked departure from that expected of lawyers. The Panel does not accept this position.

[57] While it is commonplace for lawyers to work closely with assistants and paralegals as a component of their legal practices, it is not, however, acceptable or possible to relieve oneself of the responsibility for an undertaking simply because the execution of the undertaking was delegated to an assistant or paralegal. The ultimate responsibility for ensuring all accepted undertakings are fulfilled rests with the lawyer.

[58] The Panel finds that the Respondent did commit professional misconduct when he failed to honour a trust condition imposed by JH in each of his ten letters dated January 29, 2015. He did fail to provide JH with copies of the Compliance Deposit Agreements signed by the end purchasers prior to the registration of the transfer documents, contrary to rule 7.2-11 of the Code.

[59] The fact that the Respondent relied on his assistant to satisfy the undertaking cannot relieve the Respondent of his obligation to satisfy the undertaking. The Law Society can only ensure the protection of the public where a lawyer is ultimately responsible for clients with an undertaking. A lawyer's undertaking cannot be neutralized by the competent delegation of duties to an incompetent or negligent delegate. To do so would provide extraordinary indulgence to the lawyer while providing inadequate protection for the public.

[60] For these reasons, the Panel finds that the Respondent's actions in allegation #2 constitute professional misconduct.

Allegation #3 – Did the Respondent act contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia* regarding lots 17, 27, 58, 78 and 93*?*

[61] In allegation #3, the Law Society alleges that the Respondent failed to honour trust conditions imposed by counsel for FF in each of five letters dated either March 31, 2015 or April 13, 2015 by doing one or more of the following, contrary to rule 7.2-11 of the Code:

1. Failing to provide JH with a copy of the Compliance Deposit Agreements signed by the end purchasers prior to authorizing registration of transfer documents by the conveyancing notary; and

2. Failing to provide JH with a copy of undertaking letters between the Respondent's office and the conveyancing notary prior to the completion date under the Purchase Agreement between A Inc. and the end purchasers.

[62] The parties have admitted in paragraph 62 of the Notice to Admit that lots 17, 27, 58, 78 and 93 were to be conveyed from FF to the end purchasers on April 14, 2015. Importantly, it is admitted that lots 17 and 58 were originally scheduled to close their conveyance on April 1, 2015. On March 31, 2015, JH sent the executed Seller's Documents for lots 17 and 58 to the Respondent. In two separate cover letters dated March 31, 2015, JH provided the Respondent with the executed Seller's Documents that would allow the transfers on the basis of undertakings he set out in the separate cover letters for lots 17 and 58.

[63] The cover letters from JH for lots 17 and 58 included, inter alia, the following undertakings, which he sought to impose on the Respondent:

1. You will provide our office with a copy of the signed Compliance Deposit Agreement prior to authorizing registration of the Form A Transfer by the Transferee's lawyer/notary public;

2. You will provide our office with a copy of the undertaking letter between your office and the Transferee's lawyer/notary public 3 business days prior to the completion date under the purchase agreement between the Buyer [A Inc.] and the transferee [end purchaser].

[64] The parties have acknowledged that there is no consequence in the descriptions "Compliance Deposit Agreement" and "Construction Compliance Deposit Acknowledgement" referenced in the evidence, as both JH and the Respondent used both terms interchangeably.

[65] Even though it was originally intended that lots 17 and 58 would be transferred on April 1, 2015, they were not transferred until later. With respect to lot 17, registration of the Form A Transfer occurred on April 14, 2015 at 12:44:03 hours. The Respondent did not deliver the Compliance Deposit Agreement for lot 17 to JH until April 15, 2015 at 16:49 hours, a time after that stipulated in the undertaking. The Respondent had delivered the undertaking letter, the subject of undertaking #2, for lot 17 to JH on April 1, 2015 at 14:41 hours.

[66] With respect to lot 58, registration of the Form A Transfer occurred on April 14, 2015 at 15:35:36 hours. The delivery of the Compliance Deposit Agreement to JH occurred later on the same day at 17:28 hours.

[67] The subject of the second undertaking for lot 58, the delivery to JH of undertaking letters for lot 58, occurred on April 1, 2015 at 14:41 hours.

[68] As a result of the delivery of the Compliance Deposit Agreements for lots 17 and 58 after registration, the Law Society alleges that the Respondent breached the undertakings imposed by JH in his March 31, 2015 letters to the Respondent.

[69] The imposition of an undertaking is governed by rule 7.2-11 of the Code. Commentary 1 provides that:

> Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. ...

Commentary 2 provides that:

> Trust conditions, which are equivalent to undertakings, should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.

[70] Counsel for the Respondent submitted that a condition requiring three days' notice in circumstances where (it has been admitted) the completion was to occur the next day was manifestly unreasonable and, as such, would be void. Did this then invalidate the effort to impose undertakings on the Respondent?

[71] JH imposed the conditions in what appears to be a standard form letter drafted by JH that was similar in form to other letters imposing similar or the same trust conditions on the Respondent. JH testified that he used the form language in an effort to give some structure to the numerous closings. It was for this reason that the two types of undertakings in the letters sent to the Respondent were the same standard undertakings used in all 93 transactions involving JH's client and the Respondent's clients.

[72] It is the use of the standard form undertaking that resulted in the manifestly unreasonable trust condition requiring the provision of a copy of the undertaking letter three business days prior to the completion date. The parties have admitted the completion date was to be the day after delivery of JH's letter imposing the trust condition. Had the parties turned their minds to this condition, they would have realized that it would not have been reasonable to impose the trust condition and it would not have been reasonable for the Respondent to have accepted the trust condition on the closing date as he simply could not have complied with it.

[73] Commentary 3 to rule 7.2-11 provides that:

> The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. ...

Commentary 4 provides that:

> If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

Commentary 5 provides that:

> Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. ...

[74] The Respondent did not seek to vary the term stipulating three business days for the provision of the undertaking letters prior to the completion date. As a result, the parties operated on a standard set of expectations.

[75] It is not unreasonable to assume that JH thought the Respondent was reading the letters he sent to the Respondent. The Respondent should have sought clarification or sought to vary the undertakings. As the transactions did not complete on April 1, 2015, it was not unreasonable for JH to suppose undertakings were operative for the purposes of registration of the Form A Transfers as stipulated in his letters. Registration occurred on April 14, but delivery of Compliance Deposit Agreements was not perfected until April 15, in the case of lot 17, and about two hours after registration in the case of lot 58. In the circumstances, the Respondent breached the trust conditions imposed for lots 17 and 58 by failing to provide copies of the clients' Compliance Deposit Agreements prior to authorizing registration of the Form A Transfers.

[76] Counsel for the Respondent has argued that there is no evidence the Respondent authorized registration of the Form A Transfer. The Panel rejects this argument. Implicit in the fullness of the evidence of the transactions is the oversight of the Respondent. The Panel infers his authorization from his testimony generally and, more specifically, his necessary

involvement in the complexity of the transactions, including his dealings with his staff and his oversight of them and the documents.

[77] By delivery of the undertaking letters to JH on April 1, 2015, the Respondent confirmed acceptance of the trust conditions imposed by JH for lots 17 and 58. If he did not accept them, he should have acted differently by communicating non-acceptance.

[78] As stated above, undertakings are of fundamental importance to the legal practice. It is essential that the public and lawyers can rely on an undertaking completely and absolutely. Anything less compromises the efficacy of the undertaking as a vital tool of legal practice. Non-compliance or incomplete compliance with undertakings erodes the public's confidence and trust in lawyers.

[79] The numbers of transactions that were being conducted by the Respondent did not excuse assessment of each undertaking as imposed in each separate transaction. On the contrary, it obliged his careful scrutiny. In *United Mining and Finance Corporation Ltd. v. Becher*, [1910] 2 KB 296, the House of Lords said:

> Those undertakings are given in their capacity as solicitors, and money is entrusted to them under those undertakings largely because they are solicitors and are deemed therefore, and found to be, especially worthy of trust.

[80] There is an expectation on the part of the public and between lawyers that a lawyer's undertaking, including the fulfilment of trust conditions, will be fulfilled completely and fully. If there is to be only one standard for, and no exception to this expectation, strict compliance with an undertaking is required for the public and lawyers to have complete trust in the undertaking of a lawyer.

[81] In *Law Society of BC v. Faminoff*, 2014 LSBC 22, a hearing panel confirmed the requirement for strict compliance with undertakings. At paragraph 67 it said:

> Undertakings play a fundamentally important role in the day to day practice of law. Strict compliance with undertakings is therefore equally important in order to ensure that they can continue to be given and relied upon by members of the Law Society and the public.

[82] The Law Society also alleges that the Respondent failed to deliver his undertaking letters to JH for lots 27, 78 and 93, contrary to the undertaking JH imposed as undertaking #2. The subject properties were all registered on April 14, 2015, but no party has record of the undertaking letters being duly provided for the transactions three business days prior to the completion date.

[83] JH testified that he had his staff search for evidence of receipt of the undertaking letters. He testified that his staff could not find evidence of delivery of them. However, JH did not search himself, and the Panel cannot rely on hearsay evidence in these circumstances. The Respondent testified that, when it was first brought to his attention that there had been an allegation of failure to provide the copies of the undertaking letters, he followed up with his staff. He also testified that he had done his best to find the correspondence or emails "where the documents had been sent over." He testified that he was not able to find them. He indicated that he had gone through numerous staff changes and was not sure if the emails had inadvertently been deleted by one of the staff members, or had been misfiled. He simply did not know. He testified, however, that "at the end of the day," he thought that they had been delivered because in the final letter from JH he had said everything was "done and complete."

[84] In the circumstances of this evidence, the burden of proof is on the Law Society to establish the Respondent's failure to deliver the undertaking letters. JH did not, in his own evidence, indicate that he did not receive the letters, and there was some evidence from the Respondent that he did provide the undertaking letters. In these circumstances, allegations of breach of trust conditions for lots 27, 78 and 93 have not been proven.

[85] No one was negatively affected directly by the breaches of undertaking related to lots 17 and 58. The Respondent ultimately and relatively promptly rectified the breached undertakings. These were, however, the second instances of breach of undertakings in the complex of transactions. The Respondent had already been put on notice that there had been lack of compliance with undertakings, and yet these breaches occurred. In such circumstances, the Panel finds these breaches are neither exceptional nor excusable and finds they constitute professional misconduct.

Allegation #4 – Did the Respondent act contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia* regarding lots 37, 54, 64 and 69*?*

[86] With respect to allegation #4, the Law Society alleges that the Respondent failed to honour a trust condition imposed upon him with respect to the transfer of lots 37, 54, 64 and 69 when the Respondent registered transfers of the lots while not holding sufficient funds in trust and without concurrently registering the applicable mortgages.

[87] The Respondent says he did not breach any undertakings nor trust conditions as they were amended by JH at 3:51 pm on Friday, May 22, 2015.

[88] The last 12 lots in the S Project were scheduled to complete on May 22, 2015.

[89] The May 22, 2015 date had been negotiated as a final extension for all remaining lots in the S Project. A Inc. had paid an additional deposit of $100,000 to FF that would be

subject to forfeiture in the event of the failure of A Inc. to complete the purchase and sale of all remaining lots by May 22, 2015.

[90] As of May 21, 2015, the final six lots, namely lots 3, 4, 37, 54, 64 and 69 in the S Project, were still to be conveyed from A Inc. to end purchasers on May 22, 2015 (the "Batch #3 Lots").

[91] The Respondent represented both A Inc. and the relevant end purchasers with respect to the purchase and sale of the Batch #3 Lots.

[92] On May 22, 2015, the Respondent forwarded the Sellers' Documents with respect to the Batch #3 Lots to JH for execution by FF. On May 22, 2015 at 10:01 am, JH returned the copies of the executed Seller's Documents for the Batch #3 Lots. The executed documents were provided on the basis of undertakings set out in six separate covering letters (one for each of the Batch #3 Lots) from JH to the Respondent, each dated May 22, 2015.

[93] The six covering letters included the following identical undertakings imposed on the Respondent:

1. You will provide us with a copy of the signed Compliance Deposit Agreement prior to registration.

2. You will not deal with the Transfer in any manner whatsoever, or attempt to register the Transfer until such time as you hold in your trust account sufficient funds which, when added to the proceeds of any new mortgage to be filed concurrently therewith, will allow you to complete this transaction in accordance with the contract of purchase and sale and enclosed approved Seller's Statement of Adjustments.

3. To the best of your knowledge and if applicable, the Buyer has fulfilled all the new lender's conditions for funding except for submitting the new mortgage for registration and you know of no reason why the new mortgage should not be registered and funds disbursed thereunder in the ordinary course of business.

4. Upon acceptance of your application for registration by the appropriate registry offices, upon receipt of satisfactory post index searches, and upon receipt of new mortgage funds, if applicable, you will pay to us *on the closing date* as stated on the enclosed approved Seller's Statement of Adjustments, the funds payable to the Seller as per the Seller's Statement of Adjustments.

5. If, for any reason, you are unable to comply with the above undertakings, or if the transaction does not complete on the closing date as stated on the enclosed approved Seller's Statement of Adjustments for any reason whatsoever, you will,

on demand, return the unregistered Transfer to us, or, if it has been submitted for registration, request its withdrawal and return it to us upon its receipt.

[emphasis in original]

[94] The covering letters also state:

> Your use of the enclosed documents constitutes acceptance of the above noted undertakings and they cannot be varied without express written consent from the undersigned.

[95] On May 22, 2015 at 2:11 pm, the Respondent received an email from A Inc. forwarding an email exchange between representatives of A Inc. and FF in which A Inc. had raised a concern about funding of the Batch #3 Lots

> … by the [the financial institution] … which has its own timetable and close on Mondays. Has caused history of timing headaches. They [A Inc.] are in an abundance of caution wanting your assurance that if they get the documents to your lawyer [JH] today that they have until Wednesday to assure delivery of the cash to your lawyer.

[96] On May 22, 2015 at 2:53 pm, the Respondent forwarded the email he had received from A Inc. to JH together with the following message:

> We will be registering all 6 today.
>
> Don't think undertaking will be necessary.
>
> Is paying out on Wednesday as per below ok?

[97] On May 22, 2015 at 3:51 pm, JH responded to the Respondent as follows:

> The client has agreed to Wednesday. The undertakings are amended to state that if we don't have funds by Wednesday you will withdraw the transfer(s).

[98] On May 22, 2015, the Respondent registered the Form A Transfers of the Batch #3 Lots to the end purchasers.

[99] At the time of registering the Form A Transfers, the Respondent did not concurrently register a mortgage with respect to lots 37, 54, 64 and 69 whose proceeds, together with funds held in trust on behalf of the end purchasers, would allow the Respondent to complete the purchase transactions in accordance with the contract of purchase and sale and the statement of adjustments. At the time of registration of the transfers, the

Respondent did not have sufficient funds in trust to complete the purchase transactions with respect to lots 37, 54, 64 and 69.

[100] On May 25, 2015, the Respondent's assistant confirmed that the Respondent was still waiting for mortgage instructions from the financial institution for the Batch #3 Lots, which they expected to receive the next day. Prior to the email of May 25, 2015 at 3:10 pm, the Respondent had not informed JH that he did not have mortgage instructions from the financial institution.

[101] On Monday, May 25, 2015, the following emails were then exchanged between the Respondent and JH:

JH at 3:31 pm

Amarjit,

I demand that you immediately withdraw the transfers of the last 6 lots. You have not complied with our undertaking letter. I cannot comprehend how you could register the transfers without having executed mortgages that you were to register concurrently with the transfers as per paragraphs 2 and 3 of our undertaking letters.

Please respond to this e-mail immediately.

Respondent at 3:36 pm

We do have executed mortgages with a different lender, in case [the financial institution] does not provide us instructions in time, we will be registering the other executed mortgages. We are not in breach of the undertakings, thus will not withdraw the transfers.

JH at 3:40 pm

Amarjit – I again demand that you withdraw the transfers immediately. I did not authorize you to register a transfer on a Friday and a mortgage with a different lender on a Wednesday. I authorized you to payout on Wednesday on the basis that [the financial institution] is closed Monday. Withdraw the transfers immediately.

Respondent at 3:57 pm

JH,

Please go back and read the email, dated May 22, 2015, where you authorized the registration of the lots on Friday with payout no later than Wednesday.

There is not mention of what you are claiming below. We are not in breach of any undertakings, thus, we will not be withdrawing the transfers.

JH at 4:12 pm

Amarjit – I repeat, withdraw the transfers immediately. Consenting to paying out on Wednesday is not in any way the same as consenting to you registering transfers before you have mortgage instructions and before you have registered the "other mortgage" with the backup lender. I am astonished that you cannot appreciate the distinction. What if a judgment were to get registered against your buyer tomorrow – would your new mortgagee fund in that instance? What if your buyer sells the property out from under all of us?? There are myriad other examples I can provide. Withdraw the transfers now.

Respondent at 5:22 pm

JH, I will have to seek instructions from my clients.

[102] The Respondent did not withdraw the Form A Transfers for the Batch #3 Lots.

[103] On Tuesday, May 26, 2015, KH ran a title search on the Batch #3 Lots that indicated that the transfers had been registered for the Batch #3 Lots, and only two of these lots, lot 3 and 4, had mortgages and assignment of rents registered concurrently with the transfers.

[104] On May 26, 2015, the Respondent registered Form B Mortgages in favour of A Inc. with the Land Title Office against titles to lots 37, 54, 64 and 69.

[105] On Tuesday, May 26, 2015, the Respondent withdrew the Form B Mortgages registered with the Land title Office with respect to lots 37, 64 and 69.

[106] On Wednesday, May 27, 2015, the Respondent received a letter from S Inc. enclosing a Form B mortgage to be registered against title to lots 37, 64 and 69 and another property unrelated to the S Project in favour of NL.

[107] On Wednesday, May 27, 2015, the Respondent forwarded the sale proceeds to JH's office with respect to the balance of the Batch #3 Lots.

[109] The Respondent, in filing the transfers for lots 37, 54, 64 and 69, relied on his interpretation that JH, by his 3:51 pm email of May 22, 2015, was releasing the Respondent from all of his undertakings but for the requirement to forward the funds by the following Wednesday. The Panel finds this interpretation to be untenable.

[110] The only date that was referenced in the standard form of undertaking letter was the date related to the payment of funds, and this was the only date that could have been amended. When JH amended the date to Wednesday, he was amending the date upon which funds could be delivered and nothing more. JH did not waive all undertakings, and his evidence was that he would never have done so as it would put his client in a position of transferring the properties without any security for payment of said properties.

[111] If the transfers were not filed by May 22, 2015, A Inc. would have forfeited its $100,000 deposit. The Respondent proceeded to register the transfers on May 22, 2015 without having sufficient funds in his trust account to complete the transactions in an effort to protect A Inc.'s deposit. In doing so, the Respondent breached the terms of the undertakings imposed upon him by JH.

[112] The Panel finds that the Respondent acted contrary to rule 7.2-11 of the Code as per the Citation, which on the facts of this case, constitutes professional misconduct.

CONCLUSION

[113] The Panel find as follows:

(a) Under allegation #1, the Law Society has met the onus of demonstrating that the Respondent acted in a conflict of interest, contrary to rule 3.4-1 and paragraph 2 of Appendix C of the Code, constituting professional misconduct;

(b) Under allegation #2, the Law Society has met the onus of demonstrating that the Respondent failed to honour the trust conditions and, in doing so, his conduct constitutes professional misconduct;

(c) Under allegation #3(a), the Law Society has met the onus of demonstrating that the Respondent failed to honour the trust conditions and, in doing so, his conduct constitutes professional misconduct. The Law Society has failed to meet the onus with respect to allegation #3(b); and

(d) Under allegation #4, the Law Society has met the onus of demonstrating that the Respondent failed to honour the trust conditions and, in doing so, his conduct constitutes professional misconduct.