2019 LSBC 34
Decision issued: September 13, 2019
Citation issued: July 25, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GEORGE ERIC ALEKSEJEV

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	March 7, 2019
Panel:	Tony Wilson, QC, Chair Clarence Bolt, Public Representative Carol Hickman, QC, Lawyer
Discipline Counsel:	Mandana Namazi,
Counsel for the Respondent:	David J. Taylor

BACKGROUND

[1] On July 25, 2018, a citation was issued to George Eric Aleksejev (the "Respondent") pursuant to the *Legal Profession Act* and the Law Society Rules (the "Citation"). The Citation alleged:

1. On or about October 26, 2017, in the course of representing your clients TP and QP in a real estate transaction, you breached an undertaking you gave in a letter to SS dated October 16, 2017 by registering transfer documentation when you did not hold in your trust account sufficient funds which, when added to the proceeds of any new mortgage, would allow you to complete the transaction, contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia*.

> This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[2] The Respondent admits that he was served with the Citation.

[3] The Respondent and the Law Society submitted an Agreed Statement of Facts (the "ASF"), the salient portions of which are listed below:

a. Lawyer SS represented the sellers in a residential real estate transaction (the "Transaction"). The Respondent represented the buyers with respect to the Transaction, which was to complete on October 26, 2017 (the "Closing Date");

b. Ten days before the Closing Date, the Respondent wrote to SS and gave a written undertaking as follows:

> > We will not attempt to register the transfer documentation until such time as we hold in our trust account sufficient funds which, when added to the proceeds of any new mortgage, will allow us to complete this transaction in accordance with the contract of purchase and sale made between the Buyer and Seller and the approved Seller's statement of adjustments.
> >
> > (the "Undertaking");

c. The day prior to the Closing Date, SS sent a letter to the Respondent, who returned the signed Form A Transfer on the Undertaking. At 1:35 pm on the Closing Date, the Respondent electronically registered the Form A Transfer for the Transaction;

d. However, at the time the Form A Transfer was registered, the Respondent had not yet received all the funds from the buyers that he required in order to allow him to complete the Transaction and to formally register the Form A Transfer;

e. By registering the Form A Transfer prior to being in receipt of funds, the Respondent was in breach of his Undertaking;

f. At 4:10 pm on the Closing Date, SS's assistant called the Respondent's office to inquire about the status of the Transaction and spoke with the Respondent's assistant, who confirmed that the Form A Transfer document had in fact been registered but that the Respondent was still waiting for the buyers' funds;

g. SS's assistant immediately called SS and told her what she had been told by the Respondent's assistant. SS asked her assistant to immediately call back and clarify whether or not it was mortgage funds that were not yet available or if it was the buyers' funds and, if so, to advise the Respondent that he was in breach of his Undertaking;

h. At 4:15 pm on the Closing Date, SS's assistant telephoned the Respondent's assistant and was advised that the Respondent was waiting for the buyers' funds and that the Respondent knew that he was in breach of the Undertaking. The Respondent's assistant said that they would withdraw the transfer document from the Land Title Office if their clients did not come in with the money by the end of the day;

i. The Respondent subsequently told SS and SS's assistant that he did not have all the purchase funds from the buyers, but that he understood they would bring in the remaining funds and were in fact on their way to his office. He said that his clients were "ready, willing and able to complete, but not quite." He also said that he could withdraw the transfer document if requested to do so;

j. Shortly thereafter, on the Closing Date, the buyers provided the Respondent with the funds required to allow the Respondent to complete the Transaction, and the Transaction was completed on the Closing Date; and

k. SS had not waived the Undertaking.

[4] On November 8, 2017, SS made a formal complaint to the Law Society with respect to the Respondent's breach of his Undertaking, and pursuant to the ASF, the Respondent admitted that he breached the Undertaking by registering transfer documentation when he did not hold in his trust account sufficient funds that, when added to the proceeds of any new mortgage, would enable him to complete the Transaction.

[5] The Respondent admitted that this conduct amounted to professional misconduct.

DISCUSSION AND LAW

[6] Based on the admissions contained in the ASF, the Panel concludes that the Respondent breached his Undertaking, and that his breach of undertaking constituted professional misconduct.

[7] Professional misconduct is established where there is a fundamental degree of fault amounting to a "marked departure" from the conduct that is expected of the profession: *Law Society of BC* v. *Martin*, 2005 LSBC 16. In determining whether conduct constitutes professional misconduct, there are a number of relevant considerations including the gravity of the misconduct, its duration, whether there is a pattern of behaviour or the conduct was a solitary incident, the presence or absence of *bad faith and an*y harm caused by the misconduct.

[8] Rule 7.2-11 of the *Code of Professional Conduct* sets out provisions with respect to undertakings and trust conditions:

> A lawyer must:
>
> a. not give an undertaking that cannot be fulfilled;
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> b. fulfill every undertaking given; and
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> c. honour every trust condition once accepted.

[9] The profound importance of undertakings to the legal profession is further well established by numerous case precedents. The Court of Appeal in *Law Society of BC v. Heringa*, 2004 BCCA 97 at para. 6, cited with approval, the following comments made by a Law Society hearing panel concerning the sanctity of undertakings:

> 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.
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> The trust and confidence vested in lawyer's 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.

[10] In *Hammond v. Law Society of BC*, 2004 BCCA 560, the Court of Appeal made an equally strong statement on the importance of undertakings to the legal profession at paras. 55 and 56:

> The heading of Chapter 11 [of the *Professional Conduct Handbook*] might suggest that the Law Society is concerned only with undertakings given by one lawyer to another and not with undertakings given by lawyers to members of the public. Neither counsel suggested that such a restrictive interpretation was warranted. This is not surprising given the paramount responsibility of the Law Society to the public (s. 3 of the Act) and the primary importance which the Law Society and its members attribute to lawyers' undertakings. These undertakings are regarded as solemn, if not sacred, promises made by lawyers, not only to one another, but also to members of the public with whom they communicate in the context of legal matters. These undertakings are integral to the practice of law and play a particularly important role in the area of real estate transactions as a means of expediting and simplify those transactions.
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> When a lawyer's undertaking is breached, it reflects not only on the integrity of that member, but also on the integrity of the profession as a whole. …

[11] The panel in *Law Society of BC v. Dhindsa*, 2019 LSBC 05, noted at para. 78 that 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.

[12] In *Law Society of BC v. Faminoff*, 2014 LSBC 22 at para. 67, the hearing panel confirmed the requirement for strict compliance with undertakings:

> 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.

[13] Similar to physical infrastructure, the legal infrastructure underpinning social, political and economic relations, when functioning properly, does so largely under the public radar. The public may not understand the legalese underpinning such relations, but expects the infrastructure to work.

[14] Breaches of undertakings impact not only the legal profession but also public perception of and confidence in the country's legal system and the rule of law. Breaches of undertakings are betrayals of trust.

[15] In this case, the Respondent deliberately breached his Undertaking by registering the Form A transfer document. In his January 24, 2018 letter to the Law Society, he noted that his clients told him they were "… on their way with the balance of funds so I registered the documents so that when I got the funds I could have the registration complete and make the funds available to the vendor as early as possible."

[16] The Respondent offered no mitigating circumstances to his breach of undertaking but "justified registering early" because his use of a land registry agent to register his documents can "delay registration up to an hour." He did not report his breach of undertaking to the Law Society.

[17] With respect to the Respondent's position that the use of a land registry agent to register documents "can delay registration up to an hour," the electronic filing of documents is authorized by Part 10.1 of the *Land Title Act*, RSBC 1996, c. 250, and enables a subscriber such as the Respondent to electronically file land title documents at the Land Title Office through the online Juricert service without the need for a land registry agent. The Respondent was a subscriber of the Juricert service.

[18] As noted in *Law Society of BC v. King*, 2019 LSBC 07 at para. 44, quoting *Law Society of BC v. Williams*, 2010 LSBC 31, at paras. 12-14:

> … As officers under the [*Land Title*] *Act*, members of the legal profession play a key role in ensuring the integrity of transfer documents and safeguarding the system from fraud.
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> ... the submission of documents that are defective in their execution harms the land title system by eroding the reliability and authenticity of documents submitted for registration. Further, because the officer does not submit the originally executed document when an electronic document is submitted for registration, the defect is not apparent, and the Land Title Office cannot scrutinize the original document to ensure its registrability.

Issue concerning statement made by Respondent and inference

[19] A matter arose at the Hearing concerning an offhand remark made by the Respondent in the course of expressing his remorse regarding his breach of the

Undertaking, leading to an issue between counsel concerning that statement. The Respondent said, in effect, "I don't know why I did it." Counsel for the Law Society took the position that that statement was contrary to the ASF. Counsel for the Respondent took the position that the ASF was the evidence that the Panel had before it, that the statement made by the Respondent in the course of his apology was not evidence but an offhand remark, and that the Panel should only be looking at the evidence in the ASF.

[20] Although some written argument and case law was forwarded to the Panel after the Hearing concluded, the Panel concluded that this issue was not determinative or helpful to the issue of the breach of undertaking, to the matter of professional misconduct nor to the penalty. Accordingly, the Panel has relied upon the evidence contained in the ASF.

DISPOSITION AND DISCIPLINARY ACTION

[21] The list of factors to be considered in assessing penalty are set out in *Law Society of BC v. Ogilvie,* 1999 LSBC 17, [1999] LSDD No. 45, and include:

a. the nature and gravity of the conduct proven;

b. the age and experience of the respondent;

c. the previous character of the respondent, including details of prior discipline;

d. the impact upon the victim;

e. the advantage gained, or to be gained by the respondent;

f. the number of times the offending conduct occurred;

g. whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong in the presence or absence of other mitigating circumstances;

h. the possibility of remediating or rehabilitating the respondent;

i. the impact upon the respondent of criminal or other sections or penalties;

j. the impact of the proposed penalty on the respondent;

k. the need for specific and general deterrence;

l. the need to ensure the public's confidence in the integrity of profession; and

m. the range of penalties imposed in similar cases.

[22] Not all of these factors will come into play in all cases, and the weight given to factors may vary from case to case. Indeed, in *Law Society of BC v. Dent*, 2016 LSBC 05, the hearing panel suggested a consolidation of the *Ogilvie* factors to the following:

a. nature, gravity and consequences of conduct;

b. character and professional conduct record of the respondent;

c. acknowledgment of the misconduct and remedial action; and

d. public confidence in the legal profession including public confidence in the disciplinary process.

[23] In terms of the nature and gravity of the misconduct, there is no question that this was a serious breach and that it was deliberate, reckless and irresponsible. The case law cited earlier in this decision is clear on the importance of undertakings to the profession and that they are solemn promises. However, the buyers did arrive with sufficient funds by the end of the Closing Date and the Transaction did close without a loss, a delay, a victim or a gain by the Respondent. The Respondent did not attempt to use the breach of undertaking for his own gain, or to secure an advantage for him or his client, and offered to withdraw the registration documents.

[24] Nevertheless, as a lawyer practising for 25 years predominantly in the field of real estate, the Respondent should have known better than recklessly to breach his Undertaking and register the transfer documents for the purposes of expediency or convenience on the basis that "I can withdraw them if the money doesn't show up." No lawyer should breach an undertaking and file transfer documents on the expectation that the lawyer can simply withdraw the documents later in the day if the undertaking cannot be complied with. A lawyer who has done so has committed professional misconduct.

[25] Although the Panel was advised of previous citations (one of which involved a breach of undertaking), those transgressions were in 1992 and 1993 respectively. It is the Panel's belief that the previous transgressions, being more than 25 years ago, do not amount to a pattern of behaviour. Instead, we see this 2017 breach of

undertaking as a result of a lawyer with a busy real estate practice cutting corners for expediency and convenience.

[26] The Panel accepts the Respondent's acknowledgment of misconduct contained in the ASF and his sincerity and remorse. Given the circumstances, the significant penalty to be imposed, and the fact that this decision will be publicized, we doubt that the Respondent will act so cavalierly with his undertakings in the future.

[27] However, it is important for the profession, and the public at large, for the Law Society to ensure that there is public confidence in the integrity of the profession and in the Law Society's disciplinary processes, and that a clear message about the seriousness of the offence be sent to the Respondent and other members of the profession under the principles of specific and general deterrence.

[28] The Panel has reviewed the authorities and the range of penalties in similar cases. In *Law Society of BC v. Sandrelli*, 2015 LSBC 17, the lawyer had no prior discipline record. However, in breaching his undertaking, the lawyer acted deliberately on the instructions of his client to secure an advantage for his client. Indeed, he deliberately stopped payment on his trust cheque, on the instructions of his client, to attempt to secure better terms before providing replacement trust cheques. The panel determined that a $10,000 fine and a reprimand were appropriate in the circumstances.

[29] In *Law Society of BC v. Promislow*, 2009 LSBC 04, a lawyer with 50 years' experience as a real estate litigator deliberately ignored the trust condition that had been imposed on him, resulting in a breach of undertaking. His prior history was more extensive than the Respondent's (one citation, six conduct reviews and a referral to practice standards). The panel determined that his past conduct was a significant aggravating factor in assessing penalty. The panel determined that a $10,000 fine was appropriate in the circumstances.

[30] In *Law Society of BC v. Clendenning*, 2007 LSBC 10, the lawyer breached an undertaking to provide a discharge of mortgage in a real estate conveyance and failed to respond to communications with respect to the undertaking from the notary public acting for the purchaser. The lawyer admitted that his conduct constituted professional misconduct, and the lawyer and the Law Society made a joint proposal for a $7,500 fine. The lawyer's prior conduct review regarding compliance with undertakings was considered to be an aggregating factor leading this fine.

[31] In *Law Society of BC v. Chodra*, 2011 LSBC 31, a lawyer with many years of experience breached an undertaking in a real estate transaction by failing to

discharge a builders lien or provide a filed copy of the discharge to other counsel. The lawyer's conduct history consisted of a conduct review for failing to comply with an undertaking three years previously. More significantly, the lawyer believed it was preferable to his client to have the builders lien removed through negotiation. Accordingly, he was using his breach of undertaking to secure an advantage for his client. The panel determined that a fine of $5,000 was appropriate.

[32] In the current case, the Law Society argues that, to protect public confidence in the integrity of the profession and the discipline process, as well as specific and general deterrence, a fine of $10,000 is required, in addition to costs of $3,163.81. However, we believe that this is high in light of the factors enunciated in *Ogilvie* and *Dent*. The Respondent's previous conduct history involving citations was over 25 years ago and is not current enough to warrant, in our view, a higher penalty.

[33] Unlike *Chodra* (where the panel ordered a $5,000 fine) and *Sandrelli* (where a $10,000 fine was ordered), the Respondent in this case did not attempt to exploit the breach of undertaking to secure an advantage. Given that the Transaction closed, there was no serious impact on the opposing party or counsel. Instead, a lawyer with a busy real estate practice breached an undertaking for expediency and convenience, not to secure advantage for him or his client. We find his behaviour reckless and cavalier, but we also believe that the penalty ordered here is appropriate in the circumstances to protect public confidence in the integrity of the profession and for specific and general deterrence.

[34] Accordingly, it is the Panel's decision that the appropriate fine necessary to protect public confidence in the integrity of the profession and the discipline process, as well as specific and general deterrence, is $7,000.

COSTS

[35] It appeared to the Panel that Respondent's counsel and Discipline Counsel had agreed on costs of $3,163.81, but if that is not the case, then it is the view of the majority of the Panel that the parties may make submissions on costs within 30 days from the date of these reasons.

ORDERS

[36] This Panel orders that:

(a) the Respondent pay a fine of $7,000 within one year from the date of this order; and

(b) pursuant to Rule 5-8(2)(a), if any person other than a party, seeks to obtain a copy of the transcript or any exhibits filed in these proceedings, that client names, identifying information and any information protected by solicitor-client privilege must be redacted from the exhibit before it is disclosed to that person.