

## Timothy John Hordal

Abbotsford, BC

Called to the Bar: June 30, 1976

**Discipline hearing:** June 17, 2004

Panel: Patricia L. Schmit, QC, Chair, Gavin H.G. Hume, QC and Terence E. La Liberté, QC

Report issued: July 7, 2004, indexed as 2004 LSBC 22

Counsel: Jean P. Whittow, QC, for the Law Society and Jerome D. Ziskrout, for Mr. Hordal

## Summary

In the course of representing a party to a real estate transaction, Mr. Hordal induced another lawyer, through false representations, to forward to him an executed release of an *inter alia* mortgage against the property. Mr. Hordal subsequently registered the release of the *inter alia* mortgage without having first provided the other lawyer with a registrable transfer of a second mortgage on title and an estoppel certificate, which was in breach of his undertaking.

The hearing panel found that Mr. Hordal's conduct in making false representations and in breaching his undertaking amounted to professional misconduct. The panel considered various factors on penalty, including the seriousness of the misconduct and the fact that Mr. Hordal had earlier been subject to a conduct review for similar conduct. The panel ordered that Mr. Hordal be reprimanded, be suspended for two months as of August 7, pay a \$12,500 fine and pay costs of \$5,000.

On a review of penalty under s. 47 of the *Legal Profession Act*, the Benchers noted that the test to be applied on review is whether the hearing panel's penalty was correct. The panel in this case had not given appropriate weight to Mr. Hordal's separate and compounding misconduct in both breaching his undertaking and misleading counsel. The panel had also failed to give sufficient weight to the fact that Mr. Hordal had undergone a conduct review six months earlier for breach of undertaking. The Benchers upheld the reprimand and order for costs against Mr. Hordal, but ordered that his suspension should be increased from two to six months and that, given this increased penalty, he not be required to pay a fine.

## Facts

In 2001 Mr. Hordal represented J Enterprises Ltd. in its sale of certain properties to a business, ICP. A lender (CWB) held an *inter alia* mortgage on the properties.

In the sale of the properties to ICP, Mr. Hordal was to receive the purchase proceeds on his undertaking to pay sufficient funds to discharge the CWB *inter alia* mortgage. J Enterprises Ltd. had agreed to provide financing to ICP by way of a new mortgage loan.

The sale proceeds were insufficient to satisfy the CWB mortgage and assignment of rents. Moreover, CWB's security extended to certain other properties that were not included in the sale. The CWB mortgage remained a first mortgage and the new mortgage financed by J Enterprises Ltd. was a second mortgage on title.

CWB agreed with J Enterprises Ltd. to make a partial release of its mortgage and assignment on the condition of receiving an assignment of the second mortgage. Mr. Hordal gave an undertaking to this effect.

CWB sought to enforce its security and, by December, 2001, Mr. Hordal had still not obtained a release and had not obtained or registered an assignment of the second mortgage.

In early December J Enterprises Ltd. arranged to borrow money from a new corporate lender, conditional on J Enterprises Ltd. transferring the second mortgage to that lender. Soon after, Mr. Hordal spoke with counsel for CWB who was of the view that CWB would not require an assignment of the second mortgage, although he would need to confirm this with CWB. The next day J Enterprises Ltd. transferred the second mortgage to the new corporate lender and Mr. Hordal signed the transfer as an officer and registered it in the Land Title Office.

On December 7, 2001 counsel for CWB wrote to Mr. Hordal to advise him that CWB still required an assignment of the second mortgage. Mr. Hordal did not tell CWB's lawyer that J Enterprises Ltd. had already transferred its interest in the second mortgage.

On December 28, 2001 Mr. Hordal forwarded a release of the *inter alia* mortgage to CWB's lawyer for execution. He stated in his cover letter that the executed release could be returned to him on an appropriate undertaking to register an assignment of the second mortgage. At the time he sent this letter, Mr. Hordal knew that the second mortgage had already been transferred to the new corporate lender.

In March, 2002, Mr. Hordal forwarded to CWB's lawyer an unsigned document purporting to be a transfer of the second mortgage. Mr. Hordal said that his client would sign the transfer the next day. He asked CWB's lawyer to send him the signed release of the CWB mortgage. Although Mr. Hordal had made an appointment for a representative of his client, J Enterprises Ltd., to sign the transfer, his statements were misleading as they carried the implication that the signing of the transfer would have immediate legal effect. In fact, J Enterprises Ltd. had been attempting to secure alternate financing to pay out its debt to CWB and have the second mortgage transferred back to it, but ultimately failed in the attempt.

In early April, 2002 Mr. Hordal wrote to CWB's lawyer requesting the executed release of the *inter alia* mortgage and enclosing a schedule of payments that ICP had made under the second mortgage. He did so to indicate that J Enterprises Ltd. was prepared to transfer the second mortgage and to induce the lawyer to deliver the executed release.

CWB's lawyer wrote back, enclosing an executed and registrable release of mortgage on Mr. Hordal's undertaking not to deal with the documents until he had provided to CWB a registrable transfer of the second mortgage and an estoppel certificate. Mr. Hordal, however, registered the release of the CWB mortgage in breach of his undertaking.

The lawyer for CWB, not knowing that CWB's release had been registered, reminded Mr. Hordal of his undertaking and demanded that he comply or return the documents. Mr. Hordal did not tell the lawyer that he could not comply with his undertaking.

In early June the lawyer for CWB performed a title search and discovered that J Enterprises Ltd. had earlier assigned the second mortgage. The lawyer wrote to Mr. Hordal to flag the breach of undertaking and sent the Law Society a letter of complaint.

## Verdict

Mr. Hordal admitted, and the hearing panel found, that his conduct constituted professional misconduct.

# Penalty

The hearing panel considered various factors on penalty, including the single most important factor in this case, being the nature and gravity of the misconduct. Mr. Hordal had received a mortgage release on his undertaking not to register it until he had fulfilled certain conditions, but he deliberately breached that undertaking and then deceived another lawyer for a further two months. Honesty, integrity and trustworthiness are fundamental values of the legal profession. The panel found that the violation of the duty of honesty and a breach of undertaking amount to grave misconduct.

The panel also noted that Mr. Hordal had previously undergone a conduct review for similar misconduct involving a breach of undertaking. The panel was convinced, however, that Mr. Hordal had learned his lesson this time and could be trusted to reach out for help if he needed it. If that trust proved to be misplaced, it would be a grave matter.

In this case, the panel also took into account the fact that the debt to CWB was ultimately repaid, that Mr. Hordal had gained no personal advantage, that he was remorseful and that he had the support of lawyers in his community, even after they were made aware of his misconduct. While he did not acknowledge his misconduct until after a complaint was made against him, Mr. Hordal did later admit to it and cooperated fully in the discipline proceeding. The panel further balanced the need for deterrence and the impact of penalty on Mr. Hordal and his modest financial circumstances.

The panel accordingly ordered that Mr. Hordal:

be reprimanded;

be suspended for two months, beginning August 7, 2004;

pay a \$12,500 fine by June 17, 2006; and

pay \$5,000 as costs of the hearing by June 17, 2006.

## **Bencher review**

On a review of penalty under s. 47 of the *Legal Profession Act*, the Benchers noted that the test to be applied on review is whether the hearing panel's penalty was correct. In this case, the panel had not given appropriate weight to Mr. Hordal's separate and compounding misconduct in both breaching his undertaking and misleading counsel. Nor was enough weight given to the fact that he had undergone a conduct review six months earlier for breach of undertaking.

The Benchers noted that a suspension is a significantly more severe penalty than a fine. They upheld the reprimand and order for costs against Mr. Hordal, but ordered that his suspension should be increased from two to six months and that, given this increased penalty, he not be required to pay a fine.