2020 LSBC 52
Decision issued: November 4, 2020
Citation issued: September 4, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

HONG GUO

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	February 3-7 and 10-14, 2020 June 23, 2020
Panel:	Jennifer Chow, QC, Chair Ralston S. Alexander, QC, Lawyer John Lane, Public representative
Discipline Counsel:	Alison L. Kirby
Counsel for the Respondent:	Gerald A. Cuttler, QC Lucy X. Zhao

OVERVIEW

[1] After returning from vacation in late March 2016, the Respondent learned she was missing millions of dollars from her trust accounts. The Respondent's bookkeeper and a former employee stole about $7.5 million from the Respondent's trust accounts.

[2] After the theft, the Respondent focused on ensuring that various upcoming real estate and financial transactions would complete on time, despite the missing trust funds. The Respondent immediately deposited some replacement funds. However, the primary way the Respondent addressed her trust account shortfall was by moving various trust funds around between different clients and different trust

accounts to complete the affected transactions. In other words, since she did not have sufficient trust funds in her trust accounts to meet upcoming financial transactions, the Respondent moved various trust funds around, taking trust funds from some clients to fulfill another client's financial commitments. Because the Respondent did not advise her clients about the theft, the use and movement of the trust funds in this manner put those clients' trust funds at risk without their knowledge or consent.

[3] The Respondent says that she did not commit professional misconduct. Her mistake was placing trust in her employee who took advantage of her trust to commit a sophisticated scam. She says that, although she breached trust accounting rules by using trust funds from some clients to pay other clients, her actions minimized the overall impact of the missing trust funds on the upcoming client transactions. In other words, if she had not moved the trust funds around, more clients would have been adversely affected by the employee theft. The Respondent argues that, since she moved trust funds around to minimize the impact on her clients, her actions mitigate against a finding of professional misconduct.

[4] The Law Society says that the Respondent committed professional misconduct. The Law Society says that the theft occurred because the Respondent herself created the lax conditions that allowed the theft to occur. The Respondent did not properly supervise her bookkeeper, and she failed to use best practices in running a very busy real estate practice. The Respondent's lack of supervision, combined with the use of pre-signed blank trust cheques and breaches of Law Society trust accounting rules, created the conditions that gave rise to the employee theft of around $7.5 million.

[5] The overarching issue before the Panel is whether the Respondent committed professional misconduct in moving the various trust funds around between different clients and different trust accounts, or whether her actions amounted to a breach of the trust accounting rules.

[6] For the reasons discussed below, the Panel finds that the Respondent committed professional misconduct in regard to the majority of the allegations in the Citation.

PROCEDURAL BACKGROUND

[7] On September 4, 2018, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Rules (the "Citation"). The 13-page Citation sets out five separate allegations, some of which include several separate

sub-allegations of misconduct. No issues were raised before the Panel regarding service of the Citation.

[8] The Citation sets out five allegations as follows:

(a) The Respondent failed to comply with various trust accounting rules under Part 3, Division 7 of the Rules and the *Code of Professional Conduct for British Columbia* (the "*Code*");

(b) The Respondent failed to properly supervise her bookkeeper, JL, or improperly delegated accounting responsibilities to him, or both, thereby facilitating the misappropriation of over $7.5 million from the Respondent's trust account (the "Bank 2 Trust Account");

(c) In three instances, the Respondent misappropriated or improperly withdrew client trust funds totalling $649,423.24 from her other trust account (the "Bank 1 Trust Account") when her trust accounting records were not current and there were insufficient funds on deposit to the credit of the clients on whose behalf she made withdrawals. In regard to this allegation, the Law Society seeks a specific finding of intentional misappropriation of client trust funds;

(d) The Respondent breached an undertaking dated April 19, 2016 given to the Law Society (the "Undertaking"); and

(e) The Respondent breached a Law Society order made August 17, 2016 (the "August Order").

[9] The subject matter of some of the allegations described in the Citation relate to the employee theft. Other allegations relate to errors in trust accounting practices revealed during the forensic audit that followed the discovery of the theft. These non-compliant events occurred in some instances before the employee theft and had nothing to do with that theft.

[10] The Hearing was heard over ten days commencing February 3, 2020. Oral submissions were to be heard on March 23, 2020 but the Hearing was adjourned due to the COVID-19 pandemic. On April 14, 2020, the Panel ordered that the Hearing continue by videoconference. On June 23, 2020, the Panel heard oral submissions and reserved our decision.

[11] Over the course of the ten-day Hearing, the Panel heard evidence about 20 factual incidents relating to the Citation. The Panel heard evidence from five Law Society witnesses: AC and SG, two senior forensic accountants with the Law Society's

Trust Regulation Department; ML, a real estate conveyancer who worked for the Respondent; DW, a part-time lawyer who worked on contract for the Respondent; and EM, the manager of the Law Society's Trust Assurance Group. The Panel also heard testimony from the Respondent herself.

FACTUAL OVERVIEW

[12] In 2016, the Respondent was a sole practitioner conducting a very busy practice in Richmond, British Columbia. Her practice focused on real estate conveyances, immigration and corporate/commercial transactions. The Respondent employed between 10 to 12 staff, including a number of legal assistants, JL as a bookkeeper and DW as a lawyer on contract, who worked in the office three days a week from February 2016 to December 2017. DW was not delegated any trust accounting responsibilities by the Respondent.

[13] The Respondent also had an office in Beijing, China where she was the only lawyer overseeing that office.

[14] The Respondent employed JL as her bookkeeper and office manager from May 2014 to April 1, 2016. JL's responsibilities included preparing trust and general cheques, making bank deposits, recording financial transactions, preparing monthly trust reconciliations, preparing payroll and other general office duties.

[15] The Respondent also employed QP as a conveyancing assistant from June 2014 to August 2015. After learning of the theft, the Respondent also learned that JL and QP worked together to steal $7.5 million from the Respondent's trust funds.

The theft of $7.5 million in trust funds

[16] The Respondent relied on JL to a significant extent to ensure compliance with Law Society accounting rules. The evidence at the Hearing disclosed that JL was frequently casual about the timing of trust receipts and disbursements but until the theft, the Respondent had no reason to question his work. The theft events and accompanying trust transactions, including missing trust account reconciliations, was an obvious and substantial departure from the professional standards expected from a bookkeeper.

[17] Several key trust account reconciliations were not done for the months leading up to the fraud. If the trust reconciliations had been done, the artificial and false inflation of the trust account balances by fake deposits would have been revealed because the trust accounts at that time were incapable of reconciliation. If

reconciled, the trust reconciliations would have showed that there was more money owed to clients than was in the bank.

[18] During the last two weeks in March 2016, the Respondent was vacationing in the United States. On March 27, 2016, the Respondent returned to her office.

[19] Before leaving on vacation, the Respondent signed a number of blank trust cheques and left them with JL to use for trust transactions. The Respondent submits that some of the blank trust cheques used for the theft were forged. No appropriate evidence either way was provided to the Panel. At the end of the day, nothing much turns on that question. However, the Panel finds that the pre-signed blank trust cheques were a key component of the employee theft.

[20] JL was able to orchestrate the theft by crediting fake deposits to a trust account ledger he had set up in QP's name, thereby inflating the apparent balance available for withdrawal. From late February to March 31, 2016, $7.5 million in trust funds was provided to QP using the pre-signed blank trust cheques.

[21] From time to time, up to April 1, 2016, JL and QP converted the trust cheques payable to QP to bank drafts, and they then cashed the bank drafts at a local casino and flew to China with the cash. Although QP and JL attempted to steal over $7.5 million, the final cheque was caught by the bank when it was cashed. Accordingly, the actual theft amount was $6,619,256.

[22] On April 1, 2016, the Respondent discovered the employee theft when she could not find JL to review her monthly trust reconciliation statements.

Post-theft events

[23] Most of the events described in the Citation relate to events JL structured to enable the theft or to steps taken by the Respondent following her discovery of the employee theft and the circumstances presented by the unauthorized withdrawal from her trust account of $6,619,256.

[24] To the Respondent's credit, one of her early responses to the theft was to deposit to her trust account approximately $2.6 million of family money to address some of the more pressing real estate closing obligations occasioned by the theft.

[25] By early 2018, the Respondent's trust shortage was fully eliminated. The shortage was eliminated by the approximately $2.6 million in family funds, as well as about $4 million in funds from an insurance policy that covered employee theft. The

insurance funds were not paid for more than 18 months following the discovery of the theft. No explanation for this delay was before the Panel.

[26] The Respondent submits that the evidence shows that she did not plan or execute this sophisticated scheme. Rather, JL and QP did, and the Respondent's mistake was in fully trusting JL as her bookkeeper. Additionally, the Respondent submits that her actions after the theft demonstrate that she fulfilled her responsibility by ensuring that her affected clients were minimally impacted by the employee theft.

[27] The Respondent testified that, in early April 2016 she flew to China to hire some local or retired police investigators to drive with her to locate JL and QP in Chinese hotels in various cities. Further, she testified that JL and QP were later charged and convicted in China for the alleged fraud and theft of her trust funds in Canada. She also testified that JL and QP were in a Chinese prison as a result. We note that no evidence of any Canadian criminal charges against JL and QP was presented to the Panel. Further, no independent evidence was provided to the Panel to show that JL and QP were convicted in China for the alleged offences. We take notice that China and Canada have different legal systems and that no evidence was presented to the Panel to explain how the Chinese criminal system would have prosecuted individuals in China for alleged theft or fraud committed in Canada. The Panel was not satisfied that the evidence provided by the Respondent on this issue was sufficiently developed for the Panel to make any determinations based upon it.

Notice to Admit

[28] In developing its case against the Respondent, the Law Society provided a Notice to Admit pursuant to Rule 4-28 of the Law Society Rules. The Notice to Admit consists of 187 paragraphs and includes ten volumes of supporting exhibits. The Respondent replied to the Notice to Admit with responses to each of the 187 paragraphs by admitting some of the statements, providing a qualified admission to some and denying some entire paragraphs. The exchange of views and the evidence provided by the Notice to Admit assisted the Panel in our deliberations.

The Citation

Allegation 1

Between approximately January 2014 and October 2016, you failed to maintain accounting records in compliance with the provisions of Part 3,

Division 7 of the Law Society Rules and in particular you did or failed to do one or more of the following:

(a) Between January 2014 and March 2016, you did not prepare monthly trust reconciliations of your pool trust accounts, within 30 days of the effective date of the reconciliation or at all, in one or more of 85 instances set out in Schedule "A" to the Citation, contrary to Rule 3-73

[29] This allegation is largely made out. There are instances where the alleged missing trust reconciliations were not located at the time they were requested due to difficulty with the accounting records of the Respondent's law firm. However, it is clear from the records produced that some trust reconciliations were not done at all and numerous instances of trust reconciliations were done late and outside the 30 day time frame within which they were required to be prepared.

[30] In respect of this allegation, the Panel finds that the number of missing and late trust reconciliations is something less than 85; however, for our purposes, we note that the number is significant. We also note that, because of the fake deposits and related withdrawals from trust, there was a time period of several months immediately prior to April 1, 2016, when trust account reconciliations could not be done and were not done.

(b) Withdrawn

(c) In one or more of 39 instances set out in Schedule "B", you withdrew trust funds from your Bank 2 Trust Account when there were insufficient funds held to the credit of the client, contrary to Rule 3-64(3)(b)

[31] The majority of the trust shortages described in this allegation are the result of a mismatch between the date of the trust cheque and the date of the deposit of the trust funds for which the trust cheque was written. Despite arguments to the contrary, these are "real" trust shortages because the Rules require that, before a trust cheque can be written, the funds for which the cheque is written must be on deposit in the trust account. If the trust cheque is paid out before the matching funds are deposited, the cheque can only be cleared with unrelated trust funds that are standing to the credit of other clients. The numerous instances of mismatch of deposits and cheques are, in the Panel's view, the result of careless practices by the Respondent and her staff. It is also likely the result of a practice volume that is, in the Panel's view, beyond the capacity of a single lawyer to supervise and manage without error.

[32] There is a second aspect to this allegation. The Respondent submits that there is no trust shortage when there are sufficient funds standing to the credit of the client in a different trust account even where the cheque dispersing the funds is written from a trust account with insufficient funds. This argument cannot prevail. Trust accounts are silos, with each bank account standing alone and requiring a separate accounting. When a trust cheque is written in the circumstance that some of the funds are in one account and some of the funds are in a different account, two trust cheques must be written - each one representing the funds that stand to the credit of the client in the respective bank account. For this reason, this allegation is made out. The Panel does not agree with the Respondent's submission that there was no trust shortage in one trust account where sufficient funds existed in other trust accounts. That the trust cheque cleared in one trust account, without a transfer of funds from the "other" trust account, can only occur where trust funds of other clients were used to clear the cheque. This allegation of the Citation is made out.

(d) Withdrawn

(e) In one or more of four instances between July 10, 2015 and March 31, 2016, you failed to report to the Executive Director that your Bank 2 Trust Account was overdrawn by more than $2,500, contrary to Rules 3-63 and 3-74

[33] Three of the four instances alleged in this allegation are admitted by the Respondent. The fourth is an instance where the overdraft was caused by the theft. Despite the fact that the Respondent reported the theft to the Law Society, the Respondent was advised that she still had an obligation to report the overdraft to the Executive Director as required by Rule 3-74. The Respondent did not report the overdraft occasioned by the theft to the Executive Director, and accordingly, this allegation is made out.

(f) In one or more of 17 instances set out in Schedule "C", you withdrew trust funds from your Old Bank 1 Trust Account when there were insufficient funds held to the credit of the client, contrary to Rule 3-64(3)(b)

[34] This allegation describes a number of trust shortages that occurred prior to the theft, and the evidence discloses that they were the result of further mismatches between trust deposits and the issuance of trust cheques to disburse those same deposits. These trust shortages are not apparent on the face of the trust ledger. They are hidden in the trust ledger by backdating transactions to indicate (incorrectly) that the trust deposit was made prior to the creation of the trust cheques that disbursed the funds. It appears that this approach to trust account

reconciliation retrospectively was undertaken by JL to cover his errors in processing deposits and cheques. They are nonetheless trust shortages for which the Respondent is responsible. Accordingly, this allegation is made out.

(g) Withdrawn

(h) Between April 4, 2016 and April 11, 2016, in one or more of in [sic] ten instances set out in Schedule "D", you withdrew or authorized the withdrawal of a total of $1,870,123.08 in trust funds from your Bank 2 Trust Account by way of debit memo, contrary to Rules 3-64(4) and (7)

[35] The withdrawal of trust funds by debit memo is not permitted by the Rules. Trust funds must be withdrawn either by cheque or by electronic transfer to comply with the rules for those transactions. The "debit memo" transactions occurred during a period of time when the Respondent was in China allegedly to find and confront JL and QP. While the Panel has concerns about the Respondent's testimony about travelling to China in early April 2016 to confront JL and QP, we find that nothing turns on this issue.

[36] The requirement to have trust funds issued by way of debit memo was occasioned by the combination of the Respondent being in China and the fact that several real estate transactions were scheduled to close in her absence. We find that the Respondent made no effective arrangements to cover her practice while she was in China. Accordingly, the Respondent had no other way to close these transactions except by debit memo.

[37] In that regard, the Respondent was communicating with a representative of her bank who facilitated the closing of the transactions by issuing debit memos that allowed the funds to be withdrawn from her pooled trust account. The efficacy of the outcome does not relieve against the breach of the Rules, and accordingly, this allegation of the Citation is made out.

(i) Between approximately February 2016 and March 2016, you gave a non-lawyer one or more of 112 pre-signed blank trust cheques for your Bank 2 Trust Account, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*

[38] Our analysis of this allegation of the Citation requires an examination of the circumstances surrounding a document described in evidence as "the spiral notebook". This document contained many pages that appeared to be purported entries with respect to financial transactions in the Respondent's practice. The spiral notebook was found in JL's desk area and was clearly a document

maintained by JL to keep track of the variety of important steps that were not captured by the more conventional bookkeeping system used by the Respondent.

[39] The validity and accuracy of the spiral notebook was not admitted by the Respondent. However, it is open to the Panel to attribute to the spiral notebook whatever evidentiary value we think appropriate in the circumstances. There is some internal consistency with entries in the spiral notebook, and there are references that are entirely consistent with other evidence of the Respondent's trust accounting and file records.

[40] Accordingly, while we do not find all of the evidence within the spiral notebook to be probative of issues before us, some evidence in the spiral notebook was corroborated. In those instances, we find the references within the spiral notebook to be helpful in our analysis of the outcomes required to be determined in this Hearing.

[41] An example of the usefulness of the spiral notebook in our deliberations is the reference described as follows:

> [JL] retain following cheques on March 2016
>
> (1) Bank 2 90 cheques from 1677 to 1766
>
> (2) Bank 1 trust account five cheques -7031 to 7035
>
> (3) Bank 1 general 20 cheques -1801 to 1820.

[42] The referenced entry in the spiral notebook appears to be initialled by both JL and the Respondent. The evidence of the Respondent was that she was unclear as to whether that initial in the spiral notebook was her writing. We find that the Respondent's lack of clarity regarding her own handwriting to be not credible.

[43] The Respondent admitted that she left pre-signed blank trust cheques with JL. This admission is consistent with the Panel's understanding of the only manner in which the Respondent's practice could continue during her absence from the office. The Respondent was, at all material times, the sole signatory on her trust accounts. The evidence shows that there was no other way the Respondent could have conducted an active real estate practice without being present, except through pre-signed blank trust cheques.

[44] Given the volume of transactions flowing through her practice, the Respondent was required either to be physically present to sign trust cheques as the sole signatory on the trust account or to leave pre-signed blank trust cheques with JL to be used in

transactions in her absence. There is no dispute from the Respondent that she left pre-signed blank trust cheques with her bookkeeper. The Respondent's only dispute relates to the number of pre-signed blank trust cheques she provided to JL. We find that the reference in the spiral notebook is evidence of the number of pre-signed blank trust cheques the Respondent provided to her bookkeeper to facilitate closings in her absence.

[45] The Law Society has provided an analysis of the 90 trust cheques referenced in the spiral notebook and has demonstrated how they were used in respect of both the theft and the legitimate completion of many other appropriate trust transactions.

[46] We find that this allegation in the Citation has been made out. The fact that some of the pre-signed blank trust cheques were used to complete the theft from the trust account does not impact our finding.

(j) Between March 11, 2016 and March 30, 2016, you permitted a non-lawyer to issue one or more of 90 trust cheques drawn on the Bank 2 Trust Account totalling $44,731,730.65 without proper supervision, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*

(k) On or about March 11, 2016, you gave a non-lawyer one or more of five pre-signed blank trust cheques for your Old Bank 1 Trust Account, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*

(l) Between March 15, 2016 and March 30, 2016, you permitted a non-lawyer to issue one or more of five trust cheques drawn on the Old Bank 1 Trust Account totalling $8,426,333.41 without proper supervision, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*

(m) In or about March 2016, you gave a non-lawyer one or more of three pre-signed blank trust cheques for your Bank 3 Account No. [number] and Bank 1 Trust USD Account No. [number], contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*

[47] These four allegations are substantially similar and relate to the Respondent's accounting practice while she was away from the office on vacation and at other times. As noted above, the Respondent's law practice cannot carry on without her physical signing of cheques, unless someone else can access the trust accounts to enable transactions to complete.

[48] The Respondent admitted to leaving pre-signed blank trust cheques and only disputes the number of cheques she left. We find that there is an element of double counting in the numbers used by the Law Society and that there were not 215 pre-signed blank trust cheques provided. We find from the evidence that 125 blank cheques were provided to JL. Even this smaller number is significantly more than is admitted by the Respondent. However, a review of the bank account statements over the approximate two week absence of the Respondent from her office in March 2016 leads the Panel to conclude that 125 is accurate.

[49] To address the question of the required supervision, we need to consider what amounts to an appropriate level of oversight. It should be clear that more is required in terms of supervision of a bookkeeper than simply leaving a series of pre-signed blank trust cheques with advice that they be used "where necessary" to complete transactions. It is clear from the evidence that that is the basis upon which JL came to be in possession of the pre-signed blank trust cheques used in the employee theft.

[50] No evidence was adduced before us to assist with our understanding of what might be considered to be an appropriate level of supervision when leaving pre-signed blank trust cheques with a bookkeeper. Accordingly, the Panel will not suggest more than our finding that the basis upon which the blank trust cheques were left with the Respondent's bookkeeper did not meet the minimum requirements of required supervision. In that result, we find that allegations 1(j), (k), (l) and (m) are made out.

(n) Commencing January 2016 onwards, you failed to maintain sufficient funds on deposit in your Bank 2 Trust Account and Old Bank 1 Trust Account to meet your obligations with respect to funds held in trust for your clients, contrary to Rule 3-63

[51] This allegation engages a consideration of the effect that the early processing of the "theft" cheques had on the balance of funds standing to the credit of clients in the Bank 2 Trust Account. The first theft cheque, written to MW, cleared the bank account on February 24, 2016. From and after that date, there was a trust shortage in the Bank 2 Trust Account that was not discovered until the theft came to the attention of the Respondent on or about April 1, 2016.

[52] This February 24, 2016 transaction was followed shortly thereafter by cheques dated February 26 and 28, March 2, 3, 5, 9, 11, 17, 21, 22 and 24, 2016. All of the theft cheques, save the first one, were written to the accomplice QL. In total, the theft cheques fraudulently removed from the Respondent's Bank 2 Trust Account a

total of $7,506,818. This total is reduced as discussed earlier by the recovery of the last cheque that was not cleared by the bank.

[53] It is clear that there were no matching deposits from which these withdrawals could be paid. Accordingly, we find that, after February 24, 2016, the Respondent failed to maintain in her Bank 2 Trust Account funds sufficient to cover her trust liabilities to clients since all but one of the theft cheques had cleared and were paid without matching deposits. The Respondent correctly notes that the effective date for the commencement of the overdraft occasioned by the theft cheques is February 2016 and not January 2016 as noted in the Citation. Nothing turns on the difference in dates. This allegation is made out.

Allegation 2

Between approximately January 2016 and March 2016, you failed to properly supervise your bookkeeper JL or improperly delegated your trust accounting responsibilities to him, or both, thereby facilitating the misappropriation of a total of $7,506,818.00 from Bank 2 Trust Account No. [number], contrary to Rule 3-64 of the Law Society Rules or rule 6.1-3 of the *BC Code*, or both

[54] The Respondent's counsel took exception with the Law Society for using the word "facilitate" in this allegation. He argued that it was improper for a victim of a crime to be accused of inviting or assisting with the crime. The word "facilitate" connotes nothing more than "making something easier" and in that regard we believe that the word is properly used in this allegation. The Respondent did not pay sufficient supervision to JL in his bookkeeping activities nor sufficient attention to ensure her firm's accounting practices complied with the Rules. In particular, she "trusted" JL to essentially govern himself to ensure that his day-to-day accounting responsibilities were fulfilled. The Respondent's lack of supervision leading up to her vacation in March 2016 undoubtedly made the theft "easier" for JL and QP to execute. It is apparent that JL's ability to manipulate the trust account in the manner that he did from time to time over the two-year period leading to the theft, suggests that the Respondent took a "hands off" approach to her trust accounting obligations. Whether the Respondent improperly delegated her responsibilities to JL, or improperly supervised JL as her bookkeeper, does not matter. In either case, the Respondent was either too busy or indifferent to her trust accounting practice, which in any case, is not appropriate in any circumstances. In particular, such improper delegation or lack of supervision is not appropriate in an office of many employees and only one lawyer with trust accounting authority and a constantly large volume of transactions underway at all times.

[55] The evidence before us verified a long history of mismatches of trust deposits and cheques. Should there have been but a few of these events in the early months of the bookkeeper's employment, the Panel might accept the existence of a learning curve before appropriate levels of consistent accuracy were achieved. However, to see the mismatches repeated over many months and in many instances indicates a failure by the Respondent to appreciate or supervise her bookkeeper. The Respondent testified that she was not aware of these mismatches. Thus, consistent with the Respondent's own evidence, the Panel finds that the evidence demonstrated a lack of supervision by the Respondent over her bookkeeper regarding her trust accounts.

[56] The Respondent's explanation for many of the trust account rule breaches is that she was not aware of those breaches. This explanation suggests that the bookkeeper had an essentially free rein in his work within the office well before he began executing his planned theft. Even before the theft, the multiple instances of trust overdrafts, each of several days duration, indicate that the Respondent's supervision of her trust accounting practice was insufficient and inconsistent with her trust accounting responsibilities.

[57] The repeated failure, over a long period of time, to properly record and process the trust deposits and disbursements indicates that there was a disconnect between the Respondent's supervision and her bookkeeper. The consequences of that disconnect or lack of supervision created the environment for JL to commit the theft of millions of dollars from the Respondent's trust accounts.

[58] The Respondent's counsel submits that it is not necessary for a lawyer to constantly look over the shoulder of an employee at all times and in all instances. We take no issue with that characterization of the obligation to supervise, but on the other hand, supervision requires more than permitting an employee to process transactions alone and without any intervention or involvement of the supervising lawyer or the lawyer's delegate. In other words, by leaving JL with a number of pre-signed blank trust cheques to use as he saw fit, the Respondent created opportunities for JL to commit the theft he committed. We find that the evidence shows that her bookkeeper attended to many transactions with little to no involvement from the Respondent.

[59] An element in this allegation is verified by the fact that approximately ten employees were working on files in the Respondent's office at the material times. This ratio of employees in an office of one full-time and one part-time lawyer supports a finding that this is a high volume practice. There were significant numbers of transactions in progress at the same time. Each transaction required

some attention from the responsible lawyer both in terms of reviewing documents prepared by staff to ensure conformity with the contractual obligations and lender instructions. In addition, the responsible lawyer was also required to attend to in-office appointments with clients to explain the transactions, verify identities, review all documents and then process the exacting land title registration regime for each transaction.

[60] With all that going on in multiple transactions at the same time, the sheer magnitude of the required tasks made it improbable that the Respondent could properly supervise the accounting department, let alone all employees. We find that JL's theft required various steps and transactions to occur over several months. We find that the Respondent's lack of supervision gave the bookkeeper sufficient confidence in pursuing the fraud and theft of millions of dollars under the nose of the Respondent. The Panel finds that the Respondent provided virtually no supervision of the bookkeeper who was free to work in any manner he felt appropriate, including facilitating a massive theft from trust. The number of pre-signed blank trust cheques is clear evidence of the Respondent's lack of proper supervision over her staff. This allegation is made out.

Allegation 3

Commencing in April 2016, you misappropriated, or improperly withdrew client trust funds from your Bank 1 Trust Account No. [number] when your trust accounting records were not current and there were insufficient funds on deposit to the credit of the clients on whose behalf you made the withdrawals, contrary to one or both of Rule 3-63 or Rule 3-64(3) of the Law Society Rules, on one or more of the following occasions:

(a) between April 11, 2016 and July 26, 2016, you withdrew trust funds totalling $1,909,198.02 on behalf of your client TZ when you held only $1,270,508.59 to the credit of that client resulting in a trust shortage of $638,689.43

(b) on or about June 8, 2016, you withdrew trust funds of $5,250 on behalf of your client YS when you held no funds to the credit of that client resulting in a trust shortage of $5,250

(c) between approximately April 8, 2016 and April 11, 2016 you withdrew trust funds totalling $744,454.40 on behalf of your client HL when you held

only $738,970.59 to the credit of that client resulting in a trust shortage of $5,483.81

Allegation 3(a)

[61] This allegation relates to a purchase transaction where the client had funds on deposit in trust from a previous sale transaction. These funds were stolen as a component of the employee theft, resulting in a consequent trust shortage. This transaction is illustrative of the manner in which the Respondent completed real estate transactions following the theft. She manipulated her trust account records in a way that allowed her to use other client's funds to complete real estate transactions.

[62] The Respondent made decisions to close certain real estate transactions based upon the imminent timing of closing dates. The Respondent's evidence was that the transactions needed to be completed and that she had determined that the consequences of not completing the transactions were more than could be managed by her. Accordingly, she proceeded to complete the transactions essentially acknowledging that an element of misappropriation was an inevitable consequence of proceeding as she did.

[63] It is necessary at this point in the analysis to discuss the treatment of funds provided to the trust account by the Respondent and her family. By about April 5, 2016, the Respondent had deposited $1,690,000 in family funds to the Bank 1 Trust Account. These funds were not allocated to particular clients or client files; they were deposited and recorded in trust ledgers identified as being related to the employee theft. To the extent that these funds were on deposit, some payments were made to complete transactions that would otherwise have further overdrawn the trust account.

[64] By April 11, 2016, most of the unallocated $1,690,000 had been paid to close other transactions. Only $157,683.08 remained available to offset further trust shortages. The Respondent submits that the amount of the misappropriation in allegation 3(a) is overstated by that amount. We do not agree. In the absence of a direct deposit to the credit of this client on this transaction, there is no way of knowing what amount of misappropriation occurred except by reference to the numbers shown in the trust ledger.

[65] TZ, the client on file #160406 (the "Langley Purchase") had successfully completed a previous sale transaction on March 31, 2016, and funds in the amount of $2,162,808.81 were deposited to the Bank 2 Trust Account. Several appropriate distributions were made of these funds, but there was supposed to be $630,090.65

available to complete on a purchase for this same client in the Langley Purchase. However, as a result of the theft, there was only $221,259.34 remaining in the Bank 2 Trust Account on April 11, 2016. Of that amount, $53,933.79 was transferred to the file for the Langley Purchase and $167,066.21 was paid to the client.

[66] The funds required to complete the Langley Purchase were $1,909,198.02. The Respondent had received mortgage proceeds in trust in the amount of $1,214,044.05, which together with the residue of funds from the March 31, 2016 sale in the amount of $53,933.79 and funds from the client in the amount of $2,530.75, indicated total available funds of $1,270,508.59.

[67] However, the Respondent needed funds in the amount of $1,909,198.02 to complete the purchase. Cheques totalling that amount were paid by the Respondent from the Bank 1 Trust Account on or about April 15, 2016.

[68] Given the deficiency in the available funds for this client, the only way that this transaction could complete was by the Respondent using other funds in trust to close this purchase. This use of other clients' funds to complete the Langley Purchase on behalf of client TZ amounts to a misappropriation of other clients' funds in the amount of $638,689.43. Accordingly, this allegation is made out.

Allegation 3(b)

[69] This allegation relates to a real estate transaction scheduled to complete on March 30, 2016. The Respondent had received all required funds from the client purchaser and the funds were deposited to the Bank 2 Trust Account. On March 30, 2016, the Respondent attempted to complete this transaction by issuing two trust cheques drawn on the Bank 2 Trust Account in the amounts of $686,857.17 and $5,250 respectively. The latter cheque was paid to a real estate firm on account of a balance of real estate commission owing on the completion of the transaction.

[70] However, as a result of the theft, there were insufficient funds in the Bank 2 Trust Account to cover the two cheque amounts issued. Those cheques were not honoured, as insufficient funds were on deposit to pay these cheques.

[71] Between April 15, 2016 and May 17 2016, the Respondent made a series of deposits to her Bank 1 Trust Account, totalling over that period of time the sum of $128,958. Over the same time period of these deposits, the Respondent issued various trust cheques to deal with trust obligations that were consequent upon transactions in the ongoing real estate practice. A subsequent forensic analysis by a forensic accountant retained by the Respondent indicated that, over the period of time indicated, the Respondent's Bank 1 Trust Account went from a deficit of

$49,003.04 (April 15, 2016) to a positive balance of $45,392.21 (May 16, 2016) and back to a deficit of $54,223.04 (July 8, 2016).

[72] According to the forensic analysis, the $5,250 payment made on July 8, 2016, to replace the balance of real estate commission dishonoured cheque described above, increased the deficit from $48,973.04 to $54,223.04. This analysis was provided to the Respondent in the Notice to Admit but was not admitted by the Respondent. The Respondent's response to this analysis in the Notice to Admit was that the forensic analysis was inaccurate. No evidence was adduced by the Respondent to disprove the accuracy of the analysis. Accordingly, this allegation is made out.

Allegation 3(c)

[73] The circumstances of this allegation are the result of a deposit to the Bank 2 Trust Account at the precise time the theft was in progress, and those funds ($20,709.87) became a component of the stolen money. What happened was that a purchaser paid a deposit to a broker at the time the offer to purchase was concluded, and the deposit amount was more than the commission amount payable to the brokerage that received the deposit. In this circumstance, the brokerage with the excess deposit funds forwarded that excess to the purchaser's lawyers so that the funds were available for the closing.

[74] The balance of required funds in this transaction was deposited to the Bank 1 Trust Account. Upon the completion of the transaction on or about April 8, 2016, the Respondent paid the vendor's law firm and the property transfer tax. The combination of these two payments was $744,454.40, while the Respondent only had $738,950.79 on deposit in the Bank 1 Trust Account to the credit of this client. The balance of the funds to complete this transaction, referenced above in the amount of $20,709.87, had been stolen.

[75] The approach adopted by the Respondent in this transaction was typical of her response to closing transactions in the face of the theft. In this case, she delayed paying the other half of the real estate commission ($12,728.63), some unpaid strata fees ($569.92) and her legal account for fees, disbursements and taxes. By deferring these payments in this way, the trust shortage impact of the theft of $20,709.87 was reduced to $5,483.81 for the time being.

[76] The Respondent argued that there was no trust shortage in this transaction on the basis that funds she had deposited to her Bank 1 Trust Account to cover the money stolen were still standing to her credit in the Bank 1 Trust Account. The "make up" funds deposited by the Respondent had not been recorded in the trust ledger as

being deposited to any particular file. She simply deposited the funds to a catch all account that referenced the theft matters.

[77] The absence of a specific allocation of the "make up" funds to a transaction file by the Respondent makes it difficult for her to argue that the particular trust shortage identified in this transaction was covered by the excess funds on deposit in the "make up" trust account. Similarly, the absence of a specific allocation to a transaction file makes it difficult to determine the amount of funds actually on deposit and uncommitted at any particular time in the chronology of the trust account.

[78] The Respondent was criticized in argument by the Law Society for her failure to deposit the "make up" funds pro rata among all clients impacted by the theft. There is no rule of the Law Society that requires a deposit of funds made to redress a trust shortage, when the funds deposited are not sufficient to completely eliminate the trust shortage, to be allocated on a pro-rated basis among the various client ledgers where shortfalls have been identified. The absence of such a rule is logical given the unprecedented nature of the circumstances and the lack of any rational basis upon which such a pro-rated allocation can be supported.

[79] Funds deposited by the Respondent in the early days following the theft were far short of the amount required to cover the funds stolen. Accordingly, "make up" funds provided by the Respondent were used to cover immediate transactions that were just completing at the time of the deposit. In most instances, it is clear that the "make up" funds were applied at the time of the deposit to cover a particular, identified shortfall in a particular transaction.

[80] We make no adverse finding against the Respondent for her failure to allocate the "make up" funds provided by her on a pro rata basis. However, where she failed to allocate the funds to a particular account, the Panel cannot determine whether an apparent trust shortage was covered by a deposit of the "make up" funds. The Panel is not able to make the allocation for the Respondent to any particular transaction or even to be confident that, at any particular time, there was a positive balance in the trust account at all. In the result, we find that this allegation is made out.

Allegation 4

Between approximately April 20, 2016 and August 17, 2016, you breached your undertaking dated April 19, 2016 to the Law Society British Columbia

(the "Undertaking"), contrary to rules 7.1-1(f) and 7.2-11 of the *BC*, by doing one or more of the following:

(a) failing to immediately open a new trust account for new client matters, contrary to paragraph 1(d) of the Undertaking

(b) depositing trust funds totalling $196,613,345.22 into Bank 1 Trust Account in connection with one or more of 165 new client matters, contrary to paragraph 1(d) of the Undertaking

(c) between June 8, 2016 and July 12, 2016, withdrawing trust funds totalling $7,269,159.28 by way of one or more of 30 cheques that had not been signed by a second signatory, contrary to paragraph 1(e) of the Undertaking

Allegation 4(a)

[81] Following the disclosure to the Law Society by the Respondent of the massive trust shortage on or about April 1, 2016, the Law Society assembled a team in response to investigate the circumstances. On July 13, 2016, the Vice-Chair of the Discipline Committee ordered, pursuant to Rule 4-55, that an investigation of the books and records of the Respondent be undertaken. The Rule 4-55 order required the Respondent to provide the Law Society with access to all of her financial information, files and records in both paper and electronic format.

[82] The Rule 4-55 order was served on the Respondent on April 14, 2016, and various records and computers of the Respondent were seized and removed from her office. The Respondent confirmed to the Law Society staff in attendance on the date of service of the Rule 4-55 order that she would cooperate fully with the Law Society in its investigation of the circumstances surrounding the theft from her trust account. Following the preliminary analysis of the materials seized by the Law Society, the Respondent was asked to provide an undertaking to the Law Society, which she willingly provided on April 19, 2016 (the "Undertaking").

[83] The Undertaking required, *inter alia*, the Respondent

> (d) to immediately cease depositing any client trust funds into [the Bank 2 Trust] Account and to open a new trust account for the purpose of all new client matters after today's date; and

(e) as of May 1, 2016, to only operate my trust account(s) with a second signatory who is a practising lawyer, not an insolvent lawyer, and who is approved by the Executive Director of the Law Society.

[84] The requirement of the Undertaking to immediately open a new trust account was, by the Respondent's admission, not complied with until July 25, 2016. The Respondent offered an apology for the failure to comply with the Undertaking to open a new bank account. She explained that she was preoccupied with the theft and the pressures created by trying to manage her practice suffering under the consequences of the theft. We find that allegation 4(a) is made out as acknowledged by the Respondent.

Allegation 4(b)

[85] It is not alleged by the Law Society that the Respondent deposited funds to her Bank 2 Trust Account following the date of the Undertaking. The Bank 2 Trust Account was "frozen" by the bank. By the time the account was frozen, there was only $259.34 remaining on deposit.

[86] The parties dispute whether the Undertaking required the Respondent to use the new trust account for "all new client matters" following the date of the Undertaking. The dispute relates to what constitutes a "new client matter". Some of the lack of clarity on this issue relates to the file numbering system employed by the Respondent. The evidence on the numbering used in the file opening system is not easily rationalized.

[87] It is the position of the Law Society, based upon an analysis by its forensic accountant, that the file numbers relate to the date that the file was opened. This analysis is developed from the legal accounting software used by the Respondent and examined by the forensic accountant for the Law Society. On this approach, the first new file opened in April 2016, regardless of the expected completion date of the transaction, would be 160401. The next new file opened in April 2016 would be 160402, and so on.

[88] The Respondent testified that the file opening system was based upon the month and year in which the contemplated transaction to which the file related was expected to close. As each new file is opened for closings in a particular month, they are accorded the next ensuing serial number. For example, the first new file received in the office with a closing date in April, 2016 would be numbered 160401. The next new file received in the office with a closing date in April 2016 would be numbered 160402, and so on.

[89] The evidence adduced on this issue, while not entirely consistent, is sufficiently clear to satisfy the Panel that, at least at the material time involving the opening of new files while the practice was subject to the Undertaking, files were being assigned numbers based upon the expected completion month and the serial order in which the files with closing dates in a particular month were received in the office.

[90] An example of the application of this finding on the methodology of the file opening numerology is file #160402. Paragraph 156 of the Notice to Admit advises that the Respondent was retained on this matter in March 2016 and that trust funds were received on March 31, 2016. If the file number was assigned based upon the date that the file was opened, it should have had "03" as the month and not "04". Similarly, if the file was opened based upon the date it was opened and accorded a serial number for number of the transaction in that month, that would mean that by late March, there would be more than two files opened in that month.

[91] The file numbering system and the numbers accorded to files under consideration is important in this context because it bears on the evidence of the Respondent's compliance with the Undertaking to deposit funds for "new client matters" to the new trust account that was to be opened forthwith after April 19, 2016. As it turns out, with the file numbering system based upon expected closing dates rather than the date the file was opened, the numbers on the files were not helpful in determining when the file was opened and, therefore, were not probative of the issue of compliance with the "new client matters" directive.

[92] The Respondent argues that the wording of the Undertaking permits an interpretation that allows a new matter for a former client (and therefore not a "new client") to not be subject to the requirement for deposit to the new trust account. We do not agree with this interpretation and suggest that the Respondent is seeking to rely on a technical argument that does not accord with common sense. The purpose of the requirement to open the new trust account was to isolate new transactions from the troubled trust accounting issues occasioned by the theft. We do not find it credible that the Respondent believed that new transactions for former clients were not required to be deposited to the new trust account. It is not a defence for the Respondent to assert some of the "new client matters" were for former clients.

[93] It is clear from the evidence that, following the date of the Undertaking, the Respondent continued to use the existing Bank 1 Trust Account in exactly the same manner as she had prior to the Undertaking. This behaviour was in part motivated

by the fact that she did not open the "new" Bank 1 Trust Account until July 25, 2016 and did not start using the "new" account until September 12, 2016. It has been proved that, from and after May 16, 2016 until September 12, 2016, at the earliest, the majority of the trust transactions were processed through the then existing "old" Bank 1 Trust Account. Accordingly, we find that allegation 4(b) is made out.

Allegation 4(c)

[94] As noted above, sub-paragraph 1(e) of the Undertaking required the Respondent, from and after May 1, 2016, to only operate her trust account with a second signatory who was a practising lawyer approved by the Executive Director of the Law Society. The date by which the second signatory was to be in place was extended to May 6, 2016. By that date, DW, a contract lawyer, had been added to three of the Respondent's trust accounts.

[95] The Respondent admitted the truth of allegation 4(c) and advised that she did not breach the Undertaking intentionally. She testified that she had no explanation for her breach of the Undertaking, except to say that she was overwhelmed and unfocused. The Respondent apologized through counsel to the Law Society for this breach of the Undertaking. Accordingly, we find that allegation 4(c) is made out.

Allegation 5

You failed to comply with an interim Order made by Three Benchers on August 17, 2016 (the "August Order"), contrary to rule 7.1-1(e) of the *BC Code*, by doing one or both of the following:

(a) between August 18, 2016 and September 20, 2016, depositing trust funds totalling $24,446,106.29 into Bank 1 Trust Account in connection with one or more of 28 new client matters, contrary to paragraph 1(l) of the August Order

(b) on or about December 14, 2916 [sic], making a $80,000 payment to M. Inc., a client affected by a trust shortage in your Bank 2 Trust Account, without

the knowledge or consent of the custodian, contrary to paragraph 1(d) of the August Order

Allegation 5(a)

[96] On August 17, 2016, the Law Society obtained an interim order under Rule 3-10 to address the issues now the subject of this Hearing. Rule 3-10 permits three Benchers of the Law Society to place restrictions on the practice of a lawyer in circumstances where they believe that extraordinary action is required to protect the public before a disciplinary citation is issued.

[97] The Rule 3-10 order provided, *inter alia*, that:

> The Lawyer must ensure that all trust transactions relating to all new client matters are only handled through [the new Bank 1 Trust Account] and [the new Bank 1 Trust Account (US)]. The Lawyer must only operate these new accounts with a second signatory.

[98] The Respondent admitted that she had deposited trust funds totalling $24,446,106.29 into her "old" Bank 1 Trust Account in connection with one or more of 28 new client matters. However, she stated that many of these ledgers and deposits related to clients of the Respondent who were not new and/or to files opened before August 18, 2016. This argument is similar to the argument advanced by the Respondent in respect of allegation 4(b).

[99] We did not accept the explanation provided as an answer to allegation 4(b). We find that there is nothing in the evidence to treat allegation 5(a) differently. Accordingly, we find that this allegation is similarly made out.

Allegation 5(b)

[100] The terms and conditions of the August 17, 2016 Rule 3-10 order (the "Order") are ambiguously crafted. The Order describes certain steps that are to be taken by a forensic accountant to be retained by the Respondent and in the course of providing those steps, seeks to identify certain classes of client and information required to be provided in respect of those clients. The full extent of the theft was not known on August 17, 2016, but the Order nevertheless attempted to provide some global definitions to direct the work of the forensic account.

[101] Some of the defined terms include;

> … a complete [Bank 2] client trust listing of the clients affected by the Trust Shortage as at September 30, 2016 (the "[Bank 2] Client Trust Listing") and the names, addresses, phone numbers and email addresses for the clients identified in the [Bank 2] Client Trust Listing (the "[Bank 2] Clients");
>
> The "Trust Shortage" was previously defined in the Order to be the $7,506,818.00 reported theft.

[102] Paragraph 1(b) of the Order required the Respondent to consent to the appointment of a custodian of "part of the Lawyer's law practice, namely the Bank 2 Trust Account and any files or client matters related to or affected by the Trust Shortage ("Bank 2 Trust Files")."

[103] Paragraph 1(d) of the Order provided that the "the Lawyer must make no payments to or on behalf of the Bank 2 Clients except through the Custodian."

[104] The appointed forensic accountant prepared a list of 100 clients that were impacted by the Trust Shortage and then separated the clients on that list into Bank 2 Clients that were affected by trust shortage, and Bank 1 Trust Clients that were affected by the Trust Shortage. Client 9 Inc., on whose behalf the payment described in allegation 5(b) was made, was one of the Bank 1 Trust Clients and therefore, by default, was not one of the Bank 2 Clients.

[105] The Law Society argued that the Bank 2 Clients (as defined in the Order), included all 100 clients on the list of affected clients prepared by the forensic accountant. We agree that that is an interpretation supported by the language of the Order where the repeated references to the Bank 2 Trust Account and the Bank 2 trust shortages are deviated from with the words "the clients affected by the Trust Shortage." However, those words appear immediately after the words "a complete Bank 2 client trust listing," and it is by no means clear that the defined term "Bank 2 Clients", being those clients identified in the "Bank 2 Client Trust Listing", include the clients identified as Bank 1 trust clients on the list prepared by the forensic accountant.

[106] A reader must be forgiven for being misled by the repeated references in the Order to the Bank 2 Trust Account and the Bank 2 Client Trust Listing and not realizing that the intent of the August Order was to include payments made to or on behalf of a Bank 1 Trust Client. The issue on this allegation is further confused by the fact that the payments in question all occurred well after the theft and were not in any material way impacted by the theft. The client deposited $287,064.50 to the Bank 1 Trust Account on July 29, 2016, and that money was paid out, at the direction of

the client to itself and to M Inc. as named in allegation 5(b). There was no suggestion that the client wanted the funds paid in any manner other than as directed by it.

[107] Accordingly, we find that allegation 5(b) has not been proven and must be dismissed.

BURDEN OF PROOF

[108] We have instructed ourselves that the burden of proving the allegations in the Citation on the balance of probabilities rests with the Law Society.

[109] The Respondent provided a number of significant admissions in response to the Notice to Admit. There were issues where, although the Respondent did not admit the statement in the Notice to Admit, the refusal to admit the statement was based upon an error in the detail contained within the statement. In those circumstances, where there was no admission of a significant component of an allegation, we have reviewed the evidence before us and made the determinations described in this decision in respect of the various allegations of the Citation.

[110] Where we have found that an allegation of the Citation was made out, we did so on the basis of being satisfied on the balance of probabilities that the evidence before us from the Notice to Admit and the materials provided over the ten days of the Hearing was clear, cogent and relevant to the decisions we have made.

ANALYSIS AND DISCUSSION

Professional misconduct

[111] The Law Society asks that we find that the Respondent has committed professional misconduct in respect of each of the allegations of the Citation. In the circumstances of this case, we have determined that we will look at the overall pattern of behaviour as determined by us in our analysis of the various allegations. We have examined the actions of the Respondent as a whole and applied the appropriate test to those actions determined as proven in this Hearing.

[112] We refer to *Law Society of BC v. Martin*, 2005 LSBC 16, and *Re: Lawyer 12*, 2011 LSBC 35, as the starting point for any analysis of professional misconduct. Those cases have established that the proper test for professional misconduct is to determine whether the facts as made out disclose a marked departure from that conduct the Law Society expects of lawyers; if so, it is professional misconduct.

[113] We do not need to ask whether the use of one client's trust funds to complete another client's transaction is a marked departure. Those facts are the substance of the behaviour we have determined to be at the core of the response by the Respondent to the theft. There were numerous other circumstances where the trust account was overdrawn due to sloppy practices of trust deposits and withdrawals where there was not enough painstaking attention to detail. Those instances were revealed by the investigation of the Respondent but were not the reason the investigation was undertaken.

[114] This decision needs to state the obvious in case lawyers think that, in some dire and drastic circumstances, they can justify an encroachment on the trust funds of one client for the benefit of another client. The Respondent argued that the criminal law defence of "necessity" should provide a defence for some of the allegations of the Citation. In criminal law, that defence may be available. The three elements of the test are that the accused must be in imminent danger or peril, there must be no reasonable alternative course of action available and the wrong perpetrated must be in proportion to the harm avoided.

[115] Without devoting a disproportionate amount of our judgment space to a criminal law notion, we note that the criminal defence of necessity does not apply to this case, even assuming that the defence of necessity applied in the civil context. For instance, we find that the Respondent was in no imminent danger or peril, save a financial peril, which we find does not qualify for this defence. It is our view that that criminal law defence must be confined in its application to the criminal law.

[116] In addition, the strict liability notion that supports trust fund administration would, in our view, render the necessity defence beyond reach. Though trite in the writings of Law Society jurisprudence, trust funds are inviolate. This rule exists to protect the public and not the lawyer. There are no circumstances where any encroachment upon those funds can be permitted. We reiterate for the record that, in our view, the misappropriation of client trust funds can never be found to be anything but professional misconduct.

[117] It is our determination that, when we consider the overall response of the Respondent to the theft of her trust funds, we can reach no conclusion but to find that she committed professional misconduct. Her conduct of intentionally delaying payment of some funds from trust on a transaction, for example payment of a real estate commission, in order to leave some money behind to assist with closing another transaction, must be clearly identified as a marked departure from conduct the Law Society expects from a lawyer.

[118] The ongoing failure in two distinct ways to comply with the Undertaking is equally worthy of condemnation. There is no room in our profession to permit acceptance of the Respondent's apology for these two events because the focus is not on the lawyer, but on the protection of the public. There was no permitted excuse or explanation for a breach of the Undertaking. However, possibly more significant, and certainly more troubling in the full context of the then developing circumstances, is the breach of an undertaking given to one's regulatory body.

[119] The concern is that there is no real explanation for the misbehaviour. On April 19, 2016, the Respondent provided the Undertaking to the Law Society that she would open a new trust account. The reason for the request and the need for a new "clean" trust account was manifest. Despite that clarity, it was not until July 25, 2016, nearly 100 days later, that the new trust account was opened. Moreover, the new account, once opened, was not used as directed for a further 50 days on September 12, 2016. This blatant disregard of the regulator's requirement must be responded to in the clearest possible terms as unacceptable. While the Respondent may have been too stressed or distracted to comply with the Order, the Respondent should have recognized that the Undertaking was not required to address the Respondent's own concerns; rather, the Undertaking was required to protect the public's interest in light of the massive trust account theft that had occurred under the Respondent's watch.

[120] In argument, the Respondent suggested no explanation or excuse other than distraction by the circumstances of the theft. We were directed to a variety of authorities by the Law Society. However, the Panel does not require precedent to find that the Respondent's intentional, repeated disregard over 150 days of the clear and unequivocal obligations imposed by the Undertaking amounts to professional misconduct.

[121] There are some characteristics of this matter that require further elaboration. The Respondent submitted throughout the Hearing that her circumstances were exacerbated by the refusal of the Law Society to provide assistance in response to her frequently recurring pleas for help. The Respondent's counsel argued that Section 3 of the *Legal Profession Act* includes a statutory obligation on the Law Society to provide assistance to lawyers, in the following language:

> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[122] The obligation to support and assist is clearly stated. The fact that the Respondent frequently asked for help is not disputed. The problem with the argument,

however, is that the Law Society is a regulator and cannot prosecute the Respondent and assist the Respondent without being placed in a conflict of interest. The Law Society correctly provided the Respondent with information that it could. It also correctly encouraged the Respondent to retain counsel and she did that nearly immediately following her receipt of the advice.

[123] There can be no expectation that the Law Society would provide financial assistance. The Respondent was advised early on that there was no Law Society insurance available to cover employee defalcations. She was encouraged to examine her own insurance policies to determine if coverage was available. The difficult reality of the circumstances of the Respondent is that there really is no assistance that the Law Society could have provided to her that would relieve her crisis because of the unprecedented level of employee theft that occurred under her watch. The Respondent could not have reasonably expected the Law Society to investigate her actions to protect the public interest and assist her at the same time.

[124] The Panel finds that the Law Society did all that it could do in the circumstances in terms of providing support and assistance.

[125] The Law Society submits that we should make a specific finding that the Respondent "intentionally" misappropriated the funds in allegation 3. This is an unusual submission given the nature of misappropriation.

[126] The nature of misappropriation is discussed and clarified in *Law Society of BC v. Ali*, 2007 LSBC 18 at para. 79, where the panel highlighted the following definition of misappropriation:

> Misappropriation is defined in *Black's Law Dictionary*, 6th Edition as follows:
>
> > The unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended. Misappropriation of a client's funds is any unauthorized use of clients funds entrusted to an attorney, including not only stealing but also unauthorized temporary use for lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom …

[127] This passage is helpful in understanding the nature of misappropriation. It appears that any unauthorized use of a client's funds qualifies. It is not necessary for the panel to make a finding of stealing so long as there is an unauthorized use for the lawyer's own purpose. In this case, the unauthorized use was to facilitate

transactions where the funds required to complete had been stolen by the Respondent's bookkeeper.

[128] Our understanding of misappropriation is assisted by reference to the following passage from *Law Society of BC v. Harder*, 2005 LSBC 48 at para. 56:

> A useful further clarification of the meaning of misappropriation is found in an American authority, in the matter of *Charles W. Summers* 114 NJ 209 @ 221 [SC 1989] where the Court stated "Misappropriation is any unauthorized use by the lawyer of client's funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom". [. . .] as we stated in *Re Noonan* [. .], knowing misappropriation consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking" [. . .]. The lawyer's subjective intent to borrow or steal, the pressures on the lawyer leading him to take the money, the presence of the attorney's good character and fitness and absence of "dishonesty, venality, or immorality" are all irrelevant.

[129] In these circumstances, "borrowing" from one client's trust funds to complete a transaction for another establishes the necessary elements of misappropriation. We also find that the Respondent knew what she was doing in respect of the manipulation of her trust funds and the related obligations that she was abusing in her response to the theft.

[130] In response to the submission that we find that the misappropriations identified were intentional, we respond that such a finding has the potential to create confusion where there is no room for it. We see potential for subsequent panels to attribute additional weight or seriousness to an intentional misappropriation as compared to a misappropriation that is somehow not intentional. We believe that no useful purpose is served by seeking to create degrees of seriousness around different "types" of misappropriation.

[131] If the facts demonstrate that the elements of misappropriation are made out, in our view, more is not necessary. The use of a client's trust funds for a purpose not intended or authorized by the client is misappropriation. A marked departure finding will almost certainly follow and professional misconduct will be the result. There is virtue in the clarity of that outcome.

DECISION

[132] We find that the Law Society has demonstrated on a clear preponderance of credible evidence that the Respondent has committed professional misconduct in respect of all allegations contained in the Citation, with the exception of allegation 5(b), which we have dismissed.