2021 LSBC 35
Decision Issued: August 31, 2021
Citation Issued: February 7, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

SPENCER OWEN MAY

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	February 1, 2, 3 and April 26, 2021
Written Submissions:	July 14 and 20, 2021
Panel:	Dean Lawton, QC, Chair Michael Dungey, Public representative Monique Pongracic-Speier, QC, Lawyer
Discipline Counsel:	Michael S. Shirreff Gregory A. Cavouras
Counsel for the Respondent:	William G. MacLeod, QC

INTRODUCTION

[1] On February 7, 2020, the Law Society issued an eight-paragraph citation (the "Citation") against the Respondent. The allegations in the Citation arise in connection with retainers between the Respondent's firm and two individuals, YZ

and ZZ, and two numbered companies, which we will identify as Company 1 and Company 2, between August 2015 and August 2018. The Citation alleges:

1. Between approximately December 19, 2016 and January 4, 2017, in the course of acting for one or more of ZZ, YZ, Company 1 and Company 2 in a without-notice hearing in the Supreme Court of British Columbia, you failed to act honourably and with integrity, or acted contrary to your obligations to the court, or both, by doing one or more of the following:

   (a) misleading the court by stating that the defendants appear to have left the country or disappeared, when you knew that one of your clients possibly knew the whereabouts of, had contacted, or had the means of contacting one of the defendants, and had purportedly obtained the defendant's signature on documents in or about November 2016;

   (b) misleading the court by failing to disclose material information concerning the whereabouts of, contact with, or means of contacting one of the defendants, including evidence that one of the defendants had purportedly signed and provided documents in relation to the proceeding in or about November 2016; and

   (c) filing or relying upon the affidavit of your paralegal, AC, when you knew or ought to have known that the affidavit was false or misleading in relation to a purported contract document between Z & Co. and DT.

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

2. Between approximately March 3, 2017 and March 14, 2017, in the course of acting for one or more of ZZ, YZ, Company 1 and Company 2 in a without-notice hearing in the Supreme Court of British Columbia, you failed to act honourably and with integrity, or acted contrary to your obligations to the court, or both, by doing one or more of the following:

   (a) misleading the court by making statements to the effect that one of the defendants had not been or could not be located when you knew that one of your clients had purportedly obtained the defendant's signature on documents in or about November 2016;

   (b) misleading the court by failing to disclose material information concerning the whereabouts of, contact with, or means of contacting

one of the defendants, including evidence that one of the defendants had purportedly signed and provided documents in relation to the proceeding in or about November 2016; and

(c) offering, presenting, or relying upon the affidavit of YZ when you knew or ought to have known that the affidavit was false or misleading in relation to a purported contract document between Z & Co. and DT.

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

3. In the course of acting for one or more of ZZ, YZ, Company 1 and Company 2, you failed to comply with a direction from a Justice of the Supreme Court of British Columbia made on or about March 14, 2017, that you serve an order on the defendants.

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

4. In the alternative to Allegation 3, you failed to honour an undertaking or commitment you made to a Justice of the Supreme Court of British Columbia on or about March 14, 2017, to serve an order on the defendants, contrary to one or more of rules 2.2-1, 5.1-6 and 7.2-11 of the Code of Professional Conduct for British Columbia (the "Code").

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

5. In or between August 2015 and July 2018, in the course of acting for one or more of ZZ, YZ, Company 1 and Company 2, you failed to make reasonable efforts to obtain, or record, client identification information in relation to your clients, contrary to Rule 3-100(1)(a) and (b) of the Law Society Rules.

   This conduct constitutes professional misconduct or incompetent performance of duties, or a breach of the *Act* or rules, pursuant to section 38(4) of the *Act*.

6. Between approximately August 2015 and July 2018, in the course of acting for one or more of your clients ZZ, YZ, Company 1 and Company 2, you failed to do one or both of the following:

(a) make reasonable inquiries about your clients or the subject matter and objectives of your retainer; and

(b) make a record of inquiries made.

This conduct constitutes professional misconduct or incompetent performance of duties, pursuant to section 38(4) of the *Act*.

7. Between approximately June 2018 and November 2019, in the course of a Law Society investigation arising from your representation of ZZ, YZ, Company 1 and Company 2, you failed to cooperate fully in the investigation, contrary to one or both of Rule 3-5(7) of the Law Society Rules (the "Rules"), and rule 7.1.1 of the Code, by failing to comply with a requirement dated June 18, 2018 to produce your complete client files by the time and date set by the Executive Director, contrary to one or both of Rules 3-5(7) and 3-5(11) of the Rules.

   This conduct constitutes professional misconduct or a breach of the *Act* or rules, pursuant to section 38(4) of the *Act*.

8. Between approximately June 2018 and November 2019, in the course of a Law Society investigation arising from your representation of ZZ, YZ, Company 1 and Company 2, you failed to cooperate fully in the investigation, contrary to one or both of Rule 3-5(7) of the Law Society Rules (the "Rules"), and rule 7.1.1 of the Code, by providing incorrect, inaccurate, incomplete, or misleading information in one or more letters dated June 28, 2018 and September 27, 2019, about what records had been compiled or produced for or to the Law Society.

   This conduct constitutes professional misconduct or a breach of the *Act* or rules, pursuant to section 38(4) of the *Act*.

[2] Service of the Citation is admitted.

[3] For the reasons that follow, the Panel finds:

(a) The allegations at paragraphs 1(a) and (b), 2 and 3 of the Citation are proved;

(b) It is unnecessary to address paragraph 4 of the Citation;

(c) The Law Society has established that the Respondent committed a breach of the Rules in respect of the conduct alleged at paragraph 5 of the Citation;

(d) The Law Society has established that the Respondent committed professional misconduct in respect of the conduct alleged at paragraph 6 of the Citation; and

(e) The allegations at paragraphs 1(c), 7 and 8 of the Citation are dismissed.

FACTS

[4] The parties tendered into evidence at the hearing of the Citation an agreed statement of facts, cross-referenced to a book of documents. The Panel also had the benefit of *viva voce* evidence from the Respondent and from Amy Chan, a paralegal employed by the Respondent's firm. Our findings of fact are based on the totality of the evidence.

[5] Owing to the nature and number of the allegations against the Respondent, the long time period at issue, and the structure of the Citation, it is necessary to canvass the facts in some detail.

Background

[6] The Respondent was called to the bar and admitted as a member of the Law Society in May 2007. Since October 2009, he has practised at Campbell Froh May and Rice LLP, a law firm in Richmond, British Columbia. The Respondent became a partner in the firm in January 2015.

[7] At the times material to the events at issue in the Citation, the Respondent maintained a mixed litigation and solicitor's practice. He now practises primarily as a solicitor.

August 2015: ZZ, YZ and Company 1 retain the Respondent; a builder's lien action is filed

[8] On the morning of Friday, August 14, 2015, the Respondent's law firm received a referral of a builder's lien matter from a local lawyer who had a conflict with respect to the matter. The Respondent took the referral. He was, at that time, reasonably experienced with builder's lien matters and was familiar with the basic principles underlying the British Columbia *Builders Lien Act.*

[9] The Respondent met with ZZ, YZ and the solicitor acting for them (the "Solicitor") at approximately 1:00 pm on August 14, 2015. He had never before dealt with any of them.

[10] ZZ and YZ had low to very low facility in spoken English. The Solicitor translated for ZZ and YZ throughout the meeting.

[11] The Respondent was advised at the meeting that ZZ and YZ, through Company 1, had performed a substantial renovation of a condominium property in Richmond (the "Condominium"). The work included painting the "whole house", renovations to the kitchen, installation of hardwood floors, new appliances and the provision of antique cabinets valued at $250,000 to $260,000. The renovation was reported to have begun in May 2015 and finished by the end of June 2015.

[12] ZZ and YZ further advised the Respondent, through the Solicitor, that the Condominium was listed for sale for $768,000 but was subject to a mortgage of approximately $560,000. In addition, the Condominium was somehow at issue in another lawsuit in which the plaintiff claimed approximately $300,000.

[13] The Respondent was advised that, on July 8, 2015, "Company 1 (YZ)" had filed a builder's lien for $500,000 against the Condominium. ZZ and YZ gave the Respondent a copy of the filed lien. ZZ and YZ also advised the Respondent that the builder's lien claim consisted of the following approximate amounts:

(a) antique cabinets: $250,000 to $260,000,

(b) work and materials: $140,000 to $150,000, and

(c) "old work": $80,000.

[14] The Condominium was owned by DT and HX. The Respondent understood that DT and HX were a married couple who had split up or were in the process of splitting up.

[15] On August 14, 2015, the Respondent was provided with a letter dated July 24, 2015 from counsel for HX confirming that she and her "ex-husband", DT, were the registered owners of the Condominium. The Respondent does not recall whether the lawyer's letter was discussed at his initial meeting with ZZ, YZ and the Solicitor. In any event, the letter, addressed to Company 1 and YZ, affirmed that DT and HX were in the process of selling the Condominium when the lien was discovered. The letter questioned the basis for the lien as follows:

> Our client knows of no basis on which the Lien could be filed against the Property. We understand that our client has never dealt with the Company, and did not retain the Company with respect to any work on the Property or otherwise. We are further advised that our client resided in the Property since 2004. In the last 10 years, she did not undertake any renovations of the Property, nor did she engage any person or company to renovate the Property. If there is any basis for the Lien, or if your Company performed any work on the Property, please contact me to discuss as soon as possible.

[16] The letter went on to say that the lawyer had attempted to contact YZ at the telephone number given on the lien and at the telephone number associated with the registered address of Company 1, without success. The letter enclosed a Notice to Commence an Action within 21 days, delivered pursuant to s. 33 of the *Builders Lien Act*, SBC 1997, c. 45.

[17] The Respondent was retained to prosecute a builder's lien action with respect to the Condominium during the meeting with ZZ, YZ and the Solicitor.

[18] After the meeting, the Respondent reviewed the incorporation documents for Company 1. These showed that Company 1 was incorporated on June 22, 2015, *i.e.*, well after the work on the Condominium had reportedly begun and only a week or so before the stated date of completion. Concerned that the lien filed on July 8, 2015 may not have named the proper claimant, the Respondent immediately prepared and filed a second builder's lien against the Condominium. Like the first lien, the second lien claimed $500,000. The claimants on the second lien were ZZ and YZ; Company 1 was not named as a claimant.

[19] On the afternoon of August 14, 2015, the Respondent also spoke by telephone with counsel for HX. He advised counsel for HX that he had been retained in respect of the builder's lien and that he had been provided with a copy of counsel's letter to Company 1 and YZ. The Respondent advised that his understanding of the facts concerning the renovation of the Condominium was not the same as the other lawyer's understanding of the facts.

[20] The Respondent was away from the office on vacation during the week of August 17, 2015. So as to meet the clients' limitation date to commence an action under the *Builders Lien Act*, in the Respondent's absence, an associate at the Respondent's firm filed an action in the name of ZZ, YZ and Company 1 (the "Action"). A certificate of pending litigation was filed against the Condominium the same day.

[21] The Notice of Civil Claim filed in the Action pleaded that the plaintiffs, or some of them, entered into a contract with DT and HX, or some of them, in or about May 2015 to provide work and materials to improve the Condominium, and that DT had provided a deposit of $1,000. The Notice further pleaded that the work commenced on or about May 1, 2015 and was completed on July 2, 2015. The total value of the work and materials was $500,000. The Action claimed a lien in the amount of $500,000 under the *Builders Lien Act*, judgment in the amount of $500,000, plus contractual interest or, alternatively, interest pursuant to the *Court Order Interest Act*. The Action also asserted an alternative claim for damages in *quantum meruit* or unjust enrichment.

[22] On August 24, 2015, upon his return to the office, the Respondent learned that HX's lawyer was no longer acting for her.

[23] The Respondent attempted to serve the Notice of Civil Claim in the Fall of 2015, but the defendants were not located. The Respondent took no further steps in the Action for approximately eight months.

[24] On September 15, 2015, however, the Respondent sent a written retainer agreement to his clients, care of the Solicitor. The retainer agreement pertained to the Action and authorized the Respondent to take instructions in the matter from the Solicitor. The retainer agreement was signed by ZZ and YZ and returned a week later. No one signed the retainer agreement for Company 1. The clients did not date their signatures.

[25] At this point, it is convenient to note that the Respondent did not fully comply with the Law Society's client identification requirements in respect of ZZ and YZ. In particular, the Respondent did not obtain a telephone number for YZ but only took an email address for him. Also, the Respondent did not, in 2015, confirm the home addresses of ZZ and YZ.

[26] In addition, the Respondent did not obtain copies of driver's licences for ZZ and YZ, and there is no suggestion in the evidence that he reviewed government-issued identification for them. He did not confirm with the Solicitor whether the Solicitor had ever identified the clients in accordance with the Rules.

June to early November 2016: Steps are taken in the Action

[27] In 2016, the mortgage on the Condominium went into foreclosure. The Respondent was served with the foreclosure petition and he went on record for his clients. The foreclosure proceedings caused the Respondent to feel some urgency

to obtain judgment in the Action so that the judgment could be registered against title.

[28] In June 2016, the Respondent amended the pleadings to correct a misnomer in the style of cause. Service of the Amended Notice of Civil Claim on the defendants was then attempted, again without success. In July 2016, the Respondent obtained an order of the court permitting alternative service on the defendants. The Respondent caused the Amended Notice of Civil Claim to be served pursuant to that order. The defendants did not file a Response to Civil Claim.

[29] In August 2016, the Respondent made three applications for a desk order for default judgment in the Action, but each was rejected by the court registry. In an effort to address some of the concerns that had led the registry to reject the applications, the Respondent secured leave to amend the pleadings to remove the claims for damages for breach of contract, in *quantum meruit* and in unjust enrichment. The Respondent served the Further Amended Notice of Civil Claim pursuant to an alternative service order; again, however, no Response to Civil Claim was filed.

[30] In October 2016, the Respondent again applied for an order for default judgment in the Action. On November 3, 2016, the court denied the application.

[31] On November 7, 2016, the Respondent wrote to the Solicitor to advise that the clients would need to prove "how the $500,000 was calculated" to obtain judgment in the Action. This email to the Solicitor marked the first time the Respondent turned his attention to the question of the evidence in support of his clients' claim.

November and December 2016: new facts and new issues emerge

[32] The Respondent and his paralegal assistant, Ms. Chan, met with ZZ and YZ on November 9, 2016. Ms. Chan provided language translation between the Respondent and the clients. The Respondent updated the clients on the status of the Action and confirmed that he needed documentation to support the claim for $500,000. The clients delivered several batches of documents to the Respondent.

[33] On November 9, 2016, the clients delivered a one-page loan agreement to the Respondent. This agreement, dated March 25, 2015, documented a loan of $500,000 from YZ to DT to pay for "the mortgage, property tax and previous renovation bills" for the Condominium. Interest of three per cent per month, or 36 percent per annum, was payable from April 1, 2015 until the loan was paid in full. The document said that the borrower agreed to use the Condominium "as collateral

for the said loan." The document was signed by DT as borrower, by YZ as lender and by a witness.

[34] On November 18, 2016, the clients delivered additional documents to the Respondent. The first was a standard form, preprinted renovation contract, which had been partially completed by hand. The renovation contract indicated that it was between Company 1 as "contractor" and YZ as "owner". The contract also listed YZ as "project manager". The Respondent interpreted the listing of YZ as "owner" as a mistake arising from YZ's limited English and the fact that YZ was the owner of Company 1. The address of the property to be renovated was the address of the Condominium. The description of the work was as follows:

> Whole house renovation.
> Paint the whole house. New carpet + hardwood floor.
> Installed [*sic*] a pair of antique Paitition [*sic*] Wall.

[35] Labour and materials were at cost plus 45 percent. The contract price was $240,000. Nonsensically, the contract also provided for a payment to the contractor of $240,000 to coordinate with the owner's "separate contractors or forces." The contract also stipulated a $2,000 deposit – not a $1,000 deposit, as the Respondent was previously told – and provided for a one-year warranty on work and materials.

[36] The sections of the contract pertaining to permits and sub-trades were not completed. The section of the contract dealing with the timing of the work was crossed out, and "N/A" was written next to that section.

[37] Payment terms were within three days of the completion of the work, with 36 percent interest per year thereafter on any unpaid balance.

[38] The renovation contract had signatures for the owner, the contractor and a witness. Names were not written under or next to the signatures, but each signature was dated January 27, 2015. The Respondent later learned that DT signed as "Owner", that YZ signed as "Contractor" and that the witness to the renovation contract was one and the same person as the witness to the loan agreement described above.

[39] The second document delivered to the Respondent's firm on November 18, 2016 was an invoice from a "Fine Arts Gallery" in Richmond. This invoice, dated May 28, 2014, was to an "overseas buyer", "Z & Co. Ltd.", for the purchase of one "Wood Paitition [*sic*] Wall" for $150,000. There was no GST or PST charged on the purchase. Remarkably, although the invoice was plainly a computer-generated

document, the Fine Arts Gallery's name, address and telephone number were apparently applied to the invoice with an inked stamp.

[40] The third document delivered was a handwritten invoice dated July 4, 2015 from Company 1 to DT, for "renovations". The total amount charged was $281,680, *i.e.*, more than $41,000 over the renovation contract price. The work listed on the invoice was: changing carpets, changing hardwood flooring, interior painting, installation of an antique wood partition wall, retiling of the kitchen and bathroom and "clean, garbage". Of note, there was no mention of new appliances. Also, the charge for installing the antique wood partition wall was $217,500, an amount that did not reflect the cost of the installed antique wood cabinets that the Respondent was told about on August 14, 2015, but did reflect the cost of the "Wood Paitition [*sic*] Wall" on the Fine Arts Gallery invoice, plus 45 per cent.

[41] Finally, the clients delivered a packet of invoices for materials, purportedly related to the clients' renovation work for DT. In reality, the invoices included invoices from suppliers to persons other than Company 1, ZZ or YZ. In some instances, the invoices were for materials that clearly had nothing to do with the interior renovation of the Condominium, as the Respondent acknowledged on cross-examination. A few examples will be illustrative. There was an invoice for decking screws dated January 13, 2015, *i.e.*, *before* the date of the signatures on the renovation contract. Another invoice dated January 20, 2015, – again, *before* the date of the contract – was for the purchase of a 100-foot all-weather hose, a "white plastic house [*sic*]" and a leaf rake. A third invoice between the same vendor and buyer – not ZZ, YZ or Company 1 – dated later in January 2015, included an order for 10-foot lengths of rebar. Then, there were invoices dated March and April 2015 from flooring suppliers for 898.75 square yards of vinyl flooring, adhesive and "commercial carpet".

[42] The Respondent testified at the hearing of the Citation that he did not notice that the invoices for supplies his clients provided listed persons other than Company 1, ZZ or YZ as the buyers of the materials. He admitted that he was not as careful as he should have been in reviewing the invoices. He did not sit down with the clients to go over the invoices. He likewise did not compare the invoices to the lien filed by the clients in April 2015, or to Company 1's invoice, to cross-reference between the documents.

[43] On November 22, 2016, Ms. Chan contacted ZZ with questions about the renovation contract and the Fine Arts Gallery's invoice. Specifically, she inquired whether the listing of YZ as "owner" in the renovation contract was a mistake, and whether the wood partition wall was actually purchased in 2014, *i.e.*, before the

renovation contract was signed. ZZ affirmed that the listing of YZ as "owner" in the renovation contract was an inadvertent error. He said, however, that DT had signed the contract as "owner". ZZ further advised that the 2014 date on the Fine Arts Gallery invoice was a "typo" and that because payment had not yet been remitted, he could ask the vendor to fix it. ZZ asked to retrieve the Fines Arts Gallery invoice from the firm so that he could take it back for correction. He also advised Ms. Chan that DT had "borrowed money from him and he didn't want his wife to know about it. [T]hat's why [DT] signed the document alone."

[44] Ms. Chan met with ZZ on November 24, 2016. ZZ provided Ms. Chan with an amended invoice from the Fine Arts Gallery, now bearing a purchase date of May 28, 2015. The word "Partition" was correctly spelled on this version of the invoice. ZZ also gave Ms. Chan a new first page to the renovation contract, which showed DT as the owner of the property to be renovated and "Z & Co." – not Company 1 – as the contractor. ZZ advised Ms. Chan that DT had received a copy of the renovation contract showing him as the owner.

[45] After Ms. Chan's meeting with the client, the Respondent reviewed the new materials delivered by ZZ. His evidence at the hearing of the Citation was that he took "Z & Co." to be a "doing business as" name. The Respondent also characterized the new page of the renovation contract as a "slip sheet".

[46] Returning to Ms. Chan's meeting with ZZ, Ms. Chan asked ZZ why Company 1 was listed as the contractor in the first version of the renovation contract provided to the firm when Company 1 was not incorporated until June 2015. ZZ advised Ms. Chan that, originally, there was no written contract for the renovation job but that the renovation contract was made up later, signed and "pre-dated" to January 27, 2015.

[47] ZZ asked Ms. Chan to return to him the corrected Fine Arts Gallery invoice and the original renovation contract so that he could ask DT to acknowledge the authenticity of the documents. The Respondent authorized Ms. Chan to return the original documents to ZZ, and she did so.

[48] ZZ also advised Ms. Chan at their meeting of November 24, 2016 that "he has friends who can get hold of [DT]. [DT] is hiding as he has a lot of creditors." He said, "[DT] acknowledges the debt but that he has no money to repay them."

[49] Ms. Chan made notes of her meeting with ZZ, which the Respondent reviewed. Upon learning that there might be a way to locate DT, the Respondent prepared and provided ZZ with three documents for DT to sign and return.

[50] The first document was a consent order in the Action by which DT consented to pay ZZ, YZ and Company 1 the sum of $500,000, plus interest pursuant to the *Court Order Interest Act*, and costs in the Action.

[51] The second document was an acknowledgment of a debt of $500,000, owed by DT to ZZ, YZ and Company 1, as of March 25, 2015. The document provided that the indebted amount was "intended to satisfy my financial obligations in connection with [the Condominium]," including "mortgage payments, property taxes, and cost of [a] home renovation performed by [ZZ, YZ and Company 1] … in the amount of $281,680."

[52] The third document was a certificate of independent legal advice.

[53] From the evidence, it appears that the Respondent did not think to try to deliver or serve the Further Amended Notice of Civil Claim along with the documents he had prepared.

[54] On November 30, 2016, ZZ delivered to the Respondent's firm a signed consent order and a signed debt acknowledgment form. The latter was apparently signed by DT and witnessed by an unnamed person who gave an address in Richmond and stated that his occupation was "businessman". DT's signature on the debt acknowledgment form was dated "07/05/2015"; ZZ told Ms. Chan that it was actually signed by DT on November 27, 2016. ZZ confirmed that the debt acknowledgment was witnessed by the same person who witnessed the loan agreement.

[55] A signed certificate of independent legal advice was not returned to the Respondent. ZZ told Ms. Chan that DT "refuses to get ILA from lawyer and have it signed, because he has some concerns on his wife."

[56] ZZ also brought another document to the Respondent's firm with the signed documents: a revised invoice from Company 1 to DT dated July 4, 2015. This revised invoice was similar to the first that had been delivered to the firm, except that a $1,500 charge for "clean, garbage" was not included on this invoice and the invoice number was different by two digits. The total amount of the invoice was unchanged. ZZ asked the firm to "just use" the newly delivered invoice. He later told Ms. Chan that the invoice was net of a $1,000 deposit paid for the renovations.

[57] On November 30, 2016, ZZ also told Ms. Chan that Z & Co. was never incorporated but was owned by YZ. YZ had contemplated incorporating a company by this name and hence used the name on the renovation contract. ZZ also confirmed that it was YZ who had made the $500,000 loan to DT.

[58] In early December 2016, the Respondent reviewed the documents that ZZ had delivered to Ms. Chan on November 30, 2016. The Respondent queried whether the documents had been signed in the clients' presence. Ms. Chan investigated. There was no suggestion that ZZ or YZ had met with DT, but Ms. Chan was given a telephone number for the witness to DT's signature. Ms. Chan spoke to the witness who affirmed that he saw DT sign the documents and had also witnessed DT sign the loan agreement of March 25, 2015. (There appears not to have been a mention of the witness seeing DT sign the renovation contract, although the witness signature on the renovation contract is identical to the witness signature on the loan agreement.) Ms. Chan arranged to meet with the witness.

[59] At approximately the same time, the Respondent determined that the court registry would not accept the consent order for filing because DT had not filed a Response to Civil Claim in the Action. The consent order thus became moot in all respects, except for the fact that it was purportedly signed by DT.

[60] When the Respondent determined that the consent order could not be filed, Ms. Chan's meeting with the witness was cancelled at the Respondent's direction. The Respondent's evidence to the Panel was that, at this time, he had failed to appreciate that one and the same person had supposedly witnessed DT's signature on the renovation contract, the loan agreement and the two documents purportedly signed on November 27, 2016.

[61] Ms. Chan contacted ZZ to obtain further information about YZ's loan to DT. It is not clear on the evidence why she did not contact YZ directly. Nonetheless, ZZ advised that, on or about December 5, 2014, YZ had loaned US $200,000 to DT. DT had asked YZ to deposit the funds to his account at a hotel in Las Vegas where DT was employed. A friend of YZ who had won money gambling at the hotel made the deposit in cash; YZ then repaid the friend. YZ and DT then entered into the loan agreement of March 25, 2015. That agreement "marked up" the loan to CDN$500,000 to take into account interest for late payment of the loan and to encourage DT to pay off the loan more quickly. ZZ confirmed that the three per cent monthly interest rate on the loan applied to the US$200,000 and not to the CDN$500,000.

[62] In light of the information received about YZ's loan to DT, the Respondent determined that it would be necessary to amend the pleadings in the Action yet again. The Respondent and Ms. Chan met with ZZ and YZ on December 13, 2016 to discuss the amendments and seek instructions.

[63] At the December 13, 2016 meeting, the Respondent did not question the remarkable evolution of the facts of the case. He did not ask for documents relating

to the loan. He did not ask YZ how it was that he was able to advance a cash loan for US$200,000 to DT in December 2014.

[64] On December 15, 2016, the Respondent took an affidavit from Ms. Chan in which she deposed, on information and belief from ZZ, that DT borrowed and received US$200,000 on December 5, 2014 and then retained ZZ and YZ to renovate the Condominium in January 2015. The affidavit did not specify that YZ was the lender of the money. The affidavit went on to explain the relationships of ZZ, YZ, Z & Co. and Company 1 (again, on information and belief), gave an overview of the history of the Action and noted the existence and progress of the foreclosure proceedings against the Condominium.

[65] Ms. Chan exhibited to her affidavit "a true copy of the Renovation Contract" between Z & Co. and DT dated January 27, 2015. That "true copy" was, in fact, and to the Respondent's knowledge, an amalgamation of the body of the renovation contract delivered by the clients on November 18, 2016, plus the new first page delivered to the firm by ZZ on November 24, 2016. Also exhibited to Ms. Chan's affidavit were: the loan agreement of March 25, 2015; the second version of Company 1's invoice to DT of July 4, 2015 (again, said to be a "true copy" of the invoice, although the Respondent knew it was the revised version of the invoice); and a list of "invoices submitted by various subcontractors for materials [and] supplies, along with true copies of the supporting invoices totalling $167,471.33." The invoices were, in fact, the invoices that the clients had delivered to the Respondent in November 2016 and the revised Fine Arts Gallery invoice, as described in paragraphs 41 and 44. The Respondent appreciated that the replacement Fine Arts Gallery invoice was exhibited to the affidavit.

[66] At the hearing of the Citation, the Respondent was not questioned about, and did not volunteer, the reason why he took an affidavit from Ms. Chan on information and belief on December 15, 2016 instead of taking an affidavit from one of the clients.

[67] In any event, on December 19, 2016, the Respondent filed a Notice of Application in the Action seeking orders to amend the Further Amended Notice of Civil Claim and to serve it on the defendants by alternative means of service. The amendments sought were to allege a US$200,000 loan from YZ to DT in December 2014 and renovation work valued at $281,600 carried out by ZZ and YZ between January and July 2015.

[68] The Respondent caused Ms. Chan's affidavit to be filed with the Notice of Application.

January to February 2017: The Respondent appears in court to amend the Claim and then secures an order for default judgment

[69] On January 4, 2017, the Respondent appeared in Supreme Court, without notice to the defendants, to speak to the applications that he filed the preceding month.

[70] At the hearing of the applications, the Respondent said to the court, "the defendants appear to have left the country or – or disappeared somehow." He noted that he had previously served the defendants by alternative means, as had the mortgage holder in the foreclosure proceedings.

[71] The Respondent did not disclose to the court that he had been told by ZZ that DT had been contacted in Richmond in late November 2016 and had purportedly signed two documents, one of which was an order consenting to judgment against him.

[72] At the hearing of the Citation, the Respondent was questioned about what he did and did not tell the court on January 4, 2017. The Respondent's evidence was that by January 2017 – indeed, from at least December 2016 – he did not have confidence in the authenticity of the documents purportedly signed in November 2016, but that he had come to believe that there had been *no* contact with DT at that time and that the signatures on the documents may have been forged. The rationale for this conclusion was that "everything else that had happened previously was, this guy was untraceable." The Respondent said he took the view in January 2017 that it would not be appropriate to say to the court that DT had been located in Richmond when he did not believe that to be true.

[73] The court granted the orders sought by the Respondent. The Second Further Amended Notice of Civil Claim was filed in the Action and then served by alternative service. No Response to Civil Claim was filed.

[74] On January 30, 2017, the Court granted an order for the sale of the Condominium in the foreclosure proceedings.

[75] On February 10, 2017, the Respondent succeeded in obtaining a desk order for default judgment in the Action, with damages to be assessed.

March 2017: Damages are assessed; declaratory relief is granted; judgment is registered against title

[76] The Respondent's next step in the Action was to apply to the court to have the plaintiffs' damages assessed and for a declaration of a builder's lien in favour of ZZ

and YZ. In support of the application, the Respondent filed an affidavit given by YZ that, among other things, exhibited the amalgamated renovation contract as a "true copy" of the contract. The Respondent also filed an affidavit from ZZ. ZZ's affidavit exhibited the same supplier invoices as had been exhibited to Ms. Chan's December 2016 affidavit, along with the second version of the Fine Arts Gallery invoice. The body of ZZ's affidavit described the collection of invoices as "true copies" of "invoices submitted by various subcontractors for materials supplies … ." In addition, ZZ's affidavit exhibited the second version of Company 1's invoice for the renovation work on the Condominium.

[77] On March 14, 2017, the Respondent appeared before Justice Walker in Supreme Court to speak to the application.

[78] It is material to the allegations in the Citation that, when he appeared before the court, the Respondent advised Justice Walker that the defendants had not been served with the application materials because "we've never been able to find them … they appear to have left the country, I believe – would be my guess." The Respondent further explained to the court that his process servers and the process servers retained by the financial institution in the foreclosure proceedings had been unable to locate DT and HX.

[79] When the court commented to the Respondent that the normal practice is to serve a judgment debtor with an application for an assessment of damages, the Respondent said:

> I appreciate that, My Lord, and in fact I brought a case … I can hand it up if you wish, but I expect you are aware of the law that this sort of an order, if it's made without notice, can be set aside by the … defendants.
>
> …
>
> So that's sort of what I was resting on, in that sense, that if – if they at some point come out of the woodwork, they're – they have – they're at liberty to have this order set aside.

[80] The judge then asked about the terms of the alternative service orders the plaintiffs had obtained in the Action. The following exchange occurred between judge and counsel:

> THE COURT: Does your client have an email address for them at all?
>
> MR MAY: No.

THE COURT: Nothing.

MR. MAY: No. No.

[81] The Respondent did not disclose to Justice Walker that he had been advised by his clients that they had a way to, and purportedly did, contact DT in November 2016.

[82] At the hearing of the Citation, the Respondent was questioned about the exchange with Justice Walker on March 14, 2017. The Respondent referred to the conclusion he had drawn in December 2016 that the information about the purported contact with DT was unreliable. The Respondent said that he likely did not turn his mind to the matter again in March 2017.

[83] Justice Walker granted an order (the "Order") in favour of the Respondent's clients, as follows:

(a) judgment against DT and in favour of YZ in the amount of US$200,000, plus prejudgment interest at 36 per cent per annum;

(b) damages to ZZ and YZ against DT and HX of $281,680, plus prejudgment interest at 36 per cent interest per annum against DT;

(c) post-judgment interest and costs; and

(d) a declaration that ZZ and YZ were entitled to a builder's lien in the amount of $281,680 against the Condominium.

[84] The following exchange occurred between the Respondent and Justice Walker:

THE COURT: All right. You can take the order and I've signed it.

MR. MAY: Thank you.

THE COURT: You're going to serve that on –

MR. MAY: I will – I'll serve it in accordance with –

THE COURT: Yes.

MR. MAY: -- with the substitutional service orders.

THE COURT: Yes.

MR. MAY: Thank you. Thank you.

[85] The Order was entered. The Respondent was then obliged to obtain a desk order – granted March 13, 2017 – to correct misspellings of the plaintiffs' names in some paragraphs of the Order. In the event, neither the Order nor the desk order was served on DT or HX. The Respondent's evidence to the Panel was that he "absolutely would have intended" to serve the Order but that it "just slipped my mind." The lack of service came to the Respondent's attention in June 2019 in the wake of a communication from the Law Society.

[86] On March 23, 2017, the Respondent registered his clients' judgment against the title to the Condominium. The Condominium was sold in May 2017. The proceeds of the sale were paid into court in April 2018.

The Respondent's retainers concerning Company 2:

[87] The Respondent acted for Company 2 in two matters in 2016 and 2017. The Respondent's retainers in connection with those matters are relevant to the allegations at paragraphs 5 and 6 of the Citation.

[88] On February 10, 2016, the Respondent was engaged by the Solicitor, on behalf of the individual clients, to commence a claim for Company 2 against the owners of a house in Richmond (the "Richmond House"). The Respondent was advised that Company 2 was owed money for the interior renovation of the Richmond House and that Company 2 had filed a builder's lien for $450,000 in connection with that work in April 2015.

[89] The day he was retained, the Respondent conducted a company search in respect of Company 2. The search results showed that the sole officer and director of Company 2 was not ZZ or YZ but a woman, HL, who had no obvious relationship to the Respondent's clients. The Respondent did not notice who was listed as officer and director on the company search and so did not inquire as to how HL was connected to ZZ and YZ, if she was connected to them at all.

[90] The Respondent did not obtain a business telephone number or address for Company 2 when he was retained. The information he collected to identify the company was limited to what appeared on the face of the company search, *i.e.*, the registered and records address and the name and address for HL.

[91] The Respondent did not gather any documentation from ZZ or YZ in relation to the renovation of the Richmond House, except for the filed lien. The lien stated that Company 2 "built the house."

[92] The Respondent filed an action and a certificate of pending litigation against the Richmond House for Company 2 on February 11, 2016 (*i.e.*, the day after he was retained), although there was no apparent urgency to take either step.

[93] The action relating to the Richmond House was settled before the end of February 2016. One of the owners of the Richmond House reportedly made payment to Company 2; the Respondent was not involved in that transaction. The Respondent then released the certificate of pending litigation filed against the title to the Richmond House and, on February 29, 2016, rendered his account to ZZ, YZ and Company 2, care of the Solicitor.

[94] On March 17, 2016, a Notice of Change of Directors was filed for Company 2 to make ZZ a director of the company effective May 2012. It is not clear on the evidence when the filing of the Notice of Change of Directors came to the Respondent's attention, although it would not appear that he was aware of it in 2016. The copy of the Notice tendered into evidence shows that it was printed on June 4, 2019.

[95] The Respondent was retained in connection with a second builder's lien matter for Company 2 in April 2016. The instructions in this matter were, once again, provided by the Solicitor, who advised that Company 2 had constructed a house in Vancouver (the "Vancouver House") between January 2014 and April 5, 2015. A $2 million lien had been filed against the Vancouver House on April 10, 2015.

[96] The Respondent reviewed a copy of the lien, but the image was poor and the text was partly illegible. The Respondent sought clarification from the Solicitor as to whether the amount owing was $200,000 or $2 million. The Solicitor confirmed the amount owing was, indeed, $2 million. An email exchange between the Respondent and his assistant reveals the Respondent's state of mind about this information. In response to his assistant's query about whether the lien amount had been confirmed, the Respondent affirmed that it had, and said:

> It's supposedly $2M.
>
> These guys are tots legit.

[97] Then, when the assistant quipped that she wondered how it could have cost only $200,000 to build such a nice house, the Respondent retorted: "Yeah because all contractors do $2M in work without getting paid at all …"

[98] The Respondent proceeded to draft a Notice of Civil Claim and emailed it to the Solicitor for review. On the Solicitor's instructions, the Respondent filed the claim

and a certificate of pending litigation in April 2016. The claim was settled for full value in October 2017. In November 2017, the Respondent received $2 million in trust. He released the certificate of pending litigation. The Respondent then disbursed the trust funds, save for a modest amount his firm continued to hold as a retainer to wrap up his work in connection with the Condominium Action. The firm's outstanding accounts were paid. Nearly $1.98 million was disbursed to Company 2.

2018: The solicitor-client relationship ends

[99] In early February 2018, the Respondent received an email from a newspaper reporter, who asked the Respondent to forward the reporter's email to ZZ and YZ and to another individual, whose name also began with Z, if the Respondent represented the other individual.

[100] The theme of the email was that the reporter's newspaper was preparing to publish a story about how suspected drug money was being laundered through private loans and mortgages against Vancouver-area realty. The reporter advised that she had documented a total of approximately $20 million worth of mortgages, loans and builder's liens issued by the Zs, individually or through numbered companies, since 2014. The reporter advised that the newspaper would be reporting that, collectively, the Zs, or the companies, had laid a dozen claims against Vancouver-area properties over the years. The newspaper would report that the builder's liens were particularly dubious because they were for non-existent construction or renovations, and that the Zs filed the liens to collect on other debts owed by the property owners.

[101] The reporter also said that the Zs had been found with more than $600,000 in cash, which was seized by the Vancouver Police in 2016; the police had the Zs under surveillance for suspected drug dealing. The reporter also said that the newspaper would be reporting the cash was forfeited to the province as proceeds of crime because it contained traces of fentanyl and other drugs.

[102] The reporter's email ended with the statement that the newspaper wanted to give the Zs every opportunity to comment on the allegations, but as soon as possible. The reporter gave her telephone number in the email and invited the Zs to contact her before a deadline eight days later.

[103] The Respondent sent the reporter's email to ZZ who instructed that the reporter should be ignored.

[104] In mid-February 2018, the newspaper published the article. The Respondent read it on or about the same day it was published. A copy of the article, taken from the newspaper's website, was tendered into evidence at the hearing of the Citation, for the purpose of establishing what the article reported. The Panel received the article into evidence on that basis, and not for the truth of the allegations it made against ZZ, YZ and others.

[105] Generally speaking, the article reported that ZZ, YZ and others had acted as private lenders to wealthy Chinese newcomers or tourists who had bought property in Canada and wished to use it to borrow large amounts of money for gambling or other extravagant purposes. The article reported that the lenders charged high rates of interest and secured their loans against their clients' realty, to ensure a means of recovery, if the properties went into foreclosure. The article theorized that this unregulated, private lending could be inflating sale prices in the Vancouver area, as borrowers sought to pay the exorbitant interest rates charged by the lenders. It also reported that it was suspected that the proceeds of some of the private loans were being used by Canadian-based drug-trafficking rings to buy fentanyl in China for sale in Canada.

[106] ZZ and YZ were referred to by name in the article. The article reported that ZZ and YZ had "posed as builders, claiming they did so-called 'construction' and 'renovations', none of which were done, let alone by them." The article cited, as an example, the Vancouver House, which ZZ and YZ had claimed on the builder's lien they had built for $2 million. The article reported, "In fact, it had been built three years earlier by a registered builder."

[107] At the hearing of the Citation, the Respondent described his reaction to the reporter's email and the newspaper article as one of "shock"; he did not want to act for the clients anymore and wanted to "fire" them. The Respondent testified that the communication from the reporter and the published newspaper article also caused him to lose "faith" that there had been a construction project at the Condominium. Nonetheless, the Respondent waited to terminate the retainer because ZZ was abroad and the Respondent wanted to ensure that the Notice of Intention to Withdraw in the foreclosure proceedings concerning the Condominium – which were then still unresolved – was delivered by personal service.

[108] On June 18, 2018, the Respondent asked his assistant to arrange a meeting with ZZ and YZ.

[109] In early August 2018, the Respondent met with ZZ and ended the retainer.

Law Society investigation

[110] On June 18, 2018, the Law Society notified the Respondent that it was "investigating concerns" connected to proceedings in which the Respondent was acting, or had acted, for ZZ, YZ, Company 1 and Company 2. The Law Society confirmed that the investigation was not prompted by a complaint from the clients. The Law Society requested the Respondent's client files and all records and information in his possession relating to client identification and verification obligations. The Respondent provided file materials to the Law Society on June 28, 2018. The "tots legit" email string referred to above at paragraph 96 was not among the documents produced.

[111] The Respondent admitted in his evidence to the Panel that, in June 2018, his assistant had asked him about whether the "tots legit" email string should be included in the materials to be delivered to the Law Society. The Respondent decided it should not be included. The Respondent testified that, in June 2018, it was not clear to him whether the email exchange was properly part of the client files; he tended to view the emails as "us joking around and making a snide comment."

[112] On May 30, 2019, the Law Society investigator requested additional documents from the Respondent. The Respondent provided the materials he had on June 5, 2019. The "tots legit" email string was produced at that time.

[113] In August 2019, the Law Society investigator requested production of an email exchange from December 5, 2016 that was noted in some of the documents produced but that had not been produced. Counsel for the Respondent produced it to the Law Society investigator the same day it was requested.

[114] Then, on September 11, 2019, the Law Society investigator asked the Respondent to explain why documents produced on June 5 and August 7, 2019 had not been included in the Respondent's original production to the Law Society on June 28, 2018, and why paper copies of the documents allegedly signed by DT had not been produced.

[115] The Respondent answered on September 27, 2019. He set out the method his firm had used in June 2018 to search the firm's files related to the Z matters. He explained the steps he had taken to respond to the Law Society's request of May 30, 2019. The Respondent noted that original documents not used in the litigation had been scanned but were not retained by his firm.

[116] In November 2019, the Law Society investigator made yet another request for documents. The request listed emails referred to in documents that had been produced by the Respondent but were missing from the Respondent's file.

[117] One week later, the Respondent located and supplied copies of some 160 previously undisclosed emails. In covering correspondence, the Respondent explained that, until November 2019, he had been under the impression that the emails had been included in the documents disclosed to the Law Society in June 2018; he had only just come to realize that his impression was mistaken. The Respondent apologized for the error.

[118] At the hearing of the Citation, the Respondent provided further details as to why the 160 emails had not been produced to the Law Society before November 2019. He explained that a folder of Ms. Chan's emails in connection with the Z matters was not produced by mistake; the Respondent had thought it was included in the original production when, in fact, it was not. The Respondent also explained that some other emails were missed in the production because the firm's keyword searches had failed to capture all relevant emails. Finally, the Respondent explained that, until November 2019, he had been labouring under the erroneous impression that all of his emails relating to the Z matters had been copied to his assistant (and caught through a search of her emails) when, in fact, not all of his emails had been copied to his assistant. When the Respondent undertook a fresh search of emails relating to the Z matters in November 2019, he located the missing materials.

[119] The Respondent also gave evidence that he attempted to provide full cooperation to the Law Society throughout the investigation and that he did not intend to frustrate or wilfully fail to comply with the Law Society's requests.

ISSUES

[120] We have elected to address some paragraphs of the Citation together, as some of the allegations are closely related.

[121] Additionally, the Law Society did not address all aspects of each paragraph of the Citation in their submissions. The issues the Law Society addressed were as follows:

(a) In respect of paragraphs 1 and 2: between December 19, 2016 and January 4, 2017, and between March 3 and March 14, 2017, did the Respondent, in proceedings in the Action, fail to act honourably and

with integrity, or did he act contrary to his obligations to the court, or both, and therefore commit professional misconduct by:

(i) misleading the court by stating that the defendants appeared to have left the country or disappeared, when the Respondent knew that one of his clients may have known the whereabouts of, could contact or had the means to contact, DT and, through a third party, had purportedly obtained DT's signature on documents in or around November 2016;

(ii) misleading the court by failing to disclose material information, i.e., that one of the Respondent's clients may have known the whereabouts of, could contact or had the means to contact, DT and, through a third party, had purportedly obtained DT's signature on documents in or around November 2016; and

(iii) filing and relying on affidavit evidence that the Respondent knew or ought to have known was false or misleading in respect of the renovation contract document between Z & Co. and DT?

(b) In respect of paragraphs 3 and 4: did the Respondent commit professional misconduct by failing to comply with a direction from Justice Walker or by failing to honour an undertaking or commitment made to Justice Walker to serve the Order on the defendants in the Action?

(c) In respect of paragraph 5: in or between August 2015 and July 2018, did the Respondent fail to make reasonable efforts to obtain the client identification information required by the Rules and so commit professional misconduct? Alternatively, did he breach the Rules?

(d) In respect of paragraph 6: between approximately August 2015 and July 2018, did the Respondent fail to make reasonable inquiries about ZZ, YZ, Company 1 or Company 2, or the subject matter and objectives of his retainers? If so, do the Respondent's failures amount to professional misconduct?

(e) In respect of paragraphs 7 and 8: between approximately June 2018 and November 2019, did the Respondent fail to cooperate fully in a Law Society investigation by:

(i) failing to comply with a requirement dated June 18, 2018 for the Respondent to produce his complete client files by the time and date set by the Executive Director; and

(ii) providing incorrect, incomplete or misleading information in letters dated June 28, 2018 and September 27, 2019 about the records that had been compiled for or produced to the Law Society?

If so, did the Respondent commit professional misconduct or breach the Act or the Rules?

ANALYSIS

Onus and standard of proof

[122] The Law Society bears the onus of proving each allegation in the Citation on the balance of probabilities: *Foo v. Law Society of British Columbia*, 2017 BCCA 151 at para. 63. "Balance of probabilities" means more likely than not: *F.H. v. McDougall*, 2008 SCC 53 at para. 44. For the Law Society to meet its burden of proof, there must be clear, convincing and cogent evidence in support of the allegations: *McDougall* at para. 39.

The test for professional misconduct

[123] Professional misconduct is a marked departure from the conduct that the Law Society expects of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171.

[124] In *Law Society of BC v. Edwards*, 2020 LSBC 21 at paras. 44 to 46 ("*Edwards* facts and determination"*)*, the hearing panel elaborated on the "marked departure" test:

> In *Martin*, the panel observed that a finding of professional misconduct did not require behaviour that was disgraceful or dishonourable. It concluded:
>
> > The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

In *Re: Lawyer 12*, 2011 LSBC 11, a hearing panel summarized previous applications of the *Martin* test as follows:

> In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

More recently, in *Law Society of BC v. Kim*, 2019 LSBC 43, a hearing panel emphasized that the test for professional misconduct is not subjective:

> The *Martin* test is not a subjective test. A panel must consider the appropriate standard of conduct expected of a lawyer, and then determine if the lawyer falls markedly below that standard. In determining the appropriate standard, a panel must bear in mind the requirements of the *Act*, the Rules and the *Code*, and then consider the duties and obligations that a lawyer owes to a client, to the court, to other lawyers and to the public in the administration of justice. Each case will turn on its particular facts.

[125] We accept the correctness of the "marked departure" test stated in *Edwards* facts and determination. We will have more to say about the application of the test for professional misconduct, and particularly what it means for the test to not be "subjective", in the context of some of the paragraphs of the Citation.

The test for a breach of the *Act* or the Rules

[126] *Law Society of BC v. Lyons*, 2008 LSBC 09 at paras. 32 and 35 discussed the distinction between professional misconduct and a breach of the *Act* or the Rules:

> A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
>
> …

> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

[127] We accept this as a helpful statement of the criteria to make out a breach of the Rules, within the meaning of s. 38(4)(b)(iii) of the *Act*, except that we note that later cases have clarified that the absence of loss to a client and the absence of dishonesty in practice are not *sine qua non* of breaches of the Rules. See, *e.g.*, *Law Society of BC v. Guo*, 2021 LSBC 20 at para. 54.

Paragraphs 1 and 2 of the Citation

The allegations

[128] Paragraphs 1 and 2 of the Citation contain parallel allegations with respect to the proceedings in the Action between December 19, 2016 and January 4, 2017, and between and March 3 and 14, 2017. For convenience, we will summarize the allegations.

[129] The allegation at paragraph 1 is that the Respondent committed professional misconduct between December 19, 2016 – the date the Respondent filed the Notice of Application seeking orders to amend the Further Amended Notice of Civil Claim and to serve the amended pleading on the defendants by alternative means of service – and January 4, 2017 – when the Respondent appeared in court to speak to the application. It is alleged by the Law Society that the Respondent failed to act honourably and with integrity, or acted contrary to his obligations to the court, or both, by doing one or more of:

(a) misleading the court by stating that the defendants appeared to have left the country or disappeared, when the Respondent knew that one of the clients may have known the whereabouts of, had contacted, or had the means of contacting, DT and had purportedly obtained DT's signature on documents in or about November 2016;

(b) misleading the court by failing to disclose material information concerning the whereabouts of, contact with, or means of contacting DT, including evidence that DT had purportedly signed documents in relation to the proceeding in or about November 2016; and

(c) filing or relying upon Ms. Chan's affidavit when the Respondent knew or ought to have known that the affidavit was false or misleading in relation to a purported contract document between Z & Co. and DT.

[130] Paragraph 2 alleges that between March 3 and March 14, 2017 – *i.e.*, in connection with the application to assess damages in the Action – the Respondent engaged in professional misconduct by:

(a) misleading the Court by making statements to the effect that DT had not been, or could not be, located when the Respondent knew that one of the clients may have known the whereabouts of, had contacted, or had the means of contacting, DT and had purportedly obtained DT's signature on documents in or around November 2016;

(b) misleading the court by failing to disclose material information concerning the whereabouts of, contact with, or means of contacting DT, including evidence that DT had purportedly signed documents in relation to the proceeding in or about November 2016; and

(c) offering, presenting or relying upon the affidavit of YZ when the Respondent knew or ought to have known that the affidavit was false or misleading in relation to a purported contract document between Z & Co. and DT.

[131] We wish to highlight that the allegations in paragraphs 1 and 2 of the Citation are partly disjunctive. The Respondent is said, by the conduct alleged in the subparagraphs, to have failed to act honourably and with integrity or to have acted contrary to his obligations to the court, *or both*.

[132] The parties' submissions did not address the disjunctive nature of the allegations in paragraphs 1 and 2 of the Citation. The Law Society focused on whether the Respondent's conduct was in any respect misconduct under the "marked departure" test. The Respondent's submissions focused only on the allegations that the Respondent failed to act honourably and with integrity. For the reasons elaborated below, we consider the disjunctive nature of the allegations in paragraphs 1 and 2 to be to be an important feature of the Citation.

Overview of the parties' submissions

[133] The Law Society, relying on *Law Society of BC v. Nejat*, 2014 LSBC 51 and *Law Society of BC v. Albas*, 2016 LSBC 18, submits that counsel's duty of candour to the court required the Respondent to disclose all material facts on the issue before

the court, and that the Respondent failed to do this in appearances on January 4 and March 14, 2017. The Law Society says that on an objective test, the Respondent's conduct qualifies as professional misconduct and it is immaterial whether he intended to mislead the court.

[134] The Respondent argues that it is "startling" for the Law Society to argue that he is guilty of misconduct irrespective of his motivations. Additionally, he asserts that he did not at any time think he was misleading the court. The Respondent also submits that he was not under a duty to disclose to the court "facts which he did not believe to be true and which if true were not material" to DT's defence. Instead, his professional obligation was to *not* tender evidence that the Respondent believed to be unreliable. Alternatively, he submits that it is not professional misconduct for a lawyer to assess the evidence and determine that certain evidence is untrustworthy and should not be laid before the court.

Paragraphs 1(a) and (b) and 2(a) and (b) of the Citation

[135] Turning to the allegations in the first two subparagraphs of each of paragraphs 1 and 2, specifically, the Law Society says that, after initially equivocating about whether to obtain evidence from the person who was said to have witnessed DT sign two documents in late November 2016, the Respondent decided not to do so. He then also deliberately decided not to disclose to the court what he knew about the possible location of DT and the documents purportedly signed by DT because he considered the information to be unreliable.

[136] The Law Society submits that it is difficult to reconcile the Respondent's stated lack of faith in the documents DT is said to have signed in late November 2016 with his willingness to tender the loan agreement and renovation contract in evidence, given that these documents were purportedly signed by DT and witnessed by the same person said to have witnessed DT's signature in November 2016. The Law Society says that the Respondent's evidence that he had not turned his mind to the fact that the same person witnessed all of the documents does not withstand scrutiny. The Law Society also says it is telling that the Respondent never expressed to Ms. Chan a belief that DT's purported signatures in November 2016 may have been forgeries.

[137] The Respondent argues that his submissions to the court in January and March 2017 were not conduct that was dishonourable or lacking in integrity. Rather, the Respondent had genuine doubts as to the contact with DT and the reliability of the documents purportedly signed by him. The Respondent says he acted on his understanding and engaged in principled advocacy. He argues, "Right or wrong,

this is what one would expect an honourable lawyer to do." The Respondent also points out that his advice to the court that HX, in particular, had apparently left Canada was accurate, as it is supported by evidence from the foreclosure proceedings in or around May 2017.

[138] The Respondent takes issue with the Law Society's argument highlighting that he did not tell Ms. Chan that he thought DT's signatures on the documents purportedly signed in November 2016 may have been forged. The Respondent notes that this issue was not raised in cross-examination. He argues that the Law Society's argument on facts not canvassed in cross-examination offends the rule in *Browne v. Dunn* (1893), 6 R. 67 (HL) that if a party intends to impeach a witness on a point of fact, that party is bound to first put the subject of the intended impeachment to the witness so that the witness has an opportunity to explain himself.

[139] We find it unnecessary to address this aspect of the Respondent's argument because we do not ascribe any particular significance to what the Respondent did not tell Ms. Chan.

[140] The Respondent also urged us to find that he genuinely failed to appreciate in late 2016 and early 2017 that the same person had apparently witnessed DT's signature on each of the renovation contract, the loan agreement, the debt acknowledgment and the consent order. We accept that the Respondent did not "connect the dots" between the documents. The totality of the evidence makes it clear that the Respondent was not particularly attentive to details while representing ZZ, YZ, Company 1 and Company 2.

Paragraphs 1(c) and 2(c) of the Citation

[141] The Law Society submits that the evidence tendered by the Respondent as to the renovation contract was clearly false or misleading. The Law Society says that the affidavits of Ms. Chan and YZ "simply presented the Amalgamated Renovation Contract as if it were a true copy of an authentic, original, contemporaneous document," although it was not. The Law Society argues that the Respondent was wrong to rely in court on a document that was "effectively created by his own office." The Law Society relies on *Law Society of BC v. Milne*, 2004 LSBC 19 at para. 29:

> … it must be made very clear to the members of the profession that a document cannot be altered without authority and that the integrity of a signed document is fundamental to our practice and to the preservation of the rule of law in our society.

[142] We would observe that, in *Milne*, the respondent altered a document that had been signed by a representative of the Crown and then caused the altered document to be registered in the Land Title Office. The hearing panel found at para. 29 that "tampering with a document without appropriate authorization is in this case, professional misconduct." This is a markedly different situation from the facts at issue in paragraphs 1(c) and 2(c) of the Citation.

[143] The Law Society says that the Respondent was wrong to tender the renovation contract into evidence without qualification and that, even if the Respondent honestly believed that the amalgamated contract represented the parties' agreement, his duty of candour to the court required him to disclose much more about the creation and authenticity of the document.

[144] The Respondent answers the Law Society's argument by submitting that he takes the Law Society's case with respect to paragraphs 1(c) and 2(c) of the Citation to be that the renovation contract was false or at least so suspicious that the Respondent ought not to have tendered it in evidence. Respectfully, we do not consider that to be a fair reading of the Law Society's argument. We understand the Law Society's argument to be that the Respondent failed in his professional obligations by tendering the amalgamated renovation contract in evidence to the court without also leading evidence as to the circumstances of its creation.

[145] The Respondent says that he and Ms. Chan both thought that the renovation contract was the basis for a valid lien claim. The Respondent also argues that, as counsel, he had an obligation to put forward the sworn evidence that he understood to be the evidence in support of the claim his clients asserted.

[146] The Respondent urges the Panel to observe that he was obliged to rely on the Solicitor and Ms. Chan to translate for the clients who were, additionally, unsophisticated parties. The Respondent points to comments he made to the court on March 14, 2017 about his clients. We will discuss those comments below.

Applicable professional standards

[147] A lawyer's duties to the court are discussed in several provisions of the *Code*. The Introduction to the *Code* provides:

> Some issues are dealt with in more than one place in the Code, and the Code itself is not exhaustive of lawyers' professional conduct obligations. In determining lawyers' professional conduct obligations, the Code must be consulted in its entirety and lawyers should be guided in their conduct equally by the language in the rules, commentary and appendices.

(See also: *Edwards* facts and determination at para. 57.)

[148] In our view, the following paragraphs of the *Code* are the most pertinent to the allegations articulated in paragraphs 1 and 2 of the Citation. We acknowledge that the parties did not highlight all of these provisions in their arguments. We consider it appropriate to do so, since lawyers are taken to be bound by the network of obligations established by the *Code*.

[149] Rule 2.1-2 of the *Code* provides, in relevant part:

> (a) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.
>
> …
>
> (c) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law …

[150] Rule 2.2-1 of the *Code* provides:

> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

[151] The Commentary to rule 2.2-1 provides:

> [1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.
>
> [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
>
> [3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the

> integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in a lawyer, the Society may be justified in taking disciplinary action. …

[152] Rule 5.1-1 of the *Code* provides:

> When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

[153] The Commentary to rule 5.1-1 of the *Code* includes the following:

> [6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

[154] These provisions of the *Code* show that the duties to act honourably and with integrity, and the duty of candour, are complementary but distinct.

No failure to act honourably and with integrity

[155] In our view, the evidence does not show on a balance of probabilities that the Respondent failed to act honourably or with integrity in respect of the matters alleged in paragraphs 1 and 2 of the Citation. Charges of dishonourable conduct or a lack of integrity in the course of practice tend to carry a taint of dishonesty, deception or immorality. Such charges are allegations that a lawyer has acted for an improper purpose or with a lack of rectitude. As such, allegations of dishonourable conduct and a lack of integrity in the course of practice necessarily comment on the lawyer's state of mind in respect of impugned conduct: see, *e.g.*, *Law Society of BC v. McLean*, 2015 LSBC 39. In this case, the evidence does not show that the Respondent was acting immorally or was motivated by an improper purpose.

[156] In respect of paragraphs 1(a) and (b) and 2(a) and (b) of the Citation, the Respondent testified that he did not tell the court about the purported meeting with DT in November 2016, or the documents purportedly signed by DT, because he did not believe that the meeting with DT had taken place and he had concluded by December 2016 that the documents were not reliable; indeed, he thought that DT's

signature may have been forged in November 2016. The Respondent's evidence on direct examination, which was not weakened by cross-examination, was as follows:

> A: … I was concerned that, among other things, that if I referred to this information and I didn't have faith in it that's doing the opposite of what I should be doing.
>
> Q: When you say the opposite what do you mean?
>
> A: In terms of the duty of candour I'm presenting evidence that I didn't have faith in. I wasn't clear that would be appropriate, and I made the judgment call that I shouldn't refer to that evidence.

[157] We accept the Respondent's evidence as to his state of mind.

[158] In respect of subparagraph (c) of each paragraph, we likewise conclude that dishonourable conduct or lack of integrity has not been proved on a balance of probabilities. Rather, the evidence suggests that the Respondent allowed himself to be convinced that the synthesized renovation contract represented the "true" agreement governing the renovation of the Condominium. The following evidence leads us to this conclusion:

(a) The Respondent took a generous view of problematic aspects of the contract "that didn't completely make sense" to him because of the clients' limited facility in English;

(b) The Respondent viewed ZZ and YZ as "very unsophisticated builders" who did not "have an understanding of the legal end of how you operate a construction business." The Respondent testified that, in his experience, record-keeping practices in the construction industry are frequently poor. As such, receiving a "corrected" first page for the renovation contract from ZZ did not throw up a red flag; and

(c) Owing to the combination of the first two factors, the Respondent accepted the clients' advice that the first page of the original version of the renovation contract was "just a mistake." He therefore accepted their instructions to substitute the new first page for the original first page of the contract because he "thought it was a slip sheet type situation" and understood the "corrected document" to "represent the contract."

[159] On the strength of this evidence, we do not accept that the Respondent knowingly presented false evidence to the court as alleged at paragraphs 1(c) and 2(c) of the Citation.

The Respondent failed to fulfil his duty of candour to the court, and professionally misconducted himself, in respect of all allegations except paragraph 1(c)

[160] Although we are not persuaded that the Respondent's conduct was dishonourable or lacking in integrity, we do find that the Respondent failed to fulfil his obligations of candour to the court in January and March 2017. He culpably misled the court as alleged, with one exception.

Applicable principles

[161] The supporting Commentary to rule 5.1-1, set out above, states in the plainest terms the lawyer's basic obligations to the court in an *ex parte* application: the lawyer "must take particular care to be *accurate, candid and comprehensive* in presenting the client's case so as to ensure that the tribunal is not misled." [emphasis added]

[162] The lawyer's duty of candour to the court was discussed in *Nejat*. In that case, the panel considered a proposed conditional admission of professional misconduct by the respondent. The respondent was cited, under the former *Professional Conduct Handbook*, for failing to advise the court, in an appearance in June 2011, that he had ceased to hold funds in trust on behalf of his client, when the court ordered funds held in trust be frozen pending a final determination of the issue between the parties in a family law proceeding. The respondent was also cited for failing to subsequently correct the record or continuing to leave the impression that he held the funds in trust on other occasions. The hearing panel commented at paras. 37 and 40:

> As officers of the court, lawyers have an overriding duty to ensure that they provide accurate information to the court, opposing counsel and self-represented litigants. When lawyers fail in this duty, the integrity of the profession and the administration of justice are compromised. It is no excuse that a lack of candour may inure to the client's benefit. [A factor not in play on the facts of the case against the Respondent.] A legal system in which the courts and other actors cannot trust a lawyer to be accurate in his or her representations cannot hope to achieve justice or maintain the respect of the public.

> …
>
> The Respondent's admission that his *failure to disclose material information* as detailed in the citation constituted professional misconduct is appropriate. *While he did not intend to mislead the court* or opposing counsel, *his failure to disclose constitutes gross culpable neglect*.
>
> [emphasis added]

[163] The lawyer's duty of candour to the court was also considered in *Albas*, in respect of a citation that was determined in the absence of a former lawyer, owing to his non-appearance at the hearing. One of the allegations against the respondent was that he had failed to disclose material facts to the court in a foreclosure proceeding in which he presented an offer to purchase the foreclosed property, a property in which the respondent also had an interest through a numbered company. The undisclosed facts were that the respondent had not been able to speak with the representative of the company that had tendered the offer, despite trying to do so, but that he had concerns about the viability of the offer. The court approved the offer to purchase, over an offer for a lesser amount. Later the same day, the respondent reviewed a company search for the offeror and found that the company had been dissolved more than two years earlier. The respondent did not disclose this new information to the court or to the other parties.

[164] The hearing panel in *Albas* said the following at para. 103:

> A lawyer's duty of candour and integrity includes the obligation to disclose *all material facts* in an application before the court. The failure to do so has the potential to mislead the court and other interested parties.
>
> [emphasis added]

[165] The hearing panel found that the respondent had an obligation to tell the court that he had not been able to contact the buyer's representative, despite attempts to do so, and that he had concerns about the veracity of the offer put before the court. The panel found that had the information been disclosed, another offer may have been accepted over the offer the respondent presented. The panel held that the respondent's failure to disclose the information caused the court to be misled about the strength of the offer, relative to others. His omission was professional misconduct: para. 111.

[166] We find these cases to be of assistance in assessing the Respondent's conduct. Although these cases are factually distinct from the one before us, the principles

they articulate transcend factual specificities. The cases stand for the principle that the duty of candour requires a lawyer to disclose to the court all evidence that is relevant to the material facts so that the court is not left to make a decision on incomplete information.

[167] The Respondent did not appropriately discharge his duty of candour in the applications heard in January and March 2017. He was, instead, selective in what he disclosed to the court. With respect to information regarding DT's whereabouts, the Respondent deliberately chose to shield the court from information that the Respondent thought was dubious, and instead positively asserted that it appeared that DT had left the country. That is, because the Respondent seriously doubted that DT had met with an associate of the Respondent's clients in Richmond in late November 2016 (and signed documents at that meeting), the Respondent did not disclose to the court information about DT's possible presence in British Columbia. In both court applications, however, the question of whether DT was in British Columbia was a material fact.

[168] In the application heard on January 4, 2017, the Respondent sought an order to serve amended pleadings by alternative means. The question of whether DT was within the jurisdiction and could be contacted in person was obviously material to this aspect of the relief sought.

[169] Whether the plaintiffs had a means of contacting one of the defendants was also material to the question of whether the application heard on March 14, 2017 should have proceeded as a without-notice application *at all*. It requires little imagination to foresee that the court may have requested submissions on whether to proceed on a without-notice application on March 14, 2017, if Justice Walker had been advised of the alleged contact with DT in November 2016.

[170] In addition, the location and accessibility of one of the defendants was material to the exchange between the court and counsel on March 14, 2017 regarding the method by which the Order was to be served.

[171] The Respondent's omission was misleading to the court because it left the court with the impression that there was no question as to whether DT might be located in British Columbia; in both January and March 2017, the Respondent said that both DT and HX "appear to have left the country." That the court accepted this evidence may be inferred from the terms for service imposed by the court in January and March 2017. In both instances, the court ordered alternative service on *both* defendants.

[172] As noted above, the Respondent argues that professional misconduct is not made out in respect of paragraphs 1(a) and (b) and 2(a) and (b) of the Citation because the Respondent made *bona fide* judgments about the evidence that was, and was not, appropriate to place before the court. In our view, this argument cannot be sustained, for two reasons.

[173] First, as a matter of law, a finding of professional misconduct is not precluded simply because the respondent has acted in good faith: *Law Society of BC v. Guo*, 2021 LSBC 20 at para. 52. *Nejat* also makes it clear that lack of intention to mislead is not a dispositive factor in respect of an allegation of professional misconduct by misleading the court; see also the recent decision in *Law Society of BC v Lee*, 2021 LSBC 31 at para. 88. The question is whether, in all the circumstances, the Respondent's conduct was a marked departure from the standards expected of lawyers in British Columbia.

[174] Second, on an *ex parte* application, it is not open to counsel to present only the facts that counsel believes to be plausible; counsel must disclose *all* material facts: rule 5.1-1 of the *Code* and accompanying commentary; *Nejat*; *Albas*. Similarly, it is not counsel's function to preemptively decide how the evidence should be weighed or the facts construed; those are matters within the province of the court. By failing to draw to the court's attention all relevant facts and evidence, the Respondent's conduct had the effect of usurping to himself the court's decision-making function. The fact that he did so indicates a basic misunderstanding of the institutional roles of court and counsel in the administration of justice. In the Panel's opinion, this constitutes a marked departure from the conduct expected of a lawyer.

[175]The allegations at paragraphs 1(a) and (b) and 2(a) and (b) are proved.

[176] With respect to the allegations at paragraphs 1(c) and 2(c) of the Citation, we are of the view that the Respondent ought to have known that the evidence in Ms. Chan's affidavit and in the affidavit of YZ concerning the contract document between Z & Co. and DT was misleading. Both affidavits present the amalgamated renovation contract document as the "true copy of the Renovation Contract" entered into by Z & Co. and the defendant DT, and "dated" / "bearing date" January 27, 2015. Neither affidavit commented on the history of the dealings between the parties. Most critically, neither affidavit explained that the contract in relation to which relief was claimed had started out as an oral agreement that was later be reduced to writing and "pre-dated" – actually, backdated – to January 27, 2015. The natural inference upon seeing a written contract "dated" or "bearing [the] date" January 27, 2015 would be that the written contract was entered into on January 27, 2015 by

the parties named in the contract; the Respondent admitted as much under cross-examination. In response to the suggestion that there was no way for the court to know from Ms. Chan's affidavit – which was, in the relevant respect, identical to YZ's later affidavit – that the renovation contract document exhibited to the affidavit had not been created until at least June 22, 2015, the Respondent said, "That's true."

[177] Understood in the most generous terms, the evidence suggests that in January, 2015, YZ and DT entered into an oral agreement, which YZ wanted to style as an agreement between Z & Co. and DT because he hoped to incorporate Z & Co. Then, some unknown number of months later (and certainly no earlier than June 22, 2015), some version of the agreement was reduced to writing. It was apparently first documented as an agreement between Company 1 and DT, then reformulated as an agreement between Z & Co. and DT — presumably when it became apparent to ZZ and YZ that Company 1, incorporated in June 2015, could not be party to an agreement entered into in January 2015.

[178] None of this evidence was put before the court. It should have been.

[179] By declining to canvass the admittedly convoluted evidence of the dealings between the parties but instead simply exhibiting the amalgamated renovation contract to Ms. Chan's and YZ's affidavits, the Respondent gave the court a partial and inaccurate impression of the plaintiffs' contentions as to the history of the dealings between the parties. This course of action is not consistent with the Respondent's duty to present accurate, candid and comprehensive evidence to the court on *ex parte* applications.

[180] The remaining question is whether the Respondent's departure from his duty of candour to the court, in the particular circumstances alleged in each of paragraphs 1(c) and 2(c) of the Citation, is sufficiently serious as to amount to misconduct.

[181] In assessing whether the Respondent committed professional misconduct, counsel for the Respondent encourages us to consider a number of factors.

[182] Counsel says, first, that we should note that the Respondent was obliged to rely on the Solicitor and Ms. Chan to translate for the clients. We do not find this to be a compelling consideration in the legal characterization of the Respondent's conduct. The Respondent admitted on cross-examination that when he met with the clients and the Solicitor, he had no difficulty getting answers to the questions he was posing to the clients. Additionally, the evidence was that Ms. Chan dealt only with ZZ, except for one telephone call with YZ. When Ms. Chan spoke with ZZ, they communicated in Cantonese, her native language and his preferred language.

When Ms. Chan did speak with YZ, she spoke to him in his preferred language, Mandarin, a language in which she has a working proficiency.

[183] Second, counsel encourages us to consider the evidence about the renovation contract document in connection with the Respondent's submissions to the court in March 2017. The Respondent submitted to Justice Walker:

> … these aren't the most sophisticated parties. …
>
> I don't really want to rely on this – this document I think is evidence of – of the underlying facts, but I – I don't think this document perfectly sets out exactly what happened, which is part of the reason why we've had to go through a number of amendments to the pleadings.

[184] These submissions to the court do not assist the Panel in determining whether the allegations at paragraph 2(c) of the Citation are made out, however, because the submissions concern the loan agreement of March 25, 2015, not the renovation contract.

[185] We do consider that it is relevant to the allegation in paragraph 1(c) of the Citation that the main matter at issue in January 2017 was the application to amend the pleadings. As counsel for the Respondent points out, as a matter of general practice amendments are liberally granted: see, *e.g.*, *Langret Investments S.A. v. McDonnell* (1996), 21 BCLR (3d) 145 (CA) at para. 34. It is difficult to see the materiality of the misleading description of the history of the renovation contract to the application to amend. It is also of no apparent relevance to the application for alternative service. Since the duty of candour in an *ex parte* application requires a lawyer to be accurate, candid and comprehensive on *material issues*, we do not find that the Respondent committed professional misconduct as alleged in paragraph 1(c) of the Citation.

[186] The situation is different in respect of the allegation at paragraph 2(c) of the Citation. The matters at issue in the application heard on March 14, 2017 included the assessment of damages and the Respondent's request for a declaration that ZZ and YZ were entitled to a builder's lien against the Condominium. In connection with these matters, the court was entitled to have full and candid information from the Respondent as to the evidence of the history of the renovation contract between the plaintiffs and DT. In our view, it was a marked departure from the standards expected of the Respondent to present the renovation contract in YZ's affidavit as the "true" contract, without also presenting the plaintiffs' other evidence as to the history of the plaintiffs' contractual dealings with DT.

[187] In summary, paragraphs 1(a) and (b) and all of paragraph 2 of the Citation are proved.

Paragraphs 3 and 4 of the Citation

The allegations

[188] Paragraphs 3 and 4 of the Citation allege that the Respondent committed professional misconduct, either by failing to comply with a "direction" from the court on March 14, 2017 to serve an order on the defendants in the Action or, alternatively, by failing to honour an "undertaking or commitment" to the court.

The parties' submissions

[189] The Law Society submits that the effect of the exchange between the court and the Respondent on March 14, 2017, as set out above at paragraph 84, was clear: the court expected the Respondent to serve the Order on the defendants and the Respondent, appearing as counsel on an *ex parte* application, committed to do so, knowing that he must. The Law Society says that the sequence of events in court is, in and of itself, sufficient to prove the allegations at paragraphs 3 or 4 of the Citation, as it must be considered a marked departure of the conduct expected of a lawyer for counsel to fail to follow through with a commitment made to the court. The Law Society accepts that the Respondent did not deliberately fail to effect service but submits, citing *Law Society of BC v. Hops*, [2000] LSDD No. 11 at para. 35 and *Law Society of BC v. Batchelor*, 2014 LSBC 11 at para. 20, that carelessness or inadvertence is not an excuse for the Respondent's failure serve the Order.

[190] The Respondent submits that a proper understanding of the quality of his error in failing to serve the Order requires the facts to be considered along with the seriousness and consequences of the breach. The Respondent points to the fact that he was not seeking to obtain any advantage in failing to serve the Order and says that no harm or advantage came of his error. The Respondent says, "If some latitude to err is not recognized the consequences is that every error, no matter how innocent or inconsequential by a lawyer in giving effect to a judge's direction would be professional misconduct."

[191] The Respondent distinguishes *Hops* and *Batchelor* on their facts; he notes that the former case involved a mishandling of trust funds and the latter involved an intentional misrepresentation by the lawyer that an affidavit had been properly sworn, when the lawyer knew that it had not. Additionally, the Respondent says

that *Hops* was decided before *Martin* and does not add to or clarify the test in *Martin*.

Discussion

[192] Neither party's submissions considered whether there are distinctions to be drawn between "directions", "undertakings" and "commitments", although the general thrust of the Law Society's submission was to suggest that, at least in this case, there is no material distinction between these words. We agree in part.

[193] The Panel considers that the court's comments to the Respondent on March 14, 2017 are fairly characterized as a "direction": the judge made it clear that he expected the Respondent to serve the Order in accordance with the alternative service orders previously made in the Action. The Respondent himself admitted in evidence that he understood that the court had given him a direction. He said in direct examination that after a communication from the Law Society in June 2019, he had "realized that I had failed to, to comply with that *direction from the Court.*"

[194] After hearing the court's direction, the Respondent committed to follow it. In our view, there is no real distinction between the Respondent's failure to comply with the court's "direction" and his failure to meet the "commitment" he gave in response.

[195] We would not characterize the interaction between court and counsel as amounting to an undertaking, however. An "undertaking" has special meaning in the professional regulation of lawyers. An undertaking is a very specific form of solemn promise given by a lawyer. It imposes an obligation on the lawyer to give the promise "the most urgent and diligent attention possible in all the circumstances": *Law Society of BC v. Heringa*, 2004 BCCA 97 at para. 10; see also rule 5.1-6 of the *Code*: "A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation." In our view, the interaction between the court and the Respondent on March 14, 2017 did not result in the Respondent giving an undertaking, in the sense in which the term is used in connection with the professional regulation of lawyers.

[196] Since we have concluded that the court gave the Respondent a "direction", we will address the Respondent's conduct in the context of paragraph 3 of the Citation.

[197] It is uncontroversial that the Respondent failed to comply with the court's direction to serve the Order. The only live issue is whether the Respondent's failure to do so amounts to professional misconduct. We conclude that it does.

[198] We agree with counsel for the Respondent that the quality of the Respondent's error must be assessed in context. As held in *Law Society of BC v. Harding*, 2014 LSBC 52 at para. 68, "Whether conduct 'has crossed the permissible bounds' must be assessed in a holistic way, taking into account all of the circumstances and the nature of the impugned conduct."

[199] Only by examining the Respondent's conduct in light of all relevant facts can the Panel determine whether the Respondent's error is of sufficient gravity to qualify as a marked departure from the standard of conduct expected of a lawyer in the circumstances at issue. What are the relevant facts in that regard? Three are important, in our view.

[200] First, it is a point of elementary legal procedure that counsel for the prevailing party in an *ex parte* application must serve the resulting order on an affected party, unless otherwise directed by the court. The reason for this is simple: it is a matter of fairness "to notify the defendant of his jeopardy": *Michalakis v. Nikolitsas*, 2002 BCSC 1708 at para. 8.

[201] Second, the Respondent was aware of his *obligation* to serve the *ex parte* order on the defendants. His comments to the court, set out at paragraph 79 above, demonstrate that he knew and understood the practice and its rationale. The Respondent's submission to the court would have been pointless, were he labouring under the view that service of the Order was not obligatory.

[202] Third, the Respondent was utterly inattentive to the court's direction to him. He did not put his mind to his service obligations after he left the courtroom on March 14, 2017. He did not address his service obligations after obtaining a further order on March 31, 2017 to correct naming errors in the original Order. Indeed, the evidence is that he did not think about service of the Order again until June 2019 when, forced to consider the matter while communicating with the Law Society, he finally realized that the Order had not been served. The Respondent's persistent and prolonged inattention to the court's direction is no mere slip of the mind. It is a pronounced failure by the Respondent to comply with a professional obligation, as directed by the court.

[203] We respectfully disagree with counsel for the Respondent as to the weight to be given to the facts that the Respondent did not by his omission seek or obtain an advantage. A lawyer's motive for inaction may be relevant to whether an omission is misconduct, but the lack of motive cannot be decisive: *Harding* at para. 79. The policy reason for this is simple. If inattention or carelessness is sufficient to excuse misconduct, then negligence would be a defence to almost any allegation of professional misconduct: *Hops*, at para. 35. But it is beyond dispute – and has

been, at least since *Martin*, if it were ever in doubt – that a lawyer's negligent behaviour may amount to misconduct.

[204] The Law Society has proved professional misconduct in respect of paragraph 3 of the Citation. It is unnecessary to address the alternative allegation in paragraph 4.

Paragraph 5 of the Citation

The allegation

[205] Paragraph 5 of the Citation alleges that, contrary to Rule 3-100(1)(a) and (b) of the Rules, between August 2015 and July 2018, the Respondent failed to make reasonable efforts to obtain or record client identification information for ZZ, YZ, Company 1 and Company 2. Paragraph 5 alleges that the conduct is professional misconduct, incompetent performance of duties or a breach of the *Act* or Rules. Incompetent performance of duties was not argued by the Law Society in the Hearing, however. Additionally, the Law Society did not pursue subparagraph (b) of Rule 3-100(1) in argument.

[206] Between August 2015 and July 2018, Rule 3-100(1)(a) and (b) provided as follows:

> A lawyer who is retained by a client to provide legal services must make reasonable efforts to obtain and, if obtained, record all of the following information that is applicable:
>
> (a) the client's full name, business address and business telephone number;
>
> (b) if the client is an individual, the client's home address, home telephone number and occupation;

The parties' submissions

[207] The Law Society submits that the Respondent was delinquent in his duty to obtain and record the following information, despite acting for the clients for nearly three years:

(a) The business telephone numbers for each of ZZ and YZ;

(b) The business telephone number for Company 1, which is an issue of particular concern because the letter from HX's lawyer given to the

Respondent at his initial meeting with ZZ and YZ should have put him on notice that the "registered" telephone number may have been incorrect;

(c) The business telephone number for Company 2;

(d) The home addresses for each of ZZ and YZ; and

(e) The positions of ZZ and YZ, if any, within Company 2.

[208] We observe that the last category of information is not information that a lawyer is obliged to request pursuant to Rule 3-100(1)(a) or (b). It is, instead, information that would fall under Rule 3-100(1)(c), which requires a lawyer, in respect of an organizational client, to obtain "the name, position and contact information for individuals who give instructions with respect to the matter for which the lawyer is retained." A default in respect of Rule 3-100(1)(c) is not alleged in paragraph 5 of the Citation, so we will not address the last of the Law Society's allegations of improper client identification, or the Respondent's response to them, in the context of paragraph 5 of the Citation.

[209] The Law Society argues that the Respondent's failure to fully comply with his client identification obligations should be understood as professional misconduct, "in part because further basic inquiries by Mr. May could very well have led him down a train of inquiry that would have led him to identify concerns about his clients' [*sic.*] long before receiving an email" from the newspaper reporter. The Law Society highlights that an important purpose of Rule 3-100 is "to ensure that the legal profession does not become an inadvertent participant in the improper processing of laundered money and that the fraud of identity theft is not aided and abetted by lawyers": *Law Society of BC v. Wilson*, 2019 LSBC 25 at para. 21. The Law Society goes on to say that incomplete client identification work by the Respondent "may very well have impeded his ability to properly assess the nature of his retainer" and that more complete client identification in respect of Company 1 and Company 2, in particular, "could very well have put Mr. May on a chain of inquiry in support of his obligation to make reasonable inquiries about what he was being asked to do."

[210] The Respondent says that if there is a breach of Rule 3-100, it is no more than that. He says it is not plausible to argue that if he had only recorded any of the "allegedly missing" information, he would have identified the concerns about his clients raised in the reporter's email. The Respondent says, moreover, that the submissions of the Law Society seek to colour "clerical omissions to record

particular client information with a sinister brush." The Respondent says that if the failings occurred, they were not causally connected to any harm or loss.

[211] With respect to the particular allegations of missing client information set out in the Law Society's submissions, the Respondent says:

(a) It is questionable whether a failure to specifically record business telephone numbers for clients breaches the Rules or is professional misconduct, if many people conduct business on their personal mobile phones, especially where, as here, the companies are closely held;

(b) The home addresses for ZZ and YZ were apparently disclosed in the incorporation records for Company 1, which the Respondent reviewed;

(c) It is admitted that copies of driver's licences were not obtained and that the Respondent did not confirm with the Solicitor whether he had taken copies; and

(d) In each matter in which the Respondent acted, he was introduced by the Solicitor "who had apparently acted for the [Zs] in many matters [and] who gave instructions on their behalf."

[212] In reply, the Law Society takes issue with several of the foregoing submissions attempting to explain the Respondent's actions and approach to client identification.

Discussion

[213] The evidence shows that the Respondent did not take steps to obtain business telephone numbers for any of the clients. This omission is perhaps most remarkable in respect of Company 1. HX's lawyer had highlighted in her letter to Company 1 and YZ that her office had been unable to contact YZ at the telephone number for Company 1 given on the builder's lien filed in July 2015 or at the telephone number associated with the address given in the company's incorporation records. That letter was provided to the Respondent on August 14, 2015.

[214] The evidence also shows that the Respondent did not obtain home addresses for ZZ or YZ. The Respondent may have assumed that addresses given on the incorporation documents for Company 1 were ZZ's and YZ's home addresses, but an assumption is not a "reasonable effort to obtain" the information, as stipulated by Rule 3-100(1)(b). The Respondent made no effort to confirm – either with the clients or with the Solicitor – the home addresses of ZZ and YZ.

[215] To this extent, the facts at issue in respect of paragraph 5 of the Citation are made out. The Panel rejects the Law Society's submission that taking reasonable steps to obtain the missing information may have put the Respondent on a train of inquiry to uncover concerns about his clients, however. That argument is speculative.

[216] The remaining issue is to characterize the Respondent's failure to fully comply with the obligations imposed by Rule 3-100(1)(a) and (b). The Law Society says that the Respondent committed professional misconduct. The Respondent says that if there was a breach of Rule 3-100(1)(a) and (b), "it was no more than that."

[217] In our view, the Respondent's failure to fully comply with Rule 3-100(1)(a) and (b) is a breach of the Rules. On the facts of the case, and especially given the involvement of the Solicitor in each of the three matters in relation to which the Respondent represented the clients, we would not find that the cited client identification failures represent a marked departure from what is expected of a lawyer in British Columbia. That said, we reject the submission that the Respondent's errors were merely "clerical omissions". Simply put, the Respondent did not pay sufficient attention to his obligations under Rule 3-100(1)(a) and (b). He was, instead, too casual in addressing his client identification obligations. That casual approach amounts to a "not insignificant" breach of the Rules.

Paragraph 6 of the Citation

The allegation

[218] The allegation arising from paragraph 6 of the Citation is that, between August 2015 and August 2018, the Respondent failed to make reasonable inquiries about ZZ, YZ, Company 1 and Company 2, or the subject matter and the objectives of the Respondent's retainer. The conduct alleged is said to constitute professional misconduct or incompetent performance. The latter allegation was not elaborated in submissions, however. The Law Society also did not pursue the allegation that the Respondent failed to make a record of inquiries made.

The parties' submissions

[219] Upon considering the Law Society's written submissions after the Hearing of the Citation, the Panel was uncertain as to the scope of the Law Society's intended submission in connection with paragraph 6 of the Citation. In particular, it was not clear to the Panel whether the Law Society alleged professional misconduct or incompetent performance in respect of events connected to the actions the Respondent filed for Company 2 in February and April 2016. We therefore issued

a memo requesting clarification from the Law Society and offering the parties the opportunity to make additional submissions specific to these aspects of the allegations, if they were being pursued. In response, the Law Society confirmed that it alleges professional misconduct in connection with the actions the Respondent filed for Company 2, clarified its original submissions on this point and offered additional submissions. The Respondent responded to the Law Society's additional submissions and the Law Society replied. We have considered the parties' original and supplementary submissions in reaching our decision on paragraph 6 of the Citation.

[220] The Law Society's central submission is that the lawyer's obligation to make inquiries is established by the *Code* and the jurisprudence (*Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para. 93; *Law Society of BC v. Elias*, [1993] LSDD No. 182; *Law Society of BC v. Rai*, 2011 LSBC 02; *Law Society of BC v. Gurney*, 2017 LSBC 15) and was triggered in this case by objectively suspicious circumstances. The Law Society says that the documents ZZ and YZ provided to the Respondent, and their instructions, "cried out" for caution and further inquiry on the Respondent's part but that he culpably failed to identify potential issues of illegality in relation to his retainers and, in particular, to the builder's lien that underpinned the Action. The Law Society says, "without question, based on the information at the time, it was not a legitimate builder's lien claim." The Law Society also submits that:

> The illegitimacy of the [clients'] … claims was readily and objectively there to be seen, had Mr. May applied even a minimal amount of critical thought and analysis to the information he received. Instead, Mr. May prosecuted at least one (and possibly three) fraudulent builder's lien claim, providing the … [clients] with a veil of legitimacy.

[221] The Law Society, citing *Law Society of BC v. Uzelac*, 2020 LSBC 58 and *Law Society of BC v. Hsu*, 2019 LSBC 29, notes that all lawyers have an obligation to be on guard against being used as tools of illegal activity. The Law Society also highlights the unique and powerful nature of the builder's lien: it is a statutory remedy that allows an unpaid builder or supplier of building materials to claim priority over other creditors, and to register a charge against title to real property to enforce the claim. The Law Society says that the Respondent's act of obtaining default judgment in the Action when "it [was] … not reasonable to conclude that any construction had actually taken place was an abuse of the *Builders Lien Act.*"

[222] The Law Society also submits that the facts show that "the lien" filed in respect of the Condominium contained a false statement, which the Respondent should have

detected immediately upon being advised that the $500,000 DT purportedly owed to the Respondent's clients consisted, at least in part, of a loan. The Law Society says that it is an offence under the *Builders Lien Act* to file, or to cause to be filed, a claim of lien containing a false statement. The Law Society's submissions on this point are somewhat unclear, however, as they do not distinguish between the lien filed by YZ in July 2015 and the lien filed by the Respondent on August 14, 2015. In any event, and as the Respondent points out, the offence provision at s. 45(1) of the *Builders Lien Act* provides that it is an offence to *knowingly* file or cause an agent to file a claim of lien containing a false statement. The loan came to light long after the liens in respect of the Condominium were filed on July 8 and August 14, 2015.

[223] In respect of the actions that the Respondent filed on behalf of Company 2 in 2016, the Law Society urges the Panel to appreciate the "connections between the [Zs] and both numbered companies, in terms of both the ownership of the companies as well as the fact that the three retainers each involved the prosecution of a builder's lien action." The Law Society submits that YZ, ZZ, Company 1 and Company 2 "were not four unrelated clients" but were related parties. As such, the Law Society urges us to consider "what was happening with each of these clients and the multiple actions." The Law Society says that, in any event, the Respondent failed to request or obtain any documentation to confirm the purported value of the construction claim for either the Richmond House or the Vancouver House.

[224] The Respondent strongly resists the Law Society's allegations against him. The Respondent says that what is important is whether dishonest dealings have been shown and whether he is guilty of a marked departure from the standard expected of lawyers in not having detected a dishonest scheme before he was contacted by the reporter in February 2018. The Respondent says that dishonesty has not been proved against him or any of the clients; illegality on the part of ZZ, YZ, Company 1 of Company 2 has not been proved; and that the Law Society has not demonstrated that the documentation received by the Respondent from the clients was "so suspicious that he departed in a marked way from what a lawyer is expected to do." The Respondent distinguishes the authorities relied on by the Law Society on their facts.

[225] The Respondent says that throughout his retainer in connection with the Action, he reviewed the documentation and instructions the clients provided and attempted to make sure that the claims he was advancing were supported by the evidence of his clients. He made inquiries of the clients through Ms. Chan and amended the pleadings to ensure that they reflected the information conveyed to him by ZZ and YZ. The Respondent says that the circumstances of his instructions and the clients'

claims were explicable as the result of unsophisticated and sloppy business practices on the part of the clients and that if "he missed some aspect of inconsistency in the documentation in support of the lien claim, this does not rise to professional misconduct." The facts known and reasonably known to the Respondent did not "reach the level of manifest suspicion."

[226] The Respondent points, once again, to the existence of the language barrier between his clients and him and highlights the involvement of the Solicitor in providing his instructions.

[227] With respect to the actions the Respondent filed for Company 2 in 2016, the Respondent says that the Law Society has not explained why the failures alleged against him amount to professional misconduct, taking all the circumstances into account. He says that, in respect of the Richmond House, he did nothing except to file an action on the instructions of one of the Zs and the Solicitor to preserve a lien. He notes that the lien was promptly paid out. In respect of the Vancouver House, the Respondent notes that he took instructions from the Solicitor to file the action, shortly before the limitation date tolled. He argues that lawyers should be able to safely act on instructions given by another solicitor. He says, moreover, that if lawyers are expected to investigate the full merits of their clients' claims before accepting instructions to file an action, "this will be a major change in litigation practice and a considerable financial and practical obstacle to the 'just, speedy and inexpensive determination' of proceedings on their merits'," as contemplated by the Supreme Court Civil Rules.

[228] Finally, the Respondent also addresses the "jocular passing comments" made in the "tots legit" email string between him and his assistant in April 2016. He refers to his evidence, in which he said that he was being "facetious" in making the comments but that he "didn't have any thought of criminal behaviour or illicit loans or any of these concepts that came up in 2018" and that he had not heard of builder's liens being used to launder money before being contacted by the newspaper reporter in February 2018.

Discussion

[229] The *Code* confirms that lawyers have a duty to understand their clients and their retainers and to give meaningful attention to the legal foundations of the clients' claims. As the Canons of Legal Ethics announce, the lawyer functions in several capacities at once:

> A lawyer is a minister of justice an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.

The lawyer's professional obligations flow from the multifaceted nature of the role of the lawyer in a free and democratic society.

[230] Rule 2.1-1(a) of the *Code*, which is cited in argument by the Law Society, confirms:

> A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

[231] Rule 2.1-3(a), also cited by the Law Society, provides in relevant part:

> A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client …

[232] We also note Rule 3.1-1 of the *Code*, which defines the "competent lawyer". This is a person who

> … has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:
>
> …
>
> (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
>
> …

[233] Rule 3.2-7 of the *Code*, cited by the Law Society, provides:

> A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

[234] The Law Society also relies on the first three paragraphs of the Commentary to Rule 3.2-7, so we reproduce them here as well:

> [1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
>
> [2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or

> money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.
>
> [3] Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, crime or fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.

[235] As to the application of these principles, some preliminary comments are in order.

[236] We wish to be clear that our analytic approach to paragraph 6 of the Citation is not premised on the assumption that the builder's liens at issue in the Action and connected to the Richmond House and the Vancouver House were fraudulent. They certainly may have been fraudulent; the evidence gives ample reason for suspicion. At the same time, it is possible that at least some aspects of the clients' claims may not have been fraudulent. The record does not contain sufficient admissible evidence for us to draw conclusions as to whether the clients were engaged in illegal activities or were prosecuting "legitimate" builder's lien claims.

[237] Equally, we have not assessed the Respondent's conduct and whether it evinces a marked departure from the standards expected of a lawyer in light of the newspaper report in February 2018. In our view, the Respondent's conduct must be assessed against what he knew or ought to have known at the times relevant to the alleged defaults. In this regard, we appreciate the Law Society's submissions as to the power of the builder's lien to leverage payment and the repugnance of its misuse, and the Respondent's submission that the issue of builder's lien scams only really began to register on the radar of the legal profession after the reporter's newspaper article was published in February 2018.

[238] Moreover, we observe that the jurisprudence on which the Law Society relies must be applied cautiously, as the cases cited by the Law Society predominantly concern misuses of lawyers' trust accounts. The case before us is distinguishable from the precedents in that the allegation against the Respondent in paragraph 6 of the

Citation is not that he permitted the misuse of his trust account but that he failed to make reasonable inquiries about his clients and the subject matter and objectives of his retainer.

[239] We also confirm that we do not accept the Respondent's submission that it is necessary for the Law Society to prove dishonesty on the part of the clients or the Respondent to prove the allegations at paragraph 6. A culpable failure to make reasonable inquiries may be established without proof of dishonesty. The essence of the allegation is not malfeasance but negligence.

[240] With those observations in mind, we turn to the allegations levelled against the Respondent in connection with paragraph 6. We are of the view that the Respondent culpably failed to fulfill his professional obligations to inquire of his clients when confronted with information and evidence that called out for further inquiries. Our finding is that the misconduct occurred in two different time periods and in two different aspects of his retainers.

Issues arising in November and December 2016

[241] The first aspect of the Respondent's misconduct relates to the information disclosed to the Respondent in the midst of his retainer in the Action. Between November 9 and December 13, 2016, the Respondent was presented with an evolving story about the history of the transactions between ZZ, YZ and DT. The information presented to the Respondent at that time not only shifted over the course of a few weeks but was also in material respects different from what the Respondent was told when he was retained in August 2015.

[242] The most dramatic aspect of the shifting facts was the re-characterization of the debt that DT was said to owe to ZZ, YZ or Company 1. From a $500,000 debt for a renovation, the story shifted to a US$200,000 loan, plus a debt for unpaid renovations, all of which was repackaged into a "marked up" debt of $500,000. Then, a renovation contract and invoice were produced to suggest that the debt associated with the renovation – a debt in relation to which a lien could be enforced – was $281,680. While the Respondent properly took instructions to amend his clients' claim, he nonetheless failed to meaningfully consider the changed facts. For example:

(a) The Respondent had been told by ZZ and YZ in August 2015 that their builder's lien claim in respect of the Condominium included a charge for $140,000 to $150,000 in "work and materials", excluding the "antique cabinets" then said to be worth $250,000 to $260,000. Both versions of the Company 1 invoices to DT, delivered to the Respondent

in November 2016, listed work and materials (exclusive of the "antique partition wall") of less than $35,000. The Respondent did not investigate the radical differences between the information he was given in August 2015 and November 2016, as to the value of the work and materials;

(b) As for the installation of the antique fixture in the renovation, the Respondent did not inquire as to how it was that "antique cabinets" that in August 2015 were supposedly worth $250,000 to $260,000 in late 2016 morphed into an "antique partition wall", which was purportedly purchased for $150,000 and then installed at a price that was 45 percent of its value, *i.e.*, $67,500;

(c) The Respondent was advised in August 2015 that new appliances were part of the renovation of the Condominium. There was no mention of appliances in any of the materials delivered by ZZ and YZ in late 2016. The Respondent did not follow up on this point; and

(d) The Respondent was advised in August 2015 that a $1,000 deposit had been paid in respect of the renovation of the Condominium. The renovation contract that ZZ delivered to the Respondent's firm on November 18, 2016 provided for a $2,000 deposit. On November 30, 2016, ZZ told Ms. Chan that the "corrected" Company 1 invoice to DT for the renovation of the Condominium was net of a $1,000 deposit. The Respondent did not investigate the shift in the facts as to the amount of the renovation deposit.

[243] The Respondent's failure to investigate the evolving facts is inconsistent with a lawyer's duty under rule 2.1(3)(a) of the *Code* to obtain sufficient knowledge of the relevant facts to properly advise the client. It is also inconsistent with the Respondent's professional responsibility to engage in competent lawyering, as defined by rule 3.1-1.

[244] The Respondent was complacent in late 2016 in his consideration of the documents and replacement documents delivered by the clients. He accepted what he was told and did not turn his mind to the significance of blatant inconsistencies in the evidence, such as the changed identity of the contractor in the renovation contract. His conduct in this regard constituted a marked departure from the standards expected of lawyers. The public, the courts and other members of the profession are entitled to expect a lawyer to bring to his practice a greater degree of discernment than the Respondent displayed in late 2016.

[245] Moreover, the Respondent's carelessness in reviewing the packet of invoices that was delivered to his office in November 2016 is highly concerning. Through inattention, the Respondent failed to observe that the invoices included charges for supplies that: (a) could not possibly be associated with the interior renovation of the Condominium; (b) were, in some cases, purchased at times inconsistent with the time frame for the renovation contract and the evidence as to when the renovation was carried out; and (c) were purchased by persons apparently unconnected to ZZ or YZ. Because the Respondent failed to notice the features of the invoices, he did not inquire with his clients about how these invoices could be connected to the claim asserted in the Action. The Respondent's failure to do so was a culpable breach of his professional obligations. It led the Respondent to rely upon and tender to the court manifestly untrustworthy evidence in the Action, an outcome that is inconsistent with the Respondent's responsibilities as an officer of the court.

[246] In addition, we find the Respondent's failure to inquire about YZ's US$200,000 loan to DT constitutes a marked departure from the conduct expected of a lawyer. Information that an "unsophisticated" builder has loaned US$200,000 to a client, through a third party, via an account at a hotel in Las Vegas, requires exploration. The Respondent did not ask any questions about this remarkable transaction. His failure to inquire is incompatible with the critical and analytic faculties competent lawyers are expected to bring to their practices.

[247] As noted above, the Respondent explains that his conduct was influenced by the language barrier between him and his clients and by the involvement of the Solicitor in the Respondent's retainer with ZZ, YZ and Company 1. For the reasons set out in paragraph 182 above, we do not accept the Respondent's argument as to the relevance of the language barrier between him and his clients. In addition, we agree with the Law Society that the involvement of the Solicitor is not relevant to the Respondent's conduct in late 2016. The Solicitor was not involved in the communications between the Respondent and the clients at that point in time.

The Respondent's work for Company 2

[248] The second way in which we find that the Respondent committed professional misconduct as alleged in paragraph 6 of the Citation concerns the Respondent's work for Company 2. In our view, the evidence supports a finding that the Respondent failed to make reasonable inquiries about the work he was asked to undertake for Company 2 in early 2016.

[249] The Respondent's evidence to the Panel was that the Solicitor contacted him to say that the clients had filed a lien in respect of the Richmond House, in the name of a numbered company (*i.e.*, Company 2) and that they wanted a Notice of Civil Claim filed to preserve the lien rights. The Solicitor advised the Respondent that ZZ and YZ had "some interest" in Company 2, but it does not appear that the nature of this interest was specified to the Respondent. In any event, on February 10, 2016, the Respondent conducted a company search, the results of which were tendered in evidence. As described above, the search results showed that the sole officer and director of Company 2 was a woman with no apparent connection to ZZ or YZ. The Respondent testified that he did not notice the identity of the director and officer but that nobody raised an issue about the authority of the person instructing him.

[250] The following day, the Respondent filed an action naming Company 2 as plaintiff and asserting a builder's lien for $450,000, although, as the Respondent acknowledged in his evidence, there was no particular urgency to get the Notice of Civil Claim filed on that date.

[251] In our view, the Respondent committed professional misconduct by filing an action in the name of Company 2 on February 11, 2016 without attending to the source of his authority to do so. The Respondent's failure to review the company search for Company 2 with sufficient care to notice that the name of the sole director and officer was not ZZ or YZ and his failure to inquire with the Solicitor about the asserted relationship between ZZ, YZ and Company 2, was egregious. It is unacceptable for a lawyer to file a legal action in the name of a company without first confirming the basis for his authority to do so. We find that the Respondent's conduct in February 2016 was reckless and cavalier. It certainly fell below the standard expected of a lawyer in British Columbia.

[252] The Respondent's inattention to the basis for his instructions to act for Company 2 had a knock-on effect in respect of the second retainer for Company 2, *i.e.*, the one concerning the Vancouver House. In this case, the Respondent was confronted with a $2 million construction lien – a rather extraordinary lien amount for "unsophisticated" residential builders – and a short deadline to file a Notice of Civil Claim before the limitation period tolled. At the time that this matter came up, it would appear that the Respondent still did not have accurate information about Company 2. There was no suggestion in the evidence that the Respondent was aware in April 2016 that a Notice of Change of Directors for Company 2 had been filed pursuant to s. 127 of the *Business Corporations Act* on March 17, 2016. The burden of the evidence is that the Respondent filed the builder's lien action with respect to the Vancouver House on the same basis as he filed the builder's lien

action with respect to the Richmond House: without sufficient understanding of the corporation on behalf of which he was acting and without any proper understanding of the basis for his instructions.

[253] Based on the foregoing, we find that the Law Society has proved professional misconduct in respect of the allegations at paragraph 6 of the Citation.

Paragraphs 7 and 8 of the Citation

The allegations

[254] It is convenient to consider the allegations made at paragraphs 7 and 8 of the Citation together. These paragraphs allege that the Respondent committed professional misconduct or breached the Rules by failing to cooperate fully in the Law Society's investigation of the Respondent's representation of YZ, ZZ, Company 1 and Company 2, in particular by failing to provide his complete file within the time specified by the Executive Director, and by providing incorrect, inaccurate, incomplete or misleading information in letters dated June 28, 2018 and September 27, 2019, about what records had been compiled or produced for or to the Law Society. The professional obligations cited in connection with these allegations are Rules 3-5(7) and 3-5(11) and rule 7.1-1 of the *Code*.

[255] Rule 3-5(7) provides:

> A lawyer must co-operate fully in an investigation under this division by all available means including, but not limited to, responding fully and substantively, in the form specified by the Executive Director
>
> (a) to the complaint, and
>
> (b) to all requests made by the Executive Director in the course of an investigation.

[256] As the Law Society did not request a response to a "complaint" against the Respondent in June 2018, the allegations do not put Rule 3-5(7)(a) in issue; only Rule 3-5(7)(b) is legally relevant.

[257] Rule 3-5(11) provides:

> A lawyer who is required to produce files, documents and other records, provide information or attend an interview under this rule must comply with the requirement

(a) even if the information or files, documents and other records are privileged or confidential, and

(b) as soon as practicable and, in any event, by the time and date set by the Executive Director.

[258] Rule 7.1-1 of the *Code* provides:

A lawyer must

(a) reply promptly and completely to any communication from the Society;

(b) provide documents as required to the Law Society;

(c) not improperly obstruct or delay Law Society investigations, audits and inquires;

(d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;

(e) comply with orders made under the Legal Profession Act or Law Society Rules; and

(f) otherwise comply with the Law Society's regulation of the lawyer's practice.

The parties' submissions

[259] The Law Society submits that the Respondent was not sufficiently diligent in responding to the Law Society's request for his file in 2018 and that he did not adequately respond to the Law Society's follow-up requests in 2019. Additionally, the Law Society says that the Respondent was inaccurate in his communications to the Law Society and misled the Law Society investigator as to the completeness of the Respondent's document production in his letters of June 28, 2018 and September 27, 2019.

[260] The Respondent, in his submissions, acknowledges that there were "unfortunate errors" in his document production to the Law Society investigator but says that they were unintentional. The Respondent notes that his firm's dealings with the clients were spread over a number of files and over several years. There were communications from multiple email accounts. In addition, the files were partly in paper and partly in electronic form. When the client files were prepared for

delivery to the Law Society, the Respondent involved staff members in that process and did not appreciate that they were missing documents that should have been included in the production. The Respondent regrets any inconvenience caused by his failures to produce documents.

Discussion

[261] The allegations made at paragraphs 7 and 8 of the Citation are dismissed.

[262] The Panel accepts the Respondent's evidence that, on June 28, 2018, when the Respondent responded to the Law Society's June 18, 2018 inquiry, he had thought that all relevant emails and documents were included in the materials he sent to the Law Society. The Respondent's letter to the Law Society of September 27, 2019 sets out the steps the Respondent took to compile the materials in June 2018:

> Upon receipt of your request dated June 18, 2018, I, along with my assistant … and paralegal Amy Chan, put together all of the email correspondence in our email folders relating to the [Z] files. We also obtained our closed files from storage, provided all the physical files, and printed out all of Amy Chan's digital notes.
>
> … generally speaking my files are stored in our document management system and I keep paper copies, which are meant to be duplicates of the electronic files. The documents which I first delivered to you were compiled from the paper files, with the addition of emails and print-outs of digital notes.

[263] The Law Society does not challenge this evidence but faults the Respondent for failing to step back and reassess the completeness of the document production when called upon to do so in 2019.

[264] In the Panel's view, the letter of September 27, 2019 demonstrates that the Respondent made a meaningful effort in June 2018 to compile his "complete, original client files" for production to the Law Society. The later discovery that the disclosure was imperfect does not undermine the fact that the original efforts were a meaningful attempt to comply with the Law Society's request.

[265] The Panel also accepts the Respondent's evidence that he attempted to provide full cooperation to the Law Society throughout the investigation and that he did not intend to frustrate or wilfully not comply with the Law Society's requests.

[266] In any event of the Respondent's subjective beliefs, we find that the Respondent did not fail to cooperate in the investigation by failing to comply with a requirement dated June 18, 2018 to produce his complete client files by the time and date set by the Executive Director. Rules 3-5(7)(b) and (11) and rule 7.1-1 of the *Code* must be read purposively, not formalistically. The purpose of these rules is to require lawyers whose conduct is being investigated by the Law Society to diligently cooperate in the investigation, and to meaningfully respond to requests put by the Law Society.

[267] In a world in which paper and electronic records proliferate, document disclosure can be an error-prone business. It is a reality that counsel can, and do, miss relevant documents in searching hybrid electronic and paper files, only to discover the omissions later. Unintentional omissions in document production do not equate to a culpable failure to cooperate in a Law Society investigation. The Respondent's failure to capture every document from his hybrid paper and electronic files and deliver them to the Law Society in June 2018 does not amount to a breach of Rules 3-5(7)(b) or (11), nor does it so offend his obligations under rule 7.1-1 of the *Code* as to amount to professional misconduct.

[268] Admittedly, the "tots legit" email string is in a different category from the documents not disclosed due to oversight. As the Law Society points out, the Respondent considered whether to disclose these emails in June 2018 and decided not to do so. The Panel considers that the Respondent made an error in judgment in withholding these emails from production in June 2018 but it was corrected in the Respondent's next production to the Law Society. The error in judgment does not rise to the level of a breach of the Rules, nor was it professional misconduct.

[269] The Panel likewise rejects the contention that the Respondent committed professional misconduct or breached the Rules by providing incorrect, inaccurate, incomplete or misleading information in his letters to the Law Society of June 28, 2018 and September 27, 2019 about the records that had been compiled or produced for or to the Law Society. The Respondent's duty under Rule 3-5(7)(b) was to respond "fully and substantively" to the Law Society's requests for documents. The Respondent's communications in his letters of June 28, 2018 and September 27, 2019 were substantive in nature. To the extent that the responses were not "full" – or, to use the language of rule 7.1-1 of the *Code*, "complete" – the omissions were due to an honest misapprehension on the Respondent's part as what had been included when he handed over his files to the Law Society.

[270] In *Law Society of BC v. Lo*, 2020 LSBC 09, the hearing panel considered an allegation that the respondent had provided inaccurate information to the Law

Society in an annual trust declaration and so offended rule 7.1-1 of the *Code*. The panel held at para. 49 that the respondent's "state of mind in making [the] … declarations is important in assessing his degree of fault." We agree with this observation. We also adopt the following observation from para. 51 of *Lo*:

> It is our view that, if a lawyer inadvertently provides mistaken information in the course of their reporting duties to the Law Society, but the lawyer honestly and reasonably believes the information to be true, it would generally weigh against a finding of professional misconduct. If the lawyer has reasonable grounds to believe that the information is truthful, the lawyer's conduct may not be such a marked departure from proper conduct that it would constitute professional misconduct. Depending on the particular circumstances, an innocent error for which the lawyer has a reasonable explanation may not constitute a discipline violation.

[271] In our view, the Respondent's communications to the Law Society of June 28, 2018 and September 27, 2019 did not breach the Respondent's professional obligations under Rule 3-5(7) or pursuant to rule 7.1-1 of the *Code*.

DETERMINATION

[272] In summary, we find:

(a) The Respondent committed professional misconduct as alleged at paragraphs 1(a) and (b), 2, 3 and 6 of the Citation;

(b) The Law Society has established that the Respondent committed a breach of the Rules in respect of the conduct alleged at paragraph 5 of the Citation;

(c) The allegations at paragraphs 1(c), 7 and 8 of the Citation are dismissed; and

(d) Given our findings in respect of paragraph 3 in the Citation, it is unnecessary to address paragraph 4 of the Citation.

NONDISCLOSURE ORDER

[273] The parties seek an order under Rule 5-8(2) of the Rules that portions of the transcript and exhibits that contain confidential client information or privileged information not be disclosed to members of the public. Recent amendments to the

applicable rules have made the order unnecessary, as explained in *Law Society of BC v. Edwards*, 2020 LSBC 57 at paras. 118 to 121 (*"Edwards disciplinary action").* Like the panels in *Edwards disciplinary action* and *Law Society of BC v. Sangha*, 2021 LSBC 03, we decline to make the order sought.